Neutral Citation Number: [2020] EWHC 194 (QB)

County Court Claim No: D00CL099
Appeal Ref: AB/2018/0322

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
ORDER OF HHJ SAGGERSON DATED 23 OCTOBER 2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2020

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

(1) SHARN PANESAR LIMITED **(2) SHARN PANESAR**	**Appellants/ Claimants**
- and -	
(1) PISTACHIOS IN THE PARK LIMITED **(2) AYSIN DJEMIL**	**Respondents/ Defendants**

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Ms Ebony Alleyne (instructed by **Owen White Limited**) for the **Appellants**
Mr David Sawtell (instructed by **Oracle Solicitors**) for the **Respondents**

Hearing date: 30 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MURRAY

Mr Justice Murray :

1. This is an appeal brought by the appellants, Sharn Panesar Limited ("SPL") and Mr Sharn Panesar, against an order made on 23 October 2018 ("the Order") by HHJ Saggerson ("the Judge") following a trial in the County Court at Central London of preliminary issues (the "Preliminary Issues") in relation to a claim brought by the appellants against the respondents, Pistachios in the Park Limited ("PITPL") and Mr Aysin Djemil.

2. The central contention of the appellants is that the Judge made findings of fact that went beyond those necessary to answer the Preliminary Issues and that this amounted to a serious procedural or other irregularity so as to be unjust. The respondents concede that the Judge made findings of fact that went beyond the Preliminary Issues but disagree with the appellants as to the consequence that should flow from a finding by this Court to that effect.

3. The appellants say, in essence, that the whole hearing was tainted by procedural injustice, and therefore the proper consequence is that the Order should be quashed and a new trial in the County Court should be ordered before a different judge. The respondents say that the Judge's findings in relation to the Preliminary Issues can and should be preserved, with the remainder of the Judge's factual findings to be set aside and the trial to continue in the County Court on the basis of the Judge's findings on the Preliminary Issues.

The claim and the parties

4. The claim was issued on 22 December 2016. It is a claim for damages in the amount of £172,834.02 plus interest against the respondents for misrepresentation. It concerns a franchise for the operation of a Pistachios in the Park ("PITP") café in Frimley Lodge Park, Camberley, Surrey GU16 6HY.

5. The first appellant, SPL, is a private limited company that was incorporated on 29 September 2011 for the purpose of operating, as a franchisee, the PITP café in Frimley Lodge Park. The second appellant, Mr Panesar, is a qualified chef. Prior to entering into the franchise arrangement with which this claim is concerned, Mr Panesar worked as a chef in Birmingham.

6. The first respondent, PITPL, is a private limited company and franchisor carrying on business offering a system, trademark and trade name, namely, "Pistachios in the Park", for the operation of community-based cafes, including retail sale of traditional children's toys. Mr Djemil is the Director of PITPL and Head of Franchising. He personally operated the first PITP café, which traded from a premises in Manor House Gardens, Lewisham from 2000. PITPL's franchise model is said to have been based on the PITP café operated at Manor House Gardens.

Background

7. At the time the claim was filed, there were twelve PITP cafes, the majority being franchises. In September 2011 Mr Panesar's sister, Ms Ranjeet Panesar, entered into a franchise agreement with PITPL to operate a PITP café on Palewell Common in East Sheen. At the opening event for that café, on 10 September 2011, Mr Panesar spoke

with Mr Djemil about the possibility of his becoming a PITPL franchisee. At that time PITPL had no specific franchise opportunity to propose to Mr Panesar.

8. Shortly after their first meeting, Mr Djemil contacted Mr Panesar by telephone to inform him that the PITP café in Frimley Lodge Park had become available.

9. The Frimley Lodge Park café had at one time been operated on behalf of the local authority by an organisation called Veolia. PITPL acquired the right to run the café in February 2011 and subsequently entered into a franchise agreement with a company called Foodelicious Limited, whose director was Mr Colin Vear, for the café to be operated as a PITP franchise. The Judge found that Mr Vear had written a business plan for the franchise, which I mention as it featured prominently in the Judge's consideration of the evidence. At some point in or about September 2011 PITPL terminated its franchise agreement with Foodelicious Limited.

