Court of Appeal. 15th January 1982.

Golder v. Dodd & Barry Venton Ltd.

7

President:

The plaintiff in this action was the owner of a building known as 18 Broad Street and 59 King Street, St. Helier. The building consisted of a ground floor and two upper floors. In 1971 he engaged the first defendant to act as architect in the planning, designing and supervision of alterations to the building. In March, 1972, the plaintiff contracted with the second defendant, a company of building contractors, to carry out these alterations. The alterations included the construction of new first and second floors in place of the existing floors. Shortly after that contract was made work was started. The first floor was replaced, and work then proceeded on the second floor. By the 20th April, 1972, an area of that floor to the north-west of the building had been replaced, but on that date part of one of the walls, an external wall on the west side of the building, moved outwards at the level of the second floor. A crack developed at the northern end of that wall, at a point where that wall curved to form the north-west corner of the building. The bulge where the wall moved extended southwards along the west wall from the area of the crack. It was then found necessary to demolish the whole of the external wall to first floor level, and to rebuild. Thereafter the plaintiff raised an action against the first defendant and the second defendant, claiming damages from them, jointly and severally, or severally, in respect of losses which he alleged he sustained as a result of the movement of the wall and its consequent demolition and rebuilding. The action was called on the 5th January, 1973, and after sundry procedure a proof was heard on the 14th, 15th and 16th November, 1973, and 25th, 26th and 27th February, 1974. At that stage the Court was asked only to determine the question of liability. The plaintiff gave evidence himself, and on his behalf only one witness was led, a Mr. Williams, a structural engineer. The first defendant, Mr. Dodd, gave evidence, and on his behalf two witnesses, a Mr. Pearson, the district building inspector, and a Mr. Alderson, a consulting engineer, were led. For the second defendant, Mr.

Venton, of that defendant company, gave evidence himself, and on his behalf two witnesses were led, a Mr. Swain, an architect, and a Mr. Rothwell, a chartered engineer. On the 28th August, 9174, the Court gave judgment discharging the first and second defendants from the action, and condemning the plaintiff to pay the costs. On the 4th September, 1974, the plaintiff lodged an appeal against that judgment. In his written case in the appeal, he presented a concentrated attack upon the evidence of Mr. Dodd, Mr. Pearson and Mr. Venton on one particular matter. This was the method by which the joists had been replaced. The defendants had led evidence to the effect that this had been carried out for the most part, at least in the north-west section of the building, by a systematic and successive replacement of joists one or two at a time. The plaintiff claimed in his appeal that such a method was impossible, and in particular, in relation to the north-western area, that the evidence of progressive replacement of one or two joists at a time was untrue.

In 1978 Mr. Dodd and Mr. Venton and Mr. Pearson were prosecuted for perjury in respect of certain parts of the evidence which they had given at the proof in relation to the method of replacement of the joists. After trial, Mr. Dodd and Mr. Pearson were acquitted; Mr. Venton was convicted on one charge only of several charges brought against him. That conviction was upheld on appeal by this Court on the 13th January, 1982. After the trial in those criminal proceedings, the plaintiff lodged a supplementary notice of appeal in the civil action. The grounds which he put forward in that supplementary notice were these, and I quote:

> "The plaintiff will ask the Court of Appeal to order that a new trial be had on the grounds that the evidence given by the First Respondent, Barry Frederick Venton and Sydney Pearson at the Criminal Assizes sitting on the fifteenth day of May 1978 et seq. at which they were charged with having committed perjury as witnesses at the hearing of this suit raises grave suspicion that the Royal Court was deceived by the evidence

which they gave at that hearing and that any further proceedings involving that evidence might result in a miscarriage of justice."

It is solely this supplementary application in the appeal which has been argued before us. The appellant's submission proceeds upon a comparison of the evidence of the three witnesses given at the proof in the civil action with that which they gave in the criminal action. It is convenient at this stage to note briefly principal points of difference which were founded upon. So far as the evidence of Mr. Dodd was concerned, in the civil case he agreed, in answer to questions put to him, that the joists in the north-western area of the building were not removed as an entity, but by the changing of individual members (page 109 of the notes in the civil case). In the Criminal Assize, he stated that he had no evidence before the civil action of the procedure, and he did not see any joists actually being replaced (the notes, 302 and 311). Again, in the civil case he said that in the north-west corner both of the first and second floors were not missing at the same time (page 121), and in the criminal case he said it was possible that they were (Page 290, 292). So far as Mr. Pearson's evidence was concerned, in the civil case he said that he never saw any departure from the agreed procedure for removal (at pages 302 and 304), and in cross-examination that he had seen individual joists being taken out and replaced singly in the north-west area (313). In the criminal case, he said he did not actually see any joists being taken out and replaced (page 422). Again, in the civil case, he said he had carried out daily inspections, and it was essential to follow the agreed procedure for the removal of the joists (pages 157 and 159); in the criminal case, he said that most of his daily inspections were spent scrutinizing the external walls and not the joists (pages 420 and 444). Finally, Mr. Fenton in the civil case gave evidence to the effect that both on the first and second floors the joists had been taken out one or two or three at a time (pages 250 to 251, 271 to 272, and 280); in the criminal case, while affirming that the second floor was removed in accordance with the

