Neutral Citation Number: [2009] EWCA Civ 1024

Case No: B2/2008/2665

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
His Honour Judge Dight
CHY07367

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE HUGHES
and
LORD JUSTICE RIMER

- -

Between :

HORTENSE LITTLEWOOD	**Appellant**
- and -	
(1) DAVID RADFORD	**Respondents**
(2) CHARLES BOSTON	
(formerly t/a BOSTON CARRINGTON PRITCHARD)	

- -
- -

Mr Stephen Boyd (instructed by **Wilson Barca LLP**) for the **Appellant**
Mr Michael Pryor (instructed by **Bircham Dyson Bell LLP**) for the **Respondents**

Hearing date: 29 June 2009

- -

Judgment

Lord Justice Rimer :

Introduction

1. This is a fact-based appeal against an order dated 20 October 2008 made by His Honour Judge Dight in the Central London County Court dismissing the appellant's claim for damages for professional negligence. Both liability and quantum were in issue before the judge. He found against the appellant on liability. With Longmore LJ's permission, the appellant appeals against that conclusion.

2. The appellant, Hortense Littlewood, a citizen of the United States of America, married in 1985. In the 1990s she sold her flat in New York and moved to London with her husband and child. She wanted to buy a replacement flat there. In 1996 she bought a leasehold flat at 13 St James's Chambers, 2/10 Ryder Street, London SW1 ('the flat'). The lease was for a term of just over 35 years from 10 October 1978, expiring in 2014. The landlords (freeholders) were the Crown Estate Commissioners ('the CEC').

3. By 1999 Mrs Littlewood was entitled and wanted to exercise her right under Chapter II of the Leasehold Reform, Housing and Urban Development Act 1993 to acquire an extended lease of the flat. Any such lease would be for a term expiring 90 years after the term date of the existing lease and at a peppercorn rent. The CEC are formally exempt from the provisions of the Act, but by a ministerial statement made in Parliament they agreed to apply its provisions as if it did bind them.

4. The scheme of the Act is that the tenant serves on the landlord a notice exercising the right to an extended lease (section 42). The notice must (inter alia) specify the premium the tenant proposes to pay for the grant of the new lease and the terms he proposes should be contained in such lease. The landlord must then serve a counter-notice by the date specified in the tenant's notice (section 45). If by that notice the landlord admits the tenant's right to acquire a new lease, the counter-notice must state which of the tenant's proposals are and are not accepted and, in relation to each of the latter, the landlord's counter-proposal. If in such a case any of the terms of acquisition remains in dispute at the end of two months following the service of the counter-notice, the Leasehold Valuation Tribunal ('the LVT') may, on the application of either party, determine the matters in dispute (section 48(1)). Any application to the LVT must be made no later than the end of the period of six months beginning with the date of the giving of the counter-notice (section 48(2)). If no such application is made within that period, the tenant's section 42 notice is deemed to be withdrawn (section 53). In such a case no further section 42 notice can be served for at least 12 months after the deemed withdrawal (section 42(7)). At any time before a new lease is entered into in pursuant of the tenant's notice, the tenant may withdraw that notice by giving a further notice to that effect (section 52).

5. The defendants/respondents are David Radford and Charles Boston, surveyors, who formerly practised in partnership as Boston Carrington Pritchard. Their offices are or were at St Ives' Street, London SW3. Mrs Littlewood retained Mr Radford to act for her in connection with the acquisition of the extended lease. She served a section 42 notice on 1 March 2000 and the CEC served a counter-notice on 8 May 2000. All terms apart from the premium were agreed within two months. That meant that, unless agreed in the meantime, the amount of the premium had to be referred to the

LVT, there being a window from 8 July to 8 November 2000 in which an application for that purpose had to be made. The premium, calculated in accordance with Schedule 13, is the aggregate of the diminution in value of the landlord's interest as a result of the new lease, the landlord's share of the marriage value and any compensation payable for loss or damage suffered by the landlord arising out of the grant of the new lease.

6. There was no agreement as to the premium but Mrs Littlewood failed to make an application to the LVT by 8 November 2000. As a result, her section 42 notice was deemed to have been withdrawn. She thus lost the chance of being able to buy an extended lease for £380,900 (a figure since agreed by the experts) under the 1993 Act and proceeded instead to purchase it outside the Act, paying £485,000 on 31 October 2001.

7. She sued the defendant firm for damages, the complaint being that in breach of retainer Mr Radford negligently failed to make, or to advise her to make, an application to the LVT by 8 November 2000 for the determination of the premium. The judge found that the firm committed no such breach on the basis that its retainer had terminated on 5 June 2000 and that during its currency Mr Radford had advised Mrs Littlewood of the importance of making an LVT application by 8 November 2000. In case he was wrong on that, the judge also found that Mrs Littlewood had not mitigated her loss as she might have done and that (had liability been established) she would have been entitled to damages of £56,400. There is no appeal or cross-appeal in respect of that further finding.

8. The only issue before us is whether the judge was wrong to acquit the defendant firm of liability. In dealing with the appeal, I propose first to summarise the judge's findings of fact, conclusions and reasoning. The essence of the rival cases before him was that whereas Mrs Littlewood claimed that she had given general instructions to Mr Radford to obtain a lease extension for her, his case was that she had instructed him only on an *ad hoc* basis and did not instruct him at the stage of the process when the LVT application had to be made.

