SYKES v TAYLOR-ROSE

COURT OF APPEAL

(Peter Gibson and Mantell L.JJ. and Sir William Aldous): February 27, 2004[1]

[2004] EWCA Civ 299; [2004] 2 P. & C.R. 30

Diminution in value; Duty of disclosure; Misrepresentation; Murder; Sale of land;Sellers powers and duties

H1 *Land law—purchase of house—purchasers subsequently made aware that a murder had been committed at the property—purchasers wished to re-sell—Solicitor advised no obligation to disclose history of the house—completion of "Seller's Property Information Form"—question 13 "Is there any other information which you think the buyer might have a right to know?" answered negatively—house re-sold—whether duty to disclose murder—whether misrepresentation or negligent misrepresentation—whether question 13 required objective or subjective answer*

H2 The respondents purchased a house in 1998. They subsequently became aware that a horrific murder had been committed at the property in the early 1980s. Their solicitor advised them that the vendor had been under no obligation to disclose the history of the property and that they would be under no such obligation when they came to sell it. They continued to live in the house for another 18 months and then sold it to the appellants for £83,000. Prior to transfer, the respondents completed a "Seller's Property Information Form". In response to question 13 "Is there any other information which you think the buyer may have a right to know?", the answer was "No". The transfer was completed in December 2000. The appellants were unaware of the murder until July 2001 when they saw a TV documentary about it. The victim's body had been dismembered and the programme inferred that parts still existed within the property. The appellants moved out and put the house on the market. The appellants revealed the history of the house to potential buyers and the house sold for £75,000 which the appellants contended was £25,000 below its market value. The appellants instituted proceedings for damages for misrepresentation and/or negligent misrepresentation on the basis of the respondents' answer to question 13. H.H. Judge Langan Q.C. held that the respondents were not under a duty to disclose that the murder had taken place at the property, nor what had happened and dismissed the claim. The particular facts of the case did not make it an exception to the rule that there is no general duty on a vendor to disclose defects in the quality or expected enjoyment of land which he is selling, or matters which may affect the value of the land. Further, question 13 did not require

[1] Paragraph numbers in this judgment are as assigned by the court.

disclosure of facts which any reasonable person would think the buyer had a right to know. The question was directed at the state of mind of the vendors and whether, in their honest opinion, there was information to which a purchaser was entitled. On appeal, and cross-appeal on the order for costs, to the Court of Appeal:

H3 **Held,** dismissing the appeal and the cross-appeal, that the judge was right to conclude that it was necessary to construe question 13 and to conclude that question 13 was subjective and had to be answered honestly and did not require reasonable grounds for the belief. Although the question went wider than seeking information that the purchaser had a right to know, it was confined to information which the purchaser *might be* entitled to know. The appellants' submission that the question referred to any information that would affect the enjoyment of the property, whether or not the vendor thought that the purchaser had a right to know it, disregarded the plain meaning of the words. If all that was needed was an honest answer, then there could be no breach of duty. Further, given that the respondents had acted on the advice of their solicitor, it could not be said that they had acted negligently. The costs order was also within the ambit of the judge's discretion.

H4 **Cases referred to:**
(1) *Brown v Raphael* [1958] Ch. 636; [1958] 2 W.L.R. 647; [1958] 2 All E.R. 79
(2) *Economides v Commercial Union Assurance Co Plc* [1998] Q.B. 587; [1997] 3 W.L.R. 1066; [1997] 3 All E.R. 636
(3) *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409; [2002] 3 All E.R. 385
(4) *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560; [1992] 2 W.L.R. 867; [1992] 1 All E.R. 865
(5) *Taylor v Hamer* [2002] EWCA Civ 1130; [2003] 1 P. & C.R. D6
(6) *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016; [1994] 3 All E.R. 932

H5 **Legislation referred to:**
Civil Procedure Rules 1998, rr.44.3(1), (2), (4) and (5)

H6 **Appeal** by the claimants, Alan Ernest Sykes and Susan Sykes, from a decision of H.H. Judge Langan Q.C. given on July 8, 2003 in the Leeds County Court. The learned judge thereby dismissed a claim for damages against the defendants, James Walker Taylor-Rose and Alison Claire Taylor-Rose, for alleged misrepresentation in the sale of a house at 16 Stillwell Drive, Sandal, Wakefield. The facts are stated in the judgment of Sir William Aldous.

