Peter Andrew English v Emery Reimbold & Strict Ltd
CA on appeal from Stoke on Trent District Registry, His Honour Judge Rubery

D J & C Withers (Farms) Ltd v Ambic Equipment Ltd
CA on appeal from Liverpool District Registry TCC, His Honour Judge MacKay

Verrechia t/a Freightmaster Commercials v Commissioner of Police for the Metropolis
CA on appeal from QBD, The Hon. Mrs Justice Steel

B e f o r e : **Lord Phillips MR, Latham LJ, Lady Justice Arden.** Date: 30th April 2002

Lord Phillips MR :
This is the judgment of the Court to which all members have contributed.

Introduction

1. In ***Flannery v Halifax Estate Agencies Ltd*** [2000] 1 WLR 377 this Court allowed an appeal on the sole ground that the Judge had failed to give adequate reasons for his decision. This was despite the fact that his judgment was 29 pages in length. The trial had involved a stark conflict of expert evidence. The Judge had preferred the expert evidence of the defendants to that of the plaintiffs, without explaining why. This Court ordered a retrial.

2. *Flannery* has inspired a large number of applications for permission to appeal on the ground of inadequate reasons. In granting permission to appeal in one of the appeals before us, Sedley LJ remarked that they were becoming a cottage industry. It is an industry which is an unwelcome feature of English justice. The rights of appeal that are afforded under statute reflect the fact that no Judge is infallible. It should, however, be possible to deduce from a judgment the reason for the Judge's decision. Happily the rash of applications for permission to appeal based upon the decision in *Flannery* does not reflect a widespread inability or disinclination on the part of the judiciary to explain the basis for their decisions. Rather it reflects uncertainty on the part of litigants and Judges alike as the extent to which a judgment should detail the chain of reasoning which has led to the order made by the Judge.

3. This judgment addresses three appeals which were listed for hearing together. In the event, the first two, '*English*' and '*Withers*', were heard together, while the third, '*Verrechia*' followed immediately afterwards. In *English* the critical issue was whether a disabling dislocation of a section of the claimant's spine was attributable to an injury for which the defendants were responsible or resulted from a congenital condition. On this issue, expert evidence was of critical importance. In *Withers* the central issue was also one of causation ? whether a hydraulic system for milking cows supplied by the defendants had suffered from design defects which had been responsible for an outbreak of mastitis in the claimant's herd. Again expert evidence was of critical importance. In each case the Judge found for the defendants. In each case the claimant accepted that such a finding was one that was open to the Judge on the evidence. In each case the claimant contended that, because the Judge had failed to explain why he had reached his decision, he had not received a fair trial and was entitled to a retrial.

4. The decision challenged in *Verrechia* was of a different nature. In that case the claimant had sued the Commissioner of Police of the Metropolis for the return of a large number of commercial vehicle parts which had been lawfully seized in connection with criminal proceedings. He succeeded in relation to about one third of these; the remainder were shown to have been stolen ? without complicity on the part of the claimant ? and to belong to third parties. The Judge made no order as to the costs of the proceedings, without explanation. The claimant obtained permission to appeal against her decision in relation to costs, not merely on the ground that she had failed to give any reason for it, but on the ground that it was wrong in principle.

5. Before turning to the facts of the individual appeals, we propose to examine the decision in *Flannery* in order to see whether it is possible to dispel the uncertainty to which it appears to have given rise.

The decision in *Flannery*

6. In giving the judgment of the Court, Henry LJ remarked at p.381 that it was clear that today's professional Judge owed a general duty to give reasons for his decision, citing ***Reg. v. Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd.*** [1982] QB 304 and ***Reg. v. Harrow Crown Court, Ex parte Dave*** [1994] 1 WLR 98. He made the following comments on the general duty to give reasons:

> *"(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*
>
> *(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.*
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> *(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence, but it is not necessarily limited to such cases.*
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> *(4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same; the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."*

7. At the same page of the judgment, Henry LJ identified a number of exceptions to the duty to give reasons, including decisions in the Magistrates' Court and areas where the court's decision is more often that not a summary exercise of discretion, in

particular orders for costs. *Flannery* was decided before the Human Rights Act 1998 came into force. It is clearly established by the Strasbourg jurisprudence that the right to a fair trial guaranteed by Article 6 of the Convention, which includes the requirement that judgment shall be pronounced publicly, normally carries with it an obligation that the judgment should be a reasoned judgment. In response to this requirement, Magistrates Courts now give reasons for their decisions. Shortly before the hearing of these appeals another division of this Court held that, in some circumstances, Article 6 requires the Commercial Court to give at least limited reasons when refusing permission to appeal against an arbitration award under section 69 of the Arbitration Act 1996, a practice which the House of Lords in ***The Antaios*** [1985] AC 191 had held should not be followed. see ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405. We propose at the outset to consider the extent of the requirement to give reasons that has been identified by the Strasbourg Court and the nature of the decisions to which that requirement applies, before turning to consider whether our domestic law extends further than this jurisprudence.

The Strasbourg jurisprudence

8. Both the general principle and the elusive nature of the task of encapsulating it in a test that can be applied in practice are apparent from the following passage from the judgment of the Court in ***Ruiz Torija v. Spain*** (1994) 19 EHRR 553 at paragraph 29: *"The Court reiterates that Article 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the convention, can only be determined in the light of the circumstances of the case."*

These principles were reaffirmed by the Court in ***Garcia Ruiz v Spain*** (2001) 31 EHRR 589.

9. In ***Van de Hurk v The Netherlands*** (1994) 18 EHRR 481 at paragraph 59 the Court observed that Article 6(1) placed the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. The Strasbourg Court will hold that Article 6(1) has been violated if a judgment leaves it unclear whether the court in question has addressed a contention advanced by a party that is fundamental to the resolution of the litigation. see, for instance, ***Ruiz Torija v Spain*** and ***Hiro Balani v Spain*** (1994) 19 EHRR 566. In each case, however, the Court found it necessary to consider whether the fact that the Spanish Supreme Court had made no mention of the point in question could reasonably be construed as an 'implied rejection' of it. This might suggest that the Court was only concerned to ascertain whether the Supreme Court had considered and rejected the point, rather than whether it had given reasons for the rejection. However, the Court went on to state in each case that it was impossible to ascertain whether the Supreme Court simply neglected to deal with the submission or whether it intended to dismiss it 'and, if that were its intention, what its reasons were for so deciding'.

10. In ***Helle v Finland*** (1997) 26 EHRR 159 at paragraph 60 the Court emphasised that: *".....the notion of a fair procedure requires that a national court which has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court."*

11. However in ***Garcia Ruiz v Spain*** the Court held that an appellate judgment was adequately reasoned which simply endorsed the factual and legal reasons for the first instance decision to the extent that these were not in conflict with the appellate judgment.

