Case No: 2000 HC No. 003975

Neutral Citation Number: [2002] EWHC 1310 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 July 2002

Before:

THE HONOURABLE MR JUSTICE LADDIE

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Between:

	CREDIT LYONNAIS S.A.(a body corporate)	**Claimant**
	- and -	
	RUSSELL JONES & WALKER (a firm)	**Defendant**

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Mr J Seitler (instructed by **Clifford Chance** for the Claimant)
Mr D Halpern (instructed by **Bond Pearce** for the Defendant)

Hearing dates: 12-13 June 2002

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JUDGMENT

Mr Justice Laddie:

1. This is the judgment in an action for professional negligence. The claimant is Credit Lyonnais SA ("CL"), a large European bank. The defendant is Russell Jones & Walker ("RJ&W"), a well known firm of solicitors. This dispute concerns the termination of a lease dated 30 August 1991 entered into by CL in respect of premises at 15 Highpoint Business Village, Henwood Road, Ashford in Kent.

2. The lease was for a term of 25 years. When CL entered into it, it had hoped that the opening of the rail link through the Channel Tunnel would attract continental business to Ashford and that it could secure valuable customers if it had a presence there. By 1994 CL's plans had changed. It wanted to close down the Ashford retail premises. To do that it needed to exercise a break option contained in Clause 12 of the lease which is in the following terms:

> "It is hereby agreed by the parties that the Lessee (here meaning Credit Lyonnais Bank) may terminate this Lease on the third anniversary of the Term ("the Termination Date") by giving to the Lessor not less than six calendar months previous written notice ("the Termination Notice") and upon payment by the Lessee to the Lessor of the sum of £11,500 such payment to be made not later than the Termination Date then upon the Termination Date this demise and all that is contained in this Lease shall determine absolutely but without prejudice to any right of action or remedy of any party against any other for any breach of covenant or other liability (contingent or otherwise) of the Lessee under this Lease subsisting at the date of the expiration of the Termination Notice Provided That this Option shall be personal to Credit Lyonnais Bank and shall not be capable of assignment Provided Further that Credit Lyonnais Bank shall prior to the Termination Date re-instate the Demised Premises to its state and condition as at the Commencement Date and in all respects to the full satisfaction of the Lessor's surveyors."

3. It is convenient also to refer to the only other clause in the lease which may be relevant to the issues I have to consider, namely Clause 8:

> "Any notice shall be sufficiently served on the Lessee if left or sent by prepaid post registered or recorded delivery addressed to the Lessee at the Demised Premises or where the Lessee is a company at its registered office or in other cases at the Lessee's last known address. Any notice shall be sufficiently served on the Lessor or the Management Company if left addressed or sent by prepaid registered post to it at its registered office. Any notice sent by post as aforesaid shall be deemed to have been received by the addressee at the time when it ought in due course of post to have been delivered and subject as aforesaid the provisions of Section 196 of the Law of Property Act 1925 shall apply to all notices hereunder as amended by the Recorded Delivery Service Act 1962."

4. It will be seen from Clause 12 that the exercise of the break option was dependent upon compliance with a number of conditions including, in particular, the service of 6 months' prior written notice and payment of £11,500.

5. It is not in dispute between the parties that the payment required under Clause 12 is a condition precedent. Nor is it in dispute that a competent property lawyer would or should know that such a condition precedent is strictly applied. Time is of the essence. Therefore, if the payment were not made by the due date, the lessee would lose the right to terminate the lease prematurely. In the circumstances described below, the termination notice was served in time but payment was not. In the result the

landlord declined to accept premature termination. In the end CL had to buy its way out of the lease.

6. The nub of the allegation of negligence in this case is that RJ&W, who were instructed as CL's solicitors in relation to the exercise of the break option, breached the duty of care owed to their client by failing to warn it that the payment required by Clause 12 was a condition precedent and that it was time critical. It is not in dispute that if RJ&W were negligent, the damages claimed by CL in the Particulars of Claim flowed from it. There are two minor issues relating to interest and an allegation of contributory egligence, but the major dispute concerns liability.

