Case No: A2/2003/0066

Neutral Citation No [2003} EWCA Civ 1405
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH
DIVISION (MR JUSTICE HUNT)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 11 November 2003

Before :

LORD JUSTICE SIMON BROWN
LORD JUSTICE LAWS
and
LADY JUSTICE ARDEN

- -

Between :

ASIANSKY TELEVISION PLC & ANR	Appellant
- and -	
BAYER-ROSIN	Respondent

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Romie Tager QC and Mr Neil Mendoza (instructed by Messrs Barker Gillette) for the Appellant
Mr Christoper Gibson QC and Mr Christopher Semken(instructed by Reynolds Porter Chamberlain) for the Respondent

- -

Judgment

Lord Justice Laws:

INTRODUCTORY

1. This is an appeal with permission granted by Pill LJ on 21 March 2003 against the order of Hunt J sitting in the Queen's Bench Division on 13 December 2002 when (save for an award of nominal damages for breach of contract) he dismissed the appellants' claim against the respondent solicitors.

2. The two appellant companies are the creatures of Mr Sharadchandra Patel ("Mr Patel") who was in substance the real claimant in the action. Mr Patel is a wealthy and successful businessman. As the judge was to state, his interests have included mobile cinemas, and television and film production in various parts of the world, notably in Kenya. He is a British Overseas Citizen and spends substantial periods of time outside the United Kingdom. No later than 1989 he conceived of a development in London, principally (though not exclusively) to serve the Asian population here: an "Asian Centre" which would include a new television station, specialist Indian shops, a hotel, function hall, disco, private club, cinemas, restaurants and car park – what precise facilities could be provided would depend on the size of the site. This conception was referred to in the court below as Mr Patel's "dream".

3. In 1989 he came upon a site ("the Site"), which it seemed might fulfil the dream. It was an area of land about 7.8 acres in extent adjacent to the North Circular Road near Hanger Lane. The freehold was owned by the London Borough of Brent ("the Council"). The Site had once been part of a waste tip, called "Twyford Tip", and is referred to in some of the documents as "Twyford Tip West". Twyford Tip had not in fact been used for the purpose of waste disposal since about 1958. But there remained on the Site, in 1989 and thereafter, very large quantities of waste of varying degrees of toxicity: some 250,000 cubic metres standing to a height of some 15 – 20 metres would have to be cleared if the Site were to be developed. At length on 19 October 1992 Mr Patel, or more strictly the first appellant company, exchanged contracts to buy the Site from the Council. The respondent solicitors acted for him in that transaction.

4. In 1988 and 1989, deploying powers conferred by the appropriate legislation, the Department of Transport ("the DoT") had made certain compulsory purchase orders ("the CPOs") for the purpose of carrying forward the North Circular Road Hanger Lane to Harrow Improvement Scheme, a major road development in the Hanger Lane area. The principal CPO was Compulsory Purchase Order (No 3) 1988, made on 2 December 1988. The land take which it authorised included about 40% of the Site, an area substantially represented by the reference Plot 97 in the Schedule to the CPO. The thrust of Mr Patel's case in this litigation is that in the events which happened the respondents never properly advised him as to the nature and extent of the DoT's rights under the CPOs before he was committed to the purchase of the Site by the contract of 19 October 1992; and had he been properly advised he would never have so committed himself.

"IMPLEMENTATION" OF THE CPOs

5. Notices to Treat and to Enter in relation to the principal CPO were served on the Council by the DoT under cover of a letter dated 14 February 1989. Since the effect of these Notices occupied centre stage in the argument of Mr Tager QC for the appellants, I should give a brief, and I hope uncontentious, account of it. Perhaps I may be forgiven for omitting the various statutory references. The giving of a Notice to Treat creates a relationship analogous to that of vendor and purchaser. In *Holloway v Dover Corporation* [1960] 1 WLR 604, 609 Lord Evershed MR stated that the service of such a Notice is often described as creating a quasi-contract. After an acquiring authority has served a Notice to Treat it may then serve a Notice of Entry. In practice (as in this case) the two Notices may be served together. The Notice of Entry entitles the authority to obtain a warrant for possession against anyone refusing to give up possession of the land, or who hinders the authority from entering upon it or taking possession of it; and this is so whether that person is the owner or occupier of the land, or anyone else. There is a unilateral power to withdraw a Notice to Treat, but it is not freely exercisable after the acquiring authority has entered into possession of the land pursuant to its Notice of Entry. Once that has been done, the landowner has a right of compensation, which would have to be satisfied before the Notice to Treat could properly be withdrawn. The matter might of course be resolved by mutual agreement. Once a Notice to Treat and Notice to Enter have been given, a CPO is said to have been "implemented". That at least has been the argot of this appeal: I am not aware that the expression is a statutory term of art. Mr Tager says that the fact of implementation in this case makes all the difference to the issue of the respondents' liability. Mr Gibson QC for the respondents, while seeking to refute Mr Tager's argument on its merits, says also that his reliance on the implementation of the CPOs represents an illegitimate change of position having regard to the history of the case. I will deal with that aspect towards the end of this judgment.

MR PATEL'S OFFERS TO BUY THE SITE: 1989 AND 1992

6. Through his then solicitors, Messrs Jaques and Lewis, Mr Patel first made an offer to purchase the Site from the Council by letter of 26 October 1989. This letter was referred to by the judge (judgment transcript paragraph 9) as showing a degree of knowledge on Mr Patel's part, at that time, of the rights enjoyed by the DoT over the Site. That is of some relevance to the issues that fall for our decision, and I will cite certain short passages from the letter. The solicitors said they understood (obviously on instructions) that "part of the [S]ite is the subject of a [CPO] on behalf of the [DoT] who are to utilise the land for a road widening scheme…" They proceeded to indicate that their clients were "prepared to make an offer… on the following basis… 2. … the land… must include any land, currently the subject of a CPO, but not essential to or utilised by the [DoT]. 3. Apart from the transfer station and all rights of the [DoT], vacant possession of the Site must be given on completion".

