Frank & Ann Flannery v Halifax Estate Agencies Ltd [1999] APP.L.R. 02/18

CA on appearl from Manchester Courty Court (His Honour Judge James QC) B e f o r e : Henry LJ; Laws LJ; Mr Justice Hidden. 18th February 1999

JUDGMENT : LORD JUSTICE HENRY:

This is the judgment of the Court. This is an appeal by the plaintiffs from the judgment of His Honour Judge Charles James QC sitting in the Manchester County Court on 23rd January 1998. The outline facts are not contentious, and are taken from the summary contained in the skeleton argument of the appellants.

The plaintiffs, Mr and Mrs Flannery purchased a first-floor flat at 70 Simons Way, Wythenshawe, Manchester. They did so with the benefit of a mortgage from the Derbyshire Building Society. The defendants ("the valuers") were asked by the building society to carry out a valuation. The valuers, by their employee Mr Haining, valued the property at £33,000 and in their report stated in relation to movement of the land on which the property stood: "*Heave landslip or settlement*" that: *"No undue hazards were apparent at the time of inspection."*

The Flannerys claimed to have relied on that report in going ahead with their purchase.

The Flannerys then spent substantial funds renovating the property, but decided they did not like living there. They accordingly put the property on the market for £48,000, and received an offer at that sum from a prospective purchaser, Miss Hitchon. She applied to the Halifax Building Society for a mortgage. By coincidence, the Halifax asked the valuers to carry out a valuation, and this task was performed by another of the surveyors in their employ, Mr Earley. He expressed a view in direct conflict to that expressed a year or so earlier by his colleague Mr Haining. He reported that the property was affected by structural movement. The purchaser withdrew, and the Flannerys then sued the valuers for professional negligence in relation to Mr Haining's original valuation.

The valuers' defence, both as set out in the pleadings and in the trial as conducted, centred on denial that the property at any time suffered from any or any significant structural movement - neither at the date of the report nor at any time thereafter. Even though the ultimate issue for decision by the court was whether the valuer in inspecting and reporting on the property had fallen below the standard ordinarily to be expected of a competent valuer, nevertheless one, or the central issue in the action was one of fact, namely whether the property was or was not suffering from foundation subsidence at the time of Mr Haining's inspection. It was common ground that there was some cracking in the superstructure of the building, but it was contended on behalf of the valuer that that cracking was caused by thermal movement, rather than foundation disturbance. At trial there was, in relation at any rate to six of the seven cracks or other indicia of movement however caused, no dispute as to what was there to be seen. The dispute centred entirely on what had caused those cracks. The plaintiffs' called an expert valuer and an expert engineer (Mr Johnson and Mr Rhodes) who supported Mr Earley's thesis, and Mr Earley himself did not give evidence. The defendants called Mr Haining and as their expert valuer and expert engineer Mr Atkinson and Mr Cohen. The hearing covered eight court days and the judge gave a reserved judgment some six weeks after the conclusion of the case (that time including the Christmas and New Year break).

The first 25 pages of a 29 page judgment show every sign of being prepared with care. The central documentation, such as it is, is set out, as is the history summarised above. Included in the judgment is a factual account of the investigations carried out after the second valuation, even where the report was not in evidence, and no witness had been called.

Pages 25 to 27 are a bare summary of the expert evidence given on behalf of each party, being introduced with the observation that the plaintiffs' evidence was "*entirely different*" from that called by the defendants. Ten lines or thereabouts is spent on the plaintiffs' case - with a bare assertion of the conclusion "*the property had suffered from significant structural movement*" without any supporting argument or detail beyond saying: *"They drew my attention to a number of features concerning the property which they said confirmed their opinion ..."*

Then just over a page is spent on the defendants' case, with the conclusions from Mr Atkinson's report of 4th March 1997 being expressly quoted. Again, assertion and not supporting evidence or argument is there set out.

Next there is a bare reference to technical guidance for surveyors, and a publication called "Subsidence in Low Rise Buildings" (published by the Institute of Structural Engineers) to which the judge had been referred. Then he accurately set out the crucial issue, and what he had to decide.