7. The following are the essential facts surrounding the failure to exercise the break option properly. I do not understand them to be in dispute. CL had a small property department. The employee in that department who was responsible for this transaction was Mr David Evans although, as a matter of formality, all correspondence from CL on this issue was signed by Mr Evans' superior, Mr Tickle. All discussions with RJ&W were conducted on CL's side by Mr Evans and he also drafted all the relevant correspondence signed by Mr Tickle.

8. Mr Evans is not a lawyer. He holds a formal banking qualification having passed the Part 1 exam of the Institute of Bankers. He has worked for a variety of banks over the years, although he is now a civil servant. In the banking sector he has had administrative and auditing experience. At the relevant time he was the premises manager at CL, having had premises management experience at the banks he had worked at previously. He had a reasonable amount of knowledge and experience of property management and related matters. His principal experience concerned the fitting-out of premises, and included responsibilities such as arranging security contracts, refurbishing offices, liaising with designers and architects, monitoring rent payments, arranging property inspections, fixing defects and liaising with cleaning contractors. He was responsible for looking after the management of CL's premises and had day-to-day responsibility for running CL's main building in London and its 3 main branches. He also had to look after certain residential property.

9. In early 1994, there was a partner within RJ&W who specialised in property law. He was Mr Abbey. However he was not assigned to look after CL's interests in relation to this issue. Instead RJ&W gave the matter to another solicitor, Mr Stanton-Reid. Mr Stanton-Reid has always been a corporate lawyer. He started working with RJ&W in December 1993 with the title of Consultant, although he worked full time. At the material time he was a full time Consultant with the Defendant firm heading the Company Commercial department. It was Mr Stanton-Reid who talked and corresponded with Mr Evans. Mr Stanton-Reid told me that he believes that the reason RJ&W chose to assign him, rather than Mr Abbey, to this task for CL was that Mr Abbey only worked two days a week and the firm wanted to have someone available at all times to service the client. Whatever the reason, RJ&W chose to assign this matter to a lawyer who was not, and had never claimed to be, a property lawyer.

10. At all material times, Mr Stanton-Reid knew that Mr Evans was not a property lawyer although he was employed in the property department of a substantial commercial organisation. It is not suggested that he made any attempt to discover the level of property expertise held by Mr Evans or others in his department and I find as a fact that he had no reason to believe any relevant property law expertise existed in house within CL.

11. Although there were a number of telephone conversations between Mr Stanton-Reid and Mr Evans, neither have a clear recollection of what was said and Mr Seitler who appears on behalf of CL and Mr Halpern who appears for RJ&W agree that the relevant instructions are recorded in the short correspondence passing between the parties in early 1994. The only matter which is not recorded there and to which some reference has been made during the trial are the negotiations concerning fees. There is no dispute that this issue was raised at an early stage. It is not clear whether a fixed fee or an estimate of fees was agreed but nothing turns on this. A fee of £500.00 plus VAT for the work to be undertaken was discussed and agreed, at least in principle. Mr Stanton-Reid told me that at that time his charge out

rate was £200.00 per hour, so the fees discussed involved a rough estimate of about two and a half hour's work for the client.