H7 *Clive Freedman Q.C.* and *Daniel Lightman*, instructed by Levi & Co., Leeds, for the appellants.
Christopher Wilkins, instructed by Edwards Geldard, Nottingham, for the respondents.

JUDGMENT

1 **PETER GIBSON L.J.:** I will ask Sir William Aldous to give the first judgment.

2 **SIR WILLIAM ALDOUS:** This is an appeal by Mr and Mrs Sykes against an order of H.H. Judge Langan Q.C. of July 8, 2003 which dismissed their claim for damages.

3 The foundation for the proceedings is the events that happened in the early 1980s at 16 Stillwell Drive, Sandal, Wakefield. That house was, at the time, owned by Dr and Mrs Perera. He was a dental biologist working at the University of Leeds. They had living with them a 13-year-old girl called Nilanthie. She went missing and, in 1985, it transpired that she was dead. The police investigation found that parts of her body were in Dr Perera's laboratory at the University and other parts were hidden around the house; but not every part of her body was discovered. Clearly the circumstances surrounding the girl's death were horrific. Dr Perera was arrested, tried for murder, and convicted.

4 Mr and Mrs Taylor-Rose, the respondents, purchased 16 Stillwell Drive in about September 1998. They did not at that time know about the murder. They remained unaware of what had happened until March 1999 when they received an anonymous note with photocopies of certain newspaper reports of the trial. Their initial reaction was one of shock. On their behalf Mrs Taylor-Rose's mother contacted the family solicitor, a Mr Edwards, who had acted for them on the purchase of the property. Having consulted his partner, Mr Edwards advised that the vendor of the property had not been under an obligation to disclose the history of the house and they would be under no such obligation when they came to sell it. In his witness statement he said he spoke to his partner, Mr Chapman. He continued:

> "By the time I spoke to Mr Chapman the attendance note of the conversation with Mr and Mrs Durham had been typed and returned to me. When I spoke to Mr Chapman I explained to him what had been said to me by Mr and Mrs Durham. During our conversation I made manuscript notes in blue ink on the typed note. The original note will show that the manuscript notes are in blue and black ink. The whole of the manuscript motes are in blue with the exception of the following matters."

I will come back to the actual note:

> "8. During my discussions with Mr Chapman we agreed that there had been no duty on the Seller to disclose the history of the Property to the Buyer and that there would be no duty on Mrs Taylor-Rose when they sold the Property in due course."

He went on to explain that he spoke to Mrs Taylor-Rose and he used the notes to advise her of the position. He concluded his evidence in this way:

> "10. In summary I informed Alison Taylor-Rose that there was no need for her to inform any potential buyer of the Property in due course of the history of the Property. My note was then filed away in accordance with my usual practice. I received no further contact regarding the Property from either Mr

and Mrs Durham or Mr and Mrs Taylor-Rose until we were subsequently asked to act on the sale of their property."

5 The note made by Mr Edwards is as follows:

"They informed me that their daughter had received an anonymous parcel of press cuttings relating to a particularly gruesome murder in the house they recently purchased in Wakefield.

The vendor was the wife of a dentist who apparently dismembered the body of his daughter. She was according to the press cuttings implicated in some way because she received a criminal sentence in relation to the matter.

The daughter cannot now live in the house.

Should this have been reported when they purchased the property."

The note goes on:

"No duty to inform necessarily.
Where does one draw the line.
If they sell and have difficulty might revise opinion based on facts.
Monitor other sales and note agents.
Look at valuers report—was valuer local. Did not say anything.
Don't do anything.
No need to say anything when you sell."

6 Mr and Mrs Taylor-Rose left the property on the Thursday after receiving the press cuttings, but returned on the following Monday and continued to live there for about 18 months.

7 In the autumn of 2000 the respondents decided to move to Derby. They put the house on the market and the appellants made an offer of £83,000 which was accepted. There followed the normal enquiries that take place on transfer of property. Those steps included sending to the respondents what is called "Seller's Property Information Form". As the answer to question 13 of that form is at the heart of this appeal, I must refer to a substantial part of it.