7. The offer of 26 October 1989 was not accepted. But Mr Patel remained interested in acquiring the Site, although he had his eye on other potential locations for the Asian Centre. On 7 August 1991 he formed the first appellant company to acquire the land and develop the Centre, though it seems the land was in due course actually acquired, on the advice of Mr Sheth of the respondent solicitors, by the second appellant company; but nothing turns on that. At the beginning of September 1991 Mr Patel engaged Mr John Dunham, who had

been Chief Planning Officer of the Council, to co-ordinate the process of acquisition. It is to be noted that sale particulars for the Site supplied to Mr Dunham in January 1992 indicated that offers were invited "on the basis of a freehold purchase with full vacant possession". At length Mr Patel made a further offer to buy the Site from Brent at a proposed price of £1.6 million. That was accepted subject to contract by the Council by letter dated 3 March 1992. An application for outline planning permission to develop the Site had been put in in January 1992, but no relevant permission was granted in 1992. An aspect of the case which I shall have to consider is that Mr Patel was prepared in October 1992 to commit himself to the purchase of the Site without the protection of any planning permission to develop it as he envisaged.

THE RESPONDENTS ARRIVE ON THE SCENE

8. The respondent solicitors had not so far been instructed, although there had been a lunch in September 1991 at which Mr Patel had explained something of his plans to Mr Sheth and Mr Le Chat, partners in the firm. Mr Sheth was Mr Patel's "client contact partner" with the respondents, and Mr Le Chat was the conveyancer. The firm was at length instructed by Mr Patel in connection with the proposed purchase after he had received the Council's letter of 6 March 1992. I should notice at this stage that Mr Patel was also being assisted by a Dr Patel, a local general practitioner whom he had met in 1991; Dr Patel had substantial contacts with members and officials of the Council with which, in assisting Mr Patel, he was to liaise. He introduced Mr Patel to various persons at the Council including the Leader, Councillor Bob Blackman.

9. Sometime shortly before 14 May 1992 the respondents received a draft contract from the Council. It named the second appellants as purchasers and stipulated that the Site was to be sold "subject… to the rights and reservations set out in the Second Schedule". Item 4 of the Second Schedule reads:

> "Compulsory Purchase Orders made by the Department of Transport known as the A406 North Circular Road Hanger Lane to Harrow Road Improvement Scheme".

The respondents sent the draft contract to Mr Patel on 14 May. The stipulation set out in Item 4 of the Second Schedule survived unamended in the form of the contract actually entered into by exchange on 19 October 1992.

10. In the usual way the respondents submitted general pre-contract enquiries to the Council, including amongst other things a request for particulars of all notices relating to the Site. On 15 May they wrote seeking replies to their enquiries as soon as possible, and also asked for copies of the CPOs referred to in the Second Schedule to the draft contract. There followed on 27 May 1992 a telephone conversation between Mr Le Chat and the relevant Council official, after which on the same day Mr Le Chat wrote and said:

> "You also mentioned that the [DoT] had served a Notice to Treat on the Council. Would you please provide us with a copy of the Notice. Clearly if the access road is to be compulsorily purchased by the [DoT] then the Contract… should be made conditional upon the

> Council procuring that the [DoT] grant Asian Sky [sic] a right of way over the road."

11. At length on 1 June 1992 the Council replied to the respondents' pre-contract enquiries, stating:

> "The Purchaser is aware the property is a subject of compulsory purchase orders for the construction of a link road, the widening of the North Circular Road and the construction of an access road. The Council do not appear to have copies of the notices, but have requested these from the Department of Transport."

This was answered in turn by the respondents on 5 June 1992 as follows:

> "We are confused by your reply – we had thought that the property being sold to Asian Sky was not affected by the North Circular Road Widening Scheme – and should be obliged if you would clarify the position. We also await copies of the Notices served by the Department of Transport."

This documentation, that is the general enquiries, the Council's replies, and the solicitors' response, was sent to Mr Patel by letter dated 5 June 1992.

THE MEETING OF 10 JUNE 1992

12. As I understand the chronology there was no reply from the Council to the respondents' observations of 5 June 1992 before 10 June, which was the date of what on any view of the case was an important meeting attended by Mr Patel, Dr Patel, Mr Dunham, Mr Sheth and Mr Le Chat, and officers of the Council. It is important for two reasons. First, this appears to have been the last occasion when the respondents gave Mr Patel any substantive advice as to the implications of buying the Site before he committed himself to the purchase by exchange of contracts on 19 October 1992 (although Mr Patel had a meeting with Mr Sheth on 9 October 1992). What the respondents had to say on 10 June is therefore plainly significant for the question whether they failed to fulfil their duty towards Mr Patel in tort or arising under their retainer. Secondly, what was said at this meeting is very material to Mr Patel's attitude of mind towards the purchase. That is important for the issue of causation, to the extent that there was a breach of duty by the respondents: what would Mr Patel have done if he had been properly advised?

13. I turn, then, to the meeting of 10 June. What precisely transpired was disputed at the trial. It is accepted on Mr Patel's behalf (as I understand it was before the learned judge) that as at that date he knew there was a CPO affecting an access road which bisected the Site at one corner, and that this had been implemented, because the access road had been constructed. His case at trial was that it was only in the context of the access road that the CPO was discussed at the meeting on 10 June. That was rejected by the judge (judgment transcript, paragraph 22) who found there was a broader discussion of the CPOs, and Mr Tager does not seek to overturn that conclusion so far as it goes. He has, however, advanced vigorous criticisms of the judge's overall findings as to Mr Patel's state of mind at the time of the

meeting. These findings are essentially to be found in paragraph 23 of the judgment which I should set out in full:

