Solicitors' Duty to Warn – when does it arise?

March 2017

The Court of Appeal has recently dismissed an appeal against the decision of Michael Bowes QC sitting as a deputy judge in the Queen's Bench Division in *Balogun v Boyes Sutton & Perry* [2017] EWCA Civ 75. Whilst the underlying decision and aspects of the appeal judgement are fact specific, Lord Justice Lloyd-Jones' judgment provides some insight into the current judicial treatment of "duty to warn" cases and late changes to a party's pleaded case.

The background facts

The claimant was a professional restaurateur. In 2011 he instructed the defendant firm of solicitors to act for him in connection with the proposed acquisition of a commercial lease of a ground floor unit at a property in Norwood. The claimant's intention was to fit out the unit as a restaurant and nightclub. The unit was part of a mixed commercial and residential building owned by a housing association. The housing association owned the freehold and the upper residential parts of the building. The lower commercial parts of the property were leased to Anacar (the intermediate landlord). Anacar then sub-let one of the commercial units to the claimant. The unit had a purpose built ventilation shaft running from the unit up through the building to the roof.

Following completion, a dispute arose between the claimant and the housing association over the nature of works which the claimant proposed to carry out in relation to the ventilation shaft. In particular the claimant wished to install ducting in the ventilation shaft and erect a chimney to vent fumes to the roof of the building.

The claimant brought action against the defendant solicitors for professional negligence. The claimant's case at first instance was that the underlease did not confer a right to use the ventilation shaft. Further the claimant alleged that he had specifically told the defendant that (1) he intended to use the pre-existing ventilation shaft to vent fumes and (2) he intended to install works within the shaft for that purpose. The defendant argued that the underlease contained the relevant right to vent and that they had not been instructed that any works were required in order to put that right into effect.

The claim was dismissed at first instance by Michael Bowes QC, sitting as a deputy High Court judge. He found that the claimant had the necessary right to vent in the underlease and preferred the defendant's evidence in relation to the factual instructions conveyed to them.

Any comments or queries?

Paul Castellani
Partner
+44 20 3060 6344
paul.castellani@rpc.co.uk

Laura Stocks
Senior Associate
+44 20 3060 6389
laura.stocks@rpc.co.uk

The claimant's case also evolved at trial to advance various alternative allegations of negligence, including that:

- there was sufficient ambiguity in the drafting of the underlease that it gave rise to a duty to warn of a risk of dispute with the intermediate and/or head landlord
- there was a duty on the defendant to investigate whether the local authority had granted consent in relation to a particular planning condition regarding the ventilation of fumes.

Both of these points were un-pleaded. The judge considered and dismissed each of them in his judgment. He found that there was no appreciable risk in the drafting that gave rise to a duty to warn and that on the facts the claimant had not established that further investigations would have revealed anything relevant in relation to the planning consent.

The claimant appealed against the findings by the judge in relation to the two un-pleaded points. The defendant cross-appealed to argue that the points were un-pleaded and so ought not to have been heard at all.

Duty to Warn

The claimant argued that the first ground of appeal was separated into two limbs:

- that the underlease did not confer a right of access to the ventilation shaft
- in the alternative, if the underlease did confer the right of access, there was such a risk that it did not that the defendant should have warned the claimant of that risk.

The leading judgment was given by Lord Justice Lloyd-Jones. On limb 1 Lloyd-Jones LJ agreed with the trial judge's construction of the underlease. The wording was sufficiently broad to allow the claimant to connect to and use the ventilation shaft.

He noted that limb 2 had more substance. The law on duty to warn has evolved through the cases of *Queen Elizabeth's School*[1], *Herrmann v Withers*[2] and *Barker v Baxendale Walker*[3] and these were considered in his judgment.

Lloyd-Jones LJ noted that limb 2 did not rest on the true construction of the clause, but whether there was real scope for doubt as to the meaning of it. In *Queen Elizabeth's School*, even though the solicitor's interpretation of the clause was correct, the solicitor could not have been so confident as to relieve him of the need to caveat his opinion to the client. In that case, it was also relevant that the solicitor knew that a dispute had the potential to emerge with a third party over the construction.

Lloyd Jones LJ also referred to Roth J's decision in *Barker v Baxendale Walker*. In that case Roth J inferred that where a solicitor advised in favour of an interpretation that was likely to be the correct one, it seemed unlikely that they would be in breach of duty for failing to warn the client that their interpretation maybe wrong[4].