procedure, he accepted that the joists in the first floor in the north-western area could not be, and were not, replaced one for one, and that what he had said in the civil trial about the joists in the north-west area of the first floor must have been wrong (page 322). Mr. Venton was convicted of perjury in relation to his evidence that the former joists of the first floor were removed and replaced three or four at a time; he was acquitted of a similar offence based on a similar statement relating to the joists of the second floor.

The powers of this Court in appeals in civil cases are set out in Part II of the Court of Appeal (Jersey) Law, 1961, In Article 12(3) of that law it is expressly provided that the Court of Appeal, and I quote: -

> "...shall have power, if it appears to the Court that a new trial ought to be had, to order that the verdict and judgment be set aside and that a new trial be had."

By Rule 13(1) of the Court of Appeal (Civil) (Jersey) Rules, 1964, it is provided that, and I quote,

> "A new trial shall not be ordered on the ground of misdirection or of improper admission or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned."

The present case, however, is not one of alleged misdirection, nor of the improper admission or rejection of evidence, and this Rule, Rule 13(1), is not applicable. There does not, then, appear to be any express statutory guideline in the circumstances of the present case. In the present case the three witnesses are said to have given evidence in the Criminal Assize which contradicts their evidence in the civil case, and one of them has, in respect of one statement, been convicted of perjury. There is evidently no precedent in Jersey to guide us in the matter of a new trial in the circumstances of the present case. With a view to ascertaining the principles on which a new trial should or should not be allowed, we were referred to certain English authorities. From these it appears to me that the matter is essentially one of consideration of the circumstances

of each case in the light of certain guidelines. One of these is the maxim interest rei pubblicae ut sit finis litium. As Lord Loreburn, Lord Chancellor, put it in the case of Brown v. Dean (1910) A.C. 373, at page 374: -

> "When a litigant has obtained judgment in a Court of Justice, he is by law entitled not to be deprived of that judgment without very solid grounds."

One ground on which Mr. Le Quesne founded his case for the appellant was fraud; where a party has deliberately given false evidence in the essential points at issue in a trial, a new trial may well be allowed (Robinson v. Smith (1959) 1K.B. 711, Piotrowska v. Piotrowski (1958) 2 All E.R. 729). Indeed, it may be enough that the judgment is tainted and affected by fraudulent conduct, and it may be useful to refer briefly to the speech of Lord Buckmaster in the case of Hip Foong Hong v. H. Neotia & Co. (1918) A.C. 888, at page 894. His Lordship there said: -

> "In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail; but in the present case their Lordships are unable to say that such a case has been established."

It is interesting to note that even in that case there was, at least in relation to one aspect of the evidence, a conviction for perjury.

A second ground on which Mr, Le Quesne based his case was a broader one of miscarriage of justice, in that the basis of the judgment was so falsified that it would be unjust to leave matters as they are. He founded on Meek v. Fleming (1961) Q.B. 366 at 381,

Roe & another v. Robert McGregor & Sons Ltd (1968) 2 All E.R. 636 at 643e, and Skone v. Skone (1971) 2 All E.R. 582 at 587.

So far as the claim for a new trial is based on fraud or deception, it is not enough merely to point to differences between the evidence given by the respective witnesses in the civil trial and in the Criminal Assize. The suggestion of fraud is at its strongest in relation to the single point on which a conviction for perjury was obtained. That is the evidence of Mr. Venton in relation to the replacement of the joists on the first floor. But while he was held to have committed perjury in relation to that evidence, it has also to be noticed that he was acquitted of perjury in relation to his evidence about the method of replacement of the joists on the second floor. It may also be noted that he came to admit that his earlier evidence had been wrong in relation to the joists on the first floor because during the period of the criminal trial he became convinced that the original joists on the first floor ran in a north-south direction, and not in a west-east direction. If that was so, then a removal one by one and replacement by joists running in a west-east direction was impossible. He explained how he came, at that late stage, to believe that the original joists were so aligned. Whether or not that is accurate may be open to question; but it does suggest that inferences cannot be confidently drawn from the practice adopted on the one floor to that adopted on another. However that may be, it seems to me difficult to hold that there was fraud or deceit so far as his evidence relating to the second floor was concerned, and it is insecurity at the level of the second floor which is relevant to the claim made in the present action by the plaintiff and appellant.

