

Case No: A2/2013/1564

Neutral Citation Number: [2014] EWCA Civ 648
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM DISTRICT REGISTRY
(HIS HONOUR JUDGE MCKENNA)

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday, 24 March 2014

B E F O R E:

LORD JUSTICE SULLIVAN

LORD JUSTICE KITCHIN

LORD JUSTICE FLOYD

ANN MARIE HUBBARD

Appellant/Claimant

-v-

(1) BANK OF SCOTLAND PLC (TRADING AS BIRMINGHAM MIDSHIRES)

(2) BANK OF SCOTLAND PLC (TRADING AS COLLEYS)

Respondent/Defendant

(DAR Transcript of
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Official Shorthand Writers to the Court)

Stephen Hockman QC and Mr James Harris (instructed by Direct Access) appeared on
behalf of the Appellant

Mr Ian Clarke (instructed by Addleshaw Goddard) appeared on behalf of the Respondent

J U D G M E N T

1. LORD JUSTICE FLOYD: This is an appeal from the judgment of His Honour Judge McKenna, sitting as a High Court Judge in Birmingham on 22 May 2013. By his order, the judge dismissed an action brought by the appellant, Mrs Ann Marie Hubbard, against the Bank of Scotland ("the Bank") arising out of an allegedly negligent survey carried out by the bank's employed surveyor.
2. Mrs Hubbard is the owner of Ashton House, which is on Pattingham Road, Perton Ridge, Wolverhampton ("the Property"). The Property is a large, post-war, four-bedroom detached house in a private residential area said to be one of Wolverhampton's finest locations. The plot is at the top of a ridge and slopes moderately steeply down towards the south west. Prior to 1884, the land had been quarried. The quarry had been filled in by 1959, but the rock wall of the former quarry ran across the land. In 1979, when the house was built, it was located on its plot in such a way that it straddled the quarry wall underneath, so that the side of the house facing the road was built on rock but the garden side built on soft infill material.
3. Mrs Hubbard purchased the Property with the assistance of a loan provided by the Bank under their trading name, Birmingham Midshires. The survey which is the focus of this action was carried out by Mr RJ Handley FRICS, a surveyor employed by the Bank, albeit this time under their trading name of Colleys. These different trading names of the Bank account for the fact that there are two names on the pleadings but there was in reality only one defendant, namely the Bank.
4. Mrs Hubbard paid a fee of £715 for her survey and valuation report and it was addressed to her.
5. Mr Handley carried out his inspection of the Property on 14 October 2005. Mr and Mrs Hubbard were present at the Property when the valuation inspection took place. Mr Handley was not called as a witness at the trial, but his notes of the inspection included the following:

"NB* Rear bedroom window frame distorted, stepped crack to side wall.
Category 0: no RMNFA (no recent movement, no further action –
brickwork displaced slightly and slight cracks to rear elevation category
0. Repaired on rear wall also."
6. The judge was faced with the task of establishing what was in fact the condition of the Property in 2005 at the time of Mr Handley's inspection. He had evidence from later instructed experts, such as a Dr Rutherford, but Dr Rutherford first inspected the Property in 2010 and was having to work backwards from the condition of the Property at that date. The judge concluded in the end that Mr Handley's notes provided the best evidence available of what was visible in 2005 in terms of cracking at the Property. Those notes had the benefit of being contemporaneous. In addition, there was a contemporaneous photograph showing evidence of cracking, identified as photograph B364. The cracking shown in that photograph reflected Mr Handley's notes.
7. Mrs Hubbard had, in her oral evidence, accepted that she had only seen one crack, albeit she had at one time contended for the existence of very much more extensive

cracking. Photograph B364 does indeed show the cracking that Mr Handley records in his notes and also supports his view that there was some distortion of the window. The cracking to the right of the window as one faces it is a little difficult to see on the photograph, which was before the judge, which may account for the fact that Mrs Hubbard saw only one crack. Mr Handley clearly saw them both. At the inspection when Mrs Hubbard specifically called the attention of Mr Handley to the cracking which she could see, she had asked Mr Handley if this was okay and Mr Handley had told her that the cracks were old and nothing to worry about.

