1982 ?

Royal Court (Inferior Number)

Before: Mr. P.L. Crill, Deputy Bailiff,
Jurat R.E. Bailhache, O.B.E.,
Jurat L.A. Picot.

Premier Builders (Jersey) Limited
-v-
D.C. Allen Limited.

Advocate K. Hooper Valpy for the Plaintiff
Advocate C.B. Thacker for the Defendant.

This case follows an earlier action between the plaintiff, which was the defendant in that case, and Mr. T.M.J. Browne. The facts found by the Royal Court which gave its Judgment on the 2nd May, 1980, and not appealed cannot be re-opened in this case insofar as they are common to both cases. They were as follows. Mr. Browne owns Charlton House. To the East of that house Premier Builders (Jersey) Limited developed some land. It employed Mr. C. Rothwell, a Chartered Engineer, to prepare plans. They included a provision for under-pinning Charlton House's East gable. The work was done by the defendant in this case, D.C. Allen Limited, of which Mr. D.C. Allen is the beneficial owner. Structural damage occurred to Charlton House. The Royal Court found that that damage manifested itself to the eyes of Mr. and Mrs. Browne in the afternoon of the 28th May 1978. The Court found Premier Builders (Jersey) Limited, liable in tort for that damage. The Company now brings this action in contract against the defendant substantially to be reimbursed for the damages awarded against him in the first case. However, there were two heads of damages which counsel for the plaintiff company, Mr. Valpy, conceded would not be recovered in full. These are referred to at page 102 of the earlier Judgment reported in 1980 Jersey Judgments at page 95. The items were "(2) damp and cold due to the failure to render the gable: (3) inconvenience and disturbance including three falls of soot in the

living room /

living room." Head number (2) cannot be attributed to the work of the defendant company as the gable was stripped by another contractor. If we find for the plaintiff company we would have to ask the Royal Court, as then constituted, to apportion the £2,000 which was awarded under these two heads and say what sum, if any, should properly be attributable to the work of the defendant.

The complaint of the plaintiff in this action is that the defendant did not carry out the precise instructions of Mr. Rothwell, in under-pinning the gable, firstly, by extending the length of each section beyond the stipulated length of three feet and, secondly, having excavated the holes, or voids, below the gable's foundations, it left the gable un-supported for longer than necessary. In the first action the Royal Court found that Mr. Allen had not kept to his instructions. On page 97 of its Judgment it says this:

> "Mr. Allen began the work of under-pinning. He said that he worked under the supervision of Mr. Rothwell. If that is so, he didn't keep to his instructions set out in the layout plan. The method is clearly shown in photographs 2, 3 and 28. He was supposed to excavate portions of the foundations not adjacent to each other in lengths of three feet. In fact one length was as much as 5 feet 6 inches and others 4 feet. Mr. Rothwell said that possibly sand had trickled down from the interstices of the old stones. Mr. Allen agreed that the slip of sand from the foundations had been more than he had envisaged, and such that the job had to be played by ear and one had to be very careful."

Our attention has not been directed to any passages in the transcript of that case nor have we heard sufficient evidence in this case to suggest that that Judgment was wrong in attributing the damage to the gable as being caused by the work of under-pinning. We were told by Mr. Allen that he had found that someone, presumably Mr. O'Keefe, had dug a trench alongside the gable's foundations. However, there are three matters which are not covered in the Judgment. First, the Court did

not specify / ...

not specify the number of unsupported openings which were found to be on the site by Mrs. Browne on the afternoon of the 28th May. Second, the evidence of Mr. Rothwell on this point and of Mr. Jones called for the defendant, who is also a Structural Engineer, in this case, suggested that there was an element of risk in under-pinning the old gable. Third, the position of Mr. Rothwell vis-à-vis the plaintiff in this case, and his authority to act for him as a general supervisor, was not in issue.

