Neutral Citation Number: [2011] EWCA Civ 922

Case No: B3/2010/2700

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE GUILDFORD COUNTY COURT
His Honour Judge Robert Reid Q.C.
8GU02043

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE PATTEN
and
MR. JUSTICE HEDLEY

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Between :

Joanne Micklewright (on her own behalf and as executrix of the estate of CHRISTOPHER JOHN IMISON Deceased)	**Appellant**
- and -	
Surrey County Council	**Respondent**

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- -

Mr. D Sanderson (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Mr. A. Piper (instructed by **Veitch Penny LLP**) for the **Respondent**

Hearing dates : 14th June 2011

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Approved Judgment

Mr Justice Hedley:

1. On 12th August 2007 Christopher Imison decided to go on a bike ride in Windsor Great Park with his partner Joanne Micklewright and their 13 year old son David. Tragically it was the last thing they ever did together for as Mr. Imison was unloading their bicycles from the family car he was struck and fatally injured by an oak tree branch weighing nearly a ton which broke away from the trunk some 25 feet above where he was standing. He died in hospital on the 19th August 2007.

2. Miss Micklewright brought actions in the Guildford County Court under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 on behalf of herself and as executrix of Mr. Imison's estate against Surrey County Council as occupiers and as the highway authority. This is her appeal from the dismissal of those actions on 20th October 2010 by His Honour Judge Robert Reid Q.C. by an order and in a reserved judgment of that date. The trial judge did unusually give permission to appeal.

3. Prior to the trial quantum had been agreed between the parties in the sum of £500,000 subject to liability. It was never suggested that Mr. Imison was otherwise than wholly innocent in respect of this event. The key, and in the end the only, issue was whether the claimant could prove negligence in the local authority.

4. The facts of the case are uncontroversially set out by the judge in paragraphs 4 - 14 of his judgment and only a bare summary of them is necessary to establish the context of this appeal. The accident occurred on Wick Lane, a public road affording access to Virginia Water and the Great Park. The road had at some point been widened to accommodate parking bays in one of which stood the family car. The road had substantial tree cover; the relevant oak tree was some 200-300 years old and stood at a height of nearly 100 feet with a crown spread extending to 50 feet. It was a very substantial mature oak tree which effectively overhung the whole width of the road.

5. The defendant local authority had responsibility for a network of roads of a total length of about 3,600 miles bordered by some 2 million trees. In December 1975 the Department of the Environment issued a circular (52/75) relating to the inspection of highway trees which contained detailed advice as to the highway authority's duties in that regard. The learned judge found that it was not until the appointment of Mr. Banks in 2004 (some 29 years later) that the defendants sought to address this question of inspection. In the event the judge held that the defendants, although in the process of developing one, had at the date of the accident no proper system of inspection in place. That finding was not challenged before us. Moreover, it was therefore the case that there were no written records in respect of this tree although there should have been such.

6. An additional problem confronted the parties and the judge. In the aftermath of the accident (and presumably without knowledge of its seriousness) employees of the defendants attended, cleared the road, sawed up the branch into logs and seemed to have removed the greater part of the debris. Mr. Banks attended the following day and took photographs but it was only after Mr. Imison's death and the involvement of the coroner that a full investigation was carried out. That was obviously hampered by the paucity of the evidence that remained. It was claimed that only 5% of the debris remained (an assertion that Judge Reid Q.C. did not reject) and that even that may

have been mixed with other branches of other trees which would undoubtedly have been brought down in the fall. However, for a reason never explained to us (but reflected in the costs order made by the judge) Mr. Banks' photographs were not disclosed until the day before the trial began. Thus the parties and their expert arboriculturalists were working with very restricted information.

7. The learned judge addressed the applicable law in paragraphs 15-20 of his judgment and no issue is taken with his formulation. The defendant's "…duty is to take such care as in all the circumstances of the case is reasonable." In the light of the judge's unchallenged findings only two aspects of the directions in law that he applied are material to this appeal.

8. It is therefore necessary to set out two sections of his judgment. At paragraph 18, Judge Reid Q.C. says this -

> "It does not follow that because an owner or occupier fails in his duty to make the necessary inspections of his trees that he will automatically be liable if someone is injured by one of them. It may be the tree was suffering from a defect that would not be revealed by inspection. Thus in **Caminer v Northern & London IT** [1951] AC 88 at 103 Lord Normand observed that the defendants did not comply with their duty but "it is no less plain that, if they had, it would have made no difference. The tree was just such a tree as [the expert witness] says the owner might consider safe." It is necessary for the claimant to show that if the owner or occupier had complied with his duty on the balance of probability the defect or danger in the tree would have been noticed. It is important when considering whether the owner or occupier has complied with his duty to avoid using the benefit of hindsight."