8. Mr Handley's inspection was intended to, and ultimately did, produce a valuation report. However, before the valuation report was received, Mr Hubbard received a telephone call from the broker following the inspection to say that the valuation had been received and was okay. It is on this basis ultimately that Mrs Hubbard contended that she had relied on the report to purchase the Property, saying that she had known of the content of her husband's phone call. Even that case on causation suffered some further damage during her cross-examination, when Mrs Hubbard said that the full extent of her understanding of the position was that the mortgage was going ahead. That, of course, told her little, if anything, about the detailed content of the report.
9. Mr Handley's valuation report is dated 17 October 2005. It is common ground that it was not and did not purport to be a full structural survey. He valued the Property at some £690,000 in its present condition and in the current state of the market. Under the heading "Matters affecting value", he reported the following:

"The property is in acceptable condition for lending purposes. My valuation reflects the fact that there is wear and tear to some items and that maintenance, repair or upgrading would be required.

The property has suffered previous movement but I saw no evidence to suggest this is ongoing."

10. The valuation report contained guidance notes on the front page and reproduced again on the second page. They say this:

"You have chosen a valuation report which is a limited inspection of the property highlighting only those items which we consider will materially affect value. It is prepared on instructions from Birmingham Midshires in accordance with the RICS Mortgage Valuation Specification a copy of which is available on request.

Valuers cannot see through solids or see things that are hidden by wall and floor coverings. They will not move furniture or obstructions inside or outside, lift carpets, crawl under floors, climb ladders outside or go on roofs or fully enter roof spaces. Valuers will look at the outside of the property from the garden and adjacent public areas.

...

You still have the option to request a more detailed report and we would

be pleased to help you with this.

...

If you wish to discuss any technical aspects of this report please contact the valuer.

Do not forget to read the Advice for Applicants section – it is important."

11. The third page of the valuation report is the "Advice for Applicants" section. The third and fourth bullet points read:

"• Problems or issues may have been highlighted and you should get your own independent advice. You may require reports and estimates. When obtaining these we would suggest you use a reputable contractor with an insurance backed guarantee and if applicable adequate professional indemnity insurance and who is preferably a member of a trade organisation.

• When reports and estimates are being obtained, your contractor may go further than the valuer, for example lifting carpets and floorboards, and may reveal more serious problems."

12. As indicated in the guidance note, it is common ground that the RICS Mortgage Valuation Specification ("the MVS") applied to the carrying out of this survey. Under the heading "The Valuer's Role", the MVS provides at paragraph 2.2:

"The role of the valuer, who must have knowledge of and experience in the valuation of the residential property in the particular locality, is:

• to advise the lender of the Market Value, usually excluding development value at the date of inspection;

• to advise the lender as to the nature of the property and any factors likely to affect its value..."

Paragraph 5.2 contains a list of relevant factors. Amongst the relevant factors are, not surprisingly:

"The apparent general state of and liability for repair, the construction and apparent major defects, liability to subsidence, flooding, and/or other risks. Particular care must be taken with non-traditional construction."

Paragraph 6 deals with the report. Paragraph 6.2 is in the following terms:

"If it is suspected that hidden defects exist which could have a material effect on the value of the property, the valuer should advise of this and recommend more extensive investigation by the intending borrower before entering into a legal commitment to purchase ... It may be

appropriate, in exceptional circumstances, to defer making a valuation until the results of the further investigations are known."