8 The form has at its head the words "IMPORTANT NOTE TO SELLERS". There follows these words:

"● Please complete this form carefully. It will be sent to the buyer's solicitor may be seen by the buyer. If you are unsure how to answer any of the questions, ask your solicitor before doing so.

● For many of the questions you need only tick the correct answer. Where necessary, please give more detailed answers on a separate sheet of paper. Then send all the replies to your solicitor so that the information can be passed to the buyer's solicitor.

● The answers should be those of the person whose name is on the deeds. If there is more than one of you, you should prepare the answers together.

● It is very important that your answers are correct because the buyer will rely on them in deciding whether to go ahead. Incorrect information given to the buyer through your solicitor, or mentioned to the buyer in conversation between you, may mean that the buyer can claim compensation from you or even refuse to complete the purchase.

- It does not matter if you do not know the answer to any question so long as you say so.
- The buyer will be told by his solicitor that he takes the property as it is. If he wants more information about it, he should get it from his own advisers, not from you.
- If anything changes after you fill in this questionnaire but before the sale is completed, tell your solicitor immediately. This is as important as giving the right answers in the first place."

9 The notes go on, but I can pass to the questions. The first question relates to the boundaries and asked:

> "1.1 Looking towards the house from the road, who either owns or accepts responsibility for the boundary:
>
> (a) on the left?
> (b) on the right?
> (c) at the back?"

10 Question 1.3 was as follows:

> "Do you know of any boundary being moved in the last 20 years?"

Question 2 relates to disputes, and asked:

> "2.1 Do you know of any disputes about this or any neighbouring property?"

Question 3 was concerned with notices and 4 with guarantees. Question 5 dealt with the services of gas, electricity, water supplies, sewage disposal and telephone cables. Question 6 asked about sharing with the neighbours and question 7 with arrangements and rights as follows:

> "Are there any other formal or informal arrangements which give someone else rights over your property?"

Question 8 related to occupiers; question 9 with restrictions; question 10 with planning; question 11 with fixtures, and question 12 with expenses. Question 13 was headed "general". It was in these terms:

> "Is there any other information which you think the buyer may have a right to know?"

That was answered "no".

11 The transfer of the property was completed and the appellants moved in on December 11, 2000. They were unaware of the murder that had taken place until they saw a documentary programme which was shown on Channel 5 on July 5, 2001. It revealed the facts surrounding the murder including that Dr Perera's victim was in fact a house slave. She had been murdered then buried in the back garden. After the police had expressed an interest in her whereabouts, the body had been exhumed and dissected into small pieces. A number of parts of her body were secreted around the house, but not all of them had been recovered. The programme inferred that there were parts which still existed within the property. The

programme stated that according to the investigating police officers the stench of rotting flesh pervaded the house when they entered it.

12 The appellants, and no doubt many others who saw the programme, were deeply affected by it. They moved out of the house on July 9. As the judge held:

> "11. . . . They were horrified by what they saw. I am not surprised at their reaction. The film was shown in court. It shows impressively the work done by forensic scientists in various disciplines but, in order to bring home to the viewer the nature of the work, the makers have necessarily had to go into disturbing detail with regard to Dr Perera's disposal of the remains of his victim.
>
> 12. The claimants' reaction was such that they no longer wanted to live in 16 Stillwell Drive. They put the house on the market. They took the view that they could not in conscience dispose of the property without disclosing what they had found out."

13 It was the appellants' case at trial that they could not sleep in the house and one of them was put on medication. As the judge held, the house was put up for sale and they decided that the circumstances had to be disclosed. After trying to sell the property for six months they eventually sold it to an investor for £75,000 although its market value without its history was, they contended, around £100,000.

14 In March 2002 the appellants started proceedings against the defendants for damages. By order of the District Judge, issues of liability were to be tried in advance of the assessment of damages. It was those issues that came before the judge. Before him, as he saw it, there were three main issues. First, were the respondents under a duty to disclose that the murder had been committed? The second issue turned upon the answer given by the respondents to question 13, which I have set out above. It was alleged that the answer given by the defendants to question 13 amounted to a misrepresentation and/or a negligent misrepresentation giving a foundation to the appellants' claim for damages. Thus the second question to be decided was: was the answer to question 13 wrong? The third issue only arose if the answer to question 13 was wrong. It required the court to decide whether the wrong answer to question 13 provided a good cause of action for damages.