That was, and is accepted by the parties to be, an impeccable direction. Then the learned judge went on to consider the difficulties that had been raised by the disposal of relevant evidence. In that regard he said this -

> "This failure to conduct an immediate and thorough investigation into the cause of the branch's failure made, it was said, the case analogous to **Keefe v Isle of Man Steam Packet Co** [2010] EWCA Civ 683 in which Longmore LJ at para 19 in the context of a Defendant's failure to make or keep proper records said that: "…the Court should judge the Claimant's evidence benevolently and the Defendant's critically."
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> 20. In my judgment that is a correct approach. The Claimant has been put at a substantial disadvantage in advancing her claim by the manner in which the Defendant dealt with the remnants of the branch once it had fallen. In those circumstances I take the view that the proper way to approach the evidence is that suggested by Longmore LJ. This does not however reverse the burden of proof or relieve the Claimant of the need to prove her claim on the balance of probabilities."

As appeared in the argument, a key issue on this appeal is whether the judge, having thus correctly directed himself, in fact applied that direction to his evaluation of the evidence as he should have done.

9. Having found that the defendants had no proper system of inspection, the learned judge had then to consider the following questions: (i) what sort of inspection would have been required? (ii) had such inspection been carried out, would it have revealed anything warranting a more expert inspection? and (iii) if so, should such an inspection have resulted in the removal of this branch? The learned judge concluded (and this is not capable of challenge) that the type of inspection required was "a quick visual inspection carried out by a person with a working knowledge of trees as defined by the HSE". The whole focus of the appeal was in effect on the judge's approach to and answer to (ii) above. Since he answered that in the negative, (iii) did not receive close attention.

10. That being the case and given the instinctive sympathy that all must have for the appellant, it is necessary to remember the proper role of this court in a case such as this. The judge has correctly found the facts that provide the context of this case. He has correctly directed himself as to the law. It is not in those circumstances for this court to rehear the case. Counsel for the appellant sought to persuade us that the judge should have preferred the evidence of the claimant's expert to that of the defendant. That is not our proper role. It is proper that any appellate court should bear in mind when considering an appeal on essentially factual grounds the words of Lord Hoffman in **Piglowska** [1999] 1 WLR 1360 (HL) at page 1372. This was a family appeal but the words cited below are of general application. Lord Hoffman begins with reference to an earlier case G -v- G -

> "This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Plc.* [1997] R.P.C. 1, 45:
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> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
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> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this

> case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account… An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

11. In my respectful opinion these words are timely and appropriate. In my judgment we should not interfere in this case unless we are indeed persuaded that the judge did not in fact apply the principles in **Keefe** to his evaluation of the evidence in this case and that such a failure undermines or puts in serious doubt his conclusion. If that approach is adopted on the facts of this case then it seems to me that what requires close consideration is the judge's conclusion that in respect of discolouration of bark and/or foliage, the claimant had failed to prove what could have been seen by a competent inspector and that that would have led to a more detailed investigation.

12. There was a dispute as to why the branch had failed in the first place. The question was whether it was due to internal decay or to a recognised but not understood phenomenon known as "Summer branch drop". The judge expressed his finding at paragraph 47 and he discerned the two questions which resulted from it, when he said -

> "In my judgment it is of little importance whether the failure of the branch was caused by the decay alone or summer branch drop or some combination of the two factors. On any view the extensive internal decay was at least a major factor in the branch's failure. The substantial question is whether an inspection of the type the experts agreed was required would have revealed the internal decay. This involves two stages of inquiry: first whether the routine inspection which the experts agreed was what was appropriate in the first instance would have led to a request for an inspection by a qualified arboriculturalist, and, if so, whether the qualified arboriculturalist's inspections would have led to the removal of the branch so preventing the accident."

I would accept that finding as one he was entitled to make and would agree with his formulation of the key questions. Indeed I would accept further his view expressed at paragraph 60 that "there was indeed irrefutable evidence of significant internal decay."