And then, with all set up, he concluded:

"I have had the advantage not only of hearing the various witnesses give evidence but also of seeing the way in which they reacted to the questions that they were asked.

Having done so,

I prefer the Expert Evidence that was given for the Defendants to that which was given for the Plaintiffs.

I find, on the balance of probabilities, that the property was described reasonably accurately by Haining in his Report and that the opinion expressed by Mr Atkinson is correct.

Accordingly,

I find that it was not right to say in July 1995 that: "The property is affected by Structural Movement".

On the evidence which I have heard,

I find that there was no reason connected with the structural stability of the property which rendered it unmortgageable at the time when Haining inspected it in April 1994 and there is no such reason now that could justifiably do so.

Since the claims brought by:

(a) the Plaintiffs jointly for damages in respect of the condition of the property.

(b) the Second Plaintiff separately for damages in respect of personal injuries and loss

both depend upon establishing that Haining was negligent in the manner in which he described the property in his Mortgage Valuation Report dated 20th April 1994 it follows the claims fail and accordingly I dismiss them.

If necessary, I will hear further submissions from Counsel concerning the issue of costs."

That passage is the only passage in the judgment which purports to set out reasons for the decision. The appellants complain that in truth no reasons are given - we do not know why the judge preferred the defendants' expert evidence to that of the plaintiff. By way of illustration, it seems from the terms of the judgment that the judge got particular assistance from having seen the experts give evidence and "... the way in which they reacted to the questions that were asked." But that information leaves us none the wiser. We do not know why the oral evidence and the experts' reactions were so valuable, and so cannot judge whether that gave the judge good reason or no reason for preferring the defendants' experts. We know (as we have been shown from the skeleton arguments used for closing speeches) that the defendants through their counsel attacked Mr Johnson for the plaintiffs on the grounds of the superficiality of his evidence, and of a tendency to over-state his case, leading to a necessary retreat from an untenable position. Given the judge's conclusions, it is very possible, indeed perhaps likely, that the judge accepted the attack mounted on Mr Johnson. But this Court cannot properly infer that - to do so would be to guess, and that the Court cannot do.

Both counsel rightly accept that this is a case in which the judge's conclusion, that the property in question did not suffer from structural movement in April 1994, was one which was open to him on the evidence. And there is nothing in the text of the judgment to demonstrate or even suggest that he may have misapprehended any part of the evidence, or founded upon some illegitimate consideration, or anything of that kind. But the judgment is entirely opaque - it gives the judge's conclusions, but not his reasons for reaching that conclusion.

Accordingly the only complaint that is made here, that the judge failed to give reasons for his decision to prefer the evidence of the defendants' experts over that of the plaintiffs', is entirely free-standing. The case thus raises in stark form the question, when the failure of a judge at first instance to give reasons for a conclusion essential to his decision may of itself constitute a good ground of appeal.

That today's professional judge owes a general duty to give reasons is clear, (see ***R -v- Knightsbridge Crown Court ex parte International Sporting Club*** [1982] QB 304) although there are some exceptions. It does not always or even usually apply in the magistrates court, nor in some areas where the court's decision is more often than not a summary exercise of discretion - in particular orders for costs. For the general duty, see for example ***R v Harrow Crown Court ex p. Dave*** [1994] 1 AER 315, which was not cited to us but contains a useful review of earlier authority.

It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons. This is because issues are so infinitely various. For instance, when the court, in a case without documents depending on eye-witness accounts is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible (see DeSmith, Judicial Review of Administrative Action, 5th Edition, 9-049). But with expert evidence, it should usually be possible to be more explicit in giving reasons: see Bingham LJ in ***Eckersley -v- Binnie*** 18 Construction Law Reports 1 at page 77:

"In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons. The advantages enjoyed by the trial judge are great indeed, but they do not absolve the Court of Appeal from weighing, considering and comparing the evidence in the light of his findings, a task made longer but easier by possession of a verbatim transcript usually (as here) denied to the trial judge."

We make the following general comments on the 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 p. 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.