> "I find that there was a belief held by both the representatives of Brent and Mr Sharad Patel who had seen the site that the DOT would not need the land being purchased for their road-widening scheme. It was evident, as Mr Sharad Patel told me, that such scheme was nearing completion. I am satisfied that Mr Sharad Patel was content to go ahead and buy the land subject to the CPOs believing he could resolve any problems over these later. That general approach was advice he had received from Dr Patel. Mr Le Chat told me that he told Mr Sharad Patel that the CPOs meant there was a risk, a danger of being deprived of ownership. I am satisfied he did say that. Mr Le Chat says that he it was who advised that at least a Letter of Comfort should be obtained. While I am satisfied that neither Mr Sharad Patel nor Mr Le Chat appreciated the effect of a Notice to Treat or a Notice of Entry it is plain that Mr Sharad Patel was confident that with Brent's co-operation any problems would go away. Brent were keen on this project and the officials with whom he was in contact indicated co-operation as was confirmed by Councillor Winters in evidence. He described the idea favourably in comparison with Wembley. The site was not needed by the DOT. Mr Sharad Patel had the support of the Leader of the Council, Bob Blackman. He had no planning permission but was confident he would get it. I am satisfied that even if he had been told the effect of a Notice of Entry on which such stress is made by Mr Tager he would still have agreed to go ahead. He was confident that any problems would be sorted out between Brent and the DOT."

14. As I have said Mr Tager does not quarrel with the judge's conclusion that at the 10 June meeting there was broader discussion of the CPOs than merely related to the access road. His assault on the judge's reasoning in paragraph 23 has two dimensions, of which the second is really an aspect of the first. The more general criticism is that the judge's finding to the effect that Mr Patel would go ahead with the purchase *even if the legal consequences of the (principal) CPO having been implemented had been explained to him* cannot be supported on the evidence. Secondly, it is said in particular that the judge's reason for this finding, namely that Mr Patel "was confident that any problems would be sorted out between Brent and the DOT" is not only unsupported but misplaced: the Council had no voice in the use which the DoT might make of the implemented CPOs. That was, so to speak, a legal fact; but it is anyway borne out by the accounts given of the 10 June meeting by both Mr Le Chat and Mr Sheth in their witness statements and not resiled from at trial. I will just reproduce the passage cited from paragraph 29 of Mr Le Chat's statement, since it goes to what was said at the meeting as well as to Mr Patel's state of mind:

> "I warned [Mr Patel] that "the compulsory purchase orders were not a matter that Brent could influence as it was a matter for the Department of Transport and that if the compulsory purchase orders were not removed they would at least disrupt, and might prevent, his intended development."

15. This (and a like passage from paragraph 20 of Mr Sheth's statement) was perhaps a little coloured by hindsight, since it is to my mind clear from the then state of correspondence between themselves and the Council that as at 10 June 1992 the respondents did not know that the CPOs had been implemented save in relation to the access road. There had as yet been no reply to their observations of 5 June, which I have set out above at paragraph 11. And the reference there to "the Notices served by the [DoT]" implies no appreciation on the solicitors' part as to the fact or the effect of implementation of the CPOs: it is accepted, and is anyway plain from a later letter written by the respondents to the DoT on 1 September 1993 (referred to by the judge at paragraph 24), that they did not at any material time understand the legal effects of implementation. That they did not do so, or warn Mr Patel of their ignorance or themselves get advice to repair it, is a remarkable feature of the case.

16. At the meeting of 10 June 1992, then, there was discussion of CPOs affecting the Site beyond the access road; but this must have been in fairly general terms since (a) the respondents were (to say the least) hazy about the reach and effect of the CPOs and did not know that they had been implemented nor understand what that meant, and (b) while Mr Patel retained some awareness of the CPOs from his previous dealings in 1989 (despite his insistence in evidence to the contrary, which did him no credit) there is nothing to show he had any tighter understanding of their effect than had the respondents. Against that background the respondents advised Mr Patel that there were risks involved in the transaction. Any discussion of the desirability of obtaining a letter of comfort from the DoT must likewise have been in general terms. It seems to me to be clear that as at 10 June 1992 Mr Patel was prepared to go ahead with the purchase without the CPOs being assuredly withdrawn; but he was given no advice as to the consequences of the CPOs' implementation. All this, I apprehend, is at this stage of the litigation uncontentious; and it is consistent with the record of the meeting set out in a letter from the Council to Mr Patel dated 18 June 1992 setting out (amongst other things) this stipulation, to which the purchase of the Site was expressed to be subject:

> "Asiansky to accept the transfer of all outstanding compulsory purchase orders with the land including those affecting the access road."

Whatever this means, it does not suggest that any focussed understanding of the scope of the CPOs or of the effects of implementation was enjoyed by the respondents or is to be imputed to Mr Patel.

17. I will come in due course to the question of Mr Patel's reliance on the Council to sort out "any problems", as the judge put it.

JUNE TO OCTOBER 1992

18. The Council replied to the respondents' observations of 5 June 1992 (paragraph 9 above) on 2 July. They enclosed two plans, one of which (the Ordnance Survey Plan) revealed that the Site was subject to CPOs in relation to a series of numbered plots. This information taken in context should have told the respondents that about 40% of the Site was covered by a CPO(s). The Council also enclosed "copies of Notices to Treat and Enter for Compulsory Purchase Order (No 3) 1988". These materials, if they were understood, must surely have

blown trumpets in the ear of a competent solicitor. But the substance of Mr Le Chat's reply on 6 July was as follows:

> "You have now supplied us with copies of various Compulsory Purchase Orders and Notices to Treat. We are still not entirely sure how they affect the property and should be obliged if you would clarify the position. In particular, would you please confirm that the Compulsory Purchase Orders do not actually affect the land which our clients are proposing to buy. It seems to us from one of the plans which you have supplied that the land to the south east of the access road… is subject to a Compulsory Purchase Order. Is this the case?
>
> Are we correct in thinking that the Notice to Treat relates solely to the access road…?"

In fairness to Mr Le Chat, he stated in a postscript to his letter of 6 July that the CPOs and Notices were "not entirely legible and none of the plans referred to have been coloured", and so he asked for further copies. These were supplied by the Council under cover of a letter of 20 August 1992. So by this date at the latest the respondents were fully informed about the reach of the CPOs and the Notices by which they were implemented.