12. The Strasbourg Court, when considering Article 6, is not concerned with the merits of the decision of the domestic court that is under attack. It is concerned to see that the procedure has been fair. It requires that a judgment contains reasons that are sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved. It does not seem to us that the Strasbourg jurisprudence goes further and requires a judgment to explain why one contention, or piece of evidence, has been preferred to another. The common law countries have developed a tradition of delivering judgments that detail the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. We do not believe that the extent of the reasoning that the Strasbourg Court requires goes any further than that which is required under our domestic law, which we are about to consider. It remains to consider, however, the nature of the judicial decisions for which reasons are required under the Strasbourg jurisprudence.

13. All of the Strasbourg decisions to which we have so far referred were considering judgments which determined the substantive dispute between the parties. The critical issue in each case was whether the form of the judgment in question was compatible with a fair trial. Where a judicial decision affects the substantive rights of the parties we consider that the Strasbourg jurisprudence requires that the decision should be reasoned. In contrast, there are some judicial decisions where fairness does not demand that the parties should be informed of the reasoning underlying them. Interlocutory decisions in the course of case management provide an obvious example. Furthermore, the Strasbourg Commission has recognised that there are some circumstances in which the reason for the decision will be implicit from the decision itself. In such circumstances Article 6 will not be infringed if the reason for the decision is not expressly spelt out by the judicial tribunal. see ***X v Federal Republic of Germany*** [1981] 25 DR 240; *Webb v UK* [1997] 24 EHRR CD 73.

14. It is an unhappy fact that awards of costs often have greater financial significance for the parties than the decision on the substance of the dispute. Decisions on liability for costs are customarily given in summary form after oral argument at the conclusion of the delivery of the judgment. Often no reasons are given. Such a practice can, we believe, only comply with Article 6 if the reason for the decision in respect of costs is clearly implicit from the circumstances in which the award is made. This was almost always the case before the introduction of the new Civil Procedure Rules, where the usual order was that costs *'followed the event'*. The new rules encourage costs orders that more nicely reflect the extent to which each party has acted reasonably in the conduct of the litigation. Where the reason for an order as to costs is not obvious, the Judge should explain why he or she has made the order. The explanation can usually be brief. The manner in which the Strasbourg Court itself deals with applications for costs provides a model of all that is normally required.

The requirement to give reasons under common law

15. There is a general recognition in the common law jurisdictions that it is desirable for Judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement, "*there is no invariable rule established by New*

Zealand case law that Courts must give reasons for their decisions", per Elias CJ in ***Lewis v Wilson & Horner Ltd*** [2000] 3 NZLR 546 at 565. While a constant refrain is that reasons must be given in order to render practicable the exercise of rights of appeal, a number of other justifications have been advanced for the requirement to give reasons. These include the requirement that justice must not only be done but be seen to be done. Reasons are required if decisions are to be acceptable to the parties and to members of the public. Henry LJ in *Flannery* observed that the requirement to give reasons concentrates the mind of the Judge and it has even been contended that the requirement to give reasons serves a vital function in constraining the judiciary's exercise of power, see Professor Shapiro's article ***'In Defence of Judicial Candor'*** (1987) 100 Harv L Rev 731 at 737. The function that judgments play under the common law in setting precedents for the future has also been identified as one of the justifications for the requirement to give reasons, although as Mahoney JA stated in ***Soulemezis v Dudley Holdings*** (1987) NSWLR 247 at 273: *"The court's order is a public act. The judgment given for it is a professional document, directed to the parties and to their professional advisers. It may, in a particular instance, delineate, develop or even decorate the law but that is peripheral and not essential to its nature."*

16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.

17. As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example ***Flannery*** at page 382 In the ***Eagil Trust*** case, Griffiths LJ stated that there was no duty on a Judge, in giving his reasons, to deal with every argument presented by Counsel in support of his case: *"When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted, and the reasons which led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties, and if need be the Court of Appeal the basis on which he acted... (see Sachs LJ in **Knight v Clifton** [1971] 2 AER 378 at 392/393, [1971] Ch. 700 at 721)." (p.122).*

18. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A Judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the Judge was wrong. If the judgment does not make it clear why the Judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the Judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal.

19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

20. The first two appeals with which we are concerned involved conflicts of expert evidence. In ***Flannery*** Henry LJ quoted from the judgment of Bingham LJ in ***Eckersley v Binnie*** (1988) 18 Con L.R. 1 at 77-8 in which he said that 'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal'. This does not mean that the judgment should contain a passage which suggests that the Judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the Judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment.

21. When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision.

Amplification of reasons

22. In ***Flannery*** at p.383 the Court made two suggestions with a view to preventing unnecessary appeals on the ground of the absence of reasons. It suggested that one remedy open to the appeal court would be to remit the matter to the trial Judge with an invitation or requirement to give reasons. In ***Flannery*** this was not considered appropriate because more than a year had passed since the hearing. The delay between hearing and appeal will normally be too long to make a remission to the trial Judge for further reasons a desirable course. The same is not true of the position shortly after judgment has been given.

23. The other suggestion made by the Court in ***Flannery*** was that the respondent to an application for permission to appeal on the ground of lack of reasons should consider inviting the Judge to give his reasons, and his explanation as to why they were not set out in the judgment, in an affidavit for use at the leave hearing and at the hearing if leave be granted.

24. We are not greatly attracted by the suggestion that a Judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the Judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the Judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a re-hearing will involve a hideous waste of costs.

25. Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.

The approach of the appellate court

26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the Judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this Court, in the light of *Flannery* in *Ludlow v National Power PLC* 17 November 2000 (unreported). If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.

Costs

27. At the end of a trial the Judge will normally do no more than direct who is to pay the costs and upon what basis. We have found that the Strasbourg jurisprudence requires the reason for an award of costs to be apparent, either from reasons or by inference from the circumstances in which costs are awarded. Before either the Human Rights Act or the new Civil Procedure Rules came into effect, Swinton Thomas LJ, in a judgment with which the Vice-Chancellor, who was the other member of the Court, agreed, said this in ***The Mayor and Burgess of the London Borough of Brent v Aniedobe*** (unreported) 23 November 1999, in relation to an appeal against an order for costs: *"...this Court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the County Court by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's order are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event) it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course."*

28. It is, in general, in the interests of justice that a Judge should be free to dispose of applications as to costs in a speedy and uncomplicated way and even under CPR this will be possible in many cases.

29. However, the Civil Procedure Rules sometimes require a more complex approach to costs and judgments dealing with costs will more often need to identify the provisions of the rules that have been in play and why these have led to the order made. It is regrettable that this imposes a considerable burden on Judges, but we fear that it is inescapable.

30. Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the Judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial Judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the Court is likely to draw the inference that this is what motivated the Judge in making the order. This has always been the practice of the Court - see the comments of Sachs LJ in *Knight v Clifton* [1971] Ch 700 at 721. Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs.

31. This concludes our general observations on the issues raised by the three appeals, and we now turn to consider each in turn in accordance with the approach that we have commended above.

