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COURT OF APPEAL

5th April, 1989

Before: J.M. Chadwick, Esq., Q.C., (President)
L.J. Blom-Cooper, Esq., Q.C., and
S. Kentridge, Esq., Q.C.,

Between	**Kenneth Skinner**	First Appellant
	Beryl Joyce Edlin	
	(wife of Kenneth Skinner)	Second Appellant
And	**Terence John Le Main**	First Respondent
	Joan Patricia Le Main	
	(née Brady)	Second Respondent
	St. Bernard's Garage	
	and Hire Cars Limited	Third Respondent

Appeal by first and second appellants
against judgment of the Royal Court
of the 20th October, 1988.

Advocate P.C. Sinel for the Appellants
Advocate R.G.S. Fielding for the Respondents.

JUDGMENT

THE PRESIDENT: The judgment which I am about to read is the judgment of the Court.

The appellants, Kenneth Skinner and his wife, Beryl Joyce Skinner, reside at a dwelling house known as 'St. Bernard's', Carrefour Au Clercq, in the Parish of St. Saviour, as licensees of one Marie Buesnel. By an agreement for lease dated 12th March, 1987; between Marie Buesnel as lessor and Terence John Le Main and his wife, Joan Patricia Le Main, as lessees, the lessor agreed to let to the lessees certain land and buildings adjacent to that dwelling house for use in connection with the conduct of a car hire business and as a garage for the repair and service of automobiles. That business is in fact carried on through a company, St. Bernard's Garage and Hire Cars Limited.

Regrettably disputes have arisen between the Skinners on the one hand and the Le Mains on the other hand as to the activities in which each engage on the neighbouring pieces of land which they respectively occupy.

By an Order of Justice signed on the 18th September, 1987, the Le Main company, St. Bernard's Garage and Hire Cars Limited, sought certain injunctions against Mr. Skinner, restricting his use of the property which he occupied. The interim injunctions imposed on Mr. Skinner by virtue of the service upon him of that Order of Justice were confirmed with some modifications on the 9th October, 1987, following a hearing before the Bailiff in the Royal Court. By way of riposte the Skinners sought injunctions against Mr. and Mrs. Le Main and the St. Bernard's company. The injunctions sought are set out in paragraphs 18(b) and 19 (a) and (b) of an Order of Justice signed by the Bailiff on the 27th May, 1988. It appears to be common ground that that Order of Justice was served upon the Le Mains shortly thereafter and that they and their company became subject to immediate injunctions in the terms sought. Those injunctions may be summarised as follows:

First, under paragraph 18(b) of the Order of Justice, an injunction restraining Mr. Le Main by himself or by his servants, agents or sub-tenants from parking or causing to be parked vehicles in such a position as to deny or hinder access to various sheds available for use in connection with the house in which the Skinners reside. Second, under paragraph 19(a) of the Order of

Justice, injunctions restraining each of the defendants by themselves or by their servants, agents, or sub-tenants from parking vehicles on a defined portion of the land let under the lease in such a manner as to hinder access to the house itself. Third, under paragraph 19(b) of the Order of Justice, injunctions restraining each of the defendants by themselves or by their servants, agents or sub-tenants from doing various other acts, including driving vehicles at excessive speed, creating noise and dust from the cleaning and repair of cars and storing materials in the areas normally used for parking by the Skinners, their friends and relatives.

No application has been made by the Le Mains or by their company to raise the interim injunctions imposed by the service of the Order of Justice dated 27th May, 1988. The two actions have now been consolidated and we were informed that they are likely to be heard by the Royal Court in October of this year. It will be for that Court to decide on hearing the actions whether the Skinners are entitled to have the interim injunctions continued. The position which has existed since service of the Order of Justice of the 27th May, 1988 is that the Le Mains and their company are bound to comply with the interim injunctions now in force.

The Skinners complain that those injunctions have not been complied with. Their complaints are set out in the representation which they made to the Royal Court on the 7th October, 1988. It is said, in brief, that since the imposition of the interim injunctions the defendants have, with the exception of an initial period of approximately two weeks, behaved as if the interim injunctions had never been granted and that they have continued to act in the manner complained of in the Order of Justice of the 27th May, 1988. By their representation of the 7th October, 1988, the Skinners sought an order that the defendants be convened before the Royal Court to answer for their alleged breach of the interim injunctions and to be punished in whatever manner the Court thought fit.

The matter came before the Royal Court for hearing with witnesses on the 19th October, 1988. On that day Mr. and Mrs. Skinner themselves gave evidence and four other witnesses were called on their behalf. Mr. Le Main was then called for the defendants. He was examined and cross-examined and the Court then adjourned until the following day. It seems clear from

the transcript of proceedings, which has been provided to us, that at the adjournment on the 19th October, 1988, both counsel and the Court expected that the matter would continue with the evidence of further witnesses to be called on behalf of the defendants on the following morning. That did not happen.