19. In early September 1992 Mr Le Chat made certain amendments to the draft transfer which had been attached to the draft contract. By its second schedule the transfer made provision for some matters to be reserved from what was to be transferred. In the original draft these included:

> "5. Compulsory Purchase Orders made by the Department of Transport known as the A406 North Circular Road Hanger Lane to Harrow Road Improvement Scheme."

Mr Le Chat struck these words through, and substituted the following:

> "The access road is no longer to be included in the sale and insofar as the CPO relates to the Property we require it to be withdrawn."

20. On 28 September 1992 the Council wrote to the respondents as follows:

> "… the Council will endeavour to procure a letter of comfort from the [DoT] concerning withdrawal of the [CPO] insofar as it affects the site to be transferred to your clients."

The respondents replied on 30 September 1992 and said:

> "My clients' position is that they are prepared to proceed to an exchange of Contracts without any formal withdrawal of the [CPO]. However, they will require a letter of comfort from the [DoT] confirming that it does not require any of the land which is being sold by the Council to Asian Sky Properties Limited and that it will withdraw the [CPO] insofar as it relates to the Council's site."

It would appear that the reference to the respondents' "clients' position" does not reflect any fresh instructions given by Mr Patel after 10 June 1992. Mr Patel was abroad for a substantial period before early October. I should add that it is, I think, implicit in the judge's reasoning in paragraph 24 of his judgment that in substituting in the second schedule to the draft transfer a reference to a requirement to withdraw the CPO, Mr Le Chat had in mind an undertaking by way of a letter of comfort.

21. On 9 October there was a meeting between Mr Patel (who had returned to the United Kingdom on 7 or 8 October) and Mr Sheth, at which Mr Patel executed the contract on behalf of the second appellant company. At the same meeting or perhaps a little earlier Mr Patel had seen a Report on Title prepared by Mr Le Chat. That document referred to a Notice to Treat served on the Council by the DoT, but only "as a preliminary step towards compulsorily purchasing the access road…" The Report concludes (paragraph 12.01):

> "On the basis of our enquiries and investigations to date we are of the opinion that subject to such observations, qualifications or outstanding matters (if any) made or referred to in this report, it is our opinion that the Property has a good and marketable title. Such encumbrances as have come to light are not in our opinion such as are likely to prejudice the marketability of the title to the Property."

But the Notices to Treat and to Enter meant that the DoT enjoyed an indefeasible right to exclude Mr Patel and his company from 40% of the Site.

THE LETTER OF COMFORT

22. On 30 July 1992 the Council had written to the DoT seeking confirmation that part of Plot 97 (which was within the Site: see paragraph 4 above) would not now be compulsorily acquired. They raised questions and made proposals also in relation to Plot 181 which as I understand it included the access road. The DoT replied on 7 October 1992 ("the letter of comfort"). It is important to have in mind that although by this time the road works had been substantially completed, the DoT's contractors, Balfour Beatty, were still on the site: which, of course, they were entitled to occupy as the DoT's agents and licensees pursuant to the Notices to Treat and Enter. So far as material the letter of comfort reads as follows:

> "… the [DoT] is prepared to withdraw the existing [CPO] on plot… 181… as the [DoT] has no further interest in acquiring title to these plots.
>
> The [DoT] is prepared to take similar action regarding plots… 97."

Certain conditions are stipulated, and then this is stated:

> "These plots are all within the contractors' site boundary. We must therefore be assured continued access during the contract period, presently due programmed to continue until Autumn 1994."

On 12 October 1992 the Council wrote to Me Le Chat acknowledging receipt of the signed contract and enclosing the letter of comfort, asking for confirmation "that it meets with your requirements". On 15 October Mr Le Chat replied, confirming that "it appears to be in order". The only query he raised was as to a right of way over the access road. The DoT for its part sent a copy of the letter of comfort to the respondents on 19 October, which was of course the very day on which contracts were exchanged for the purchase of the Site.

23. As the judge observed (paragraph 24: see also paragraph 3) it is common ground that Mr Le Chat's duty was to advise Mr Patel of the terms and effect of the letter of comfort, and he failed to do so. So much was conceded, as I understand it, by Mr Gibson at the end of the evidence. The judge found that Mr Le Chat did not understand what in truth the letter of comfort meant; and there is no cross-appeal to challenge that finding. Apparently he read the letter to Dr Patel over the telephone, on 15 October 1992. But that was clearly no fulfilment of his duty. And so the exchange of contracts went ahead, in fact at a price of £1.3m rather than the offer figure of £1.6m. The reasons for the reduction were to do with the amount of waste that would have to be removed from the Site and the responsibilities undertaken by the purchaser in relation to the access road; but they do not concern us on this appeal. As I have indicated (paragraph 9) the contract stipulated that the land was sold subject to the CPOs. Completion took place on 3 November 1992.

THE BRITISH PAVILION

24. At some stage in 1992 (the judge at paragraph 5 said that it was very soon after the purchase of the Site: it was clearly earlier than that, but the exact date does not matter) Mr Patel became aware, initially from an article in the Financial Times, that there was a possibility of acquiring a structure called the British Pavilion, which had been erected at Expo '92 in Seville at a cost exceeding £20 million. It was now being sold by the Department of Trade and Industry ("the DTI") in kit form with all its contents, on the basis that the purchaser would be responsible for the cost of dismantling and removing it from its location in Spain. Mr. Patel believed that it could form the centrepiece of the Asian Centre. An initial meeting with the DTI was arranged for 23 September 1992. At length on 12 November 1992 the respondents instructed by Mr Patel made an offer, nominally on behalf of the first appellant company, to buy the Pavilion for £350,000. The offer was accepted by the DTI subject to contract on 22 December 1992. The contract was concluded on 26 February 1993, and obliged the first appellant to dismantle the building and clear the site. The Pavilion was insured by the first appellant for £10 million.