12. The first letter of instruction was dated 3 February 1994. The relevant paragraphs are as follows:

> "We write to confirm your telephone conversation of today with David Evans of our Premises department regarding the above property. We enclose the title deeds and documents and ask that you kindly acknowledge safe receipt on the attached duplicate schedule.
>
> You will note that page 8 paragraph 12 of the Lease indicates that we may exercise a termination of the lease on the third anniversary of the term, namely 29 August 1994 giving not less than 6 calendar months notice.
>
> We ask that you contact the landlord's agents and enquire whether they are willing to extend the notice period to terminate the lease for a period of twelve months from 29 August 1994 and on what terms. If we are not able to agree suitable terms, then it is likely that we will wish to terminate this lease although we do not want to give this impression initially to the landlord.'
>
> You will also note that the lease requires a payment from ourselves upon termination of £11,500.00 and that we are obliged to re-instate the premises to the original condition.
>
> We would like to review any possible offer from the landlord in order that we can make a financial decision on the viability of extending the notice period and to give us time to assess our longer term position.
>
> Obviously we are very close to the final date by which we can give notice and your urgent attention to this matter will be most appreciated.
>
> You asked David Evans for details of the current outgoings and these are as follows ...
>
> The rent and service charge are payable to ... who are managing agents. Their telephone number is ...
>
> If you have any further questions or require any further information, please do not hesitate to contact David Evans direct ..."

13. As this indicates, it was accompanied by a number of documents and a schedule. It is not in dispute that amongst the documents sent to Mr Stanton-Reid was the Ashford Lease.

14. It will be seen that Mr Stanton-Reid was expressly instructed to contact the landlord's agents to discover whether the landlord would be prepared to extend the notice period and, if so, on what terms. This Mr Stanton-Reid did. The landlords indicated that they were prepared in principle to agree an extension. However CL decided that it no longer wanted to defer exercising the break option. On 24 February 1994 it sent another letter of instruction to RJ&W. It reads as follows:

> "We write further to our letter dated 3 February 1994 and to the telephone instructions of today to your assistant from David Evans of our Premises department to confirm that we now wish to exercise our option to terminate the lease on the above property as from 29 August 1994 in accordance with page 8, paragraph 12 of the Lease.

> Notice of termination has to be given not less than 6 calendar months in advance and we ask that you ensure that this requirement is met and acknowledged by our landlord or their agents and confirmed to the undersigned by fax by midday Friday 25 February 1994 . ..."

15. In accordance with the second paragraph of that letter, Mr Stanton-Reid served a notice of termination in time and received a suitable acknowledgement on behalf of the landlords. This was reported back to CL by letter dated 2 March 1994.

16. The only further relevant communication between RJ&W and its client before the trigger date at the end of August, was the dispatch by the former to the latter of a fee note dated 14 July for £500.00 plus VAT. The narrative to the bill is in the following terms:

> "16.2.94 to 30.6.94 – to advice and assistance in relation to the exercise by the Bank of its option to break/terminate its lease of the above mentioned premises."

17. In the meantime, CL prepared to make the termination payment of £11,500.00. It asked the landlord's agent for an invoice but that was not forthcoming. It also engaged in correspondence aimed at reducing the VAT liability on the payment. CL was not aware of the time critical nature of the payment due under Clause 12. It is not suggested that it should have been so aware. CL continued to ask for an invoice. Not unreasonably, the landlord allowed the trigger date to pass. It then refused to accept late payment. It sent a letter enclosing an Opinion from Leading Counsel which set out accurately that payment had to be made before the trigger date failing which the option to break could not be exercised. It was not prepared to treat the lease as at an end.

18. CL complained to RJ&W that it had not been warned of the risk created by the terms of Clause 12. After it had managed to buy its way out of the lease, it commenced these proceedings.

19. CL's claim is that RJ&W was instructed to act for it to secure termination of the lease and that the express retainer was in wide enough terms to include advice on how to ensure the break option was complied with. Alternatively it says that RJ&W was required to draw to CL's attention any substantial risk of which it, as a competent property lawyer, was or should have been aware. In either case it argues that a competent property lawyer would have realised the risk posed to the client by the interaction between the condition precedent in Clause 12 and the established caselaw on the time critical nature of such clauses. CL should have been warned. If it had, the payment would have been made on time and CL would not have had to continue paying rent after 29 August or buy its way out of the remaining term of the lease.