The Answer of the defendant admits that the openings were not limited to lengths of three feet due, it says, to slippage of sand but adds that Mr. Rothwell knew of this and gave instructions about it. In the course of this hearing those instructions, which were denied by Mr. Rothwell, were to expedite the work. Mr. Allen says that he asked Mr. Rothwell what he was to do about the increased lengths which had appeared because he was worried about them and he was told to carry on wi the work. Mr. Rothwell does not recall being approached by Mr. Allen. He does remember that on Sunday the 29th May, he did tell Mr. Allen to fill in the unsupported voids which in fact Mr. Allen was in the course of doing when Mr. Rothwell arrived.

To succeed in this action the plaintiff must show (1) that the keeping to the shorter length of three feet would have prevented the damage to Charlton House and (2) that the extensions caused the damage. Mr. Allen admitted in this case that all four openings which were there on 28th May exceeded the three foot length, one of them by as much as 1'6". In the Royal Court's Judgment in the passage we have already quoted the Royal Court found that there was one length of 5'6". Secondly, if the plaintiff succeeds on this first point, then it would still have to show that Mr. Rothwell did not acquiesce in the extensions, or if he did, then his actions did not bind the plaintiff. As to point (2) the position in law is that, in the absence of an express agreement, of which no evidence was produced to us, an Architect or Engineer has no authority to waive the strict conditions

of a contract. The additional instructions, which were oral, concerned the manner of filling in the excavated holes and supporting the gable and the staggering of the excavations. Neither of these matters gave rise to any dispute. It follows that even if Mr. Rothwell saw the excavations and asked Mr. Allen to expedite the works and, we do not express an opinion as to whether this was so or not, that acquiescence, if such it was, would not prevent the plaintiff from succeeding in this action.

However, we are not called upon to decide the second question until we have decided the first. Mr. Thacker drew our attention to three passages in the transcript of the first action, which indicated that Mr. Rothwell was satisfied with the defendant's work and accepted the extra lengths as satisfactory. These are as follows:

(1) "ADVOCATE BENEST: Did he work under your direct supervision or did he ask your advice as you went along?

WITNESS: No, I would accept that he was working under our supervision at that time because we had initially shown the under-pinning on the drawings, I had explained the system to him and I visited the site everyday at that period.

Q. And you were satisfied as work was progressing that the gable was not in danger?.

A. Yes, I was satisfied."

(2) "Q. Were you satisfied that the under-pinning work that had been done previously during the week that the pockets that had been completed, leaving aside these two, had been properly done?

A. Yes. I believe that there were only two pockets completed before that weekend and I was satisfied with what had been done."

(3) / ...

(3) "Q. And afterwards during the completion of the under-pinning operation were you satisfied that the work was carried out properly?

A. Yes, I was as I say we obviously had slight variations to the original plan I obviously will not deny that, we had in some cases pockets wider than planned, but I didn't see any detrimental results."

Mr. Jones agreed that there was an acceptable degree of tolerance or stress up to 4'6". He was not asked whether he would have found such an acceptable degree up to 5'6". The point at issue really is that the under-pinning work was a risk. It was undertaken by the plaintiff company. We are satisfied from the evidence of Mr. Jones and from the previous evidence of Mr. Rothwell, to which he assented in this case, that the leaving unsupported of parts of the gable for a period of up to 36 hours, in order to allow concrete which was poured into the holes to set and then building up the brick-work to support the gable, was an essential part of the operation and did not increase the risk of damage which could have occurred the moment the support was removed when the first excavation was dug. Although Mr. Rothwell told us that, in his opinion, if Mr. Allen had kept to the maximum prescribed length of 3 feet the damage would not have occurred we are not satisfied that by extending the areas as he did to the amounts, whether admitted or found by the Royal Court in the first action, it has been proved, on a balance of probabilities, that that extension, and not the carrying out of the original plan to underpin the gable, caused the damage to the Charlton House structure. This being so we are not called upon to answer question (2) and the defendant is discharged from the action.