13. Contracts for the sale and purchase of the Property were exchanged on 18 November 2005 and the sale of the Property was completed on 16 December of that year. Following completion, Mrs Hubbard noticed cracking at the rear left-hand corner of the Property, which led her to raise the issue with the Bank in March 2007. She later made a claim on her insurance and received a payment. It was common ground that the Property has now suffered from differential subsidence. Adjacent to the area where cracking was observed, there were drains running beneath the extension which were leaking. In 2008, in addition, there was a significant burst water main at the Property and this had led to underpinning work being carried out and paid for by insurers.
14. By 2010, Mrs Hubbard and her husband had become more concerned still about cracking. They instructed a valuer who suggested that a structural survey be undertaken. Dr Rutherford was commissioned and produced a full structural report on 15 November 2010. Dr Rutherford identified progressive movement and recommended the underpinning. It was not in fact underpinned until 2011.
15. The claimant's case was summarised by the judge as being that the report (a) failed to state that the subsidence either was (or, if that could not be positively determined, might be) ongoing; (b) failed to advise the claimant to seek specialist advice; (c) failed to warn the claimant that the valuation should be reduced very substantially because of cracking. The Bank's case was firstly that in view of the absence of an amendment to the pleaded case, the admission that Mrs Hubbard did not read the report at all was fatal to her case. The judge summarised the way in which the Bank put its case on negligence in the following way:

"20. The defendant for its part asserts that the admission that the Claimant did not in fact receive Mr Handley's report anytime prior to exchange of contracts, in the absence of amendment, which was not sought, is fatal to the Claimant's case which must therefore fail since the matters set out in the Voluntary Further and Better Particulars of the Particulars of Claim as to relevance are not within the pleaded case. In the alternative, it is said on behalf of the Defendant that the Report was a Scheme One valuation which on its face identified its limits. It contained that which Mr Handley observed in October 2005 at which point there was no evidence that the property was the subject of subsidence and he cannot have been expected to predict later events, as opposed to reporting on the existing state of the property. The Report was accurate in what it reported and in so doing adequately discharged the duty of care by identifying an issue, subsidence, and recommending independent advice, which the Claimant did not act upon."

The dispute about the condition of the Property at the date of inspection was resolved by the judge in the way that I have indicated.

16. In addition to factual evidence, the judge had before him quite a panoply of expert evidence. There was firstly the report of a jointly instructed soil expert, Dr Austin. He gave evidence about the nature of the ground on which the house had been built, including the location of the quarry and its wall. Then both sides instructed a structural engineer. Mrs Hubbard called Dr Rutherford and the Bank called Mr Brewster. The judge, rightly, in my judgment, recognised crucially that neither of these experts could have had the opportunity of inspecting the Property at the relevant time and their evidence as to how they projected it might have appeared was of relatively little value.
17. Both sides called a valuation surveyor. Mrs Hubbard called Mr Perin and the Bank called Mr Close. Mr Perin's stance in his report was that the evidence of cracking on a property built on a steeply sloping site, together with the fact that there was a single-brick wrap-around extension, would have led him to provide a nil value report until a structural engineer had reported. The judge did not find Mr Perin's evidence convincing, particularly as it appeared that he had not read Mr Handley's report at the time that he prepared his report. He found for this reason and others that Mr Perin's evidence left much to be desired. He rejected the notion that what he called the "lie of the land", coupled with evidence of cracking, was something which should lead a valuer to the conclusion that there was a significant risk of further movement such as to have a material effect on value.
18. The judge set out Mr Close's opinion in summary, beginning at paragraph 44 of the judgment:

"44. Mr Close, for the Defendant, in his expert report dated 29 August 2002 [*sic*] at B495 and B504 opined as follows under the heading 'opinion':

- (i) It is my professional opinion that Robert Handley carried out his survey inspection and report with the requisite degree of care and skill expected of a Chartered surveyor and reached a conclusion open to him given the state of the property at the time. In his Report he noted that the property had suffered signs of previous movement (he identified the damage in his site notes as category 0 as defined by the Building Research Establishment as "negligible or very slight"). He also stated that there was wear and tear to some items and that maintenance, repair or upgrading would be required.
- (ii) Under RICS guidance notes for valuers on the valuation and inspection of residential property for mortgage purposes on behalf of Building Societies, Banks and other Lenders, it is expected that the valuer should have knowledge of and experience in the valuation of residential property in a particular area. However the RICS accepts that it is unrealistic to expect surveyors to be aware of each and every property (or any number of properties) in an area, which may have suffered

structural problems in the past unless they have had personal dealings with such properties, or there has been prominent press publicity advertising the fact.