(3) The extent of the duty, or rather the reach of what is required to fulfill 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.

(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.

Mr Graeme McPherson, for the respondent defendants, reminded us of all the advantages enjoyed by a trial judge who has seen and heard the evidence. But, as he reminds us, Robert Goff LJ in ***Armagas Limited -v- Mundogas SA*** [1985] 1 Lloyds Reports at 56 quotes the "classic statement" of the trial judge's advantage from Lord Thankerton's speech in ***Watt -v- Thomas*** [1947] AC 484, where dealing with when the Court of Appeal may intervene he said: *"III The appellate court, either because the reasons given by the trial judge are not satisfactory or because it unmistakably so appears from the evidence may be satisfied that he has not taken proper advantage of having seen and heard the witnesses, and the matter will then become at large for the appellate court."*

That passage assumes the duty to give reasons, and for the appellate court to intervene when those reasons are unsatisfactory. To give no reasons cannot be satisfactory when reasons are required.

Mr McPherson submits that because of the "stark choice" between experts the judge in reality could do no more than prefer the conclusions of one to the conclusions of the other. This was because:

1) neither expert had a motive for favouring their client;

2) neither explanation for the cracks was inherently more likely;

3) there were "very few" incontrovertible facts and "virtually no" contemporaneous documents to resolve the conflict of opinion as to the cause of the cracks;

so all had to be resolved by the judge's conclusions based on the way the experts gave their evidence, and their demeanour in the witness box. It was clear that he preferred the defendants' experts therefore he accepted their reasoning and conclusions, and the judgment, and so could give his reasons shortly.

As we have already indicated, in a dispute over, say, who hit the first blow, that approach and such "reasons" expressed in an [unreasoned] preference may well be sufficient. But that is not the case.

There seem to us to be four things wrong with the respondents' analysis. First, we do not know whether the assumed thought process was the judge's actual thought process. Second, on what the judge said we do not know why he preferred the defendants' experts, nor whether that was for good reason or bad. We do not know because reasons were not given. Third, if the judge had the difficulty in choosing between the two accounts assumed by Mr McPherson, he must have been at least close to the situation where the cause of the damage could not be resolved - see ***Rhesa Shipping -v- Edmonds*** [1985] 1 WLR 948 at 955F to 956G. But if this was his difficulty he should have said so. Fourth, why did the defendants' experts performance in the witness box tip the scales? The judgment does not tell us.

Referring back to the passage quoted from Bingham LJ, it seems to us that the judge's preference for the defendants' expert (which was decisive) should have enabled him to give his reasons in the form of the "coherent reasoned rebuttal" therein referred to.

Accordingly, in our judgment this judge was under a duty to give reasons and did not do so. Without such reasons, his judgment is not transparent, and we cannot know whether the judge had adequate or inadequate reasons for the conclusion he reached.

It should not be assumed that the court that (for whatever reason) failed to give reasons had no reasons. Here, for example, it seems likely that the judge believed he had said enough. In that we differ from him. But one alternative remedy to quashing the decision is to invite or require the court to give reasons (see where this is done in the administrative law context - DeSmith 5th Edition 9-054 and 9-055). We considered that here. But by the time we were seised of the case, more than a year had passed since the hearing. It would not have been realistic for the judge to reconstitute his reasons. But, in accordance with the new Practice Direction on Leave to Appeal, leave should be sought from the trial judge immediately after judgment is delivered. On the application for leave, if a "no reasons" point is being taken, the potential respondents 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 application and at the hearing if leave be granted.

Accordingly, we do not regard this as an appropriate case to remit to the trial judge. Nor have we the evidence before us necessary to form our own view - for instance, we do not have the transcripts of the experts' evidence. Accordingly, we have no alternative but to allow the appeal, set aside the judgment, and order a new trial.

Order: Appeal allowed with costs

Mr Paul Darling (Instructed by Messrs Pannone & Partners, Manchester M3 2BU) appeared on behalf of the Appellant
Mr Graeme McPherson (Instructed by Messrs Wragge & Co, Birmingham B3 2AS) appeared on behalf of the Respondent