The judge's findings of fact and conclusions

A. The credibility of the witnesses

9. The judge explained that most of the issues were factual and turned on the credibility of the parties (Mrs Littlewood and Mr Radford). The relevant events had taken place nine years earlier and there was a stark difference in the quality of their recollection but he found the contemporaneous documents of great help. His assessment of Mrs Littlewood was that she was disorganised and that her evidence was unhelpfully vague in several respects. On some matters there was an air of unreality about what she said. She had difficulty in recalling details until taken to a document – and, before being so taken, was sometimes reluctant to commit herself to a particular version of events. The judge's impression was that her recollection was poor and that, in preparing her witness statement, she was largely reconstructing events.

10. Mr Radford claimed to have a recollection of the events even though he had made no attendance notes from which he could have refreshed his memory. This was, however, at a time when the market was quiet and Mr Radford claimed to recall the transaction

because, amongst other things, the client (Mr Littlewood) lived in New York at the time (strictly Mrs Littlewood was the client but the judge found that most of Mr Radford's communications were with Mr Littlewood). Despite the absence of attendance notes, a professional shortcoming, the judge regarded Mr Radford as retaining an accurate and truthful recollection and had no hesitation in preferring it to Mrs Littlewood's recollection on the most important issues. That was despite three unsatisfactory features of his evidence to which the judge referred, namely: (i) the making by him at the trial of a case that differed from that previously made in correspondence; (ii) the provision by him shortly before and at the trial of information about meetings and conversations that he had not provided before, but should have done; and (iii) his deliberate misleading in what he wrote in an important letter of 4 December 2000.

11. The judge also had regard in coming to his conclusion to his finding that at the time Mr and Mrs Littlewood were not financially 'flush'. He considered that the purchase and renovation of the flat had been a little too ambitious for them. He was surprised that Mrs Littlewood had no bank account in the United Kingdom, but would draw money out of her husband's account with a card and pay bills in cash. She claimed to have paid Mr Radford's fees on one occasion in cash, without receiving a receipt, which the judge found incredible, describing her evidence about this (as in relation to other matters) as 'unrealistic'. He was not satisfied that the Littlewoods would have paid bills as and when they were due or that they were in a financial position to do so.

B. The course of events

12. Mrs Littlewood gave evidence of an early meeting in 1996 with Mr Radford, Mr Carrington and Mr Thomas (her solicitor) at Mr Radford's office. This was at a time when she was looking for a flat to buy. She was challenged on several apparently cogent bases about there having been any such meeting and the judge rejected her evidence that there had. He found she had constructed a fictitious meeting in her memory. Later in 1996 she bought the flat in her married name of Robin Ann Littlewood, although she has since abandoned the first two names and now calls herself Hortense. She intended to renovate it, let it on a long-term basis and return to New York with her husband and daughter. Mr Littlewood returned to New York in 1998. Mrs Littlewood remained in London.

13. By 1999 her three-year residence qualification under the 1993 Act was complete. At some point in 1999 she retained Savilles in relation to a lease extension but that retainer seems to have fizzled out. On 30 June 1999 Mr Littlewood wrote to Cluttons (surveyors and valuers for the CEC), informed them of his interest in extending the lease and asked for 'the appropriate application forms'. The judge regarded that as showing that the Littlewoods did not intend to leave the whole matter to a specialist adviser but wanted to deal with it on a stage by stage basis. He inferred that that was because of their financial position.

14. Mrs Littlewood had a meeting with Mr Radford in October 1999. There was a dispute as to whether Mr Littlewood was present. The judge accepted Mr Radford's evidence that he was. He found that it was at this point that the defendant firm was retained. There was a dispute as to the nature of Mr Radford's instructions. Mrs Littlewood said he was instructed to obtain a lease extension for her. Mr Radford said that the instructions were to be, and were, given on an *ad hoc* basis, the initial instructions

being to serve a section 42 notice. The judge accepted his evidence in cross-examination, which was as follows:

> 'They did not instruct me to get a lease extension. I was instructed to assist them and they wanted me to do it on an *ad hoc* basis. I would usually do a valuation, notice of claim and then take instructions. My only instructions here were to serve the notice of claim after I had given my advice. I would usually have charged a scale fee for a valuation of between £1,200 and £1,500 so that the premium could be calculated. It is my practice to render an account after the work is done. If I was still instructed at this stage [which I understand to mean the stage at which an application to the LVT had to be made] I would have had to advise the claimant when the time came to make an application to the LVT and I would have done that in early November [2000]. By that time I would have corrected my diary entry because I would have been constantly going into my file.'

The explanation for Mr Radford's last point is that in May 2000 he had made an erroneous diary entry that the last date for an application to the LVT was 8 December rather than 8 November 2000.

15. The judge found that at this meeting Mr Radford explained the acquisition process to Mrs Littlewood, namely the various steps and deadlines involved, including the need to apply to the LVT. His evidence was that the process is 'straightforward, terribly simple', it was only the calculation of the premium that was complicated. Mrs Littlewood said in cross-examination that Mr Radford did explain the process to her 'quite fully, but it did not go in'. She did not dispute that he may also have explained the timetable but said she did not recall a discussion about long-stop or cut-off dates or deemed withdrawals. The judge found that Mr Radford explained the process to her in appropriate language and that he would only have moved on in his explanation when he was satisfied that she had understood what he had said.

16. The judge rejected Mrs Littlewood's evidence that shortly after this meeting she paid cash to Mr Radford so that he would start working for her. He found that in October 1999 Mr Radford prepared a section 42 notice, one originally dated 31 October, but that he did not finalise it until just before its service on 1 March 2000.