Even if there was fraud, it would have to be a fraud which had tainted and affected the judgment. No question arises in the case about insecurity of lateral support at first floor level. It was only in relation to the replacement procedure at that level that the conviction of perjury was made. The relevance and materiality of the evidence upon which the plaintiff now seeks to cast doubt is a critical consideration, particularly for the second of Mr. Le

Quesne's grounds. It is not enough to obtain a new trial merely to show that a witness has, even deliberately, told a lie in the course of his evidence, Nor is it enough for the purposes of the second ground which Mr. Le Quesne presented to be able to point to discrepancies in the evidence given on two separate occasions. It thus becomes necessary to consider the relevance and materiality to the pursuer's case, and to the judgment, of the method of the replacement of the joists at the second floor level.

The pursuer's case, as stated in paragraph 5 of the Order of Justice, was this, and I quote: -

> "That the outward movement of the external walls resulted from their being temporarily deprived of horizontal restraint. That as the building stood before the works commenced, horizontal restraint was provided by the second floor of the building, and that both the first defendant and the second defendant owed it to the plaintiff to have and to apply the knowledge and skill needed to appreciate that measures had to be taken to provide either permanent or temporary horizontal restraint prior to the removal of the second floor. That no such measures were taken."

The ground of fault upon which the claims against each of the defendants proceeded was, shortly stated, a breach of an alleged implied condition in the contracts relating to each of them respectively, in that they had each failed to exercise the due skill and care expected of them in the proper performance of the works which they had respectively agreed to carry out. This was detailed in further and better particulars which need not be stated here.

At the proof the plaintiff submitted that the western wall had originally had a means of lateral support at second floor level from the joists on that floor. That submission was accepted by the Royal Court. In that connection, the northern stretch of the western wall required to be considered separately from the remainder to the south. So far as the northern stretch was concerned, the joists were found to be in a defective condition, due to rot, but despite that they provided a significant degree of lateral restraint. So far as the southern stretch was concerned, the joists were similarly in a

rotten and defective condition. Their method of attachment, and the parts of the structure to which they were attached, differed from those in relation to the northern stretch, but still it was held that there was some, albeit inadequate, horizontal restraint against movement of the western wall. The plaintiff's case was that the movement of the wall was caused by a removal of the horizontal restraint provided by the second floor, but it is important to observe that the plaintiff did not suggest that a wholesale removal of the joists in the north-west corner had caused or contributed to the failure of the wall. Nor did he lead evidence to establish such a proposition. What he sought to found upon was an alleged lack of adequate horizontal restraint after the new joists were restored. That was the issue which the Deputy Bailiff proceeded to determine. He described the course of the work on the second floor up to the day of the failure. In so doing he narrated the agreement between Mr. Dodd, Mr. Venton and Mr. Pearson that the joists should be replaced singly, or not more than two at a time, and he declared himself satisfied that the builder had complied with that procedure to the best of his ability. He then described how the new joists in the north-western area were attached to the western walls at one end, and connected at their eastern ends to certain other members. The floor-boards were then fitted over these new joists. So far as the joists abutting on the southern stretch of the west wall were concerned, the Deputy Bailiff found that first, eighteen of the twenty-three joists along that stretch had been removed as of the 20th April, 1972, and not replaced, and he narrated the explanation given by the builder for this procedure. But it seems to me that the method of replacement of the joists only comes in as narrative, and not as anything critical to the case. Having described the position which had been reached on the 20th April, 1972, the Deputy Bailiff then summarised the plaintiff's argument in these terms: -

"1. The very fact that the wall did move outwards is proof of a lack of adequate lateral restraint at that level.

2. As regards the North-West part, although the builder claimed to have strengthened the lateral support in that part

before the movement, he cannot have done so, as otherwise the wall would not have moved.

3. All lateral restraint in the South part had been removed.

4. The nature of the movement of the wall is consistent with the cause being the removal of lateral restraint."

Plainly, the submission was a state of inadequate lateral support on the 20th April, 1972. The Deputy Bailiff then proceeded to consider the cause of the movement of the west wall. He proceeded to describe a wooden baulk which had been found inside the wall at second floor level at the start of the curve of the north-west corner. The baulk was of irregular shape, and had deteriorated in condition. It supported a layer of unbonded brickwork. The Deputy Bailiff then considered the evidence of the crack and the bulge observed on the 20th April, 1972, and concluded that the latter only extended along the northern stretch of the west wall. He then expressed the view that the movement was not caused by a removal of horizontal restraint. So far as the southern stretch was concerned, while the restraint was removed there, that did not cause the movement, because there was no bulging on that stretch of the wall. So far as the northern stretch was concerned, he observed that the joists had been completely replaced and the floor-boards fitted six days before the movement, and that it was generally agreed that the work should have strengthened the lateral restraint in that part. He then went on to hold that the most likely cause of the movement was not a general collapse of the lateral restraint along the whole of the straight section of the west wall, but a localised disturbance following the movement of the wall and the defective brickwork above it.