ENGLISH v EMERY REIMBOLD & STRICK LIMITED

32. The judgment under appeal was delivered by His Honour Judge Rubery, sitting as a Deputy High Court Judge.

The Critical Issue

33. Mr English, the appellant, was born in 1964. He suffered a back injury when he slipped at work on 18 October 1994. His employers, the respondents, admitted liability for his accident. Evidence on the issue of damages was heard on 8, 11, 13 September 2000 and 12 December 2000. Closing submissions were submitted in writing by 28 January 2001. Judgment was handed down over 4 months later on 5 June 2001. This was a lamentable document, full of errors of spelling, punctuation and syntax. In granting permission to appeal Sedley LJ accurately described it as a rambling and in places unintelligible document. He ruled that, in the light of *Flannery* the appeal had a realistic prospect of success, to the extent, at least, of securing a re-trial.

34. We had the benefit of a version of the judgment which had been edited by the Judge, pursuant to the direction of Sedley LJ, to the extent of correcting the errors of spelling, punctuation and syntax. The judgment is 18 pages in length. It presents the case as turning almost exclusively on a conflict between the evidence of Mr McBride, the Consultant Orthopaedic Surgeon instructed by the claimant and Mr Andrew, the Consultant Orthopaedic Surgeon instructed by the defendants.

35. It was common ground that, on 20 February 1995, an x-ray revealed that Mr English had an 8mm spondylolisthesis, that is an 8mm forward displacement of a part of the vertebral column by reference to the remainder of the vertebral column below. It was also common ground that, before the spondylolisthesis developed or occurred, Mr English had a congenital condition known as spondylolysis, which involves a weakening of the spine.

36. The expert evidence, which included a joint experts' report setting out where the experts agreed and where they differed, had further areas of common ground:

    i Approximately 10% of the population suffers from spondylolysis. Of these, approximately half subsequently develop spondylolisthesis.

ii The development of spondylolisthesis normally occurs either as the child grows into an adult, in the first 18 years of life ('congenital spondylolisthesis') or in old age ('degenerative spondylolisthesis').

iii Spondylolisthesis can be sustained by a person with a healthy spine as a result of a severe accident such as being run over by a motor car ('traumatic spondylolisthesis'). The slipping accident experienced by Mr English would not have sufficed to cause a spondylolisthesis if his spine had been sound.

37. Before his slipping accident Mr English had suffered from intermittent back pain. This had led on 17 November 1993 to his lumbar-sacral spine being x-rayed by Dr West, a radiologist. The x-rays had not been preserved, but Dr West's report, dated 25 November, had been. This stated 'Lumbar-sacral spine: normal examination'.

38. Dr West was called to give evidence. He had no recollection of taking the x-rays or writing the report. He said that it was not inconceivable that he had missed Mr English's spondylolisthesis, but that it was very unlikely that he would have done so in view of the fact that the slippage in question was almost 1cm.

39. The Judge correctly recorded the central issue as being whether the spondylolisthesis was developmental in origin and was therefore present before the accident, or whether it was caused by the accident.

40. It was Mr Andrew's opinion that Mr English must have developed his spondylolisthesis in the first 18 years of his life and that his slipping accident merely led to a degree of temporary back sprain. Mr McBride's opinion was that the slipping accident must have caused the spondylolisthesis because Mr English's existing spondylolysis had left him more susceptible to such an injury.

41. Mr Andrew expressed himself as amazed at Mr McBride's evidence that spondylolysis had predisposed Mr English to traumatic spondylolisthesis from an accident which could not normally have caused this. He was taken aback because Mr McBride had not mentioned this theory in his Medical Report or when agreeing the joint report with Mr Andrew. Mr Andrew was firmly of the view that Mr McBride's theory was untenable because there was no record in the text books of an adult with spondylolysis developing spondylolisthesis in such circumstances, nor was such an event known to him or his colleagues. Having regard to the number of adults in the population with spondylolysis he considered that it was not conceivable that the suggested potential effect of a minor trauma would not have been recorded if it existed.

42. In these circumstances the Judge was faced with a choice between two unlikely scenarios. Either Mr English had had a spondylolisthesis before his slipping accident, and Dr West had missed this on this x-ray examination, or he had sustained a traumatic spondylolisthesis in circumstances which were without recorded or known medical precedent.

43. We could not have formulated the central issue in this way simply from reading the judgment. We have been assisted in our understanding of the nature of the case by the submissions of Counsel and references to the evidence.

The Judgment

44. The first 6 pages of the judgment were devoted to an introduction and a summary of the evidence given by Mr English. This might have been thought by the Judge to be of some peripheral significance, for there were grounds for concluding that Mr English had somewhat over-egged the pudding when describing his symptoms to Mr McBride and the somewhat cursory treatment that he received at the hospital after his slipping accident could not readily be reconciled with the degree of agony he claimed to have been in. However, the Judge made no comment of any kind in relation to the implications of Mr English's evidence.

45. The Judge then observed that he felt it 'would be helpful' to quote in a little detail from the experts' joint report and proceeded to do so over the next four pages of the judgment. The extracts quoted demonstrated, for the most part, the difference of opinion between the experts. The Judge did not explain why the extracts that he had set out were helpful.

46. The Judge then, cryptically, interposed the following paragraph: *"Learned Counsel for the defendants submits that 'Not only must the Court distinguish between the medical opinions of Mr McBride and Mr Andrew but that when doing so it is of the utmost importance to understand how audacious is the diagnostic position adopted at the trial by Mr McBride and how logically inconsistent is his evidence in support of it.'"*

Mr Giles, for the employers, explained to us that the audacity referred to was that involved in adducing a theory at the trial to which Mr McBride had made no prior reference.

47. The Judge then remarked that it would be helpful 'in reaching the conclusion which I have' to look at certain parts of the evidence of Mr McBride and Mr Andrew. Referring first to the evidence of Mr McBride, he included the following passage: *"Put to him by Mr Pepperall so on the balance of probabilities before this man suffered his accident in October 1994 do you take the view that there was or was not evidence of degenerative change? He answered "I do not believe there was on the balance of probabilities""*

48. The Judge then commented *'and I come back to this again later'*. It is not clear to us where he did so. A little later, however, he quoted Mr McBride as saying *'I believe that the evidence in this case suggests that this was a traumatic event'*.

49. Turning to the evidence of Mr Andrew, the Judge quoted repeated and emphatic dissents from Mr McBride's evidence:
- *'one would have to have a catastrophic injury to cause a traumatic spondylolisthesis'*
- *[this type of traumatic spondylolisthesis] 'is unbelievable, it is just impossible. It is totally alien to all one can anticipate'.*
- *'I'd be as certain as I can be that he had [spondylolisthesis] the day before he slipped on the floor'.*
- *'it is just inconceivable that some minor trauma could cause this'.*
- *'there is no scientific evidence to back up Mr McBride's theory'.*

50. The Judge then summarised shortly the evidence of Dr West to which we referred earlier, without making any comment on it. Finally he stated his conclusions as follows: *"As I said earlier it would have made this judgment of inordinate length if I were to simply recite all the detailed medical evidence that the Court heard during the course of the trial. At the end of the day the Court must distinguish between the medical opinions of Mr McBride and Mr Andrew and having considered the matter at considerable length I prefer, on the balance of probabilities, the evidence of Mr Andrew that the spondylolisthesis was developmental in origin and was therefore present before the accident and not caused by the accident as is the view of Mr McBride. In preferring Mr Andrew's evidence it followed that on the balance of probabilities I accept Mr Andrew's evidence that Dr West missed the spondylolisthesis which Mr Andrew considers to have been present when he x-rayed the claimant on 7 November 1993."*

[The judge plainly meant 17 November 1993]

Submissions

51. Mr Pepperall, for Mr English, attacked the judgment with vigour. He submitted that its features were indistinguishable from those of the judgment in *Flannery*, save that in *Flannery* the Judge had at least referred to the benefit of hearing the witnesses. The Judge had set out extracts from the evidence, followed by bald conclusions. The judgment gave Mr English no better understanding of the reason behind it than had his presence at the trial. The x-ray examination carried out by Dr West had been of critical importance to Mr English's case, yet the Judge had failed to weigh Dr West's evidence of fact before turning to the expert evidence.