BREACH OF DUTY BY THE RESPONDENTS

25. The respondents accept that they were in breach of duty (whether expressed in contract or tort) albeit to a limited extent. They conceded as much before the judge at the conclusion of the evidence. I have already referred (paragraph 23) to the particular breach conceded: it was to the effect that Mr Le Chat failed to advise Mr Patel, as he should have done, of the terms and effect of the letter of comfort; indeed, as I have indicated, the judge found that Mr Le Chat did not understand what the letter meant. Mr Tager contends for a wider finding on breach of duty. The account of the facts which I have given is sufficient to determine whether such a finding is justified on the evidence. There were other matters of fact

canvassed before us which go to the question of causation of damage: if the respondents had fulfilled their duty, would Mr Patel have declined to exchange contracts for the purchase of the Site? I will come to that in due course. At this stage I will address the extent of the respondents' breach.

26. The judge does not appear to have found any broader basis of want of care on the respondents' part than was conceded before him. In my judgment, however, that is a wholly inadequate description of the length and breadth of the respondents' breach of duty. Although much emphasis was placed on the meeting of 10 June 1992 both at first instance and before us (and I have acknowledged its importance), I am more particularly struck by what was done – or rather what was *not* done – after that date and before contracts were exchanged on 19 October. I have already made it clear (paragraph 18) that at least when they received the Council's letter of 20 August 1992 the respondents were fully informed about the reach of the CPOs and the Notices by which they were implemented. Almost certainly they should have picked up these matters significantly earlier, such as when they received the Council's replies on 2 July to their observations of 5 June 1992. And if they had understood the effects of Notices to Treat and Enter in the law relating to compulsory purchase they would have been pressing the Council for full details of the precise position as soon as they had any inkling of the notices' existence.

27. But I will make the benevolent assumption that the respondents were not in breach of duty before they received the Council's letter of 20 August 1992. At that stage, in my judgment, a competent conveyancing solicitor on studying the documents must have appreciated (a) that the DoT enjoyed rights under the CPOs extending over some 40% of the Site; (b) that since the CPOs had been implemented by service of the appropriate statutory notices those rights included the right to possession of that area without limit of time, and to bar Mr Patel and his companies from entry upon it or possession of it; and (c) that the Council were legally helpless to affect the matter. The respondents by Mr Le Chat should have appreciated these things. What then should he have done? Obviously he should have advised his client about all these points. He should have given the plainest warning that Mr Patel would *not* get vacant possession of a large section of the Site. He should have put Mr Patel in a position where he was able to decide what to do in the clear knowledge of all these factors.

28. But he did not do so. As I have recounted, on 30 September 1992 the respondents told the Council that their clients would proceed "without any formal withdrawal of the [CPO]" but would require a letter of comfort from the DoT. And they provided a Report on Title which referred to a Notice to Treat only in the context of the access road, and expressed the opinion that "the Property has a good and marketable title". When at length the DoT's letter of comfort was provided, the respondents did no more than read it over on the telephone to Dr Patel, and indicate to the Council that "it appears to be in order"; and as I have said the only query raised was as to a right of way over the access road.

29. I have to say that in my judgment this was a woefully inadequate response to the situation which, at any rate from 20 August 1992, confronted the respondents. I think it was largely because they did not understand the law relating to compulsory purchase; but in that case they should have taken counsel from someone who did. The vice, and I have already stated it, is that they failed to put Mr Patel in a position where he was able to decide what to do in

the clear knowledge of the true impact of the implemented CPOs. This conclusion does not require any strained or special reading of their retainer, upon which some observations are made in the skeleton argument prepared for this court by Mr Gibson for the respondents. The retainer at the very least embraced a duty to deal competently with issues directly touching the conveyance of the Site. That obviously included the implications of the implemented CPOs.

30. In my judgment this was a very stark case of professional negligence.

CAUSATION

31. The judge concluded (last two sentences of paragraph 23, cited above at paragraph 13) that:

> "… even if [Mr Patel] had been told the effect of a Notice of Entry on which such stress is made by Mr Tager he would still have agreed to go ahead. He was confident that any problems would be sorted out between Brent and the DOT."

Much of the argument in the course of the hearing before us went to the question whether this finding could be sustained. Mr Tager's case was that Mr Patel would not have proceeded to exchange contracts if he had been advised, as I have held he should have been, about the true effects of the implemented CPOs and the letter of comfort. Mr Gibson's case is that (as the judge held) Mr Patel would have gone ahead anyway. The question which of these conclusions is right depends upon the court's assessment of what would have been Mr Patel's likely state of mind in events which did not in fact happen.

32. It is not in my judgment open to this court simply to endorse the judge's finding. It is true that the judge supported the view which he expressed at the end of paragraph 23 of his judgment by an explicit appreciation of Mr Patel's character as a businessman (paragraph 26), and also by listing and explaining (paragraph 27) seven specific matters as to which, in deciding to go ahead with the purchase, Mr Patel was prepared to leave the issues open and to take risks. But the judge appears to have proceeded upon a significant underestimate of the extent of the respondents' negligence, as I have said apparently accepting (see the last two-subparagraphs of paragraph 24) that its reach was properly defined by the concession that had been made at the end of the evidence. This view of the judge's approach is I think underlined by what he said at paragraph 29:

> "The extent of the CPOs did not matter. [Mr Patel] already knew they affected the site if not the full extent of it in plan form. He was convinced that Brent would sort these out with the D.O.T."

I should say that there was in particular no sufficient basis in the evidence for the judge's view that Mr Patel would have gone ahead anyway because he "was confident that any problems would be sorted out between Brent and the DOT", at least if one views the causation question on the assumption that Mr Patel had been properly advised about the implemented CPOs and the letter of comfort. I shall have to return to this dimension of the case in due course.