I have canvassed a number of senior, well respected and locally based surveyors, (Martin Newey, Geoff Smith, Andrew Roddis and David Salmon) who value for major companies and lenders including Countrywide, Esurv, Connells, Barclays Bank etc and most were not aware of any structural problems in this immediate vicinity. None were aware that "the Ridge" included former infilled sand quarries or possible unstable ground.

RICS Guidance notes state with regard to neighbouring properties: The nature, use and apparent state of repair of neighbouring properties in the immediate vicinity should be considered only to the extent that they may materially affect the value of the subject property.

I would not expect Robin Handley or any other bank or bank surveyor to make such extensive enquiries with other surveyors when carrying out a basic Scheme One Mortgage Valuation unless he, or they, were aware of any significant problems in the immediate vicinity. As stated in paragraph 10, I believe that it was not common knowledge in 2005 of any prevalent structural issues'."

19. The judge preferred the evidence of Mr Close to that of Mr Perin. At paragraphs 48 and 49, the judge said the following:

"48. I prefer the evidence of Mr Close that Mr Handley had carried out his survey inspection with the requisite care and skill to be expected of a chartered surveyor and that the conclusion he reached to the effect that there was no evidence of recent movement was one open to him given the state of the property at the material time. The Claimant's own evidence, at least in her witness statement and the Voluntary Further and Better Particulars of the Particulars of Claim that Mr Handley had characterised them as old, which I accept, is corroborative. In coming to that conclusion Mr Handley may well have been wrong as a matter of fact although that is by no means certain in the light of the events post 2005, but he was not negligent. There was no breach of the RICS Guidelines, the fact of historic subsidence having been highlighted and the Claimant having been advised to get independent advice.

49. To my mind, in the light of Mr Close's evidence as to the absence of knowledge of the existence of the quarry by local surveyors, Mr Handley cannot fairly be criticised for not himself having been aware of it and in my judgment Mr Perin goes too far in suggesting that Mr Handley should

have advised on the need for a full structural survey simply because of the lie of the land. Moreover it is in my judgment significant that during the course of cross examination Mr Perin, albeit that attempts were made to retrieve the situation in re-examination, did concede that the Report was not such as to fall outside the practice as accepted as proper by a responsible body of chartered surveyors. To my mind that was indicative of the difficulty which Mr Perin had in maintaining the position he advocated in his Report."

20. The judge concluded at paragraph 50 that, on the totality of the evidence, he concluded that in providing the report, Mr Handley acted in accordance with practice accepted as proper by a responsible body of chartered surveyors skilled in their particular field and had not been negligent. In those circumstances, the judge did not have to decide the issue of causation, although he did go on to say that Mrs Hubbard faced difficulties in that regard as well.
21. The judge refused permission to appeal. Fulford LJ refused permission to appeal to this court on the papers, faced with a large number of grounds of appeal. At an oral hearing, I gave permission to appeal on much more limited grounds, summarised in a skeleton argument which we have before us.
22. Mr Hockman QC submits that the judge fell into error in the final sentence of paragraph 48 of his judgment in saying that Mrs Hubbard was advised to get independent advice. He submits that that conclusion was based on an incorrect reading of Mr Handley's report. He submits that the guidance note and advice for applicants, together with the statement about movement, would lead a reader of the report to conclude that there was no need to obtain further advice from a structural surveyor. He submits that, given the appearance and extent of the admitted cracking with which Mr Handley was faced, Mr Handley plainly should have recommended the taking of that advice and the judge was plainly wrong to conclude otherwise.
23. Mr Hockman QC has stressed that, whether or not subsidence had taken place recently, it could occur at some time in the future. Mr Handley was under a duty to warn of the risk of the possible future movement of Ashton House. Mr Hockman QC also submits that the judge narrowed and misstated the question which he had to decide when he relied solely, as he submitted, on the conclusion of Mr Close that Mr Handley's conclusion that there was no recent movement was one which was open to Mr Handley. Even if there was no evidence of movement, Mr Handley should have advised that there was nevertheless a risk of future movement sufficient to require a structural report to be recommended.
24. To start with the question of whether the Bank positively recommended Mrs Hubbard to take independent advice is to my mind to approach the question from the wrong end. As I think Mr Hockman QC recognises, the Bank will not be liable for the contents of the valuation report unless they can show that in the light of the facts which Mr Handley knew or ought to have known in October 2005 a reasonably competent surveyor providing a valuation report of the kind which Mr Handley was providing should have recommended Mrs Hubbard to take independent advice in the form of a