17. On 30 January 2000 there was a meeting between Mr Radford and the Littlewoods (the judge rejecting Mrs Littlewood's evidence that her husband was in New York). Its purpose was to discuss the terms and conditions of the defendant firm's retainer, which Mr Radford had sent the Littlewoods in early January and for which Mr Littlewood had thanked him by his letter of 17 January. They were headed 'Terms of business regarding leasehold and enfranchisement and related work' and set out the work Mr Radford was prepared to do. The opening section explained that there were several stages to such work so that it was not appropriate to refer to a simple scale of charges. It said that:

> '… some aspects are of a legal nature and whereas we are experienced in dealing with such matters ourselves, it may be preferable to appoint a firm of solicitors. In any event, we shall be happy to be more or less involved as required.'

18. The stages were then set out. Paragraph 1.0, headed 'Identifying the basis for a statutory claim', listed the matters that needed to be investigated for that purpose, the

fee for such work being hourly based or included in the valuation fee. Paragraph 2.0, headed 'For preparing the statutory valuation', listed the work involved in doing so and explained that the fee was percentage based subject to a £600 minimum. Paragraph 3.0 was headed 'For establishing a legally enforceable claim', and the listed work included:

> '3.1 Preparing the statutory notices,
>
> 3.2 Preparing a statutory declaration,
>
> 3.3 Deducing title,
>
> 3.4 Dealing with the statutory deposit
>
> 3.5 Corresponding with the landlord's solicitors as required,
>
> 3.6 Making an application to the [LVT] not sooner than two months and not later than six months from the date of the landlord's counter notice admitting the claim (failure to make such an application will render the claim unenforceable and result in the tenant being liable for abortive costs)'.

The fees for that were either hourly based or to be fixed by agreement. Paragraph 4.0 was headed 'For handling the negotiations to determine the lowest possible price', the fee for which was 10% of the reduction achieved from the landlord's quoting price. The terms then explained more about fees and hourly rates. The judge found that the document showed that Mr Radford held himself out as able to carry out all the different stages of the claim, including any necessary application to the LVT. He said that the key phrase in the document was that in the opening section reading 'In any event, we shall be happy to be more or less involved as required', which the judge said contemplated that 'the defendants would do such work as they were instructed to do by those who retained them as required by instructions and not by circumstances.' The essence of Mr Littlewood's written response to the terms and conditions was, the judge found, not to focus on what was being done in the process, but at what stage the Littlewoods were likely to have find money for the fees and what sums they were at risk for.

19. The judge found that at this point Mrs Littlewood instructed Mr Radford to serve a section 42 notice. Mr Radford served it on the CEC under cover of a letter dated 1 March 2000, accompanied by a statutory declaration as to Mrs Littlewood's residence at the flat and cheques for the CEC's solicitors' fees and the deposit against the valuation fee. The notice was in Mrs Littlewood's maiden name, Robin Ann Schreiner, and she signed it in that name. It proposed a premium of £275,000 for the new lease and specified 8 May 2000 as the date by which the CEC must serve the counter-notice. The judge found that Mr Radford's instructions at this stage were limited 'to serving the section 42 notice and, as it were, getting the ball rolling.' The next stage would have been the preparation of a statutory valuation: he said that would be essential so that Mr Radford could negotiate with Cluttons.

20. CEC's solicitors, Speechly Bircham, responded to the notice on 16 March, saying they had passed Mr Radford's letter to John Clark of Cluttons, who was to inform

them whether they were instructed to proceed in the matter. On 3 April they asked why the application was made in Mrs Littlewood's maiden name, the assignment to her of the lease having been in her married name. Mr Littlewood answered Mr Radford's query on that on 19 April, explaining (wrongly) that the flat had been registered in her maiden name and authorising him, if more convenient, to continue the application in her married name.

21. Speechly Bircham served the counter-notice on 8 May. It admitted Mrs Littlewood's right to acquire a new lease. It did not agree the lease terms or premium proposed by Mrs Littlewood and made counter-proposals as to both, including that the premium should be £400,000. Speechly Bircham proposed that Mrs Littlewood should liaise with Mr Clark to agree the premium.

22. Mrs Littlewood denied seeing the counter-notice or that she ever knew that the CEC's proposal was £400,000. The judge found both assertions to be extremely unlikely. He found that on 10 May Mr Radford wrote to Mr and Mrs Littlewood enclosing the counter-notice and his invoice (£705, including VAT) for his work down to the receipt of the counter-notice. The judge found the invoice was never paid. Mr Radford wrote in that letter:

> 'As I have indicated to you on several occasions, the valuation date for these claims is the date on which all the terms save for that relating to the premium are agreed. With this in mind, I would suggest that you carefully consider the counter-proposals that are contained in the counter-notice, perhaps with a view to agreeing (at least in principle) the counter-proposals so that we may argue the valuation date to be fixed. If this argument is successful, then you would have protected yourself against time and (possible) inflation.
>
> I would suggest that the next stage is to prepare a valuation so that (a) you are aware of the premium that is appropriate and (b) I have the necessary evidence at hand to support an argument for a settlement at a lower figure. It would be unwise for me to enter negotiations without having done this work, as inevitably the landlord's agent, Mr Clark, will be "cherry-picking" the evidence to support the highest possible premium.
>
> I look forward to speaking to you soon.'

23. The judge regarded the penultimate paragraph as supporting his view that instructions were intended to be given stage by stage. He found (in paragraph 48 of his judgment) that 'the first stage was now over'. He said the second stage had arrived and that involved making a valuation, an exercise that would cost between £1,200 and £1,500 and provide the basis on which the premium would be negotiated. Mr Radford's evidence was, as the judge found, that he was never instructed to carry out a valuation. The judge rejected as unrealistic Mrs Littlewood's evidence that Mr Radford *had* carried out a valuation (that was a reference to a one-page document described by Mr Radford as a 'back of an envelope' calculation that he had prepared shortly after receiving the counter-notice and which he said he did not provide to the Littlewoods). The judge found that Mr Radford could go no further without instructions.