10. Mr Djemil and Mr Panesar arranged to meet to discuss the possibility of Mr Panesar becoming a PITPL franchisee in respect of the Frimley Park Lodge café. That meeting took place on 26 September 2011. There was a conflict of evidence before the Judge as to where the meeting took place. The Judge, at para 21 of his *ex tempore* judgment given on 23 October 2018 ("the Judgment"), resolved that issue in favour of the appellants, concluding on a balance of probabilities that the meeting took place in the Toddington services area on the M1 motorway ("Toddington Services"), rather than at a Jolly Farmer Harvester restaurant near the A3, as maintained by the respondents.

11. Mr Panesar was accompanied at the meeting on 26 September 2011 by his brother, Mr Parminder Panesar. Mr Djemil was accompanied for most of the meeting by a colleague, Mr Adrian Wickham, a consultant to and shareholder in PITPL, although Mr Wickham apparently arrived about an hour late for the meeting, which extended over several hours, according to the Judge (para 36 of the Judgment).

12. PITP makes use of a cloud-based business intelligence tool known as "PX Portal", through which it monitors the performance of PITP franchises. One question that arose on the facts, and was considered by the Judge, was the form in which information was given or shown to Mr Panesar at the meeting at Toddington Services, including whether Mr Panesar was shown financial information on PX Portal by Mr Djemil on his iPhone or his iPad.

13. On 27 September 2011, the day after the meeting at Toddington Services, Mr Djemil and Mr Wickham sent an email to Mr Panesar, which included a copy of a document, the precise nature of which is disputed, but which, intending to describe it neutrally, was a document by reference to which Mr Panesar was invited to prepare a business plan, for the purpose, among other things, of submission to potential lenders.

14. There were further pre-contract communications, the nature and purpose of which are disputed, those disputes not requiring resolution on this appeal. In due course, Mr Panesar was put in communication with Mr Mark Witten, a Development/Relationship Manager at a branch of National Westminster Bank Plc ("NatWest") at Bromley Business Centre, with a view to obtaining a loan from NatWest to fund the purchase of the PITP franchise for the café at Frimley Lodge Park.

15. In due course, NatWest made the loan. SPL was established, as already noted, in September 2011, and the franchise agreement was entered into on 23 November 2011. The appellants began operating the PITP café at Frimley Lodge Park shortly before Christmas 2011.

16. In November 2014 a dispute arose between the parties, and PITPL terminated the franchise agreement with effect from 24 November 2014. Thereafter PITPL operated the PITP café at Frimley Lodge Park until that business was closed in February 2016.

Procedural history

17. The Claim Form and Particulars of Claim were filed in the Queen's Bench Division of the High Court and sealed by the Court on 22 December 2016. The Defence was served on 24 January 2017. On 16 January 2017, Master Kay QC made an order transferring the claim to the County Court at Central London.

18. On 31 July 2017 DDJ Benjamin Wood made a case management order that lies at the heart of the difficulties leading to this appeal. Over the objections of counsel for the claimants, the DDJ directed that there should be a trial of the Preliminary Issues, which he formulated himself. The Preliminary Issues were those set out in para 10 of his order, which read as follows:

> "**Scope of trial**
>
> 10. The trial directed herein (the 'Phase One Trial') will be limited to the following issues:
>
> 10.1. What information was provided to the Second Claimant:
>
> 10.1.1. At the meeting at the Harvester on 26 September 2011; and
>
> 10.1.2. At the opening of the Second Claimant's sister'[s] café?
>
> 10.2. Was Mr Whitton the Second Claimant's agent?
>
> 10.3. Is Mr Whitton's knowledge to be imputed to the Claimants?
>
> 10.4. What information was provided, by the Defendants, to Mr Whitton?"

19. It is not in dispute that the reference to "Mr Whitton" is intended to be a reference to Mr Witten of NatWest. The meeting "at the Harvester" was the meeting I described at [8]-[11] above, which the Judge found to have taken place at Toddington services on the M1 motorway. The opening of the second appellant's sister's PITP café took place on 10 September 2011, as I have already noted.