15 The judge concluded that the respondents were not under a duty to disclose that the murder had taken place at the property, nor what had happened. He said this in para.[14]:

> "14. Mr Toone, on behalf of the claimants, accepts that there is no general duty on a vendor to disclose defects in the quality or expected enjoyment of land which he is selling, or matters which may affect the value of the land. He says, however, that
>
> '[the] particulars facts [of this case] are so heinous that they cannot be withheld because there is no other way [by] which the reasonably prudent purchaser would be able to discover them' (written submissions, para 5.14).
>
> 15. Mr Toone frankly accepts that he is asking the court to take a great leap forward in the development of the law. He says that the principle of caveat

emptor, hallowed though it may have been in the past, is nearing the end of its useful life. The terminal state of the principle is demonstrated, it is submitted, by the recent decision of the majority of the Court of Appeal in *Taylor v Hamer* [2002] EWCA Civ 1130. I have considered that case. It does not, in my judgment, mark the sea-change for which Mr Toone contends. It seems to me that the decision in *Taylor v Hamer* depended on the interplay of three relevant considerations. These were the definition of the property to be sold in the contract; a clause in that contract which stated that the purchaser was deemed to have inspected the property; and the giving of an answer regarding fixtures, surreptitiously removed by her husband, which the vendor was found to have given fraudulently. The case does not, in my judgment, have any wider significance.

16. Accordingly, I reject the first basis of the claim made in this case."

There is no appeal against the judge's conclusion upon that matter.

16 The judge then went on to consider the second issue. Rightly, in my view, he concluded that it was necessary to construe question 13. He recorded that counsel for the appellants had submitted that question 13 required disclosure of facts which any reasonable person would think the buyer had a right to know. That he rejected. He held that the question was directed to the state of mind of the vendors. They were asked to state whether or not, in their honest opinion, there was information to which a purchaser was entitled. His reasons were set out in paras [22], [23] and [24]:

"22. Secondly, that this is the thrust of question 13 becomes apparent if one contrasts it with every one of the preceding twelve questions. If one goes through the form, one can see that questions are variously directed to matters of fact, of knowledge or of opinion. The majority of the questions are concerned with matters of fact: typical examples are whether complaints about the property have been made or received (question 2.2), what services are connected to the property (5.1), or who lives there in addition to the vendors (8.1). A few questions relate explicitly to the vendors' knowledge: for instance, as to boundaries having been moved (question 1.3) or as to disputes as to the property being sold or any neighbouring property (question 2.1). Question 13 stands alone in that it asks for the vendors' opinion.

23. Thirdly, given the absence in property transactions of any general duty of disclosure, there seems to be to be a logical difficulty in giving an objective meaning to question 13. Such an interpretation would entail that the hypothetical reasonable vendor would be bound to disclose matters which, under the general law, he was entitled to keep to himself.

24. Lastly, the form in which the questions are set out is designed for completion by vendors themselves, not by their lawyers. If there were any ambiguity in question 13 (and I do not think there is), such an ambiguity should, in my judgment, properly be resolved by attributing to the question that meaning which is less onerous as regard the persons who are required to answer it."

17 The judge had no doubt as to the respondents' honesty and that the answers were honestly given. He therefore decided the second issue in favour of the respondents.

That being so, the judge had no need to consider the third issue, but he went on to do so and concluded that, even if there had been a misrepresentation, the facts did not provide a cause of action for damages.

18 Mr Freedman Q.C., who appeared in this court for the appellants, submitted that there were, in fact, four issues for the court to decide. First, what did the vendors know? He accepted that the documentary was more vivid than possibly the newspaper reports, but submitted that the vendors knew the details of what had happened. What they discovered shocked them. He drew to our attention parts of the cross-examination of the respondents. I need not read it all, but it is clear from p.7 of the cross-examination (p.61 of the appeal bundle) that Mrs Taylor-Rose knew that there had been a murder of a child by the person who occupied the property. She said she did not know the precise details, but she had been aware that there were body parts distributed throughout the house. She said she was shocked and upset, but it was an initial reaction. She did not know for certain that some of the body parts had not been recovered. She went on to explain that the weekend after knowing about the murder she went to live with her parents, but by Monday she was back to normal and then returned and lived at the property with her husband for another 18 months.