Lloyd Jones LJ was not persuaded to go as far as saying that where the solicitor had advised in line with the construction favoured by the court, there could be no duty to warn:

"...The question whether a solicitor is in breach of a duty to warn his client of the risk that a court may come to a different interpretation from that which the solicitor advises is correct will necessarily be highly fact-sensitive and will depend on the strength of the factors favouring a different interpretation and thereby giving rise to the risk. ..."

Accordingly, the key test in determining whether a duty to warn arises is the strength of the alternative argument which may give risk to the risk. In this case, Lloyd Jones LJ

1. *Queen Elizabeth's Grammar School Blackburn Ltd v Banks Wilson Solicitors* [2001] EWCA Civ 1360.
2. *Herrmann v Withers* [2012] EWHC 1492 (Ch).
3. *Barker v Baxendale Walker Solicitors* [2016] EWHC 664 (Ch).
4. *See Barker v Baxendale Walker Solicitors* [2016] EWHC 664 (Ch) at paragraph 178.

found that the defendant should have considered that there was a possible disjunct between the terms of the headlease and the underlease regarding the ventilation shaft, and therefore the risk was sufficient to require the defendant to warn the claimant of the risk. However, despite this, Lloyd-Jones LJ noted both the freeholder and intermediate landlord had accepted that the claimant had a right to use the ventilation shaft. The dispute arose out of the extent of that right. Accordingly the claimant had not suffered any loss by any failure to warn of a risk of a dispute arising over the right to vent in the underlease.

Failure to make further enquiries

The claimant argued that the defendant had been negligent in failing to request the written approval of the local planning authority in respect of installation of equipment in the ventilation shaft. This was a highly fact specific issue.

Lloyd-Jones LJ decided that the defendant was not under a duty to request written approval of the local planning authority. There was nothing to put the defendant on notice that there was anything further to investigate. The defendant had drawn the planning condition to the attention of the claimant and the factual evidence showed that there was no detailed schedule of works available to the claimant prior to completion. In any event, the relevant condition was tied to the operation of the restaurant. The fact that there was no written approval did not mean that no ducting had been constructed in the ventilation shaft. Accordingly the court dismissed the appeal.

Prejudice by the new case on the planning condition

The defendant raised a cross-appeal to assert that it was wrong for the trial judge to allow the claimant to advance various un-pleaded points in closing submissions, particularly in circumstances where no application to amend had been made. They asserted that the case advanced in relation to the second ground was one which gave rise to real prejudice.

The issue of late amendments to pleading has been subject of much judicial consideration. In *Swain Mason v Mills & Reeve*[5] the Court of Appeal said that there was a heavy burden on a party seeking to amend to introduce a new case on the first day of trial. The applicant was required to show why the change was sought so late and why it had not been sought earlier.

Whilst Lloyd Jones LJ noted that he had real concerns about the prejudice to the defendant and the fairness of the trial judge's decision to allow the point to be taken, he declined to determine the ground on a "pleading point". He preferred to determine the appeal ground on its merits. There was no material downside to the defendant because the ground was dismissed on the merits. But the decision does highlight the appeal court's inherent reluctance to interfere with case management decisions, even when it considered that there are valid grounds for doing so.

Laura Stocks and Paul Castellani of RPC acted for the successful defendant.

5. *Swain Mason v Mills & Reeve* [2011] EWCA Civ 14.

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 83 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern City legal services business."

At RPC we put our clients and our people at the heart of what we do:

- **Best Legal Adviser status every year since 2009**
- **Best Legal Employer status every year since 2009**
- **Shortlisted for Law Firm of the Year for two consecutive years**
- **Top 30 Most Innovative Law Firms in Europe**

We have also been shortlisted and won a number of industry awards, including:

- **Winner – Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17**
- **Winner – Law Firm of the Year – The British Legal Awards 2015**
- **Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015**
- **Winner – Law Firm of the Year – The Lawyer Awards 2014**
- **Winner – Law Firm of the Year – Halsbury Legal Awards 2014**
- **Winner – Commercial Team of the Year – The British Legal Awards 2014**
- **Winner – Competition Team of the Year – Legal Business Awards 2014**

Areas of expertise

- Competition
- Construction & Engineering
- Corporate/M&A/ECM/ PE/Funds
- Corporate Insurance
- Dispute Resolution
- Employment
- Finance
- Insurance & Reinsurance
- IP
- Media
- Pensions
- Professional Negligence
- Projects & Outsourcing
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Technology

16996

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000