20. DDJ Wood's case management order included the following recital:

> "AND UPON the Defendants (a) averring through counsel that the 2009 projections were accurate when they were produced but (b) admitting through counsel that the said projections were no longer accurate, could not reasonably be regarded as accurate, and were known by the Defendants no longer to be accurate in August/September 2011."

21. Ms Ebony Alleyne, of counsel, who represented the appellants before DDJ Wood and at the trial before the Judge, and who is representing them at this appeal, criticised the DDJ Wood's decision to list a trial of the Preliminary Issues as "unusual", particularly given that he felt it appropriate to list it with a provisional time estimate of three days (with one day for preparation and delivery of judgment) in circumstances where a trial of all of the issues in the case was only estimated to take five days. Ms Alleyne had submitted to DDJ Wood that a trial of preliminary issues would be unsuitable, but DDJ Wood rejected that submission and made the order.

22. The trial of the Preliminary Issues was originally listed for 3 April 2018 but was adjourned due to lack of an available judge. The trial of the Preliminary Issues was heard by the Judge over two days on 22 and 23 October 2018. He gave the Judgment *ex tempore* on the second day of the trial.

23. In the Judgment at para 27, the Judge referred to the fact that the appellants had helpfully provided a revised list of the Preliminary Issues. He indicated that he would provide his conclusions on the Preliminary Issues, as so revised, at the conclusion of the Judgment. He did that at paras 62 to 67. It is common ground, however, as I have already noted, that he made findings of fact that went beyond the revised list of Preliminary Issues ("Other Findings"), although the appellants and respondents do not necessarily fully agree on which of the Judge's findings are within scope of the Preliminary Issues and which are Other Findings.

24. I will return to the Judge's specific factual findings later in this judgment. Further references in this judgment to the Preliminary Issues are to the Preliminary Issues as revised for purposes of the hearing before the Judge, unless context indicates otherwise.

25. In the Order, the Judge set out directions for the second phase of the claim, ordering, among other things, that there should be a further costs and case management conference ("CCMC") on the first open date after 4 February 2019, reserved to himself. The Judge did not set out expressly in the Order his answers to the revised list of Preliminary Issues. Instead, he began the Order with the following recital:

> "On the trial of 'Phase One' of this action and on hearing Counsel for the Claimants and for Defendants; and on findings of fact being determined by the Phase 1 trial judge …"

26. That recital led the appellants to fear that the Judge had incorporated his findings of fact on matters that went outside the scope of the Preliminary Issues, both as originally formulated and as revised for the trial before the Judge. The appellants made an application dated 7 November 2018 for:

i) an order varying the Order to make it clear that the only binding findings of fact for purposes of the second phase of the trial were those addressing the Preliminary Issues; and

ii) that the Judge recuse himself from further involvement in the claim on the basis that, the Judge having made findings outside the scope of the Preliminary Issues when it was inappropriate to do so, it would be unfair for the appellants to have to try to persuade him as the trial judge that he was wrong in relation to those other findings.

27. The appellants initially considered that if the Judge granted the application to vary his order to clarify that only the findings of fact addressing the Preliminary Issues were binding, then there would be no need to appeal the Order. However, they were also concerned about being out of time to appeal should the application be refused. Accordingly, on 13 November 2018 the appellants filed their Appellants' Notice and Grounds of Appeal, which were sealed by the Court on 14 November 2018.

28. The Judge acceded to the application to recuse himself, however, it is common ground that by his order of 30 May 2019 he incorporated all of his findings of fact. (I did not have a copy of that order in the Appeal Bundle.)

29. The appellants' application for permission to appeal was apparently first considered on the papers by Julian Knowles J on 24 January 2019, however it appears that he adjourned the application for some reason, perhaps so that the respondents could have additional time to respond to it. (I also did not have a copy of that order in the Appeal Bundle.) On 20 June 2019 Jay J granted the appellants' permission to appeal against the Order, making the following observations:

> "I do not think that para 2 of HHJ Saggerson's Order dated 30th May 2019 addresses either the Claimants' concerns or those reflected in para 2 of Mr Justice Julian Knowles' Order dated 24 January 2019. It does not confine the findings of fact to the Phase 1 issues. I therefore grant permission to appeal.
>
> The Respondents should consider whether the better course is simply to agree that HHJ Saggerson's findings of fact are limited to the Phase 1 issues. This would enable the litigation to move forward to the next phase, to be heard before a different judge."

