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COURT OF APPEAL

27th October, 1989

Before: The Bailiff,
sitting as a Single Judge

Between:	**Martin George Hacon**	Appellant
And:	**Philip Francis Godel**	First Respondent
And:	**Brocken & Fitzpatrick Ltd.**	Second Respondent

Application by the Appellant for leave to adduce further evidence, in accordance with the provisions of Rule 12 of the Court of Appeal (Civil) (Jersey) Rules, 1964.

Advocate R.J. Renouf for the Appellant.
Advocate P. de C. Mourant for the First Respondent.
Advocate G.R. Boxall for the Second Respondent.

JUDGMENT

THE BAILIFF: I have before me a summons by the appellant in this appeal, seeking leave to adduce additional evidence before the Court of Appeal at the hearing when it takes place.

This action arises from an accident which occurred, unhappily - all parties accept that - to the appellant when he was working on premises in the Island where a scaffold had been erected by the second respondent and he was employed as a painter by the first respondent.

The case was not heard, so to speak, all at one go. The accident itself took place on the 1st August, 1987, and the action below was heard on the 3rd and 4th December, 1987, the 11th and 12th January, 1988, and the 3rd February, 1988, and judgment in the case was given by the Royal Court on the 22nd June, 1988.

I was told in the course of this hearing that as regards the hearing of the 3rd February, 1988, the learned Deputy Bailiff, who presided over the hearing, called counsel together because he wished to be addressed on a legal point. So it follows that until that time at least, if not between then and the date the judgment was given, it would have been possible for the plaintiff's advocates to have applied to the Royal Court to adduce further evidence before it. I am not very impressed with the argument that thereafter they could have applied; it is very unusual between the close of final speeches and the judgment for counsel to approach the Court, unless something has occurred which it appears to them might be important; and this must be something which they could not have reasonably anticipated.

So far as the application itself is concerned all the parties are agreed that the law is as stated, as far as this Court is concerned, in a Court of Appeal case in Guernsey which was heard on the 31st October, 1986, before their Bailiff, Sir Charles Frossard, sitting with two ordinary Appeal Court Judges. There, the Court took the opportunity to consider what its powers were, having regard to the rules and conditions of Guernsey and our own rules. I am satisfied that as far as this Court is concerned the same principle should be applied by me. In the judgment I have mentioned the Court referred to Halsbury and at page 2 of the judgment, the learned Bailiff says this:

"Turning to the substantive application and appeal, under Rule 12 of the Court of Appeal (Civil Division) (Guernsey) Rules of 1964, subsection (2), the Court has full discretionary power to receive further evidence upon questions of fact either by oral examination, by affidavit or by deposition. The power so stated is in similar terms to the powers of the Court of Appeal in England and the rule on which the Court of Appeal proceeds in applications to admit further evidence is stated in Halsbury at Volume 37 at paragraph 693 as follows, [and I quote]:

'The Court of Appeal has power to receive further evidence on questions of fact. Before further evidence will be admitted, (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible, although it need not be incontrovertible'."

Counsel for the respondents have agreed that so far as condition 3 is concerned, they accept that the evidence sought to be adduced fulfils that condition. We are left to consider whether what evidence there is to fulfil conditions 1 and 2.

There certainly has to be some solid ground before further evidence can be adduced that much is quite clear from a number of cases not least that of Brown -v- Dean and another (1910) A.C. 373 H.L., and I think that particular case is cited in a more recent case before the Appeal Court of Skone -v- Skone (1971) 2 All E.R. 582 H.L. But the fact is the Courts have been sparing in the exercise of the power because they have had regard to the well-known maxim that there should be a finish to litigation and that if one allowed too wide margins for the appellants or respondents as the case may be to bring further evidence, the case itself would be indesirably prolonged.

In this particular case Mr. Renouf seeks to bring the evidence of Mr. Edward Geoffrey Le Quesne, the science master at Victoria College, on a matter of scientific evidence. Perhaps not so much scientific evidence but evidence based on science. The purpose of this application is that the

evidence of Mr. Le Quesne would be to discount part of the evidence of one of the witnesses for the respondents at the trial. Now the issue at the trial, amongst many others, was whether Mr. Hacon fell from the scaffolding and in an effort to save himself from falling to the ground on the other side of the scaffold, jumped onto the roof (indistinct) whether he didn't in fact jump but walked on the roof (indistinct) and fell through the roof.

Looking at the evidence it is clear that Mr. Crane carried out experiments to see if it were possible to jump a distance of some 8 ft. which was indeed the distance between the scaffold and the roof and he came to the conclusion that it was possible to do so, but it was only on a limited number, out of his ten attempts, that he succeeded. His evidence indicates also that on each of the jumps whether he reached the roof or not, his hands had been out in front of him so that that lent support to the allegation that the plaintiff in jumping had straightened himself in some way and had fallen through the roof.

As against that evidence, however, the respondents called Dr. Kennedy who gave very clear evidence about the condition of the plaintiff and the effect of landing on this roof and he reached the conclusion that the plaintiff must have fallen through the roof, that is to say he was walking on the roof.

As against that there was the evidence of one of the employees of the Social Security Committee that there had been no footprints found on the roof. The same employee gave evidence about the size of the hole which might have caused the Court below to consider whether it was possible for someone in a straight position to fall through a hole which was only 2 ft. 6 ins. by 2 ft. 3 ins. and moreover there were a number of trusses which would have meant that the victim had to pass through a hole between these. There is also the evidence which is more important of Mr. Power. It is quite clear that the Inferior Number attached some importance to Mr. Power's evidence. The words they used were of some importance. Mr. Power's evidence was that he was working in the shop below the roof and he saw the victim falling through the roof feet first. There are a number of other matters in this evidence but I don't think I need go into them at the moment; the important part which Mr. Renouf is at issue with is the question of speed. Mr. Power suggested in his evidence that if the victim had jumped onto the roof he

would have fallen through the roof faster. The evidence sought to be adduced would indicate that scientifically that is not possible.

I have to ask myself whether even if that evidence were before the Court it would be of such importance (which of course is really condition 2) that it would have affected the consideration either of the Court of the rest of the evidence taken as a whole.

I am conscious that I must endeavour to ask myself a further question: whether the exclusion of that evidence would be unjust to the appellant so as to deprive him of the opportunity of addressing the Appeal Court with that evidence and of suggesting that less weight should have been attached to the evidence of Mr. Power; and that being so and taking the rest of the evidence together, whether the Court below would not have come to the decision it did. I am afraid I cannot really accept that. It seems to me that the issue is not of substance. It is impossible to say from the transcript that the Court attached more importance to that point than it did to the rest. The Court heard the evidence and reviewed it most fully before it gave its decision on the facts which it did very succinctly and reached the conclusion it did, unhappily for the plaintiff. The application is therefore refused.

Authorities cited:

Kirk -v- Blackwell (31st October, 1986) C.A. of Guernsey.
Court of Appeal (Civil) (Jersey) Rules, 1964.
Rules of the Supreme Court, Order 59, Rule 10.
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Ladd -v- Marshall (1945) 3 All E.R. 745 C.A.
Brown -v- Dean and another (1910) A.C. 373 H.L.
Devenish -v- P.D.I. Homes (Hythe) Ltd. (1959) 1 W.L.R. 1188 C.A.
Skone -v- Skone (1971) 2 All E.R. 582 H.L.