52. Mr Giles submitted that the judgment should not be disturbed. The Judge had correctly identified the issue, he had set out the conflicting expert opinions and he had made his choice on balance of probabilities. He had been justified in preferring the views of Mr Andrew, which were supported by the textbooks, rather than the theory of Mr McBride, which was produced new on the day of the trial.

53. Our initial impressions on reading the judgment accorded with Mr Pepperall's submissions. The judgment gave little indication of the process of reasoning that led to the result. By the end of counsel's submissions we were, however confident that we had identified this.

54. The clue to the Judge's reasoning lies in his use of the phrase 'on the balance of probabilities' in the final paragraph that we have quoted from his judgment. This is a strange phrase to use to qualify the choice between conflicting expert evidence. It reflects the fact that the conflict was not strictly between conflicting expert evidence, but between conflicting opinions of the experts in relation to the central issue of whether Mr English had developed spondylolisthesis before his slipping accident or sustained it as a result of the accident. The experts' opinions had regard to evidence which fell outside the area of their expertise, in particular the fact that Dr West had not identified spondylolisthesis in the x-ray examination which he carried out before Mr English's accident.

55. Mr McBride did not base his conclusion that Mr English suffered a traumatic spondylolisthesis on professional experience that spondylolysis predisposed adults to sustaining such a condition as a consequence of a minor accident of the type suffered by Mr English. He advanced, at the trial, the theory that Mr English's spondylolysis had predisposed him to traumatic spondylolisthesis as his considered explanation of all the evidence 'on balance of probabilities'. Mr Andrew's professional knowledge and experience led him firmly to reject this explanation of the evidence and thus to conclude that Dr West must have missed Mr English's congenital spondylolisthesis when he carried out his x-ray examination.

56. Each expert gave an opinion on the issue which was ultimately for the Judge. Mr Pepperall accepted that Mr English's case was largely founded on Dr West's report. He could not have hoped to succeed on the expert evidence alone, which did not provide precedents for spondylolisthesis sustained in the manner alleged on behalf of Mr English. Ultimately the Judge had to decide whether it was more probable that Dr West had overlooked Mr English's condition or that his spondylolisthesis resulted in a manner for which there was no known medical precedent. He decided that the former was the more probable.

57. The Judge could have explained the issue and his reasoning process in comparatively few words. It is regrettable that he did not do so and that it has taken the appellate process and the assistance of counsel who appeared at the trial to enable us to follow the Judge's reasoning. Having done so we conclude that this appeal must be dismissed.

D J & C WITHERS (FARMS) LTD v AMBIC EQUIPMENT LTD

58. The judgment under appeal was delivered by His Honour Judge MacKay, sitting in the Technology and Construction Court in Liverpool, on 4 May 2001. He had provided it in draft to the parties in advance. When he delivered the judgment he was referred to the decision in *Flannery* and told that the claimants ('Withers') were minded to apply for permission to appeal on the ground that his judgment did not give adequate reasons for his preference of the defendant's ('Ambic') evidence. This led the Judge to add a short addendum to his judgment, to the substance of which we shall revert in due course.

59. On the paper application for permission to appeal, Sedley LJ observed that it was arguable that the judgment did not give adequate, or indeed any, reasons for preferring Ambic's expert evidence, but refused permission to appeal on the ground that the Judge had made findings of fact which, of themselves, would have been capable of proving fatal to the claim.

60. The application to appeal was renewed on notice. On this occasion Sedley LJ, sitting with Arden LJ, acceded to the application. The court held that it was arguable that want of analytical consideration of the evidence of Withers' expert constituted grounds for setting the judgment aside. Sedley LJ observed: *"It ought to be visible in principle from the judgment, however succinctly it is expressed, why it is that the judge has preferred one expert's evidence and one party's case to the others. But I do accept that the judge had before him, and without doubt had in mind, tenable reasons for preferring the defendant's to the claimant's expert evidence. I accept too that if one goes to the reports and written arguments one can find the material there."*

The critical issue

61. Withers farmed dairy cattle on several separate farms in New Zealand. In August 1991 Withers purchased from Ambic a system of hydraulic milking which they started to use on one of the farms in September 1991, the start of the 1991-2 milking season. Withers originally contended that the Ambic system suffered from design defects which almost immediately produced an increase in the incidence of mastitis on the farm where the equipment was used, although by the time of the trial, it was conceded that there was no significant increase in clincial mastitis until the 1995-1996 season. The critical issue was whether the increase in mastitis which occurred was caused mechanically, as a result of design defects in the Ambic system, or resulted from environmental factors attributable to, or augmented by, poor dairy farming practices on the farm in question.

62. Pleaded particulars of defects in the Ambic system identified mechanical idiosyncrasies of the system and the mechanisms by which these were alleged to increase the propensity of the teats of the cattle to suffer bacteriological infection resulting in mastitis.

63. Evidence bearing on the critical issue was partly evidence of fact and partly expert evidence, nor was it possible to draw the line precisely between the two. This evidence included: evidence of facts from which the incidence of mastitis on the farm using the Ambic equipment, and on another farm which was not, could be deduced; evidence as to the standard of the dairy farming practices observed on Withers' farms; evidence indicative of the extent to which the teats of cattle were suffering damage; veterinarian evidence of somatic cell count tests and the significance of these and evidence of whether, in theory and

in practice, the allegedly idiosyncratic features of the Ambic system were liable to render the teats of cattle more susceptible to bacteriological infection.

The judgment

64. The judgment, prior to the addendum, extended to 27 pages. The first 7 pages were introductory. They included a short narrative, a description of mastitis, a list of witnesses of fact, which erroneously included a number of individuals who, while they had featured in the story, had not provided any evidence, and brief particulars of the six expert witnesses who had given evidence on different aspects of the case. The most significant of these were, for Withers, Mr Bromwell, a dairy and milking technology consultant, who had spent 27 years as a member of the Ministry of Agriculture advisory service, specialising particularly in milking machines and milking technology, and for Ambic, Dr Hillerton, a research scientist who, since 1990, had headed the Milk and Mastitis Centre of the Institute for Animal Health. For nearly 20 years he had specialised in the udder health of the dairy cow.