The Judgment and the Order

30. At para 2 of the Judgment, the Judge noted that the scope of the trial before him was limited to those issues identified by DDJ Wood at the CCMC on 19 July 2017. He also made several references to the limited scope of the trial during the first hour of the hearing, according to the approved transcript, confirming his intention to abide by the scope already ordered by the deputy district judge.

31. The Judge noted at para 6 of the Judgment that he considered the factual issues as "very finely balanced", referring to "extremely helpful skeleton arguments" from counsel on each side and "equally helpful written closing notes to assist with

concluding oral submissions". The Judge noted that there were good points on both sides of all the factual disputes, and that his task was not made any easier by the fact that he was convinced that none of the witnesses was lying, and that each witness was "doing their best to recall events that go back now some seven years".

32. In paras 7 and 8, the Judge developed his observation that considerable time had elapsed between the events at issue and the date of trial, observing at para 8 that:

> "… even at the point in time when the witnesses are recording in writing what they want to say by way of evidence, the events that they are talking about are to a great extent lost in the mists of time. That means that recollection on all sides is bound to be clouded on several if not many issues. "

33. After further commentary on the witness and the documentary evidence, the Judge set out the background to the dispute at paras 14 to 23 of the Judgment, and then at paras 24 to 26, set out the Preliminary Issues as originally formulated by DDJ Wood dividing the inquiry into two parts, namely, (i) what happened and what information was transmitted from the respondents to the appellants at events in September 2011 and (ii) the agency questions relating to Mr Witten. At para 27 the Judge noted that the list of issues had been further helpfully refined by the appellants and that he would answer those questions, as refined, at the conclusion of the Judgment, as I have already noted.

34. At para 28 the Judge made further general comments on the evidence, noting that there were inconsistencies in the respondents' evidence, but also gaps in the appellants' evidence, which in his view made the fact-finding exercise difficult.

35. At paras 29 to 36 of the Judgment, the Judge dealt principally, but not exclusively, with the events of 10 September 2011 at the launch of the second appellant's sister's PITP café on Palewell Common. From paras 36 to 51 of the Judgment, the Judge dealt principally, but not exclusively, with the events of 26 September 2011, namely, at the meeting held at the Toddington services area on the M1 motorway.

36. At para 52 the Judge dealt with the sending of a disclosure pack to Mr Panesar, which he found probably occurred on or shortly after 1 October 2011. The appellants give this as one of several examples of findings of fact that fall outside the scope of the Preliminary Issues.

37. At para 53 of the Judgment, the Judge found that on 27 September 2011, the day after the meeting at Toddington services, the respondents sent Mr Panesar a "template document in order that he might construct a bespoke business plan of his own to present to other people such as the bank". This finding, also, appears to fall outside the scope of the Preliminary Issues. In this regard, the appellants complain that during the Judge's discussion of this development in paras 54 to 57, the Judge made other findings that fell outside the scope of the Preliminary Issues, namely:

    i) that the document was only intended as a "template" (whereas the appellants argue that it was a business plan sent by the respondents with false financial projections), as evidenced by the following passage from para 56 of the Judgment:

> "Mr Wickham [by sending the document] was intending to imply: 'Look, use this document as an example. This is a sort of a foundation for you to work with, and you are going to have to change the biographical details of course'. He highlighted them in order for that to be done. What was not intended with the transmission of this template was that the biography should be changed and the whole of the rest of the document used as the basis either for submission of the business plan to somebody else, or the basis of Mr Panesar's decision-making as to the purchase of this franchisee [sic]"; and

ii) that Mr Panesar was wrong to interpret the business plan as essentially complete save for the biography section, which Mr Wickham had highlighted in yellow, the judge referring to this as Mr Panesar's "misinterpretation" in para 57 of the Judgment;

38. At paras 58 to 61 of the Judgment the Judge made some further general observations that were, in essence, inferences drawn from his factual findings relating to the information that had been given to Mr Panesar during the course of September 2011.