33. In my judgment, while the judge's underestimate of the reach of the respondents' breach of duty requires us to allow this appeal, the question of causation – what would he have done if he had been properly advised? – can unfortunately only be determined satisfactorily by a re-trial at first instance. Mr Patel was not distinctly cross-examined as to what course he would have taken if he had been properly advised as to the effect of the implemented CPOs and the letter of comfort. In my judgment we are in no position to make the crucial finding of fact that would consist in an answer to that question. However in deference to counsel's submissions on the causation issue I should review some of the materials urged on either side.

34. Mr Tager submitted that the evidence demonstrated that Mr Patel had an early timescale in mind for the commencement and progression of the Site's development. Thus a letter from Mr Dunham to the Council as early as 20 March 1992 showed an aspiration to clear the waste tip in "Year 1" – 1992, to construct the TV Centre in the following year, and to complete the development in Year 4 (1995). That, of course (as Mr Tager acknowledged), was before Mr Patel or his advisers could have known when contracts would be exchanged. Mr Tager referred further to correspondence in 1993 between Mr Patel and the contractors Cronin PLC, suggesting an early anticipated start to the work of waste clearance. Cronin offered a favourable price for a contract to carry out the work, subject to a start date no later than 2 August 1993. Matters were sufficiently advanced for boreholes to have been drilled before 19 May 1993. After 2 August 1993 Mr Patel was being charged an agreed figure by way of weekly expenses by Cronin. On 9 August the DoT's engineers, Mott McDonald, wrote to indicate to Mr Patel that the contractors (Balfour Beatty) would continue to be entitled to occupy the Site until 14 days after the issue of a completion certificate, which they could not foresee being done before March 1994, and even then "[a]fter that date the Contractor must be allowed access to the land for a period of up to one year in order to rectify any construction defects" [although] "[i]n this case I cannot foresee any reason for this requirement to be imposed". On 1 September the respondents wrote to the DoT asking to be told "the exact terms it is being claimed give rights to Mott McDonald to occupy part of our clients' land" – striking confirmation that they had not begun to understand the implemented CPOs or the letter of comfort, of which a further copy was promptly sent to them by the DoT. The same thing is confirmed in even more striking terms by a statement in Mr Le Chat's letter of 9 September 1993 to Mr Patel:

> "I confirm that at no time did Brent Council disclose to me that the property was subject to any rights of occupation."

35. There was some further correspondence with Balfour Beatty which I need not set out. Mr Tager says that his client's difficulties are exemplified by his correspondence in November 1993 with the Bank of India, which (in syndication with other banks) had indicated its preparedness to advance a loan of £44m towards the funding of the development, subject among other things to the Bank's taking a mortgage of the Site. Mr Patel's reply of 30 November 1993 is worth setting out:

> "Please note that the conditions stated in your letter under clause 4… Para (a) [which related to the mortgage] and Para (b) [which related to insurance] can not be met at this stage, until our on going dispute for the vacant possession of the site is resolved with the Brent Council. The problem has occurred due to the road contractors Balfour Beatty (working on the North Circular Road) at present are refusing to move

> out of our site. They claim and insist that under their contract with the Department of Transport, this land is under their possession until the completion of the road works, and one year thereafter. This has come to us as a total surprise when our contractor Messrs CRONIN PLC., whom we have given a site clearance contract, was refused entry to our site…
>
> We therefore foresee some serious problems which need to be resolved…"

36. Mr Tager would say that this letter illustrates the kind of difficulty about which Mr Patel would have been clearly forewarned had he been properly advised, although the possibility of any recourse to the Council was misplaced. Mr Tager pointed to certain passages in the transcript of Mr Le Chat's evidence, which I need not set out at length, to show that while Mr Le Chat was indeed saying that Mr Patel was prepared "to take a view on the CPOs because of the fact that the North Circular road widening scheme had pretty much been completed" (day 8, p. 72, lines 7-9), that in context referred to unimplemented CPOs; and there is no evidence that Mr Le Chat believed that Mr Patel thought that any problem he might have arising out of the CPOs having been implemented could be resolved by recourse to the Council.

37. Overall, Mr Tager's submission is perfectly simple. Had Mr Patel been advised of the legal effects of the implemented CPOs and the letter of comfort he would have foreseen that his hoped-for timetable would be liable to be thrown off course by delays which he would be powerless to prevent, and he would not have gone ahead.

38. Mr Gibson for the respondents was at pains to emphasise that as at the date of exchange of contracts the DoT's work on the North Circular Road widening scheme (for which it had issued the CPOs) was substantially complete. He submitted that there was no practical risk of any part of the Site not already used for the road being required by the DoT, whose only remaining interest in the Site consisted in the short-term retention of rights over the margins by the road to enable its contractors to obtain access to the road works. Save as already incorporated in the road, the DoT had no interest in the purchase of any part of the Site. The Notices to Treat and Enter gave the DoT a right of entry and possession, but they did not want any more land for the road widening scheme. Moreover, as was common ground at the trial, the Site had a negative value (because of the waste and the costs of its removal) and no mortgage would have been advanced by a competent lender once a proper valuation was obtained.

39. Mr Gibson placed specific reliance on the judge's recital at paragraph 27 of the seven specific matters as to which, in deciding to go ahead with the purchase, Mr Patel was prepared to leave the issues open and to take risks. At paragraph 34 of his skeleton argument for this appeal he puts it thus:

> "It is inconceivable that where the Claimants were prepared to purchase notwithstanding these uncertainties that they would have been deterred by Notices of Entry in respect of CPOs relating to land

> which the DoT had, by its Letter of Comfort, indicated that it did not require."

40. Mr Gibson also places particular weight on the judge's finding (paragraph 27, last sub-paragraph) that Mr Patel's proposal to reconstruct the British Pavilion on the Site in late 1993 or early 1994 was a "pipe dream" not least given the absence of any worked up scheme. The judge referred to Mr Dunham's observation to the DoT on 8 September 1992 that "the exact content of the development is wholly tentative at the moment".

41. Mr Gibson drew his case together by listing a series of contentions which he said had been put forward by Mr Patel but which had either been departed from or had been shown to be false, or which in one way or another tended to support the respondents' case that Mr Patel would have gone ahead with the contract though fully advised as to the CPOs. Mr Gibson took us to the documents and to the transcript in dealing with the detail.