structural survey. It is only if Mrs Hubbard can establish that primary proposition that it becomes at all relevant to ask whether Mr Handley did in fact so advise, reading the report as it should be read.

25. On the primary proposition, the judge was faced with rival expert views. However, having come to the conclusion that he preferred the evidence of Mr Close, he did not simply accept it uncritically. Thus, for example, he considered that Mr Close made a telling point when he said that surveyors would regularly see evidence of past movement and would have to make a judgment as to whether such movement was ongoing. He accepted the further evidence of Mr Close that a reasonable surveyor in the position of Mr Handley, who saw evidence of movement which appeared to be long-standing, would go on to say whether there was evidence that it was ongoing. Mr Handley formed the view that the crack was category 0, which, according to the Building Research Establishment, means negligible or very slight. There was evidence before the judge which showed that a category 0 crack would be of a width of less than 0.1 mm. Mr Hockman QC said that if the judge was accepting that dimension as the thickness of the cracks before they were filled, then he was in error. He failed to take account of some evidence of Mr Perin that one could not fill a crack of thickness of only 0.1 mm and thus the original crack must have been somewhat larger, although he did not suggest by how much. I do not think that that point takes this case much further. The judge did not decide the case on the precise thickness of the cracks.
26. Mr Handley plainly did form the view that the cracks were long-standing ones. That view was communicated to Mrs Hubbard at the inspection. It is not suggested on this appeal that that view was a negligent one to take. The view that there was no evidence that movement was ongoing was also one which Mr Close considered to be open to Mr Handley, based on what Mr Handley knew. Mr Handley communicated his genuine professional views about the cracks to Mrs Hubbard in his report.
27. So far as Mr Perin's evidence is concerned, Mr Hockman QC submitted that the judge was wrong to say that Mr Perin conceded that Mr Handley's report was not such as to fall outside practice accepted as reasonable. We were shown the passages of cross-examination and re-examination of Mr Perin before the judge. There is some force in Mr Hockman QC's submission, so far as we are able to assess it by reference to the transcripts, that Mr Perin may not have been intending to go as far as the judge took him to have gone. The judge, however, drew attention at the end of paragraph 50 of his judgment that this point was only indicative of the difficulty which Mr Handley had in maintaining the position he advanced in his report. The judge was still, in my judgment, entitled to reject Mr Perin's approach to the primary question, namely that the evidence of cracking of any kind, plus the position of a house on a slope, was sufficient for a valuation surveyor to consider that a full structural survey was necessary. In saying that Mr Perin went too far in that assessment, the judge was no doubt preferring the evidence of Mr Close that valuation surveyors frequently did form exactly the sort of judgment which Mr Handley arrived at in this case.
28. It is also important to bear in mind the basis on which the report is given. The report was not a full structural survey. Its limitations were amply and clearly spelled out in the guidance notes and advice sections of the form. Mrs Hubbard could have been in

no doubt had she read the valuation report that the surveyor was instructed to advise on matters relevant to valuation, not to provide a full structural appraisal of the Property. Mr Handley's duty was thus a more limited one than that of a structural surveyor. A structural surveyor is expected to look beyond the surface. As the guidance notes make clear, that is something which the valuation surveyor is not able or expected to do.