20. RJ&W does not dispute that a property lawyer who read the lease would have realised the risk. However it argues that its instructions were very narrow and did not include any requirement that it advise the client either as to the meaning of Clause 12 or as to the law on conditions precedent in tenant's options. It says that the only instructions contained in the letter of 3 February was that set out in paragraph 4, namely an instruction to contact the landlord's agents to enquire whether they were willing to extend the notice period and, if so, on what terms. It says that the only instructions contained in the letter of 24 February were set out in the second paragraph, namely to serve notice of termination in time and to obtain an acknowledgement from the landlord or its agent. Those instructions were carried out faultlessly. RJ&W argues that the very limited scope of the instructions is consistent with the very modest fees charged.

THE LEGAL PRINCIPLES INVOLVED

21. In deciding what are the duties shouldered by a solicitor, the first step is to construe the terms of the instructions given by the client and accepted by the lawyer. In doing this, it must be borne in mind that in most cases the client is not a lawyer. He will ask the lawyer to carry out certain tasks for him, although the formulation of those tasks may not be expressed with the precision one would expect of a lawyer. The lawyer accepts the instructions on that basis. If there is a bona fide obscurity as to the terms of the instructions, the lawyer should clarify them. The lawyer's duty of care covers the width of the instructions given. However that may not be the limit of his responsibilities. The question arises as to whether he owes a duty of care and has to advise outside the express terms of his retainer and, if so, how far.

22. In relation to the question of whether the duty extends beyond the express width of the instructions given, I have been taken to a number of authorities by Mr Seitler and Mr Halpern. Mr Halpern says that the guiding principle is that referred to in the Opinion of the Privy Council in *Clark Boyce v Mouat* [1994] 1 AC 428:

> "When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors." (p 437)

23. On the other hand Mr Seitler relied on a number of authorities. In *Boyce v Rendells* (1983) 268 EG 268 Lawton LJ accepted the following proposition:

> "... if, in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks, then he should do more than merely advise within the strict limits of his retainer. He should call attention to and advise upon the risks." (p 272)

24. In *Mortgage Express Ltd v Bowerman & Partners* [1996] 1 All ER 836, Bingham LJ said:

> "A client cannot expect a solicitor to undertake work he has not asked him to do, and will not wish to pay him for such work. But if in the course of doing the work he is instructed to do the solicitor comes into possession of information which is not confidential and which is clearly of potential significance to the client, I think that the client would reasonably expect the solicitor to pass it on and feel understandably aggrieved if he did not." (p 842)

25. Basing himself largely on *Clark Boyce,* Mr Halpern argues that a solicitor's duties are commensurate with the terms of the retainer, properly construed. It would not be fair to impose an obligation, for which he would receive no fee, to advise on matters outside the retainer. He says this important principle is consistent with the first sentence in the above cited passage from *Mortgage Express.* He says that there is a tension between that sentence and the one that follows it and that the need for fairness to the professional is paramount. After all, why should the client get the benefit of wide-ranging advice by asking and agreeing to pay for narrow advice only? I understand Mr Halpern to accept that his submission is difficult to reconcile with the passage from *Boyce v Rendells* cited above, but he suggests that the views of the Privy Council more accurately set out the law.

26. Were Mr Halpern right, strange and unpalatable results would follow. For example, assume that the letter instruction of 3 February only required RJ&W to send a letter to the landlord's agent asking for

an extension of the notice period but nothing else. Assume also that Clause 12 required the payment of £115,000.00 not the £11,500.00 recorded in Mr Evans' letter. Were Mr Halpern correct, RJ&W would have been under no obligation to draw this obvious error to the client's attention even if they had noticed it, because to do so was not within the terms of their retainer.

27. I do not believe that any responsible solicitor would consider his duties to be so limited. Indeed, Mr Stanton-Reid, whose performance in the witness box left me with the impression that he is an impressive and fair-minded solicitor, told me that were he to have been advising a client in his own area of legal expertise and he came across a potential trap in a contract into which the client had entered, he would draw it to the client's attention. He said that this would be in accordance with the highest standards of the profession, although he did not want that to be taken as a concession that there was a legally enforceable obligation on him to warn his client.