It seems plain to me that the case which was argued, and the case which was decided, was not one which depended upon the method of removal of the joists in the north-west area of the second floor, or of any insecurity caused by the method of their removal, but rather upon the insufficiency of lateral restraint existing on the day of the failure, and the few days before that. If that is correct, then, in my view, errors in the evidence about the method of removal,

whether fraudulent or not, do not affect the judgment; while the false evidence in respect of which Mr. Venton was convicted of perjury may have been material in the context of the criminal proceedings, standards of materiality must vary according to the context in which one is dealing, and it does not seem to me to be of such importance or relevance to the basis of the decision in the civil case, as to have caused here any miscarriage of justice, where the standard should be a relatively high one. The evidence may have been relevant to the civil trial for the purposes of the criminal trial, but it was not sufficiently material for the purposes of the present application.

It should also be noted that the matter of the method of replacement came into the case expressly by way of a defence. In the first respondent's pleadings, that respondent averred expressly: -

> "6 c). When it was required by the building inspectorate that the existing lateral joists be replaced all care was taken in the area of failure to replace them singly or in twos so as to avoid any effective removal of horizontal restraint. Failure in fact occurred some time after the new joists had been successfully installed."

This is consistent with what I have already said about the plaintiff's case and the grounds of judgment. But the plaintiff and his advisers were thus on notice that the very point about which they now complain was likely to be canvassed in evidence. An affidavit by the plaintiff's advocate has been filed, in which he explains that he personally had seen that all the joists had been removed before being replaced. He then found himself faced with a problem, because at that time he had not available to him any other witness than himself who could speak directly to the point. One possible witness he anticipated would be led by the defence. Another he discovered during the course of the proof, and after his own case was closed he endeavoured, unsuccessfully, to take steps towards citing him. As he sets out in his affidavit, he considered the position and made an assessment of the seriousness of the line of

defence. He eventually took the view that his best course was to continue in the case as advocate, and he did so. In these circumstances, it cannot be said that the plaintiff was taken by surprise, and indeed Mr. Le Quesne did not present his application on that basis. It is, however, relevant that the absence of evidence on the method of replacement of the joists came about by the conscious decision of the plaintiff's advocate.

Finally, in my view, the granting of a new trial would not be an appropriate course in the circumstances of the present case. Mr. Le Quesne clearly explained that, consistently with the presentation of the case which had previously been made, it would not be his intention in any new trial to argue that there was an instability created by a wholesale removal of the joists in the north-west corner, but that there was a state of instability through inadequate lateral restraint existing on the day of the failure, and for the few days before that. The issue in any new trial would be the adequacy of the support provided by the new floor. This demonstrates the relative unimportance of the issue on the method of replacement of the joists. It is the fact of the replacement, not the method, which is the point of the plaintiff's case, and the lack of lateral restraint founded on is the inadequacy of the new second floor to provide the required restraint. The intention would be, in a new trial, to persuade the Court to draw a different conclusion on causation on the facts. It does not seem to me that a view on culpability necessarily affects the Court's judgment on causation, nor that it would obviously have that effect here.

This is a situation which, in my view, does not call for a new trial. The length of time which has passed from the date of the event is also a consideration which weighs against a complete re-hearing of the case. I am, however, concerned that the presentation of the civil appeal should proceed with some regard being paid to the criminal proceedings, and in particular to the transcript of the evidence. In my view, the application for a new trial should be refused, but the Court should have the evidence given in the Criminal Assize before it in the hearing of the appeal, so that the

appellant can refer to it, and found on it in support of the presentation of his appeal. Mr. Le Quesne accepted that at least this would be a second best from his point of view. Mr. Valpy, for the second respondent, indicated an assent to such a course, but Mr. Michel opposed it on the ground that the evidence which had been given in the two trials had been given for different purposes. In my view, that is not a sufficient ground for not pursuing this proposed course. What I, accordingly, would propose is that the application for the new trial should be refused, so that the appeal would then proceed on the substantive grounds put forward earlier by the appellant, but that we should order that the transcript of the evidence in the Criminal Assize should be part of the material before the Court in the hearing of civil appeal, and be available for all parties to refer to and found upon for the purposes of that appeal.

Mr. Calcutt: I agree.

Mr. Hoffmann: I agree.