24. The judge also found – rejecting Mrs Littlewood's contrary evidence – that Mr Radford advised her to instruct specialist solicitors in connection with the taking forward of her proposed acquisition of the extended lease: he sent the Littlewoods a fax on 12 May listing three firms experienced in the field.

25. Although the judge had found that, upon the writing by Mr Radford of his letter of 10 May, 'the first stage was now over', he later found that it was not quite over. Mr Radford's evidence, which the judge accepted, was that in May, at about the time he rendered his bill, he spoke to his client and obtained instructions to agree the acquisition terms (other than as to the premium) proposed in the counter-notice. Mr Radford's letter of 5 June to Speechly Bircham confirmed that, having taken the Littlewoods' instructions, the terms of acquisition specified in the counter-notice (other than as to the premium) were agreed. His letter explained that 'the valuation date is therefore the 5th June 2000.' It also asked Speechly Bircham to note 'that the valuer dealing with this matter on behalf of the lessee is Mr D.C.Radford at this office.' Speechly Bircham replied on 6 June, explaining that they had sent a copy of Mr Radford's letter to Mr Clark of Cluttons 'who will be contacting Mr Radford to agree a premium.'

26. The judge found (in paragraph 55) that Mr Radford's letter of 5 June was 'the very end of the first stage of the process'. The second stage – which required the preparation of a valuation and to prepare for discussions on the premium to be paid - was, on the judge's approach, opened by Speechly Bircham's letter of 6 June. But the judge found that, for three reasons, Mr Radford could not, or at any rate did not, progress the matter to that stage. First, he was without instructions. Second, he had not prepared a valuation and so could not negotiate sensibly with Mr Clark. Third, his view was that as his bill remained unpaid, he should not move the matter forward. In the event, Mr Clark made no contact with Mr Radford and Mr Radford made none with him.

27. Mr Radford's further evidence was that he spoke to Mrs Littlewood 'sometime after June'. The valuation date had been fixed, and so had the deadline for applying to the LVT. Mr Radford's evidence was that he pointed out to Mrs Littlewood that that deadline was an important date and that the failure to apply to the LVT in time would be fatal to her claim for a new lease. The judge accepted that Mr Radford gave that advice and that he told Mrs Littlewood that the earliest date she could apply to the LVT was 8 July 2000 and that the latest date she could do so was 8 November 2000: he had his file in front of him at the time and would have known the exact deadline and the consequences of failing to meet it. No instructions were given by Mrs Littlewood to take the matter forward.

28. The story moved to August 2000, still with nothing having been done on Mrs Littlewood's behalf to progress the matter. On 1 August Mr Radford wrote to Mr Littlewood reminding him that his invoice of 10 May was unpaid and overdue. He continued:

> 'I hope you might realise that as a small practice we cannot allow debts to remain outstanding for any length of time, and in the circumstances must insist that this is settled within the next fortnight, failing which I will have to reluctantly instruct the firm's solicitors to deal with the matter. You will also understand that I will also be unable to continue to act on your behalf.

> Of course, you may have already sent a cheque in settlement which may have crossed with this letter or perhaps been lost in the post, in which case please ignore this letter!
>
> I look forward to hearing from you in the near future, but in the meantime I should advise you that John Clark has still not been in touch with me, notwithstanding Speechly Bircham's letter of the 6th June.'

29. Mrs Littlewood denied that this letter was received, as to which the judge appears to have made no finding. She also asserted, but did not persist in asserting, that it was a forgery created after the event. The judge found that it was written at the time it bore for the purpose of pointing out the consequences to Mrs Littlewood if the bill was not paid. He said it was apparent that Mrs Littlewood was not at this stage asking Mr Radford to do any work. Mr Radford said that between 1 and 15 August, he followed his letter up with three unanswered telephone calls to the Littlewoods. When making the third call (to Mr Littlewood in New York), he left a message about the unpaid fees and his intention to stop work. He did not hear from the Littlewoods and, said the judge, he 'effectively closed his file' on 15 August.

30. On 7 October Mr Littlewood wrote to Mr Radford giving details of a sale of the flat above the flat, making comparisons over 10 paragraphs between the two flats and concluding by expressing the hope that 'the above is helpful for your negotiations'. That is the only reference in the correspondence to any negotiations going on. Mr Radford did not reply to or acknowledge that letter.

31. 8 November 2000 came and went and no application to the LVT was made. Mrs Littlewood's section 42 notice was deemed withdrawn. Speechly Bircham wrote to Mr Radford to say so on 1 December. That was followed by what the judge described as a 'fairly extraordinary' letter of 4 December from Mr Radford to Mr and Mrs Littlewood. Mr Radford wrote:

> 'I am writing to advise you of some rather disturbing news from the Crown Estate concerning the notice of claim, which they now suggest is deemed to be withdrawn (see copy letter dated 1st December from Speechly Bircham).
>
> I believed that the date by which any application by you to a valuation tribunal should have be [sic] the 8th December, and had prepared an application for service on Cluttons in the event that this was necessary. However, Mr Clark from Cluttons pointed out that the date of service of the counter-notice was the 8th May, and that in the event the application should have been made by the 8th November.
>
> Mr Clark did advise me that the Crown is content to grant lease extensions to non-qualifying lessees, in which case it seemed to me to be irrelevant to be too concerned with the time limits set out in the Act. I have therefore written to him today (copy letter enclosed) inviting him to seek his clients instructions as to whether they are prepared to continue to negotiate, notwithstanding their letter.
>
> I very much regret that this has happened, but please be assured that I will do my best to ensure that the Crown continues to negotiate. In the worst case the Crown may insist that you wait the statutory 12 month period before serving notice

> again, but I trust in light of their attitude to non-qualifying lessees that they may continue to negotiate.'