39. Finally, at para 62 of the Judgement, in relation to the first part of his fact-finding task (what information was provided to Mr Panesar in September 2011), the judge set out his answers as follows (reformatting, additional numbering and highlighting of answers added for ease of reading):

> "62. Therefore, turning to the list of issues, dealing with those in turn[:]
>
> [i)] question one, as formulated in the revised list, 'What information was provided to Sharn Panesar, (1)(i) at the opening of [his] sister Ranjeet Panesar's café on 10 September 2011? In particular, did Aysin Djemil or Adrian Wickham provide a printed copy of a franchise prospectus showing, among other things, projected income of £150,000 in year one?'. **The answer to that is yes.**
>
> [ii)] '(1)(ii) At the meeting at the Harvester, or Toddington Services on 26 September, in particular, did Aysin Djemil or Adrian Wickham provide a printed copy of a franchise prospectus showing, among other things, projected income of £150,000 in year one?'. **The answer to that question is 'yes'.**
>
> 'The trading figures of the Frimley Lodge café, including its turnover figures, current sales for the month, monthly sales for the café and total sales to September 2011 on the PX Portal via Aysin Djemil's iPad or iPhone?'. **The answer to that**

> **question is mixed. I do not consider it important as to whether all this information was shown on an electronic device. The probability is that not all of it was shown on the electronic device, but I am satisfied that in the course of prolonged discussions, all of this information was given to Mr Panesar in the course of detailed discussion between himself, Mr Djemil and ultimately, when he arrived, Mr Wickham.**
>
> The next part is, 'Oral information that the council had told the defendants that the Frimley Lodge café had turned over approximately £80,000 when it was run by Veolia?'. **The answer to that question is 'yes'."**

40. At paras 63, 66 and 67 of his Judgment, the Judge dealt with the second part of his fact-finding task, namely, the agency-related questions that had been set out at paras 10.2, 10.3 and 10.4 of the DDJ Wood's case management order of 31 July 2017 but revised as suggested by the appellants' counsel. I can summarise this part of the Judgment briefly as no complaint is made about the Judge's findings in relation to this aspect. In sum, the Judge found that Mr Witten was not Mr Panesar's agent and therefore Mr Witten's knowledge could not be imputed to him. In light of those conclusions, the final question (namely, what information was provided by the respondents to Mr Witten) became irrelevant.

41. At paras 64 to 65 of the Judgment, the Judge dealt with a question that was not set out in DDJ Wood's case management order of 31 July 2017, but which he was apparently invited by the parties to address, namely, "Did the defendant provide the first claimant full access to the PX Portal on or around 10 October 2011?" His conclusion was that, on balance, he could not be satisfied that Mr Panesar was provided with full access to the PX Portal before the franchise agreement was signed on 23 November 2011, and therefore "certainly not on 10 October 2011".

42. In relation to the Judge's findings of fact that were within the scope of the Preliminary Issues, I have not attempted to set those out comprehensively, but the Judge made a number of factual findings that, in turn, support the answers to the Preliminary Issues, as revised, which I have set out above.

43. In relation to the Other Findings, in addition to the examples I have already given, the appellants gave the following examples, namely, that:

    i) "Mr Vear wrote a business plan for his franchise" (para 16 of the Judgment);

    ii) (A) as a matter of inherent probability there was "no benefit whatsoever" in the respondents being anything other than "realistic" in their financial projections shared with Mr Panesar, (B) the respondents had nothing to gain from painting a false picture to induce him to enter into the franchise agreement and (C) misleading a franchisee was a "recipe for catastrophe", namely, that the franchise would not function in the way the franchisee hoped,

would do badly and, as a consequence, negatively affect the franchise (para 48 of the Judgment); and

iii) between the execution of the franchise agreement in on 23 November 2011 in relation to the Frimley Park Lodge café and the termination of the franchise agreement on 24 November 2014 the appellants did not raise any concerns about the basis on which they had been induced to enter into the franchise agreement (para 7 of the Judgment) and Mr Panesar had "not … thought about financial misinformation for the entire duration he was operating this franchise" (para 47 of the Judgment).