65. The judgment then observed, correctly, that the crucial issue taken by Ambic was that of causation. Ambic relied on the fact that for four years their equipment had been used by Withers without any increase of mastitis in the herd. Withers' case was that during this period the mastitis was latent, in sub-clinical form, kept under control by good farming practices. Ambic contended that it was significant that Withers had experienced an outbreak of mastitis on another farm which did not use the Ambic system, and had been concerned to conceal this fact. Withers contended that events on that other farm were irrelevant. Withers contended that the Ambic equipment was liable to cause damage to the teats of cows and that Ambic were in breach of duty in failing to inform them of the unacceptable risk that this posed.

66. Summarising the position, the Judge held that if Withers were to succeed they had to show (i) that the Ambic system had a propensity to cause mastitis and (ii) that it in fact did so on Withers' farm.

67. The Judge devoted two and a half pages of his judgment to quoting a lengthy section of Dr Hillerton's Report, which compared the Ambic hydraulic system with conventional vacuum milking systems.

68. The next nine pages of the judgment are devoted to the issue of causation. We shall shortly return to consider these in some detail. The final five pages of the judgment deal with contributory negligence, limitation and quantum and are not material to this appeal. We observe, however, that the Judge found that the damages that would have been recoverable had liability been established amounted to no more than about ?15,000. This emphasises how unsatisfactory it is that further substantial costs should have been incurred because of doubts about the adequacy of the Judge's reasoning.

Submissions

69. For Withers, Mr Bartley Jones, QC, submitted that the reasons in the judgment failed to cross the threshold that a fair trial required, as identified in *Flannery*. Mr Bromwell was the only expert to address the first essential issue of whether the Ambic equipment had a propensity to cause mastitis. Dr Hillerton simply failed to deal with this, confining himself to the second issue of whether in fact the Ambic equipment had been responsible for the mastitis suffered by the Withers herd. Yet the second issue could not satisfactorily be addressed until the first had been independently resolved. The Judge, for his part, had also failed to address the issue of the propensity of the Ambic equipment to cause teat damage. The Judge had repeatedly accepted the evidence of Dr Hillerton without analysis or explanation.

70. For Ambic, Mr Moxon-Browne, QC, responded in two ways. First he submitted that the Judge had made it plain that he considered that Dr Hillerton was the more authoritative of the experts. He was right to do so and this justified his preferring Ambic's case where the expert evidence was in conflict. Secondly, he set out to demonstrate by reference to the judgment that, contrary to Mr Bartley Jones' submission, the Judge had dealt with the issue of whether the Ambic equipment had a propensity to cause mastitis.

Conclusions

71. If there were any doubt as to the Judge's view of the respective merits of the expert witnesses, this was laid to rest by the Addendum to his judgment. He explained: *"I accepted the evidence of the Defendant's expert throughout. I was particularly impressed by Dr Hillerton. The fact that he was a Research Scientist and not a Veterinary surgeon was not, to me, a crucial factor. He had made a deep and long lasting investigation into many of the problems connected with milking cows and mechanical milking."*

72. We consider that the Judge was entitled to form this view. Dr Hillerton was very highly qualified to give expert evidence in this case. The 150 odd publications itemised in his Curriculum Vitae demonstrate his particular expertise in the bovine udder and the effect of mechanical milking on mastitis. Furthermore, his Expert Report was a model of its kind identifying in detail and with precision the data on which his conclusions were based. Mr Bromwell was also highly qualified, but his Expert Report was much less disciplined and detailed. It also exhibited indications of a lack of objectivity. By way of example, it is not appropriate for an expert on milking to comment on the witness statement of a sales representative: *"In common with the statement of Mr Mills this appears to me to be a catalogue of selective recollection."*

73. It is legitimate, where there is a direct conflict of expert evidence, for the Judge to prefer the evidence of one expert to the other simply on the ground that he was better qualified to give it, or was a more authoritative witness, if the Judge is unable to identify any more substantial reason for choosing between them. This should not often be the case. If this is the basis for the Judge's conclusion, he should make it plain. We do not read Judge MacKay's judgment, even with its addendum, as placing that much weight on Dr Hillerton's conclusions. Plainly Dr Hillerton's authority added weight to his evidence, but the judgment indicates that the Judge was also impressed with the substance of what he had to say, and he made clear in his addendum that his findings of fact had some bearing on his assessment of the expert evidence, as, indeed, they should have done.

74. We turn to the section of the judgment dealing with causation. We have not found this easy to analyse. We have been able to identify a number of different reasons for the Judge's conclusions, but these are not set out in logical order; they are intertwined. So far as the expert evidence is concerned, the Judge has attempted to summarise the technical issues, but on occasion fallen between two stools, so that the relevance of the facts set out in the judgment to the particular issue is incomprehensible. We shall attempt briefly to identify each reason.

75. **Credibility**. The Judge found that Mr Withers, the proprietor of the claimants was not a reliable witness. He had failed to provide adequate records (p.17). He had alleged that he had made complaints about mastitis to Ambic's representative in the

years prior to 1995 when this was not true (p.17, and again at pp.19, 20 and 25). He had falsely stated that he had no problems with mastitis at his other farms (p.18).

76. **Track record of the Ambic equipment.** While some farmers experienced some difficulties with Ambic equipment, many farmers were entirely satisfied: 'I do not regard the criticisms which were made by some farmers as invalidating the efficiency of the equipment' (p.19), followed by reference to trials (p.21). 'I should also say that I do not regard the settlements achieved in the previous cases as relevant or conclusive in this case' (p.25).

77. **Poor standards of hygiene and dairy practice at Withers' farms.** *'More likely that the claimants' farms are not the ideal or perfectly run farms postulated' ... 'The evidence suggests that the other farms had environmental mastitis' (p.17). 'The eventual outbreak of mastitis ... had much more to do with inadequacies in cleansing and other safety measures than any fault in the equipment' (p.21). 'It seems likely that Mr Withers did not replace the teat cup liners often enough' (p.22). 'There may well have been a failure to use adequate dry cow therapy' (p.22). 'It may well be that cows were over milked and insufficient staff were employed but as I have indicated above I do not accept that the farm was as hygienically clean or as well run as the claimant contends' (p.22). '...a picture clearly emerges of a farm using elderly equipment, with poor milking practices and infrequent placement of essential equipment which would have resulted in the same level of mastitis whether or not the Hydra flow had been used. The fact that there were even worse mastitis problems in the key years on farm No.2 bears this out.' (p.23)*

78. **Allegation that the Ambic equipment increased hyperkeratosis, which led to mastitis.** This was one of the allegations of the propensity of the Ambic equipment to cause mastitis. The Judge dealt with this allegation, initially at p.14. He rejected it on the basis of Dr Hillerton's evidence which he briefly summarised. Hyperkeratosis was always a feature of machine milking. There was no relationship between hyperkeratosis and mastitis. The Judge referred to evidence of a test which confirmed the latter point. To this the Judge added that there was an almost total absence of evidence of hyperkeratosis at the relevant farm.