At the sitting of the Court on the 20th October, 1988, in circumstances which do not appear clearly from the transcript, the Bailiff gave judgment on the Skinners' application. He said this:

> "This is an application by Kenneth Leonard Skinner and his wife alleging that Terence John Le Main his wife and his company are in contempt of Court. That is of course an offence against public justice and it requires to be proved beyond reasonable doubt. The Jurats have been advised by me last night that they would have to approach the case in that light and they decided and I agree with them that the case does not fall within that category at all. The Jurats are quite satisfied that the case has not been proved by the plaintiffs' witnesses beyond reasonable doubt. That being so there is no point in wasting your time, Mr. Fielding, or the defendants' time in hearing the defendants' case because the case has not been made out by the plaintiffs. Therefore the representation is dismissed and the plaintiffs will pay the taxed costs".

(I interpose to explain that Mr. Fielding appeared below, as he does here, for the defendants).

The Skinners wished to appeal from that judgment. The original grounds of appeal as set out in a proposed notice of appeal were these: First, that the decision reached was contrary to the weight of the evidence. Second, that the plaintiffs' lawyer was prejudicially hampered by the Court in presenting his clients' case.

It appears that the view taken by counsel for the Skinners was that an appeal on those grounds would require leave by virtue of the provisions of Article 13 paragraph (d) of the Court of Appeal (Jersey) Law, 1961. Accordingly, a summons was issued requiring the respondents to the proposed

appeal to appear before the Court of Appeal to show cause why leave to appeal should not be given and time for filing of a notice of appeal be extended.

That summons came before the Court of Appeal in January of this year. We understand that the Court as then constituted indicated to both counsel that they would wish to hear argument on the question whether the direction given by the Bailiff that the case against the defendants must be proved beyond reasonable doubt, was correct in law. The hearing of the summons was adjourned to enable counsel to prepare argument on that point.

The adjourned summons for leave to appeal has now come for hearing before this Court. We have also been shown a copy of a letter dated 4th April, 1989, from the appellants' counsel in which he indicated that in the event of this Court addressing itself to the merits of the appeal, the appellants' contentions upon the appeal would be first that the Court misdirected itself in interfering with counsel for the Skinners' conduct of the case hence a retrial should be ordered. Alternatively, second, that the Court misdirected itself as to the appropriate burden and standard of proof.

It appeared to us that whatever may have been the position under the notice of appeal as originally proposed, an appeal based on these contentions as reformulated, was clearly an appeal on a question of law and so was brought without the need for leave under paragraph (d) of Article 13 of the 1961 Law. Neither counsel wished to contend before us that the decision to be appealed was interlocutory in nature so as to bring the matter within paragraph (e) of that Article. The notice of appeal as originally proposed asked this Court to set aside the judgment of the Royal Court and to order a new trial. Further or in the alternative it asked this Court to punish the defendants in respect of their alleged contempt and in any event to award the Skinners their costs at first instance and on appeal on a full indemnity basis. These latter two heads of relief are clearly misconceived. No Court could decide the question of contempt against the defendants in circumstances in which they had not completed their evidence; and without contempt being established there is no basis upon which the defendants could be ordered to pay costs. Mr. Sinel who appeared as counsel for the Skinners in the Court below and before us accepted that the notice of appeal could

not be pursued in these respects. The only relief which he could hope to obtain was the setting aside of the judgment and an order for a new trial.

In these circumstances we invited the parties to consider whether they wished us to hear the appeal on its merits. We indicated that the only two grounds on which we would be prepared to hear argument were first whether there was a material irregularity in the conduct of the case below and second whether the Court below had misdirected itself as to the appropriate standard of proof.

After a proper opportunity for deliberation each counsel agreed to this Court hearing the appeal on that basis. In the event, for reasons which will become apparent, we have heard argument only on the first of these grounds, that is to say whether there was a material irregularity in the conduct of the case below.

Mr. Sinel for the Skinners took us through a number of passages in the transcript to show, as he said, that he had been restricted in the evidence which he called and in the questions which he was able to ask of the witnesses. We do not think that this is the proper interpretation of those passages. In our view the most which can be said is that the passages to which we were referred, and indeed the transcript as a whole, show that Mr. Sinel was encouraged to believe that he had called sufficient evidence to establish his case that a contempt had been committed, and that he did not need to call further evidence for that purpose. There was of course always the possibility that the evidence called by the plaintiffs would not be accepted after hearing contradictory evidence called on behalf of the defendants.