44. At [25]-[27] above I described the Order made by the Judge and how that led to this appeal.

Grounds of appeal

45. The Grounds of Appeal are that:

i) the Judge wrongly failed to confine his factual findings to the Preliminary Issues;

ii) the Judge wrongly made or purported to make findings on issues outside the Preliminary Issues;

iii) the Judge wrongly made or purported to make findings on issues that the parties had not presented their cases on;

iv) the Order involved a serious irregularity, namely, that the parties had limited their evidence and submission to the Preliminary Issues, whereas the Judge included other issues in the Judgment, which caused the Order to be unjust;

v) by making findings of fact on matters that were not before the court, the Judge made irrational and/or perverse findings of fact; and

vi) the Judge was wrong in law and/or made irrational and/or perverse findings of fact.

Discussion and analysis

46. Ms Alleyne made a number of detailed submissions on the findings of fact that the appellants say exceeded the scope of the Preliminary Issues ("the Other Findings"). I have given a number of examples above. She submitted that it was fundamentally unfair for the Judge to have addressed and made findings of fact on issues in relation to which he did not have the full evidence that the parties would have wished to adduce had the trial not been confined to the Preliminary Issues and in relation to which the parties had not made submissions. She submitted that the Other Findings were not trivial matters, but rather were significant in the context of the claim as a whole and would have fallen to be determined by the trial judge at the next trial, which was to deal with the remaining factual issues in the claim.

47. The fact that the Judge made the Other Findings and then incorporated them into the Order constituted, Ms Alleyne submitted, a serious procedural or other irregularity

rendering the trial unjust, so that the requirement in CPR r 52.21(3)(b) is met, and the appeal should be allowed. Ms Alleyne relied on *Frey v Labrouche* [2012] EWCA Civ 881 at [38]-[43] (Lord Neuberger MR), noting that, with reference to that case, in *Dunbar Assets Plc v Dorcas Holdings Ltd* [2013] EWCA Civ 864 at [28], Lord Justice Briggs said:

> "As the Labrouche case makes clear, the denial to a party of any opportunity to make submissions in support (or defence) of its case is a fundamental denial of procedural justice in its own right, regardless of the consequences."

48. Ms Alleyne submitted that the Judge had, in effect, denied the parties the opportunity to adduce evidence and make submissions on those factual matters that he considered and on which he made the Other Findings. That, she submitted, was unjust.

49. Ms Alleyne submitted that the Judge took into account matters that he should not have taken into account when deciding the Preliminary Issues and that the Judgment was wrong in that it included unsupported and irrational and/or perverse findings, therefore meeting the requirement in CPR r 52.21(3)(a) for the appeal to be allowed. In this regard, Ms Alleyne cited the judgment of Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 at [14]-[15]:

> "14. The approach of the court to any particular case will depend upon the nature of the issues kind of case determined by the judge. …
>
> 15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. …"

50. In brief, Ms Alleyne submitted that the Judge's approach to the trial of the Preliminary Issues had the effect of depriving the appellants of a proper hearing on the Other Issues.

51. Ms Alleyne submitted that had the Judge indicated that the Other Findings were provisional or otherwise non-binding and excluded them from the scope of the Order, then it might have been possible for the appellants to have had a fair trial before a different judge of the remaining issues, without the necessity of this appeal and a reconsideration of the Preliminary Issues. As I have already noted, that was the position originally taken by the appellants in making their application of 7 November 2018 that the Judge clarify the scope of the Order. But when the Judge confirmed by his order of 30 May 2019 that all of his factual findings were incorporated in the Order, then this became an "all or nothing" appeal.