On the same day Mr Radford wrote to Mr Clark in the following terms:

> 'Further to our recent conversation I am writing to you to ask if you could seek your client's instructions on the matter of the proposed lease extension to the [flat].
>
> When we spoke you advised me that your clients were content to negotiate premiums for lease extensions outside of the 1993 Act, but still required that the applicant complete a form as if he did qualify under the Act. Given that my client has already proved to your client's satisfaction that she qualified under the 1993 Act, I should be grateful if you could advise me whether your client would still be prepared to grant a lease extension in this case, notwithstanding the deemed withdrawal of the Notice on the 8th November?
>
> I would be grateful for your urgent response.'

32. Mr Radford's case at the trial was that he had earlier told Mrs Littlewood the relevant date, that his retainer had earlier been terminated and that he had closed his file. These two letters apparently admitted and asserted that the retainer had not been terminated but was very much alive. Mr Radford also misrepresented the position to the Littlewoods: he had not prepared any application to the LVT. The judge found (in paragraph 68) that '[Mr Radford] had deliberately created the impression that he was still instructed and was acting in accordance with his instructions.' I understand that finding to be to the effect that, at the time he wrote the letters, Mr Radford genuinely believed that his retainer had been terminated earlier but, for obscure reasons, was now pretending that it had not. The finding may perhaps have been a generous one as regards the maintenance by Mr Radford of his defence, but it was one that also painted him in a poor light. Mr Radford recognised the lack of wisdom that his two letters reflected and said they were naïve. The judge found they were written in a state of panic. He regarded the letters as, at its lowest, very unfortunate. But they did not persuade him that his assessment of the relative credibility of Mr Radford and Mrs Littlewood was wrong. It is fair to note that the judge plainly found Mrs Littlewood to be a thoroughly unreliable witness (I have not referred to all his findings in that respect); and that, whatever criticisms might also be levelled at Mr Radford as a witness, he at least impressed the judge rather more than Mrs Littlewood did.

33. Mr Littlewood wrote to Mr Radford on 3 January 2001, referring to his regret as to Mr Radford's 'technical mistake' and asking for advice, saying he had taken preliminary legal advice on proceedings against the firm. The letter indicated that there had been at least one earlier telephone conversation but included no suggestion that Mr Radford had yet claimed that his retainer had been terminated. Mr Radford replied on 11 January in terms which were consistent with a recognition that his retainer was continuing and which made no suggestion that it had earlier been terminated.

34. Mr Littlewood then took the matter into his own hands. Mr Roberts (a surveyor and valuer) was instructed in place of Mr Radford and acted for Mrs Littlewood in obtaining, on 31 October 2001, a new lease that was negotiated outside the provisions

of the 1993 Act at a premium of £485,000, an open market figure. The complaint uttered against Mr Radford in Mr Littlewood's letter of 3 January 2001 went to sleep until 26 July 2006 when a letter of claim was served, followed by the issue of a claim form on 19 October 2006, about three weeks before the expiry of the limitation period.

The judge's conclusions

35. As to Mr Radford's retainer, the judge rejected as incredible Mrs Littlewood's case that she had simply instructed him to obtain a lease extension for her. He accepted Mr Radford's case that she had adopted no more than an *ad hoc*, or staged, approach to the giving of instructions. He found that the initial retainer given to Mr Radford was simply intended to take her up to the service of the counter-notice on 8 May 2000.

36. Moving to the second stage required a valuation to be carried out. Mrs Littlewood never gave any instructions to Mr Radford to move to that stage. The judge found that the scope of the only retainer that there was had been fulfilled. Despite Mr Radford's strange letters of 4 December 2000, Mrs Littlewood gave no further instructions to Mr Radford; or if any were given, they were not accepted. The judge found that Mr Radford properly discharged the duty of care to which he was subject under the limited retainer he was given.

37. That was not the end of the argument, because Mr Radford accepted that his limited retainer did not require him merely to perform it to the letter and no more but that he had, for example, to give advice as to hazards or problems that might not be the subject of express instructions but upon which a professional man would recognise his obligation to advise. In this case, there was such a potential hazard, namely the 8 November deadline. The judge was, however, satisfied that:

> '… at the initial meetings and subsequently at the time that the counter-notice was served, the hazard was pointed out to [Mr and Mrs Littlewood], that they understood it, but that they were not prepared at that stage to fund the defendants and move forward to the next stage.'

38. The judge also considered whether, if the retainer *had* continued beyond 8 or 10 May (or 5 June, see paragraph [40] below), it was terminated by the non-payment of Mr Radford's fees. He said the relevant question was whether the non-payment was a repudiatory breach of the retainer which Mr Radford had accepted. The judge referred to Mr Radford's letter of 1 August, which he said was equivocal: it said that unless the bill was paid within a fortnight, Mr Radford would consider himself unable to continue to act. The judge found there was no clear evidence that, following the expiry of the fortnight, there was a clear and unequivocal acceptance of any repudiation.

39. If, contrary to his primary finding, the retainer was not terminated in May or June but continued beyond 15 August then, in light of Staughton J's guidance in *R.P. Howard Ltd & Richard Alan Witchell v. Woodman Matthews & Co (a firm)* [1983] BCLC 117, the judge held that Mr Radford *would* have been under a duty to remind Mrs Littlewood that the deadline of 8 November was coming up. On that hypothesis, as I said in paragraph [7] above, he would have held that the damages recoverable by Mrs Littlewood to be £56,400.