There is one passage in the transcript which seems to us illustrative of the way in which the matter was proceeding on the 19th October, 1988, and I shall read it. The passage is in the transcript of the examination-in-chief of the plaintiffs' witness, John Luke Day. It begins at page 95 letter 'E'

"THE BAILIFF: Mr. Sinel, you can't cross-examine your witness. I

don't think this witness is at all hostile at the moment and I really think as I told you earlier and I can't see the point of having further witnesses. You've presented your case and brought sufficient evidence for us to adjudicate on your point of view.

ADVOCATE SINEL: Certainly, Sir, I'm prepared to .... (inter)

THE BAILIFF: And that applies to Mr. Oxenham. I can't see it's going to help us".

(note: the Bailiff consults the Jurats)

"It's all repetitive and we've really heard ....(inter)

ADVOCATE SINEL: Certainly, Sir.

THE BAILIFF: I'm not saying whether we accept it or not, that's quite another matter, but we've heard enough which, if accepted, would be sufficient. We've got to hear the other side.

ADVOCATE FIELDING: Indeed, Sir, if my learned friend hadn't summoned Mr. Day and Mr. Oxenham, I was going to call them, so I'd just like to ....(inter)

BAILIFF: Well, he can present them for cross-examination if he wants to. Yes, do you wish to go on with this witness?

ADVOCATE SINEL: Well, if Mr. Fielding likes to take him through his examination-in-chief, I'll cross-examine.

ADVOCATE FIELDING: No, no, my learned friend has called him. I will cross-examine him.

BAILIFF: He is now being called by Mr. Sinel and has been examined. Do you wish to ask any further questions before he is cross-examined?

ADVOCATE SINEL: If the Court has made up its mind .... (inter)

BAILIFF: No, it hasn't yet. All I said was that there has been sufficient before the Court for us to think about, put it that way."

As we have said the hearing was adjourned late in the afternoon of 19th October, 1988, on the basis that it would continue with the calling of further evidence on behalf of the defendants on the following morning. In these circumstances Mr. Sinel complains that the matter should not have been decided against him at the sitting of the Court on 20th October, 1988, without his first having the opportunity to address the Court on the evidence which had been given. In particular, he says, it was wrong for the Court to decide that the plaintiffs' case had not been proved by the plaintiffs' witnesses beyond reasonable doubt without having heard the submissions which he could have made on that point.

It appears to us that there is force in this complaint. We are satisfied from the examination of the transcript and from hearing the recollections of both counsel as to what took place on the morning of the 20th October, that Mr. Sinel was not invited to make any submission on the evidence before judgment was delivered; further that, having regard to the way in which the hearing had proceeded the previous day, he did not have any proper opportunity on that morning to consider his position and to address the Court as to the course which should be followed once it had become apparent that the Court had decided to give judgment.

The right of a party to be heard before judgment is given against him is fundamental to the conduct of litigation in the Courts of this Island. In the English case of Hobbs -v- Tinling; Hobbs -v- Nottingham Journal (1929) 2 K.B. 1 C.A. at page 29, Scrutton, L.J. indicated that he regarded the existence of such a right as "obvious and elementary". The circumstances which had arisen in that case were not dissimilar from those in the present case. The plaintiff was proceeding in an action for libel. During the course of the plaintiff's own cross-examination, the Judge, Hewitt, L.C.J. received a communication from the jury to the effect that they were unanimously agreed that they had heard sufficient evidence in the case. When after some delay that communication was passed on to counsel matters proceeded as follows. (I read from the passage in the judgment of Scrutton L.J. at pages 26 & 27 of the Report)

> "The Lord Chief Justice then continued: "Now I have received an intimation from the members of the jury in which they say that they are unanimously agreed that they have heard sufficient evidence in this case". To the jury: "Members of the jury do you mean by that intimation that upon the plaintiff's own evidence you desire if you can to find a verdict for the defendants?" The foreman of the jury: "Yes, my Lord, that is our opinion". The Lord Chief Justice: "And may I take it that as a consequence if as a matter of law upon these pleadings it is necessary that there should be a verdict for the plaintiff for some amount, your verdict would be for the smallest possible amount?" The foreman: "Yes, my Lord"."

> Here the Lord Chief Justice, without having informed the jury that the plaintiff's case was not finished, or directed them as to the issues they had to decide on the evidence, was suggesting to them what their answers meant. The plaintiffs' counsel then said: "Before that result is arrived at, my Lord, I would insist upon addressing the jury". It is obvious and elementary that he had such a right if he thought it worthwhile to claim it, whether against a jury who have said before the end of the plaintiff's case they have heard sufficient evidence, or a judge who showed any signs of disputing the right. However, the word 'insist' or perhaps the tone in which it was said, seems to have annoyed the Lord Chief Justice who objected to the word. He then asked the plaintiff's counsel to argue what I should have thought was an obvious proposition. "I will hear you upon that point, Sergeant Sullivan. Are you entitled to address the jury when the jury have said upon the evidence of the plaintiff himself, they are satisfied that he ought not to recover". The Lord Chief Justice called upon Mr. Birkett who very prudently declined to oppose the application and left it to the judge."