52. The appellants' position is that it is now impossible to determine the full effect of the Judge's Other Findings, which he should not have made without having considered

evidence and hearing the parties on those issues, on his findings in relation to the Preliminary Issues. Accordingly, his findings on the Preliminary Issues are tainted by the Other Findings, so that the appellants can have no confidence that they have had a fair trial if the trial were to proceed on the basis of the Judge's findings on the Preliminary Issues, even before a different judge. For that reason, the primary position of the appellants is now that the Order should be quashed and that there should be a new trial on all issues at first instance before a different judge. In the alternative, the appellants ask that this Court vary the Order to confine it to the Preliminary Issues and that there be a trial of the remaining issues before a different judge.

53. Mr David Sawtell, of counsel, for the respondents quite rightly did not seek to dispute that the Judge had made factual findings outside the scope of the Preliminary Issues. He also did not seek to argue that the Order should be upheld in its current form. He said that the respondents noted the comments made by Jay J in his order of 20 June 2019 granting permission to appeal. He agreed that the Order should be varied to clarify that it is limited to the Judge's proper findings on the Preliminary Issues.

54. Mr Sawtell submitted, however, that it was unnecessary and, indeed, wrong in principle simply to quash the Order. The Judge had made proper factual findings on the Preliminary Issues in respect of which there had been a fair hearing, during which each party had the opportunity to adduce evidence, to cross-examine witnesses and to make submissions. Mr Sawtell noted that factual findings are accumulative and that findings are built upon findings. It is inevitable that the Judge will legitimately have made some factual findings that were not, in themselves, strictly responsive to the Preliminary Issues, but which he needed to make in order to reach his factual findings on the Preliminary Issues.

55. Mr Sawtell also submitted that it was not appropriate for the appellants to seek to extract the "plums" from the "duff". One innocent example of that, he submitted, was the Judge's finding as to the location of the meeting on 26 September 2011. It was not strictly speaking a Preliminary Issue, but the finding having been properly made, it is wrong that it should be fought over again at the trial of the remaining issues in the claim.

56. In an annexure to his skeleton argument, Mr Sawtell prepared, in Scott schedule form, a set of four factual findings by the Judge, setting out the case of the respondents on each finding that could, in their view, be incorporated into the Order, essentially on the basis that both sides had had the opportunity to adduce evidence, cross-examine and make submissions on the relevant issue. The respondents' proposal was that the appellants should set out their position on each finding and that I should then decide whether the finding would be incorporated into the Order, along with the answers that the Judge had set out at paras 62 to 63 and 66 to 67 of the Judgment when addressing the revised list of Preliminary Issues.

57. In essence, therefore, the position of the respondents is that they agree that it is appropriate to limit the Order to the Judge's findings of fact necessary to answer the Preliminary Issues, but that the scope of those findings in the Judgment is not as narrow as the appellants contend it is. In addition, Mr Sawtell submitted that it is appropriate to include additional factual findings where those factual findings led directly to the Judge's conclusions on the Preliminary Issues.

58. The respondents say that the Judge's answers to the Preliminary Issues are, in essence, as I have set them out at [39]-[38]. The other factual findings, set out in the annexure to the respondents' skeleton and which the respondents submit should be included within the scope of the Order as varied, are that:

    i) the meeting on 26 September 2011 took place at Toddington Services (para 23 of the Judgment);

    ii) at the launch of Ms Ranjeet Panesar's PITP café on Palewell Common on 10 September 2011, Mr Panesar was provided with a copy of an updated prospectus which was invoiced by the printers in August 2011 (para 30 of the Judgment);

    iii) at the meeting on 26 September 2011, Mr Djemil orally explained in detail to Mr Panesar the broader overall picture of the franchise business, including describing the turnover as it was understood to have been when the Frimley Park Lodge café was operated by Veolia prior to PITPL acquiring the right to operate it in February 2011, namely, that the turnover was in the order of £80,000 per annum and that in the period between February 2011 and the termination of the PITP franchise agreement with Foodelicious Limited, the turnover was in the order of £116,000 (para 44 of the Judgment); and

    iv) Mr Panesar was provided with full access to the PX Portal by Christmas 2011, but not on 10 October 2011 (para 64 of the Judgment).