The appeal

40. There is an inconsistency in the judge's judgment as to when he found that the retainer terminated. His finding was that Mr Radford was retained merely to carry out 'the first stage' of the transaction and in paragraph 48 appears to have regarded that stage as ending with Mr Radford's letter of 10 May to the Littlewoods enclosing the copy counter-notice and invoice. However, it is plain that Mr Radford did not stop acting for Mrs Littlewood at that point. Shortly after receiving the counter-notice, he prepared an informal internal valuation which produced a figure of £381,255 (not far from the CEC's figure of £400,000). And he wrote an important letter to Speechly Bircham on 5 June, an event that, in paragraph 55, the judge described as marking 'the very end of the first stage of the process'. Thus I understand him to have accepted that the retainer continued after 10 May until 5 June, when it was terminated. In paragraph 75, however, the judge made his finding that Mrs Littlewood retained Mr Radford merely for the stage of the exercise ending with the service of the counter-notice (on 8 May) and gave him no instructions to move to the second stage. That suggests that the judge was reverting to his first thoughts expressed in paragraph 48. Mrs Littlewood's amended appellant's notice accepts, however, that the judge found that the retainer terminated on 5 June, which I regard as a correct interpretation of the judgment. The grounds of appeal challenge the correctness of that finding and assert that there was no basis on which the judge could properly have concluded that the retainer terminated at any time before the deadline of 8 November. If so, it is said - and the judge accepted - that Mr Radford breached his duty of care to Mrs Littlewood in failing to remind her of the importance of that date in the run-up to it.

41. Mr Boyd, in his submissions in support of the appeal, submitted that whilst the judge's assessment of the parties' respective credibility was relevant to his determination of certain of the factual issues that were before him, it was not relevant to the issue of when the retainer terminated. The judge's finding that the retainer terminated on 5 June was, he said, surprising bearing in mind that it was neither side's case that it terminated then. Mrs Littlewood's case was that it continued beyond 8 November. Mr Radford's case was that it continued until 15 August when he terminated it following the Littlewoods' non-compliance with the terms of his letter of 1 August.

42. In case he was wrong on his 5 June date, the judge also dealt with and rejected Mr Radford's case that the retainer terminated on 15 August. There is no cross-appeal against that rejection. Nor is there is a cross-appeal advocating any termination date other than 5 June. If therefore the judge was wrong on his 5 June date, the only conclusion open to this court is that the retainer continued beyond 8 November.

43. Mr Boyd submitted that it is obvious that Mr Radford continued to be retained after 5 June and (for reasons just given) also beyond 15 August. The essence of his point was that both parties acted on the express basis that the retainer *did* so continue. Following the receipt of the counter-notice of 8 May, Mr Radford prepared his informal valuation. Following his letter of 10 May, he obtained the Littlewoods' instructions to agree the acquisition terms (apart from the premium) proposed by the CEC. Paragraph 11 of the amended Defence admitted and asserted that after 10 May Mr Radford had several conversations with the Littlewoods as to the procedure for processing the claim. On 12 May he faxed them the names of firms of solicitors whom they might instruct in relation to the acquisition.

44. Mr Radford then wrote to Speechly Bircham on 5 June to say that Mrs Littlewood had agreed the acquisition terms (apart from the premium) and that the valuation date was therefore 5 June; and he expressly added that 'the valuer dealing with this matter on behalf of the lessee is Mr D.C. Radford at this office'. That was an unambiguous statement that he was still on the job and was ready and willing to discuss valuation matters on Mrs Littlewood's behalf. Speechly Bircham replied on 6 June and, having noted what he had written, wrote that Mr Clark of Cluttons would be contacting Mr Radford (obviously to discuss the premium).

45. During the following period, Mr Radford continued to regard himself as still retained. In paragraph 21 of his witness statement of 10 April 2008 he made the point that he had impressed upon the Littlewoods how important it was that he should prepare a formal valuation, although they did not instruct him to prepare one. But he did not regard that omission as implicitly terminating his retainer, nor did he consider that absent any such instructions he was not acting under any continuing retainer. He said in paragraph 21 that the Littlewoods were:

> '… preferring to take what might best be described as a "wait and see approach" to the claim. By this I mean that I believed they wanted to await the receipt of the valuation from the Crown's appointed surveyor and then discuss with me the appropriate response.'

His position was the same in cross-examination. He said it was only on 15 August that he regarded himself as no longer instructed and downed tools. To the question why, once 8 July had arrived (and the window for applying to the LVT had opened), he did not communicate with Mrs Littlewood, he did not say it was because he was no longer instructed. Consistently with what he had said in his witness statement, he said:

> 'Well, there was no urgency to the matter. There was no urgency to make an application. *We were awaiting figures from John Clark as to how he calculated his premium.* There was no urgency to make an application to a tribunal and there normally never is until generally speaking it is in the client's interest to make an application for the fixed valuation date until late in the day.' (Emphasis supplied)

46. The position by 1 August was, therefore, that Mr Radford was waiting to hear from Mr Clark (as he acknowledged in paragraph 35 of his April 2008 witness statement) and the Littlewoods were doing likewise (as the defendant firm acknowledged in paragraph 7 of its closing submissions at the trial). Mr Radford plainly regarded himself as still instructed. He also acknowledged in his re-examination that 'I had been instructed to negotiate', meaning to negotiate with Mr Clark. He became frustrated, however, that his invoice of 10 May remained unpaid and so he wrote his ultimatum of 1 August. That letter recorded that he was still waiting to hear from Mr Clark – and, necessarily, was doing so under a continuing retainer – but pointed out that, unless he was paid within a fortnight 'I will also be unable to continue to act on your behalf'.