19 Mr Taylor-Rose's evidence was not dissimilar. He accepted that he read the newspaper cuttings and that they shocked him. He did not know whether they legally should have been told of the facts. He accepted that any murder was horrific and he endorsed his wife's evidence that they returned to the property and lived there for a further 18 months.

20 Mr Wilkins, who appeared on behalf of the respondents, accepted that the respondents knew that an horrific murder had taken place. Their shock was such that they moved out when they obtained the information on the Thursday, but came back into the house on the Monday. He submitted that the evidence did not establish that parts of the body could still be in the house.

21 The second issue that Mr Freedman said arose was at the heart of the appeal. It was: was it sufficient to answer question 13 in the way the respondents did? Was an honest statement sufficient? Mr Freedman submitted that the judge had made a fundamental error when he concluded that the answer to question 13 was correct as it reflected the vendors' honest opinion. He submitted that the conclusion of the judge failed to take into account that the stated opinion should be regarded as a statement of fact. In support he referred us to a passage in *Chitty on Contracts* at p.339, which reads:

> "... a statement of opinion ... may be regarded as a statement of fact, and therefore as a ground for avoiding a contract if the statement is false. Thus if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact."

22 Mr Freedman submitted that the answer to question 13 was a statement to the purchaser that the opinion expressed was based upon reasonable grounds given that the answer came from the vendors who would be expected to know the facts, not available from the usual searches which a buyer might undertake. It followed that the answer to question 13 was a misrepresentation. He also submitted that the

answer represented that there were no matters relating to the property which would or might affect the buyers' decision to proceed with the purchase and/or pay the agreed price, that is that there were no other matters not disclosed which might materially affect the enjoyment or value of the property.

23 In essence he submitted that the question to 13 implied that the vendor held the stated view on reasonable grounds. In support he referred us to *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016. In particular, he drew our attention to passages in the judgment of Hoffmann L.J. (as he then was). It is sufficient if I read from 1025:

> "It is well established that a statement that a vendor is not aware of a defect in title carries with it an implied representation that he has taken reasonable steps to ascertain whether any exists: cf *Brown v Raphael* [1958] Ch 636. This may require him, in the first instance, to examine his title deeds and other records, inspect the property and obtain legal advice. If there is anything to put him on inquiry as to the existence of a defect, he may have to pursue the matter further by questioning others or examining their documents. Thus in *Heywood v Mallelieu* (1883) 25 Ch D 357 a house sold at auction by a mortgagee 'subject to any easements' turned out to be subject to an easement in favour of a neighbour which entitled her to come and wash her clothes in the kitchen. The vendor's solicitor had been told that the neighbour claimed such a right but made no inquiries because he 'was not going to put other people on their guard about mere claims.' Bacon V-C said that this was not good enough. The vendor was put on inquiry and had a duty to investigate the claim further. He dismissed the vendor's action for specific performance. In my judgment, therefore, the answer 'Not so far as the vendor is aware' represents not merely that the vendor and his solicitor had no actual knowledge of a defect but also that they have made such investigations as could reasonably be expected to be made by or under the guidance of a prudent conveyancer."

24 Mr Freedman also drew to our attention passages in *Economides v Commercial Assurance Co Plc* [1998] Q.B. 587, and in particular the authorities that Simon Brown L.J. dealt with in his judgment. They included *Brown v Raphael* referred to by Hoffmann L.J. However, Simon Brown L.J. came to distinguish those cases.

25 In the *Economides* case the insured represented to the insurers that he believed that the full cost of replacing all the contents in his flat as new was £16,000. He contended that that meant that he honestly believed that £16,000 was the full value. The insurers submitted that the representation meant that the insured honestly believed that £16,000 was the full value and had reasonable grounds for that belief.

26 Simon Brown L.J., who gave the first judgment, held that the representation made was that the insured honestly held the opinion. He rejected the insurer's submissions. He said at 599G:

> "In my judgment the requirement is rather, as section 20(5) states, solely one of honesty.
>
> There are practical and policy considerations too. What, would amount to reasonable grounds for belief in this sort of situation. What must a

householder seeking contents insurance do? Must he obtain professional valuations of all his goods and chattels? The judge below held that:

> 'it would have been necessary for him to make substantially more inquiries than he did make before he could be said to have reasonable grounds for his belief. It is not necessary to specify what those inquiries might have involved.'