13. These findings in my judgment make it probable that had a preliminary inspection warranted an expert arboriculturalist inspection then that latter inspection would or should have revealed the extent of the decay and would or should have led to the removal of the branch. That issue is not specifically addressed in the judgment because it did not arise given the judge's finding that the claimant could not prove facts which would put a reasonable inspector on notice. That said, in my view, that is a reasonable and proper inference from a finding (had one been made) that an expert

inspection was warranted. Accordingly it is to the judge's finding that no expert inspection was warranted that I must turn.

14. It was the evidence of the claimant's expert that there was a strong likelihood that the branch which failed would have had significantly discoloured leaves during the summer months prior to failure. The defendant's expert had written (para 3.2.1. of his report) "Indeed, trees can remain intact for the majority of their lives with advanced fungal decay and there are usually obvious visible signs of when failure through decay becomes imminent. These include external fungal fruiting bodies, cavities, dead bark and dead or declining foliage" but he then said, "As far as I am aware, none of these features were present in this tree or on this branch." Mr. Banks, the defendants' specialist employee found no such evidence. The judge acknowledges this evidence at paragraph 53 where he says -

> "The experts both expressed the view that there are "usually obvious signs when failure through decay alone becomes imminent" (per Mr. Barrel) and "There is also a strong likelihood that the branch which failed would have had significantly discoloured leaves during the summer months prior to its failure" (per Mr. Cocking)."

However, he makes no specific finding on that.

15. What was clearly decisive for the judge was the evidence of Mr. Banks as to what he saw at the scene and, as a finding, that is beyond challenge. The question is whether the absence of anything viewed by Mr. Banks at the scene could properly yield the inference that there never had been anything to see especially if such inference was being considered in the light of **Keefe** as almost all relevant material had been removed.

16. I have reflected long and carefully on these issues, conscious as I am of their profound importance to the parties in this case. The key submission is that the judge has not applied a 'benevolent' approach, as he said he should, to all the available inferences in this case. In particular, the claimant seeks to challenge his finding that there would have been no identifiable discolouration of bark or foliage given his findings about decay. Whilst it is accepted that the decay was found principally in the non-living heartwood and that failure by decay could not occur unless sapwood and the cambium had been affected, the claimant draws attention to the finding that "the extensive internal decay was at least a major factor in the branch's failure." There is therefore available, so it is said, an inference that the sapwood and cambium were affected and thus that there would have been external signs of decay. In those circumstances it is submitted the learned judge, applying **Keefe**, should have drawn those inferences and not disposed of the matter on a failure to discharge the burden of proof.

17. Whilst therefore Judge Reid Q.C. was entitled to conclude that no-one had actually seen any external signs of decay, it is submitted that he should not thereby have concluded that the claimant had failed to prove that there were any amongst the substantial element of fallen branch removed before inspection. Had he drawn that inference he would still have had to ask himself whether that would have justified a reference for expert reception. Counsel for the defendants rightly pointed out that the most that would be required was an annual inspection and the experts said once every

1 to 2 years. For much of that time foliage may not have been visible. However, not only was bark always visible but such trees should be inspected ideally when in leaf, according to the expert evidence.

18. It is important to see the context of the case in assessing the claimant's submissions. On the one hand a blameless life has been lost and those who seek to establish a case have been deprived of key evidence by the defendant's failure to have a system of inspection, to keep written records and to ensure that the fallen branch was available for inspection. The judge acknowledged that she was thereby significantly disadvantaged. On the other hand legal liability and not sympathy is the only proper basis for an award of damages. The defendant's failures and their delay in responding to the DoE circular do not endear them to a sympathetic ear. On the other hand their field of inspection was huge and their resources inevitably finite. Of all these matters, I remind myself.

19. I have considered anxiously whether the claimant's submissions have undermined the judgment and I have tested the judgment against those submissions. At the end of the day, however, I have reached the conclusion that these submissions go no further than demonstrating that the case could have been decided differently. This Court is quite simply not permitted to intervene in these circumstances for all the reasons given by Lord Hoffman in **Piglowska** (supra). The reality is that this challenge is directed to issues of fact in circumstances where the learned judge had heard the experts and Mr. Banks, correctly directed himself as to the law and reminded himself of the disadvantage to the claimant before making his findings and reaching his conclusion.

20. It is always discomforting where a family without any culpability, having suffered a catastrophic loss are forced to do so without compensation but this is the inevitable result of a law which ties compensation to proof of negligence. For the reasons I have set out, I have come to the conclusion that this appeal should be dismissed.

Lord Justice Patten:

I agree

Lord Justice Mummery:

I also agree