47. As I have said, there was no challenge to the judge's finding that the non-compliance with the ultimatum in that letter did not terminate the retainer. If the retainer was alive on 31 July, it therefore remained alive after 16 August. The Littlewoods do not appear to have understood it to have terminated in the summer of 2000 because on 7 October Mr Littlewood wrote to Mr Radford providing him with information for his

negotiations. His action in doing so was consistent with Mr Radford's acknowledgment in his re-examination that he had been instructed to negotiate; and by paragraph 18 of the amended Defence the defendant firm also acknowledged that the absence of a formal valuation was no bar to a negotiation with Mr Clark in response to any contact he might make, albeit that it would necessarily be of limited scope. Whilst Mr Radford did not respond to Mr Littlewood's letter, that omission did not support a conclusion that he regarded the retainer as at an end when his later letters of 4 December openly proclaimed that it was not.

48. Mr Boyd referred to the judge's three reasons (in paragraph 57 of his judgment) as to why Mr Radford was not in a position to move the matter forward after 5 June, namely (i) he was without instructions, (ii) he had not prepared a valuation and so could not negotiate with Mr Clark, and (iii) he was of the view that as his fees were unpaid, he should not move the matter forward. Mr Boyd submitted that each point was wrong. As to (i), Mr Radford *did* have instructions, which were to await Mr Clark's figure and respond to it. That was the defendant firm's pleaded case in paragraph 5(a) of the Further Particulars of paragraph 11 of the amended Defence and was recognised in Mr Radford's witness statement and cross-examination. As to (ii), that ignored the acknowledgment to the contrary in paragraph 18 of the amended Defence. As to (iii), the non-payment of fees was not advanced by Mr Radford as a reason for inactivity on his part until, as he accepted in cross-examination, 15 August. His case was that his retainer continued *until* 15 August.

49. Mr Boyd submitted further that, if the retainer did continue, Mr Radford was under a duty, by at the latest the beginning of November, to remind Mrs Littlewood of the need to make an application to the LVT by 8 November. The judge made a finding to that effect and Mr Radford acknowledged in cross-examination that, had he continued to be instructed after 15 August, he would (in accordance with his usual practice), and as the deadline approached, have advised Mrs Littlewood of the need to make an application to the LVT by the deadline. He said he would probably have given her such advice at the beginning of November.

50. A question might have arisen as to whether, had Mrs Littlewood been so reminded, she would in fact have made such an application, or have given instructions for one to be made. It was, however, implicit in her case that she would have done so, and Mr Radford expressly accepted in cross-examination that there was no reason why she would not. No point to the contrary effect was taken at the trial, and in making his alternative findings on the questions that would arise if he was wrong as to the termination of the retainer, the judge appears to have assumed this issue in Mrs Littlewood's favour. There is no cross-appeal seeking to open that matter up in this court for the first time.

51. Mr Pryor, for the defendant firm, pointed out that in paragraph 41 of his judgment, the judge found as a fact that the instructions given by Mrs Littlewood to Mr Radford in early 2000 were 'limited to serving the initial notice and, as it were, getting the ball rolling'. He said the reality of the acquisition transaction in which Mrs Littlewood was proposing to engage was that it was an entirely voluntary exercise. A lessee is at no point under any compellable obligation to complete the acquisition of an extended lease if he does not like the price (see section 52 of the 1993 Act), although he will ordinarily want to know what the premium will be. A lessee who does not even ask his own adviser for a valuation is obviously not that interested in the acquisition. Mrs

Littlewood learnt of the CEC's figure of £400,000 upon the service of the counter-notice on 8 May but did not instruct Mr Radford to do his own valuation. Once 5 June had passed, there was no sensible basis on which Mr Radford might have telephoned Mr Clark to endeavour to negotiate the price and no doubt Mr Clark was playing the same game. The reality was that if Mr Clark had telephoned Mr Radford, Mr Radford would have had to seek instructions from Mrs Littlewood. By June Mr Radford had done all that he could for Mrs Littlewood. He had served the section 42 notice; he had agreed the acquisition terms (apart from premium); he had thereby fixed the valuation date; and he had advised Mrs Littlewood of what she needed to do to preserve her claim (that is, he had advised her of the deadline of 8 November for applying to the LVT). The judge found that 5 June marked the end of the retainer and, Mr Pryor submitted, that was a legitimate view. He said that even if the retainer did continue after 5 June, in circumstances in which Mrs Littlewood was manifesting no intention to pursue the acquisition of an extended lease, there was no obligation upon Mr Radford to inform her yet again of the 8 November deadline. It was enough that he had advised her of it in June. To the court's point that Mr Littlewood's letter of 7 October raised an inference that Mrs Littlewood apparently *did* wish to pursue the acquisition, Mr Pryor said there was no evidence from Mr Littlewood, including (necessarily) no evidence as to why the invoice of 10 May had not been paid. That is true but it does not meet the point that the letter apparently reflected a continuing interest by the Littlewoods in pursuing the acquisition; and there is no explanation as to why Mr Radford chose to ignore it.

52. Mr Pryor's further submission was that, once 5 June had passed, and assuming that the retainer continued, the height of Mr Radford's obligations was to transmit to Mrs Littlewood any communication that there might have been from Mr Clark. He had no implied obligation to take any pro-active steps on Mrs Littlewood's behalf. Mr Radford knew that the Littlewoods did not like the CECs' £400,000 figure and by that stage all they wanted to know was what Mr Clark had to say. There was no further obligation upon Mr Radford, and so even if the judge was wrong that the retainer terminated on 5 June, Mr Radford committed no breach of his continuing retainer by failing to remind Mrs Littlewood of the 8 November deadline.