28. I do not accept the suggestion, implicit in Mr Halpern's submissions, that the authorities referred to above are in conflict with each other. Nor do I accept the argument that there is a "tension" between the two sentences cited from *Mortgage Express.* On the contrary, they are consistent with each other. A solicitor is not a general insurer against his client's legal problems, His duties are defined by the terms of the agreed retainer. This is the normal case although *White v. Jones* [1995] 2 A.C. 207 suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions. In relation to this I was struck by the analogy drawn by Mr Seitler. If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him. I do not need to consider what would be the consequences if the lawyer does more than asked for, for example reads documents which he was not asked to read, and discovers a risk to the client.

29. I can now turn to consider the two letters of instruction in issue in these proceedings, starting with the letter of 3 February. Mr Halpern says that the only instruction given to RJ&W was that contained in paragraph 4. They were not instructed to do anything more. They were not instructed to enter into negotiations with the landlord's agents. A simple enquiry of those agents was all that was required.

30. I accept that if that was the limit of the instructions given, then it would not require a competent property lawyer to investigate the terms of the lease and, as a consequence, he could not be expected to learn of the existence of the condition precedent. No question of a warning to the client would arise.

31. However Mr Seitler argues that this is not the limit of the instructions given. In particular he relies on paragraphs 3 and 6 of the letter which direct Mr Stanton-Reid's attention to a particular clause in the lease. Mr Seitler says that, when read in the light of the fact that Mr Evans sent a copy of the lease with the letter, these paragraphs must be construed as an instruction to Mr Stanton-Reid to read at least Clause 12 of the lease. Indeed, the fact that Mr Evans not only referred to that clause expressly, but also identified the page on which it was to be found, emphasises the point.

32. Mr Halpern disputes this. He acknowledges that a copy of the lease was sent with the letter. However he argues that, although the letter does not instruct Mr Stanton-Reid to enter into negotiations with the landlord's agents, it is apparent that the lease was supplied in contemplation of Mr Stanton-Reid being

so instructed at a later date, at which time, but not before, it would be necessary for him to read that document.

33. I do not accept that submission. There is nothing in the letter which suggests that any negotiation with the landlord was in contemplation or, if they occurred, that it was anticipated that Mr Stanton-Reid would be involved in them. Mr Stanton-Reid did not suggest that he read this letter in that way. In my view Mr Seitler is correct. The letter not only contains the express instructions in paragraph 4 but the effect of paragraphs 3 and 6 is to require Mr Stanton-Reid to read at least Clause 12 of the lease. If Mr Stanton-Reid had been an experienced property lawyer, on reading that Clause he would have been aware of the considerable risk to which the client was exposed. As I have said already, there is no reason why Mr Stanton-Reid should have been confident that CL needed no warning on this issue. It follows that RJ&W should have warned their client. Their failure to do so was a breach of duty. In addition, had Mr Stanton-Reid been an expert property lawyer, any misguided belief he might have had as to CL's ability to understand the finer points of property law and, in particular, the fact that payment of £11,500.00 was a time critical condition precedent, would have been dispelled by the terms of the 3 February letter. As Mr Seitler says, Mr Evans' understanding of the obligations relating to that payment are set out in paragraph 6 of the letter and are wrong. Clause 12 provides that the payment had to be made *before* the option could be exercised. This is not what paragraph 6 of Mr Evans' letter says. Rather it suggests that payment might be possible after termination. At the very least, this paragraph should have warned a competent property lawyer that the client might well have misunderstood the provisions of Clause 12.

35. For completeness I should consider the effect of the letter of 24 February. Mr Halpern argues that the only instruction it contains is that set out in the second paragraph, namely to serve a notice of termination and to ensure that it was acknowledged by or on behalf of the landlord. However he also accepts that the formalities of serving such a notice are not set out in the letter. For that reason he also accepts that inherent in the letter was an instruction to read the lease which had been sent three weeks earlier, at least for the purpose of discovering how the notice was to be served.