79. This brief summary did not explain the nature of hyperkeratosis. For that it is necessary to refer to the evidence. This we did, with the help of counsel. This disclosed some confusion between the experts as to the precise nature of the phenomenon. The word describes the extrusion of keratin from the teat canal as a result of the mechanism of milking. Withers' veterinary expert appears to have assumed that this depleted the amount of keratin that remained, which was an unsatisfactory feature, in that keratin seals off the teat and has antibacterial activity. Dr Hillerton, on the other hand, considered that hyperkeratosis resulted from an increase in the production of keratin as a result of the milking action. What is, however, particularly material is that Dr Hillerton was able to give evidence of participating in a study, which failed to find any relationship between the degree of hyperkeratosis in herds and the average cell count, which was taken as a measure of infection. The Judge took an active part in the discussion. It is clear from his judgment that he was persuaded by Dr Hillerton's evidence. When the judgment is considered together with the evidence, the reason for his doing so becomes clear.

80. **The allegation that the Ambic equipment resulted in 'wedging', which led to mastitis.** This suggestion was not pleaded, but was introduced in oral evidence by Withers' veterinary expert. The Judge dealt with this in a short passage of his judgment, containing references to congestion and failure of circulation which are not readily intelligible, standing alone. What was clear was that the Judge accepted Dr Hillerton's evidence that wedging did not increase the risk of mastitis. Once again, reference to the evidence, with the help of counsel, enabled us to make sense of the judgment. Again the Judge took a full part in the discussion with Dr Hillerton, and plainly followed the purport of his evidence. The phenomenon under discussion was the deformation of the teat into a wedge shape under pressure during the milking operation. It was suggested that this would reduce blood circulation within the teat, thereby depriving areas of potential infection of the therapeutic access of white cells. Dr Hillerton's answer was that the white cells in question were carried not in the blood supply, but in the milk. It is apparent that the Judge accepted this evidence as an answer to the allegation about wedging, though he went on to add that there was very little evidence, if any, that wedging in fact occurred on the relevant farm.

81. **Lack of massage leading to mastitis.** It was alleged that the mechanism of the Ambic equipment resulted in a lack of massaging of the teats, which could lead to mastitis. The Judge at page 15 referred to this very briefly, accepting Dr Hillerton's evidence that it was necessary to break the skin to cause infection and that there was no evidence that any lack of massage resulted in this. He reverted to the topic at page 20 where he stated that Withers' allegations in relation to lack of massage were not made out or likely. He added that Dr Hillerton had pointed out in his report that even a liner-less milking system involving no liner movement whatsoever did not result in any teat damage being observed. Counsel referred us to the relevant passage in Dr Hillerton's report and to the fact that he maintained his position under cross-examination.

82. Mr Bartley Jones criticised this finding on the part of the Judge, referring us to evidence which indicated that Dr Hillerton's view was unorthodox, and that the orthodox view was that massaging of the teat in the course of milking was very important if infection was to be avoided. We do not think that this criticism is in point. The grounds of this appeal are not that the Judge's reasons were erroneous but that he failed to give adequate reasons. The Judge's reason for rejecting this aspect of Withers' case on the propensity of the Ambic equipment to cause mastitis is apparent.

83. **Allegation that vacuum peaks caused damage to the teats leading to mastitis.** At p.15 the Judge recorded the suggestion that the Ambic system caused high vacuum levels which, in some way, caused damage to the teats, based on a high vacuum reading alleged to have been taken on one occasion. He recorded that Dr Hillerton had no knowledge that a high vacuum compromised the teat defence mechanism and rejected the allegation, holding that on the balance of the evidence the allegations that damage was caused by the operation of the Ambic system were not made out.

84. Once again the Judge returned to the topic at pp.20 to 21 of his judgment. The references that he there makes to the evidence are too disjointed to make sense, without reference to Dr Hillerton's evidence. What is apparent from them is that the Judge had considered the technical evidence and was preferring Dr Hillerton on the basis of the evidence that he had given.

85. **Allegation that infection was increased because milk was always in contact with the teat.** When describing the Ambic system at the start of his judgment, the Judge observed that one significant feature was that 'the liner was completely and permanently flooded with milk'. At p.20 of his judgment, he held 'I accept the evidence of Dr Hillerton, who I regard as a compelling and very expert witness, that milk cannot be trapped throughout the milking period'. This is all that the Judge had to say in answer to the allegation that the fact that milk was always in contact with the teat under the Ambic system provided a pathway for bacterial infection. This did not deal adequately with this aspect of Withers' case. Dr Hillerton had accepted that milk could provide a pathway for infection from one cow to another if the milking cluster was not disinfected after milking

an infected cow, as good husbandry required. He also made the point that the one-way valve system of the Ambic clusters would not allow milk return so that infection of one quarter could not be transmitted to the other. We have not found it possible to reconcile this evidence with the Judge's reasoning.

86. **The nature of the pathogens**. The Judge held that there was little evidence of the pathogens that caused the outbreak of mastitis in 1995, but that the best evidence was in the form of a report which he identified. This was a 'Five Year Summary of Milk Results' provided to Withers by Agvet Services Ltd. It showed that the most frequently found pathogen was Streptococcus Uberis. The Judge found that this pathogen was associated with wet and dirty conditions. He found that environmental pathogens could not be machine induced. He based these conclusions on the evidence of Dr Hillerton and on a paper which supported this.

87. **The significance of the somatic cell count.** It was common ground that an increase in somatic cells usually signifies infection, which the white blood cells are combating. The records showed that the somatic cell count was very similar in 1991/2, after the installation of the Ambic system, to what it had been in 1990/1991. It rose significantly in 1992/3, but then dropped back to its lowest level for any year in 1993/4. It rose again in the next two years and soared in 1997/8. Dr Hillerton considered the data in detail and concluded that it demonstrated that, up to 1997, there was poor dry cow management around the calving period, resulting in a high level of mastitis in the cows that were calving, whereas two year old cows which were being milked retained a very low cell count. The evidence did not suggest any influence from the Ambic clusters.

88. The Judge held, simply, at p.17 'I am unconvinced that the somatic cell count indicates a machine induced situation which only exploded in 1995'. The apparent inadequacy of this passage particularly impressed the court when giving permission to appeal. Sedley LJ commented of the Judge 'if he was to reject the suggestion that the somatic cell count pointed to machine induced mastitis, the claimant can, I think, say with some legitimacy that it is entitled to know why, and to say the same about several other places where the Judge expresses himself entirely referentially'. Having considered the evidence in relation to the somatic cell count it seems to us that it was ambivalent. Having regard to the Judge's other findings, we think that it was open to him to dismiss the evidence of the somatic cell counts in the way that he did. It would, however, have been preferable if he had given a short explanation, even if by reference to Dr Hillerton's evidence, as to why he thought that the evidence of somatic cell counts was inconclusive.

Summary

89. There were shortcomings in the judgment in this case. On a number of occasions we have had to consider the underlying material to which the Judge referred in order to understand his reasoning. On one occasion, the significance of the fact that the milking cups were perpetually full of milk, we failed to follow his reasoning even with the benefit of the underlying material. At the end of the exercise, however, we have been able to identify reasons for the Judge's conclusions which cogently justify his decision. While he did not express all of these with clarity in his judgment, he made sufficient reference to the evidence that had weighed with him to enable us, after considering that evidence, to follow that reasoning with confidence.