The problem with not specifying them, however, is that householders are left entirely uncertain of the obligations put upon them and at risk of having insurers seek to avoid liability under the policies. There would be endless scope for dispute. In my judgment, if insurers wish to place upon their assured an obligation to carry out specific inquiries or otherwise take steps to provide objective justification for their valuations, they must spell out these requirements in the proposal form."

27 Peter Gibson L.J. gave the second judgment. He came to the same conclusion as Simon Brown L.J. He concluded that the representation was not that there was objectively reasonable grounds for the belief of the insurers.

28 Clearly the facts of the *Economides* case and the present facts are very different. One relates to an insurance policy, the other relates to transfer of land. However, I believe that the reasons expressed by Simon Brown L.J. in the paragraphs that I have read are pertinent in the present case. The questions in the form were directed to the vendors. If the questions had required them to have reasonable grounds for their belief, difficult matters would arise as to what would amount to reasonable grounds for a belief in the variety of circumstances that could arise. Clearly vendors would, before answering the questions, need to seek professional advice. The answer "no" would open up endless scope for dispute. In any case the question itself makes no reference to a requirement for the belief to be based upon reasonable grounds and (for reasons which I will give later) I can see no reason why such an obligation should be imported. The question is intended to be answered by persons with no legal training and its words should be given their normal and ordinary meaning. In my view the judge was correct. As there was no dispute that the answer to question 13 was honestly given, there was no misrepresentation.

29 As I have indicated, the first step should be to construe the question, a question supplied by the appellants. The question is concerned with information which the vendors may have a right to know. There is nothing in those words to alert the vendor to the suggestion that the answer will imply that he had reasonable grounds for the answer. As the question includes the word "may" it goes wider than seeking information that the purchaser had a right to know.

30 The question also uses the word "right". The words "may have a right to know" must be given a meaning. Mr Freedman drew attention to the statement in para.[18] of the judgment, that the respondents' counsel did not put forward the narrow view that the word "right" in the question limited the question to rights which exist in law. He moved from there to submit that the purchaser had a right to know, in the

sense that they were entitled to know, any fact which would or might affect the buyer's decision to proceed with the purchase and/or pay the agreed price. The question referred to facts which might materially affect the enjoyment or value of the property.

31 It was accepted in this court that there was no legal obligation upon the vendors to disclose the history of the property. That was the decision of the judge on the first issue. The words "have a right to know" must limit the type of information that needs to be considered and seem to expand the general duty, which is agreed did not include a duty to disclose the circumstances of the murder. Thus the word "right" may have a wider meaning than an accrued right (see, *e.g. Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] 1 All E.R. 865), but cannot be construed to refer to information which might materially affect the enjoyment or value of the property as submitted by Mr Freedman. Mr Freedman's submission construes the question as referring to any information that would affect the enjoyment of the property whether or not the vendor thought that the purchaser had a right to know it. Such a construction disregards the plain meaning of the words.

32 In my view, the judge was correct to conclude, as he did, that the question was subjective and had to be answered honestly. Further the question was confined to information the purchaser might be entitled to know.

33 I come to the submission of Mr Freedman on duty of care. Mr Freedman submitted that there was a duty of care upon the respondents to answer the question upon a reasonable basis. He submitted that having regard to the horrific nature of the murder, the reaction of the parties and the deep sense of horror felt by all, it was clear that the answer was negligently given. That submission, in my view, fails for the reasons that I have already given. The duty was to give a proper answer to the question. If all that was needed was an honest answer, then there could be no breach of duty.