59. It is clear from reading the Judgment that the Judge was not being deliberately unfair. He was confronted with a complex fact-finding exercise. As the transcript shows, he had reminded himself more than once of the limited scope of the trial. He dealt with the matter *ex tempore*. His judgment is measured and thorough, and he is clearly seeking in the Judgment to be fair and even-handed. The complexity of the factual background and the effect of the passage of time on the quality of evidence on both sides, on which he commented, led him to stray into consideration of factual issues that he did not need to consider and should not have considered without the parties having had the opportunity to adduce evidence and make submissions.

60. As I have already noted, Ms Alleyne had criticised the decision of DDJ Wood to order of his own motion that there be a trial of preliminary issues in this case, and I note that Mr Sawtell had not sought to defend that decision. Ms Alleyne drew my attention to the discussion in the White Book (2019 edition) at para 3.1.10 of the decision of Neuberger J in *Steele v Steele* [2001] CP Rep 106 (Ch), in which Neuberger J set out ten legal principles that should be applied when considering whether or not to have a separate trial of one or more preliminary issues. Neuberger J set out, as his sixth factor to take into account when considering whether or not to order the determination of a preliminary issue, the following, namely:

> "… whether the determination of a preliminary issue may unreasonably fetter either or both parties or, indeed, the court, in achieving a just result which is, of course, at the end of the day what is required of the court at the trial."

61. Ms Alleyne also referred to the judgment of Lord Neuberger MR in *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021, [2013] Bus LR (CA), where the Master of the Rolls commented at [1] as follows:

> "[This appeal] represents yet another cautionary tale about the dangers of preliminary issues. In particular, it demonstrates that (i) while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, (ii) if there are none the less to be preliminary issues, it is vital that the issues themselves, and the agreed facts or assumptions on which they are based, are simply, clearly and precisely formulated, and (iii) once formulated, the issues should be answered in a clear and precise way."

62. I accept the principal submission of the appellants that the trial before the Judge was unjust due to a serious procedural irregularity, namely, that the Judge made apparently binding findings of fact on factual issues in relation to which there had not been a proper hearing. I also accept the submission that it is impossible to be sufficiently confident that the Judge's findings on the Preliminary Issues were not materially influenced by his Other Findings. In light of that, the appellants, and this Court, cannot be confident that the appellants had a fair hearing in relation to the Preliminary Issues. In my view, therefore, the Order must be quashed, and the matter must be remitted for a trial of all the issues before a different judge of the County Court.

63. As for Mr Sawtell's contention that factual findings are accumulative and that findings are built on findings, I do not disagree in principle, but those factors in this case, for the most part, cut the other way. It is impossible, in my view, to be sufficiently confident that the Judge's proper factual findings within the scope of the Preliminary Issues can be safely isolated and severed from the totality of his fact-finding exercise.

64. Given the basis on which I have decided this appeal, it is not necessary for me to consider whether any of the Judge's factual findings was "plainly wrong". I am simply deciding that the trial before him was unjust, for the reasons I have given. It is also not necessary for me to work out precisely which of his factual findings are within scope of the Preliminary Issues were otherwise fairly reached and which were Other Findings unfairly reached. The respondents have conceded that there were some. The examples of Other Findings given by Ms Alleyne for the most part, if not entirely, fall outside the proper scope of the Preliminary Issues.

65. Also, Ms Alleyne had submitted that one part of the Judge's analysis was wrong in law, in that he had applied the wrong legal test in relation to the question of deceit, which lies at the heart of the appellants' claim. I have not needed to express a view on this contention, given the basis of the decision I have reached. As to whether any of his factual findings were irrational or perverse, it is not necessary for me to make a specific finding to that effect. I have indicated where I consider the unfairness to lie and that I am satisfied that the appeal must be allowed on the basis that the Order is unjust due to a serious procedural or other irregularity within CPR r 52.21(3) for the reasons I have given. The unfairness cannot be safely cured, in my view, simply by varying the Order in the way proposed by the respondents.

66. Finally, I observe that this case appears to "yet another cautionary tale about the dangers of preliminary issues", in the words of the Master of the Rolls in *Rossetti Marketing*.

Conclusion

67. The appeal is allowed. The Order will be quashed, and the case will be remitted to be tried before a different judge in the County Court.