36. Since Mr Stanton-Reid was required to read the lease, it appears to me that, at the very least it was necessary to consider the terms of clauses 8 and 12. For reasons already given, that should have alerted him to the risk facing CL under the latter clause and they should have been warned. The failure to do so is a further breach of duty to the client.

37. However I do not accept Mr Halpern's argument that, taken as a whole, the letter of 24 February conveyed instructions limited to giving notice. Mr Seitler argues that the first paragraph of the letter sets out the overall objective of the client, namely to terminate the lease in accordance with clause 12 and the second paragraph sets out the immediate steps needed to be taken. He says that a fair reading of this is that RJ&W were instructed to assist generally in achieving the client's stated objective. Those instructions were wide enough to include giving advice on how to effect termination. Failure to warn of the existence of the risk was a breach of those instructions. I agree.

38. In summary, for each of the three reasons set out above, RJ&W failed in its duty to its client and is liable accordingly. In coming to these conclusions I have not paid regard to Mr Halpern's argument that the size of RJ&W's bill points towards the instructions being very restricted. However, if the size of the bill is to be taken into account and is assumed to throw light on what the instructions were, it tends to support CL's, not RJ&W's, case. If, as asserted, all that the firm was instructed to do was to ask whether an extension of the option was possible and, if so, the terms for the grant of any such extension, and to serve notice of termination, it is difficult to see why CL was being asked to pay for two and a half hours of Mr Stanton-Reid's time. It is more consistent with RJ&W considering the documents supplied to them. In my view, however, the size of the bill is of very little significance. It is so low that it does not give a meaningful indication of the amount of work RJ&W was expected to do.

39. I should also mention that I have considered and rejected the opposing arguments advanced as to the wording of the narrative to RJ&W's bill. There is nothing to suggest that the draftsman of that narrative had the issue of the scope of the instructions in mind. This was no more than routine wording to cover a small bill. It throws no light one way or another on what instructions RJ&W received.

40. This leaves two issues. First is the allegation of contributory negligence. It is said that CL knew that £11,500 was payable "upon termination" as set out in the 2 February letter. CL was in a position to make that payment on that date. Had it done so, the break option would have been exercised. Accordingly CL was responsible for the failure to exercise the option.

41. There is nothing in this point. CL had a bona fide concern to minimize, so far as possible, the VAT payable. The delay in making the payment was, in large part, due to negotiations with the landlord's agents on this issue. Further, and more importantly, at all times CL held itself out as willing to pay the £11,500.00. It pressed the landlord for an invoice. It cannot be said that it was holding back from payment. Rather it was the landlord who was holding back. There can only be a fmding of contributory negligence if CL was itself in some way negligent. In my view it was not.

42. Second, CL seeks interest at the judgment debt rate of 8%. RJ&W argues that this is excessive. It says that this rate is considerably higher than bank rates over the period 1994 to 2001 and that CL "chose" not to issue proceedings until the end of the limitation period. It suggests 6% instead.

43. As far as the delay point is concerned, Mr Seitler draws my attention to a document which suggested that RJ&W, or its insurers, were unlikely to dispute liability. He says that, in those circumstances, it was reasonable not to bring proceedings. I do not understand Mr Halpern to dispute this. As for the market rates point, the judgment debt rate is not intended to be accurate in all circumstances, but provides a normal rate which is likely to do rough justice in most cases. The court has a wide discretion to depart from that figure. I have not been persuaded that there is any good reason to depart from the norm in this case and the 8% rate will apply to the damages here.

44. There is one final matter to which I would like to refer. Although I have made a finding of negligence, I would not like that to be interpreted as a criticism of Mr Stanton-Reid's competence. On the material before me there is no reason to doubt that he is an able, industrious and capable corporate lawyer. No lawyer can hope to be expert in all areas of law and he has never claimed to be an expert in property law. The fault which led to CL's problems can be traced back to RJ&W's decision to assign a corporate lawyer to a property case.