34 The judge went on to consider whether there had been negligence, on the assumption that Mr Freedman's submissions on breach of duty had been established. He said:

> "28. . . . It is, I think, common ground that, in the light of the advice received from Mr Edwards and upon which they acted, the defendants were not themselves negligent. It became apparent in the course of Mr Wilkins' oral submissions that it was also agreed that negligence on the part of Mr Edwards in giving that advice would, as between the defendants and the claimants, be attributed to the defendants. . . .
>
> 29 . . . The evidence is that Mr Edwards took instructions, considered the questions put to him, discussed them with at least one of his partners and also with other colleagues, and spent a total time of one hour and ten minutes on the case. It is said, by way of a pleading amended after Mr Edwards had given evidence, that he failed to take proper instructions, or to undertake research as to the law, or to spend sufficient time on the question put to him, or to consider question 13, or to instruct specialist counsel. I accept that Mr Edwards, on his own admission, did not consider question 13, which had been answered by Mrs Silva in the same negative sense as that in which the defendants

> subsequently answered it. But that is the most that can be said against him. His notes, which were produced in evidence, show that he took an adequate history from Mrs Taylor-Rose's mother. He considered the two essential questions which were put to him—should this have been disclosed?—should we disclose it ourselves? Mr Edwards did not give an 'off-the-cuff' answer, but consulted others. He spent what seems to me to be adequate time in considering the questions. As is apparent from the way in which counsel on both sides have argued this case, the answers to these questions were very much matters of impression. No authority, one way or the other, would have directed Mr Edwards to the 'right' answer. This is one of those instances, common enough in clinical negligence litigation but not so frequently encountered as between client and solicitor, where being wrong (assuming for the purposes of argument that Mr Edwards was wrong) does not equate to being in breach of duty. I would not have been prepared to hold that Mr Edwards was negligent."

35 It seems that the judge was using Mr Edwards' name as representative of the solicitors, as he did not carry out the conveyance. The solicitor whodid confirmed that the written information given by the vendors was complete and accurate.

36 Mr Freedman placed considerable emphasis upon the fact that there was no evidence that question 13 had in fact been considered by the solicitor who confirmed that the written information was complete. Further, he drew to our attention the note (which I have read) which suggested that on further facts the matter may need to be reconsidered.

37 For my part, I find no fault with the judge's reasoning. In those circumstances, despite the persuasive submissions of Mr Freedman, I do not think it right to disturb his conclusion that there was no negligence. Upon this point it is not necessary for me to come to any concluded view as this is a case which can be decided upon the first issue. In my view the judge came to the right conclusion that the answer to question 13 was not wrong. He was therefore right to dismiss the claim.

38 The judge went on to consider the third issue. In view of the conclusion I have reached there is no need for me to do so and I will not do so. Nothing in the judgment should be construed as endorsing the judge's view on the third issue or in any way casting any doubt upon it.

39 That brings me to the cross-appeal. The trial of this action was originally listed for hearing before the judge on October 10, 2002. It was adjourned to enable the appellants to investigate statements in the witness statements that had recently been served by the respondents which disclosed for the first time that the respondents had taken legal advice from Mr Edwards. Clearly, the judge was displeased at the failure of proper disclosure of documents and of the failure to provide the witness statements earlier. He ordered that the costs thrown away by the adjournment should be paid by the respondents on an indemnity basis.

40 When the case came before the judge on the hand down of the judgment, he ordered that there be no order as to costs down to October 10, 2002, but that the claimants (that is the appellants) should pay the defendants' costs incurred after

that, such costs to be the subject of a detailed assessment on the standard basis. Mr Wilkins, on behalf of the appellants, submitted that that order was wrong, in that it penalised the respondents twice.

41 In answer the appellants drew attention to the history of the matter. On July 8, as I have said, the judge handed down his written judgment. He refused permission to appeal. That was followed by an application for permission to appeal to this court which was granted on July 29. On August 8 the appellants' solicitors sent to the respondents' solicitors copies of the order of this court and the date for the appeal was fixed on September 2.

42 Following the provision of written submissions on costs on December 12, the judge made the order to which I have referred. On December 22, the respondents wrote to the judge seeking permission to appeal against his decision on costs. For some extraordinary reason that letter was not supplied to the appellants. On December 12, the judge granted the appellants permission to appeal the costs order. On January 5, the court informed the appellants that the judge had granted the respondents permission to appeal.

43 Thereafter the appellants disregarded completely the rules requiring the respondent's notice to be lodged. They did not lodge it until very shortly before the hearing. There were (according to the appellants' solicitors) six chasing letters, but it was not supplied until February 18.

44 Mr Freedman at one stage sought to argue that the delay in providing the respondent's notice had prejudiced him. But in the end he was forced to concede that that was not the basis upon which he sought to support the judge's reasoning. He drew to our attention the Master of the Rolls' judgment in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 3 All E.R. 385 at para.[30]. There Lord Phillips M.R. said:

> "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."