42. I will not set out all these points. They include contentions about Mr Patel's state of knowledge of the CPOs in 1989, and his original case that nothing was said about CPOs at the meeting of 10 June 1992 save as regards the access road. On these issues the judge did not accept Mr Patel's evidence. However we have not, of course, heard nor seen Mr Patel in the witness-box; and there is a very substantial limit to the utility of our examining points of detail as to his credibility, especially when faced with the fact, to which I have already referred (paragraph 33), that Mr Patel was not distinctly cross-examined as to what course he would have taken if he had been properly advised as to the effect of the implemented CPOs and the letter of comfort. But I will deal with what I apprehend was the most striking aspect of Mr Gibson's points. This was to the effect that Mr Patel, despite his denials, knew in 1992 that the DoT would oppose the grant of planning permission to clear the waste and develop the Site until the roadworks had been completed; but in the face of that knowledge he went on with the purchase in October 1992. Mr Gibson says he would have been no more troubled about the implemented CPOs had he been fully informed and advised about those.

43. I have already indicated in passing (paragraph 7) that an application for outline planning permission to develop the Site had been put in on Mr Patel's behalf in January 1992. The Council submitted the relevant application documents to the DoT, whose appropriate official replied on 19 February 1992. Part of the letter reads:

> "… you will be aware that there is currently a major road improvement contract underway on the A406 North Circular Road. Because of the traffic management system now in operation, this department would only be prepared to allow a development of this scale on the condition that it does not proceed until the Trunk Road improvement scheme is complete; estimated to be April 1994."

Mr Patel's evidence was at first that he did not know that this was the stance being taken by the DoT until 1994; but it transpired that Mr Dunham had sent him the correspondence, including this letter, in May 1992. The judge accepted (paragraph 15) that he knew about it then.

44. Mr Gibson's point here is not only that Mr Patel was effectively caught out in a lie. He submitted (as I have indicated) that the fact that Mr Patel was prepared to exchange contracts in October 1992 in the knowledge that the DoT would oppose grant of the planning permission he needed until 1994 speaks volumes about what his attitude would have been in relation to the implemented CPOs, which Mr Gibson said formed an analogous impediment – a "close parallel" – to Mr Patel's aspirations.

45. Mr Gibson may be right, although in reply Mr Tager submitted with some vigour that the point was effectively refuted by a series of documents from 1992 to which he referred. Mr Gibson may be right on other points also, such as the impact of what was effectively undisputed evidence (accepted by the judge: paragraph 29) that in 1994 the Site could have been cleared of waste pursuant to a scheme which did not prejudice the remaining work to be done by the DoT's contractors. For my part, however (as I have already foreshadowed), I cannot see how this court, subject as we are to the limits of the appellate function, could possibly arrive with anything like sufficient confidence at the factual conclusion for which Mr Gibson must contend, namely that Mr Patel would have gone ahead with the purchase in October 1992 if he had been fairly and squarely advised, say in late August 1992, as to the full implications of the implemented CPOs and in due course the letter of comfort. My conclusion to that effect is all the firmer given the depths of the negligence plumbed by the respondents. I do not mean to belittle Mr Gibson's case on causation; as I have indicated we are in my judgment no more able to conclude for ourselves the causation question in the appellant's favour than the respondents'.

RELIANCE ON THE COUNCIL

46. I think it necessary to make some particular remarks about the judge's specific finding in paragraph 23 that Mr Patel was convinced that the Council would "sort out" the CPOs with the DoT, because it seems to have been pivotal to the judge's reasoning. I have already indicated (paragraph 32), without elaboration, my view that there was no sufficient basis for it in the evidence, and I have referred (paragraph 36) in particular to Mr Tager's submission that there is no evidence that Mr Le Chat believed that Mr Patel thought that any problem he might have arising out of the CPOs having been implemented could be resolved by recourse to the Council. On consideration of the transcript that submission seems to me to be well-founded. But it is no less important not to lose sight of the fact, to which I have already referred (paragraph 14), that the Council had no voice in the use which the DoT might make of the implemented CPOs.

47. It is quite right, as Mr Gibson was at pains to submit, that Mr Patel took much care to foster good relations with the Council; that Dr Patel introduced him to councillors and officers of the Council; and that Mr Dunham, who was engaged by Mr Patel, had been Chief Planning Officer of the Council. Moreover Mr Winters, who had been a Brent councillor and vice-chairman of the Planning Committee at the relevant time, gave evidence on behalf of Mr Patel, and confirmed in express terms (day 6, p. 17, lines 4-7) that the Council was fully behind the idea of the development, was keen for it to proceed, and that he would do anything he could to speed it up. In 1993 he went to a meeting with Mr Banda of Mott McDonald, the DoT's engineers (whose letter of 9 August 1993 I have cited at paragraph 34), to try to provide whatever help he could after it became apparent that the contractors were contending that they had a continuing right to be on the Site.

48. But none of this justifies a conclusion that the Council could or would be instrumental in resolving any *impasse*, should it arise, in relation to the implemented CPOs; nor, therefore, that Mr Patel would have had any confidence that the Council might do so had he been properly advised about the implemented CPOs. In these circumstances, in my judgment, the particular finding made by the judge as to Mr Patel's reliance on the Council cannot be sustained.

POSTSCRIPTS

49. For all these reasons this appeal should in my judgment be allowed and a new trial ordered on the issue of causation. There are two postscripts. The first is a melancholy one. The judge's judgment, after eight days of evidence, was very exiguous, and, I have to say, superficial. He failed to grapple with the substantial ramifications of the case on breach of duty that was being put to him, and for that reason arrived at findings on the causation issue which cannot in the terms they were made be sustained.