90. It follows that the appeal based on inadequacy of the reasons fails and must be dismissed.

VERRECHIA

91. As indicated above the appellant in this appeal challenges the order of Steel J as to the costs. The particular point of general interest in this case is that it raises in an acute form the questions discussed in general terms above, namely when is it necessary to give reasons for an order for costs and what should the approach of the appellate court be if reasons have not been expressly given for the Judge's decision? We have already concluded that reasons need not be given where they are clearly implicit from the order made. The obvious example is an order that the costs follow the event where neither party has urged the court to reflect any other factor. In such a case it is self-evident why the order was made: the court thought that the usual position should apply. On the other hand, if the reasons for the order are not obvious, the Judge should provide reasons. The present appeal tests that principle because, following a trial lasting eight days and having received substantial written submissions on costs, the Judge announced the court's decision on costs without giving any reasons at all.

92. The circumstances which had given rise to the litigation have been briefly mentioned already and were unusual. Following a raid on the appellant's business premises between 18 to 21 April 1994, the police (the party represented by the respondent on this appeal) held a number of vehicle engines and vehicle spare parts which they considered to be stolen property. The appellant and his son were charged with dishonestly handling twenty-five of these items which they conceded were stolen property. In November 1995 the appellant and his son were acquitted. The police did not however then return the property seized to the appellant. They were clearly concerned that, although the appellant and his son were found not guilty of handling, nonetheless the engines and spare parts could represent stolen property which belonged to third parties. They were able to identify the owners of some of the items.

93. In November 1998 the appellant started these proceedings seeking to recover damages under the Torts (Interference with Goods) Act 1977 in respect of sixty-five items which the police had failed to return to him. These items did not include the items which had been the subject of the charges brought against the appellant and his son. The amount of damages claimed was £141,500 exclusive of interest. In addition there were claims for aggravated and exemplary damages.

94. The police were entitled to retain the goods until the conclusion of the trial on any basis. The issue was whether they were entitled to refuse to return them to the appellant thereafter. They had established that several items were stolen property and in some cases the items had been returned to their owners. In respect of the majority of the other items the means of identification had been removed and it was not possible to trace the owners. The police case was that in all the circumstances the court should infer that they were stolen property. By the start of the trial the appellant had reduced his claim to fifty-eight items. This number was reduced to forty-five items in the appellant's opening and to forty items in the appellant's closing speech.

95. Steel J found that the claim succeeded in respect of twenty items but failed in respect of the remaining twenty items. The Judge refused to draw the inference that where the means of identification had been removed the items were stolen property. The Judge observed (for reasons with which this court has not been concerned) that the history of the case and the way in which the police had carried out their duty of care with respect to the items the subject of action gave rise to concern. However, apart from that observation, the Judge made no comment about the conduct of the parties whether before or during the trial. The Judge awarded damages in the sum of ?37,300, plus interest. The claims for aggravated and exemplary

damages were dismissed and it is unnecessary to say more about them as neither party considered that that claim had caused any significant additional costs.

96. A draft of the Judge's judgment was made available to the parties before it was handed down. The last paragraph simply said: *"111. No order as to costs."*

97. This was clearly only a provisional view and, when the judgment was handed down, the Judge, having been informed of various Part 36 matters, made an order that the issue of costs should be dealt with by way of written submissions. Unknown to the Judge, there had been various offers to settle the case. On 23 November 2000 the claimants had offered to settle the case for ?98,600 inclusive of interest and costs and on 29 January 2001 the police had made a payment into court in respect of the whole of the appellant's claims in the sum of ?5,500. Neither party succeeded to the extent of their prior offer(s).

98. Counsel submitted extensive written submissions on costs to the Judge. The position taken by the appellant was that there should be an order for costs in his favour. The police submitted that there should be no order as to costs. On 4 April 2001, the Judge handed down the following judgment in writing: *"I have considered the submissions and all the authorities cited. In all the circumstances of this action, I am unpersuaded that I should vary my order that each party should pay their own costs, and that there should be no order as to costs."*

99. The Judge had not, of course, made any order which could be varied so that when the Judge said "I am unpersuaded that I should vary my order", the Judge meant "I am unpersuaded that my provisional view was incorrect".

Submissions

100. Mr Ronald Walker, QC, for the appellant, submitted that the Judge should have given reasons. The issue as to incidence of costs was important, there had been a substantial trial and the Judge had had written submissions. Mr Walker relied on the jurisprudence of the European Court of Human Rights under Article 6. He particularly relied on ***Garcia Ruiz v Spain***, ***Hadjianastassiou v Greece*** (1993) 16 EHRR 219 and ***Robins v UK*** (unreported, 118/1996/737/936, 23 September 1997).

101. Mr Walker submitted that in making the order in this case the Judge departed from the usual order and should have given reasons. In support of this proposition he relied on ***Eagil Trust Co Ltd v Pigott-Brown*** [1985] 3 All E.R. 119 and ***Brent LBC v Aniedobe***, Court of Appeal, 23 November 1999, unreported. Mr Walker accepted that the Judge would have had reasons for the order that was made, but he submitted that this Court should not assume that those reasons were sound.

102. Mr Walker accepted that if the result which the Judge reached was the right result, the appeal should fail. However, he submitted that it would not be sufficient to show that the Judge might properly have reached the result. That would be to assume that the reasons which the Judge had were good reasons. It was not fair to make that assumption where no reasons at all had been given.

103. As respects the exercise of the Judge's discretion, Mr Walker referred to CPR 44.3. He relied on the fact that the appellant was the successful party and that there was no criticism of the appellant's conduct. If the appellant had accepted the payment then made by the police, the appellant would have been entitled to all the costs which he had incurred up to the date of acceptance. Mr Walker submitted that the appellant made timeous concessions. The police had all the information as to ownership. At most the appellant should be deprived of some of his costs. However, Mr Walker did not place a percentage on these costs. He submitted that if the appellant were to be deprived of any costs, it should be done on an issues basis. If the result of the case was truly a draw, then the appellant should at least get 50% of its costs with no order as to the balance. However, Mr Walker warned against treating success on twenty out of forty items as equivalent to success which should be represented by an award of 50% of the costs.

104. Mr Walker submitted that it is artificial to treat this case as sixty-five separate claims. He relied on the fact that the respondent failed to take the obvious step of applying to a Judge for reasons, pursuant to the practice indicated in the ***Flannery*** case.

105. Mr James Watson QC, for the respondent, submitted that this was not a case where reasons were required. He submitted that reasons would not have been required under the Strasbourg jurisprudence. He relied on the way in which the European Court of Human Rights itself awarded costs. Its usual course was not to give reasons.

106. Mr Watson submitted that the proper test was that reasons are only required where an unusual order is made. In this respect he relied on the ***Eagil Trust*** case, above, and on ***R v Harrow Crown Court, ex parte Dave*** [1994] 1 WLR 98. Mr Watson submitted that the Judge must have chosen to adopt the defendant's submissions.