Following that interchange, Sergeant Sullivan was given the opportunity to address the jury; but we are left in no doubt that if he had not been given that opportunity the Court of Appeal would have regarded that omission as a serious and material irregularity.

We are left therefore with the position in this case that the Bailiff, in a wholly understandable desire to avoid further acrimony between these neighbours in Court and the additional costs of a further day's hearing in a case in which the Court had in effect made up its mind against the plaintiffs, brought the proceedings to an end and delivered judgment without recognising or appearing to have in mind the undoubted right of the plaintiffs to address the Court through their counsel for the purpose of seeking to persuade the Court that the view of the evidence which it had formed was wrong. It is 'nihil ad rem' that any such attempt might have had little or no chance of success. It is impossible for an appellate court to hold that nothing which could have been said on behalf of the plaintiffs could have effected the mind of the court below.

In these circumstances we hold that there is no alternative but to set aside the judgment below on the grounds that there was a material irregularity in the conduct of the case. Indeed, Mr. Fielding in his helpful and frank submissions before us recognised that there was such an irregularity. He submitted however, that this was not a case in which it was appropriate to order a new trial. Rule 13/1 of the Court of Appeal (Civil) (Jersey) Rules, 1964, requires that the Court shall not order a retrial on the grounds of misdirection or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage of justice has been thereby occasioned. We doubt whether that rule has application where the misdirection takes the form of a material irregularity in the conduct of the case. But if we are wrong in this we are satisfied that the material irregularity does in the present case result in the miscarriage of justice, in that justice required that the plaintiffs had a proper opportunity to put their case before the Court. If this was not afforded to them it is not proper to speculate on what the result might have been if the irregularity had not occurred. We have in mind the words of Lord Halsbury in Bray -v- Ford (1896) A.C. 44 at page 48. In that case the judge at trial had misdirected the jury in favour of the plaintiff on the material part of the plaintiff's claim for libel and the jury gave a verdict for large damages. The Court of Appeal had declined to order a new trial on the basis that they thought that the nature of the libel was such that the jury would have been entitled to give and would probably have given the same verdict, even if the direction had been the other way. They refused the defendant's application for a new trial on the ground that in their opinion no substantial wrong or miscarriage had been occasioned by the misdirection. Lord Halsbury, L.C. said this, at page 48:

> "What influence such a wrong might have had upon the verdict, or upon the amount of damages I am not disposed to consider. The case must be tried again and I desire to say nothing which can in any way influence the arguments upon the trial which must take place. It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict as to the same amount of damages. I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me to say that an important and serious topic has been practically

withdrawn from the jury and this is, I think, a substantial wrong to the defendant".

A passage in the judgment of Lord Watson in the same appeal is also pertinent. He said at page 49:

"Every party to a trial by jury has a legal and constitutional right to have the case which he has made either in pursuit or in defence fairly submitted to the consideration of that tribunal".

We consider that those principles apply equally in this Island where the Bailiff sits with jurats. In these circumstances, but with regret, we think it is appropriate to order a new trial of the Skinners' representation. We say 'with regret' because we cannot believe that it is truly in the interests of the parties who will continue to occupy adjacent properties as neighbours, to find themselves in further proceedings on opposite sides of the courtroom. The only satisfactory solution to their present difficulties with each other is to resolve their disputes by amicable arrangement out of Court. Further we would wish to say nothing to encourage the Skinners to proceed with a new trial in advance of the hearing of the substantive action in the Autumn. If the parties have not resolved their disputes before that hearing, the Royal Court will then have the opportunity to reconsider the form of whatever injunctions may unfortunately be necessary to secure some degree of peaceful co-existence to each of the parties.

Accordingly, we set aside the judgment delivered in the Royal Court on the 20th October, 1988, and we order a new trial of the representation dated the 7th October, 1988.

Authorities

White Book Order 59, rule 11(2).

Archbold (42 Ed'n): p.469: Right of Jury to stop case.

Hobbs -v- Tinling; Hobbs -v- Nottingham Journal (1929) 2 K.B. 1 C.A.

Court of Appeal (Civil) (Jersey) Rules, 1964, Rule 13.

Court of Appeal (Jersey) Law, 1961, Article 13(d)(ii).

Fletcher -v- London & North West Railway Company (1892) 1 Q.B. 122 C.A.

Bray -v- Ford: (1896) A.C. 44 at 48.