Discussion and conclusion

53. I propose to keep the discussion relatively short because I have come to the clear conclusion, essentially for the reasons cogently advanced by Mr Boyd, that the judge was in error in finding that the retainer terminated on 5 June. Bearing in mind that not even the firm was advancing a case that it terminated as early as then, but was asserting that it continued until 15 August, that was a surprising conclusion for the judge to arrive at. The fact that neither side was suggesting that the retainer terminated on 5 June did not of course itself preclude a judicial finding that it did. If, despite the parties' assertions, the evidence pointed solidly to a termination date differing from the dates they were respectively advancing, it would be properly open to the judge to find that that was the true termination date, although ordinarily he would ensure that the parties were aware of the direction in which his thoughts were going and give them a proper opportunity to address him on them.

54. In this case, however, not only was there, in my judgment, no evidential basis on which the judge could favour 5 June as the critical date, the evidence positively pointed against any conclusion that the retainer terminated then. In arriving at the

conclusion that he did, the judge was, it seems to me, probably over-influenced by his findings that the particular professional services that Mr Radford was offering could be characterised as falling into several distinct stages and that the Littlwoods did not intend to instruct him other than on a stage by stage basis. He therefore approached the case on the basis that their intention was to do no more than to enter into a separate retainer for each separate stage. For myself, I regard as less than convincing the evidential basis on which the judge made the finding that the Littlewoods only ever intended to instruct Mr Radford on a stage by stage basis, although I have no difficulty in accepting his finding that their intention was to keep to a minimum the costs of the work they retained him to do for them. Where, however, the judge fell into what I would respectfully regard as obvious error was in his finding that Mr Radford's retainer came to an end on 5 June, being the point at which the judge found that the first stage came finally to an end.

55. That was wrong because it is apparent that the retainer did *not* then end, as both sides recognised. Mr Radford's instructions during the period following 5 June were to await Mr Clark's telephone call as to his calculation of the premium and to negotiate with him. There is no doubt that the Littlewoods regarded those as his instructions (cf Mr Littlewood's letter of 7 October) and Mr Radford admitted as much. It may be that – absent the prior carrying out by Mr Radford of his own formal valuation – the scope for any negotiation with Mr Clark would have been limited. That did not, however, mean that the instructions were without substance and Mr Radford did not suggest otherwise. The last sentence of his letter of 1 August positively recognised that he regarded himself as still acting for Mrs Littlewood: it warned that he would be unable to continue to do so unless his fees were paid. The judge made an unchallenged finding that, if the retainer was still continuing by 1 August, it did not thereafter terminate as a result of the non-compliance with the terms of the letter of that date. That meant that if, as I consider, he was wrong to find that the retainer terminated on 5 June, it must still have been in place on 8 November.

56. For these reasons, I have concluded that the judge's finding that the retainer terminated on 5 June was contrary to the evidence and was wrong. He ought to have found that it continued until after 8 November. The further question canvassed briefly before us was whether, accepting that the duties imposed on him by his retainer after 5 June were as limited as I have described, Mr Radford was also under a duty, as the 8 November deadline approached, to remind Mrs Littlewood of that and point out to her the need to make an application to the LVT by then if she wished to keep alive the benefit of her section 42 notice of 8 March.

57. It might be said that, as (so the judge found), Mr Radford had told her of this in about June or July, there was no need for him to repeat it as the deadline loomed up. This was a point which caused Longmore LJ concern when giving permission to appeal. The concern was, I consider, a legitimate one. If a professional person gives clear advice on a particular point to his client as to the need to take a particular step by a particular time, there cannot be any general principle that he is under a duty to keep repeating that advice.

58. The judge held, however, that if the retainer was still continuing after 5 June, Mr Radford *was* under an implied duty, as the 8 November deadline loomed up, to remind Mrs Littlewood of it, a finding that reflected Mr Radford's own admission as to what, in the ordinary course of his practice, he would have done. Whilst there is no

respondent's notice challenging that conclusion, Mr Pryor nevertheless submitted that, given the limited nature of the tasks that Mr Radford was expressly required to perform under his continuing retainer, there was in fact no such duty upon him. His duty did not extend beyond reporting to the Littlewoods the content of any telephone call from Mr Clark.

59. In my judgment, the judge was correct in finding that Mr Radford's continuing retainer required him, as the 8 November deadline loomed up, to repeat to Mrs Littlewood the need for her, if she wished to keep her claim alive, to apply to the LVT by 8 November. The sensible time to do so would have been in response to Mr Littlewood's letter of 7 October. Mrs Littlewood was not a lawyer. Whilst Mr Radford may well have told her in June or July of the importance of the deadline, she was a client inexperienced in the relevant field, and she was just the sort of client who could be expected to rely on a professional adviser such as Mr Radford to remind her, when the time arose, of the need to take appropriate procedural steps in order to protect her position. Mr Radford's instinct that this is what he would have done in the ordinary course was a correct reflection of the legal obligation which, in the particular circumstances of this case, I consider he would have been under. In my view the judge was right to regard Staughton J's observations in *R.P. Howard Ltd & Richard Alan Witchell v. Woodman Matthews and Co (a firm)* [1983] BCLC 118 (in particular at 121e 122c) as supporting his conclusion in this respect. Those observations were admittedly made in relation to a solicitor's duty, but I consider that, in the circumstances of his retainer, Mr Radford would have been subject to a like duty. I do not accept Mr Pryor's submission that the limited nature of Mr Radford's express duties at the material time meant that he was under no such implied duty to remind. I can see no reason why it should do so.

60. The result is that I would allow the appeal, set aside the judge's order of 20 October 2008 and enter judgment for Mrs Littlewood on her claim for damages in terms that I would hope counsel can agree.

Lord Justice Hughes :

61. I agree.

Lord Justice Waller :

62. I also agree.