107. Mr Watson submitted that the evidential burden of proving that the items in issue were stolen was on the police and that it was only by going to court that the police could avoid or reduce the liability to pay the damages sought by the claimant. The police would have lost the entire case if they had not taken any active part in the trial. Therefore, they had to go to court to protect themselves from liability. In those circumstances, they should be treated as a successful party. In this respect, he relied on ***Roache v News Group Newspapers*** [1998] EMLR 161 where the Court of Appeal examined the question whether a party was really the winner or not. The three members of the Court (Sir Thomas Bingham MR, Stuart Smith and Simon Brown LJJ) each gave separate judgments. Mr Watson relied on passages in each of the judgments, including the test put forward by Simon Brown LJ that the party seeking to recover his costs "must show at least that he has obtained at the hearing something of value which he would not otherwise have expected to get." On this basis, Mr Watson submitted that the police were equally the winner in these proceedings.

108. Mr Watson also made submissions based on the conduct of the appellant prior to trial. In particular the police had served 147 hearsay statements served for the purpose of the criminal trial. Originally the appellant wanted all of these witnesses to be called. He eventually decided upon nine of these witnesses and then at trial decided none need be cross-examined. There were other matters in the conduct prior to trial on which Mr Watson relied, but since the Judge referred to none of these in argument, it is unnecessary to refer to them further.

Conclusions

109. The Judge was clearly entitled to form a provisional view as to costs in the draft judgment. It was helpful to the parties to do so.

110. The Judge formed the provisional view that there should be no order as to costs. A fair reading of this part of the Judge's judgment leads to the conclusion that the Judge considered that that order was the right order in the light of what the appellant had obtained under the judgment It is not to be supposed that the Judge took into account factors not mentioned in the judgment. In other words, the Judge clearly thought that the action had resulted in a "draw". In our view, it was open to the Judge to reach this conclusion. Although when the case was started there were some sixty-five items in issue, by the time of closing speeches there were only forty items in issue. The appellant won in respect of half in number of these items. There were no criticisms relevant to costs in the conduct of either party. Nor was there any reference to the appellant's conduct in the interim stages of the proceedings. The Judge could not have considered that there was any aspect of the parties' conduct material to the decision on costs.

111. The reasons deducible for the Judge's provisional order as to costs must, therefore, be that the appellant had won half of his case and lost on the rest. In the circumstances of the case, it was open to the Judge to conclude, as Mr Watson submitted, that the police as well as the appellant had had to come to court to win that part of the case on which they succeeded. To this extent, the Judge was entitled to take the view that each side was to that extent the winner. Alternatively it was open to the Judge, in the light of the wide powers conferred by the CPR, to conclude that, in any event, the appellant should only have part of his costs, as he had been successful in part only of his case, and that the police should have the costs of the part of the case on which they had been successful. On either basis the Judge could properly conclude that the proportion of costs which each party should receive was 50% and that the net result was nil when these two percentages were set against each other.

112. When the Judge handed down the judgment on costs on 4 April 2001, in our judgment, the Judge confirmed that, notwithstanding the submissions which the appellant had made, in the Judge's view the order originally proposed was the correct one.

113. In our judgment, nothing turns on the question whether for the purposes of the costs this case ought to be analysed as a trial of sixty-five causes of action or as a trial of a single cause of action. That issue would have been important to the payment into court made by the police if that payment played any part in resolving the incidence of costs, since the payment in was made in respect of all causes of action and not just specified causes of action. In the present circumstances it would be undesirable if the approach of the court to the appropriate order of costs turned on such technical distinctions. The court now has wide power under the CPR to make orders for costs which reflect not just the ultimate victory, but the extent to which a party raised issues on which he did not succeed. Accordingly the Court could in this case make the same order whether the costs are treated as relating to a single cause of action, which was partly successful, or to series of causes of action, some only of which succeeded.

114. In this connection we add the following observations about the appropriate form of order where a party is to be awarded some only of his costs. Mr Walker submits that the appellant should obtain all its costs of the action other than those which relate to the issues on which it failed. In support of this approach, he relies on the decision of Neuberger J in ***Harrison v Bloom Camillin***, 4 February 2000, unreported. In that case, the Judge held that he could not do justice to the parties by placing a percentage of the costs of the hearing on the issues which either party had won. He therefore made an order that the claimants in that case should have their costs save in relation to certain specified issues. He referred to CPR 44.3 (6) and (7) which provide:-

"(6) The orders which the court may make under this rule include an order that a party must pay ?
(a) a proportion of another party's costs, ...
(c) costs from or until a certain date only; ...
(f) costs relating only to a distinct part of the proceedings; ...
(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

115. We are in no position to express a view as to whether we would have made the same order as Neuberger J did in the ***Bloom Camillin*** case. However, we would emphasise that the CPR requires that an order which allows or disallows costs by reference to certain issues should be made *only if* other forms of order cannot be made which sufficiently reflect the justice of the case (see CPR 44.3(7), above). In our view there are good reasons for this rule. An order which allows or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the Costs Judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party's legal advisers to determine whether or not it was attributable to the issue the costs of which had been disallowed. All this adds to the costs of assessment and to the amount of time absorbed in dealing with costs on this basis. The costs incurred on assessment may thus be disproportionate to the benefit gained. In all the circumstances, contrary to what might be thought to be the case, a "*percentage*" order (under CPR 44.3(6)(a)) made by the Judge who heard the application will often produce a fairer result than an *"issues based*" order under CPR 44.3(6)(f). Moreover such an order is consistent with the overriding objective of the CPR.

116. In general the question of what costs order is appropriate is one for the discretion of the Judge and an appellate court will be slow to interfere in its exercise. But the considerations mentioned in the preceding paragraphs are ones which a Judge should bear in mind when considering what form of order ought to be in order properly to apply CPR 44.3(7). These considerations will in most cases lead to the conclusion that an "***issues based***" order ought not to be made. Wherever practicable, therefore, the Judge should endeavour to form a view as to the percentage of costs to which the winning party should be entitled or alternatively whether justice would be sufficiently done by awarding costs from or until a particular date only, as suggested by CPR 44.3(6)(c).

117. For the reasons that we have given, this appeal will be dismissed.

Postscript

118. In each of these appeals, the judgment created uncertainty as to the reasons for the decision. In each appeal that uncertainty was resolved, but only after an appeal which involved consideration of the underlying evidence and submissions. We feel that in each case the appellants should have appreciated why it was that they had not been successful, but may have been tempted by the example of ***Flannery*** to seek to have the decision of the trial Judge set aside. There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the Judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage

of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision.

Edward Pepperall (instructed by Woolliscrofts for Peter English)
Roger Giles (instructed by Browne Jacobson for Emery Reimbold & Strick Limited)
Edward Bartley Jones, QC and David Casement (instructed by Bowcock Cuerden for D J & C Withers (Farms) Limited)
Robert Moxon-Browne, QC and John McDonald (instructed by Sheridans for Ambic Equipment Limited)
Ronald Walker, QC and Alexander Hill-Smith (instructed by Gordon Dadds for Verrechia t/a Freightmaster Commercials)
James Watson, QC and Jason Barrington Beer (instructed by Metropolitan Police Service for the Commissioner of Police for the Metropolis)