45 Mr Freedman reminded us of the way that the respondents' case had been prepared. Clearly the judge could have perfectly properly had in mind the delays that had occurred due to the faults of the respondents. Applying the statement in *English v Emery Reimbold* and taking into account that no request was made to the judge for his reasons for making the orders for costs, I have come to the conclusion that, hard as it is, this is an exceptional case and the judge, using his discretion, cannot be said to have erred.

46 In those circumstances, I would dismiss the cross-appeal as well.

47 **MANTELL L.J.:** I agree.

48 **PETER GIBSON L.J.:** I feel a good deal of sympathy for the appellants. I can well understand their horrified reaction to learning that their recently purchased

house had been the scene of so gruesome a murder, made all the more vivid by the details given in the documentary shown on television and with the possibility that parts of the victim's body might still lie undiscovered in their house. I can well understand their indignation that, although the value of the house has fallen so sharply in the light of its history once revealed, the respondents might not be liable to them to make good that loss.

49 However, the question for this court is a dry question of law as to whether the respondents incurred a liability to the appellants in answering question 13 of the Seller's Property Information Form in the negative. The answer to that question cannot be affected by my sympathy for the appellants.

50 Because the *caveat emptor* rule can work harshly on purchasers, whose knowledge of material facts affecting the property they are purchasing is almost certain to be considerably less than that of the vendors, the practice of sending pre-contract enquiries has become standard and the scope of the enquiries has been extended over a period of time. It is for the buyer to decide what enquiries to raise and in what form. It cannot be doubted that a more specific and less subjective question going to the value of the property or to the ability of the purchaser to enjoy the property could have been asked. Unhappily, question 13 in the Law Society's form at that time (we are told that it is no longer in use) did allow the answer to be given in a way which only required, in my view, the vendor to answer the question honestly.

51 For the reasons given by Sir William Aldous, I too would hold that this court cannot interfere with the conclusion of the judge on the main issue in the light of his finding that the vendors were honest in answering that question.

52 The cross-appeal is unusual. The respondents did not notify the appellants that they were seeking permission to appeal from the judge's order as to costs. The respondents thereby denied the appellants the right of commenting on that application before the judge granted permission.

53 Further, the cross-appeal is brought without the respondents obtaining a statement of the judge's reasons as to why he made the costs order which he did. It is for the respondents to show that the order is one which the judge could not properly make. The judge undoubtedly had a discretion under CPR r.44.3(1). The judge would have known that under r.44.3(2), if the court decided to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the court is expressly empowered to make a different order. The judge would have known that under r.44.3(4) one of the matters to which he had to have regard was the conduct of the parties, as amplified in r.44.3(5).

54 We do not know what were the actual reasons which led the judge to make his order but we do know what it was that was being argued on both sides in relation to costs. We have the skeleton arguments which were put forward by the rival parties. It is clear from the appellants' skeleton argument that they were suggesting that there should be one order for costs until October 10 which should differ from the order for costs after that date. It is plain that the judge accepted that submission. He was, however, not prepared to go as far as the appellants urged him, which was that, because the respondents were guilty of "shambolic" conduct of their case until October 10, that they should pay the costs of the appellants until then on the

indemnity basis, with a different order, that there should be no order as to costs, for the period after October 10.

55 It is a ready inference, which I am prepared to make, that the judge in deciding on the appropriate costs order for the first period took into account the disregard by the respondents of the requirements of the rules and of directions given by the court. The judge was perfectly entitled to have that in mind when he made that order. True it is that he penalised the respondents for the costs thrown away by the adjournment by the specific order which he made then, but for my part I do not accept that the respondents are being penalised twice by the order which the judge made. The judge was entitled to take the view that justice required that there be no order as to costs in the first period, save for the orders expressly made.

56 Whilst I accept that another trial judge may have reached a different view of the costs of that period, I cannot say that it is an order which was not open to the judge to make.

57 For these reasons, as well as those given by Sir William Aldous, I too would dismiss the cross-appeal.

Appeal dismissed with costs; cross-appeal dismissed with costs. Permission to appeal to the House of Lords refused.

Reporter—David Stott