29. Mr Hockman QC seeks to support Mrs Hubbard's case by reference to three further points. He refers to clause 6.2.1 of the MVS, which I have set out above and which recommends that a valuer should advise on suspicions about hidden defects which could have a material effect on the value of the Property and recommend more extensive investigations before entering into a legal commitment to purchase. However, Mr Handley did not in fact think or suspect that the defect was one which could have a material effect on the valuation of the Property, as his notes recorded. He considered that the crack was small, old and not ongoing. The obligation to recommend more extensive investigations did not arise by virtue of any suspicion which Mr Handley actually had. Whether Mr Handley ought to have had any such suspicion is the matter which was the subject of the rival views of the experts and on which the judge preferred the evidence of Mr Close. It is telling that there was in fact no positive expert evidence of anything which was or should have been apparent to Mr Handley which could suggest ongoing movement and therefore a material effect on value.
30. Secondly, Mr Hockman QC submits that Mr Handley had no information about the ground underneath the Property, despite the requirement in paragraph 2.2 of the MVS that a surveyor must have knowledge of and experience in the valuation of properties in the particular locality. I do not think this point helps. Firstly, the paragraph of the MVS is not in my view suggesting that surveyors should carry out specific investigations about the structure of the subsoil. Secondly, the judge found as a fact that local surveyors did not in general know anything about a problem of subsidence in the area, or the existence of the old quarry. It is simply not open to us on this appeal to go behind the judge's finding of fact.
31. Mr Hockman QC's third point is, in my view, also of no weight. He says that the unchallenged evidence of the jointly instructed soil expert, Dr Austin, was that where a building is constructed on a hard base at the front and a soft base at the back, cracking can take place when there is water inundation because the water strips away part of the soft base, and thus a differential settlement can occur. Accepting all this as true, once one accepts, as the judge did, that Mr Handley neither knew nor ought to have known of the existence of the quarry or the nature of the subsoil, this expert evidence falls away. Mr Handley was not a soil expert and, more importantly, was not instructed to do a ground or geological survey; his job was to produce a valuation on the basis of his visual inspection, as the guidance notes point out that the valuer cannot see through solids.
32. Thus far, it is difficult to see in what respect Mr Handley's conduct fell below that of a reasonable surveyor carrying out a valuation report of this particular kind. Mrs Hubbard's case must, as it seems to me, depend on showing that it is on the face of it

negligent for a valuation surveyor in these circumstances, who sees a small, long-standing crack which displays no signs of ongoing movement, to fail to recommend a full structural survey. The judge regarded this proposition as unrealistic and I do as well. To set the duty at that level would mean that the sale of any property which displayed cracking of almost any kind would be held up pending a full structural survey. Such a conclusion would, I would have thought, not be welcome by vendors, by lenders or by borrowers.

33. Once it is accepted that it lies properly within the expertise of a valuation surveyor to form a view on the likelihood of ongoing movement to a house, and the view which he comes to is one which he is reasonably entitled to reach, then at least within the context of a limited valuation survey of the kind in issue in this case, the valuation surveyor's duty does not require him to recommend a full structural report. The judge was entitled to hold on the material before him that Mr Handley's report was not negligent. That conclusion makes it unnecessary to decide whether the judge was right in the final sentence of paragraph 48 to say that the report did specifically recommend Mrs Hubbard to take independent advice. The report certainly does not advise her not to take such advice; it points out that she is free to do so on technical matters, of which this is plainly an example. I think a fairer reading of the report lies between those two extremes: it reminds Mrs Hubbard of the availability of more detailed advice should she decide to take it and consider it worthwhile. It follows that it is not necessary to decide what conclusion the judge should have reached on the issue of causation.
34. For my part, I would therefore dismiss this appeal.
35. LORD JUSTICE KITCHIN: I agree.
36. LORD JUSTICE SULLIVAN: I also agree.