50. The second postscript engages Mr Gibson's submission (to which I have referred in paragraph 5) that Mr Tager's reliance on the implementation of the CPOs, as a circumstance central to his case on breach of duty, represents an illegitimate change of position having regard to the history of the case. For reasons which I shall set out as shortly as I may I do not consider that this argument carries the respondents anywhere. I have found it convenient to postpone its consideration to this late stage, having explained my substantive conclusions on the appeal.

51. Mr Gibson says that the case was opened at trial on the basis that Mr Patel was not content to exchange contracts unless and until the CPOs were actually withdrawn by the DoT, and that he understood that a letter of comfort would have that effect. No point was made, Mr Gibson submitted, about any distinction between implemented and unimplemented CPOs, or as to the strict or technical legal effects of the former. The case being put was by way of a practical complaint all about access and the presence of contractors on the Site obstructing the initiation and progress of the development. Mr Gibson says that the particulars of claim (though in some respects amended at a pre-trial review in September 2002) were never amended, nor the subject of any application to amend, so as distinctly to plead that the respondents were negligent in failing to ascertain and advise that the CPOs had been implemented, and that such implementation – or rather, the respondents' failure to give accurate advice about it – was the cause of the appellants' alleged loss. Mr Gibson referred us to interlocutory proceedings in this court, which on 19 November 2001 gave judgment (Clarke, Mance and Dyson LJJ) on the appellants' appeal against orders made below striking out the action for want of prosecution. Giving the first judgment allowing the appeal, Clarke LJ set out a full exposition of the case as it was by then formulated, and as Mr Gibson says it was put in terms of difficulties arising only from the rights of the DoT's contractors, Balfour Beatty: in contrast to any case that might be made so as to rely on the specific circumstance that the CPOs were implemented.

52. Mr Gibson submits that the point goes further than a mere procedural complaint about a change of tack by his opponent; rather it gives the respondents an additional substantive argument on the causation issue. He says that given the way the case was originally put, Mr

Patel must at all material times have been proceeding on the footing that, subject only to the contractors' rights, there was no constraint upon his use of the Site by reason of the CPOs, and accordingly the CPOs, as distinct from the contractors' rights, cannot have been causative of any loss to Mr Patel or (more strictly) the appellants.

53. This latter point seems to me to be misconceived. Mr Patel was not, as I have found, properly advised as to the implications of the implemented CPOs. Insofar as his case was not originally formulated so as to complain fair and square about that fact, but it is now advanced as the jewel in the Crown, there might no doubt be issues about Mr Patel's credit and consistency. But there is nothing otherwise in this dimension of the case to give added value to Mr Gibson's submissions on causation.

54. All that remains, then, is the question whether Mr Tager ought not to be allowed to run his case now by reference to the fact – as he would put it, the central fact – that the CPOs were implemented. The truth is that, whatever the state of the pleadings, this case *was* advanced to the judge below. In paragraph 31 of his skeleton argument for the trial Mr Tager submitted:

> "… the Defendant failed to give any warning to the 1st Claimant as to the effect of the CPOs, the inadequacy of the Letter of Comfort and potential difficulties (or inability) in gaining access to the site to clear it and re-erect the Pavilion. The Claimants were left with land with a blot on its title which was effectively unmortgageable and unlettable."

At paragraphs 34 – 36 of the same skeleton submissions were made as to the legal effects of Notices to Treat and Enter. Then in his closing submissions at trial Mr Tager asserted at paragraph 2:

> "There is no longer any suggestion by the Defendant that the Claimants knew that the site was affected by <u>implemented</u> CPOs (i.e. following the service of notices to treat and enter)." (original emphasis)

At paragraph 14 of the same closing written argument:

> "Would the Claimants have proceeded to purchase the Site and British Pavilion in any event and whatever the advice that might have been given by the Defendant? The Claimants' case is, clearly, no. At its highest, the Defendant's case is Mr. Sharad Patel was prepared to take 'a view 'as to CPOs that had not been implemented. At no stage was it ever made known to him that the CPOs had been implemented and that Notices to Treat and Notices of Entry had been served. Mr. Patel certainly did not take "a view" of the transaction with the CPOs as they actually existed; it was not suggested to Mr. Patel that he would have proceeded even if he had been advised that over 40% of the Site was affected by CPOs in respect of which Notices to Treat and Notices of Entry had been served. Mr. Patel was simply not given correct advice so as to enable him to take 'view' of the situation as it actually existed."

55. In light of those extracts I do not propose to go into the pleadings. The fact that the CPOs had been implemented was plainly put before the judge as part and parcel of Mr Patel's case. While it is true that in closing written submissions Mr Gibson registered protests at the way in which by then the case was being put by Mr Tager, I am not aware of any application for an adjournment, nor is there in my judgment anything to show that Mr Gibson's clients have been disabled or disadvantaged in their capacity to respond to the case on its merits.

56. In the result there is nothing in Mr Gibson's pleas of Mr Patel's change of tack which ought, in my judgment, to displace what as I have said is in my view the correct conclusion in this case, namely that the appeal be allowed and an order made for a fresh trial on the issue of causation. If my Lord and my Lady agree in the making of such an order and at length Mr Patel were to succeed on the causation issue, there would of course (absent agreement) also have to be a trial as to the quantum of damage.

Lady Justice Arden:

57. I agree.

Lord Justice Simon Brown:

58. I also agree.

Order: Appeal allowed order below set aside; the next issue to be tried is causation by some High Court judge other than the judge from whom this appeal lay; parties to fix a case management conference; the £150,000 security for costs below originally ordered to be paid back with interest into court; the £65,000 paid on top to be repaid to the appellant with interest; security for costs of the appeal of £35,000 to be repaid with interest to the appellant; the respondents to pay the costs of the appeal; an interim payment to be made in the sum of £35,000 within 14 days; the costs below are to be reserved to the trail judge; leave given to the respondents to pay again into court the amount of £200,000; the assessment hearing into the respondent's costs to be vacated; as to the costs already incurred in respect of the assessment hearing, those too are reserved to the trial judge; interest on the £65,000 and £35,000 to be repaid to the appellants to be the commercial rate.

(Order does not form part of the approved judgment)