Judgment 29/2010

C&R Homes (Guernsey) Ltd v Ferbrache - Court of Appeal (Civil Appeal 415) – 14th July 2010

Contract – action for breach of contract by developer of apartments – appeal to the Court of Appeal from finding by the Royal Court and award of £100 damages – s.15(d) of the Court of Appeal (Guernsey) Law, 1961 engaged – limit on right of appeal by reference to value (£200) – s.15 contrasted with the correlative s.24 of the 1961 Law, governing criminal appeals – meaning of the proviso "unless there was in contest in the suit a question of law" – held that leave was required – leave will only be granted (i) where there are legal grounds clearly arguable; and (ii) where any appeal would have a reasonable chance of success – leave refused with costs. (See Judgment 5/2010)

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

The 14th day of July, 2010 before The Hon Michael J Beloff QC, presiding,
James W McNeill QC and Nigel Pleming QC

C & R HOMES (GUERNSEY) LIMITED

(Appellant)

V

ANDRE JOHN FERBRACHE

(Respondent)

In the matter of the appeal from the judgement of the Royal Court handed down on 27th January 2010 whereby nominal damages were awarded against the Appellant in the sum of £100.00.

THE COURT, having on the 12th July 2010 heard Advocates M G A Dunster and P T R Ferbrache for the respective parties thereon, this day GAVE JUDGMENT in the terms attached hereto and: -

1. DISMISSED the application for leave to appeal against the said judgment and the award of damages;
2. AWARDED costs to the Respondent on the standard recoverable basis;
3. ORDERED that within 28 days counsel for the Appellant is to give an undertaking that the said costs order will be discharged in favour of the Respondent; and
4. DIRECTED that in the absence of such undertaking written submissions should be filed with the Court as to why the directors/shareholders of the Appellant Company should not be made responsible for the costs order against it.

S M D ROSS
Deputy Registrar of the Court of Appeal

IN THE COURT OF APPEAL, GUERNSEY

CIVIL DIVISION – APPEAL NO. 415

Between:

ANDRE JOHN FERBRACHE

(Plaintiff and Respondent)

v.

C & R HOMES (GUERNSEY) LIMITED

(Defendant and Appellants)

Before:

THE HON. M J BELOFF QC, President
J W McNEILL QC
N P PLEMING QC

M G A DUNSTER for the Appellants
P T R FERBRACHE for the Respondent

HEARING DATE: 12 July 2010
JUDGMENT DELIVERED: 14 July 2010

Cases and Text referred to:
Allan v Pratt (1888) 13 App. Cas. 780
Mason v Burningham [1949] 2KB 545
Connor v Maunder & Anr [1972] 1 WLR 914
Guille v Mackay Guernsey Court of Appeal, 14 June 1967
HM Revenue and Customs v Gresh and Another 2009-10 GLR 2239
Court of Appeal (Guernsey) Law 1961, Section 15

McNeill JA:

Introduction

1. This is the Judgment of the Court. The Appellants were the defendants in proceedings brought in the ordinary division of the Royal Court of Guernsey. The respondent was the Plaintiff who owned one of the apartments in a development known as Symphony Park in Hacse Lane in the Vale. The development had been carried out by the Appellants.

2. The respondent had complained about an excessive amount of noise from the flat above and alleged that the cause was that the Appellants had failed to construct his apartment in accordance with the terms of the building contract entered into between the parties.

3. The court below considered that the issues for it were to establish what the parties had agreed as a method of construction, whether there had been a breach of contract, if so was that breach the cause of any noise problems and, if so, to what remedy was the Plaintiff entitled.

4. After four days of hearing in December 2009, the court below (Collas, Deputy-Bailiff presiding, with Jurats) handed down a judgment on 27 January 2010. The Court expressed its conclusion in the following terms:

> "85. In conclusion, the Plaintiff suffers an unacceptable level of noise from the second floor apartment No. 12 which he hears most loudly in his main bedroom and is caused principally by impacts on the granite kitchen work surfaces. By a majority, the Court decided that the ceiling of the Plaintiff's apartment and the floor of the apartment above were not constructed in accordance with the express terms of the Contract between the Defendant and the Plaintiff. However, such breach of contract is not the cause of the noise problems experienced by the Plaintiff. The Plaintiff has therefore failed to prove his claim for substantial damages to carry out remedial works. In such circumstances, the Court awards "nominal damages" in the sum of £100.00.".

5. The court below had considered the issue as to the cause of the noise problems in paragraphs 27 to 32 of the judgment below. Each party had presented evidence from a witness with expertise in acoustic issues. The judgment concluded, on this matter, as follows:

> "32. The Jurats considered carefully the opinions of the two experts and concluded that [the defendant's expert] was the more plausible witness. They therefore concluded that the absence of any sound insulation in the ceiling cavity is of no consequence to the transmission of sound from the kitchen work surfaces and is not a cause of the problems experienced by the Plaintiff."

6. We were informed by Advocate Dunster that, despite this finding, and the nominal damages in issue, the Appeal has been pursued in order to protect the Appellants' reputation from an unchallenged decision that they had been found to have acted in breach of contract.

Jurisdiction

7. In the Respondent's case, Advocate Ferbrache brought to the attention of this court Section 15 of the Court of Appeal (Guernsey) Law 1961, the material parts of which provided:

> "An appeal shall not lie to the Court of Appeal under this part of this Law –
>
> ….
>
> (d) without the leave of the presiding judge of the court whose decision is sought to be appealed from or of the Court of Appeal, where the value of the matter in dispute does not exceed the sum of two hundred pounds sterling, unless there was in contest in the suit a question of law.".

8. The amount at issue in relation to this appeal was the sum of one hundred pounds. Advocate Ferbrache indicated that he had been unable to identify from the Appellants's Notice of Appeal any point of law. He had written to Advocate Dunster on 24 February 2010 making these points but no reply had been sent. A formal response was filed by Advocate Dunster on 5 July.

9. On that basis, Advocate Ferbrache made three submissions. Firstly, as no leave had been granted and as the findings in issue seemed to be merely of fact, there was no right of appeal.

10. Secondly, even if there was a right of appeal, the Appellants, in their documentation, had not either satisfactorily identified the issue or issues they wished considered nor put before the court relevant material to enable it to identify and determine such issues. The appeal accordingly should be refused as unreasonable.

11. Thirdly, the Jurats' findings of fact were such that it could not be said that there was no evidence upon which they could reasonably have concluded that the Appellants had constructed the ceiling of the plaintiff's apartment, and floor of the apartment above otherwise than in accordance with the contract.

Discussion

12. On the day of the hearing before this Court we were informed that the Appellants accepted that the value of the cause engaged section 15. It may be helpful, however, to outline the arguments for the purpose of future guidance. The Respondent contended that there was no right of appeal as the amount in dispute is less than £200 and the appeal was not on a question of law. In response, the Appellants had contended that the relevant amount was that claimed in the Cause and at trial, which greatly exceeded £200. Advocate Dunster had referred us to two English authorities in support of his proposition. Those authorities are *Mason v Burningham* [1949] 2KB 545 and *Connor v Maunder & Anr* [1972] 1 WLR 914.

13. In our view neither authority is of assistance as the correlative provisos in similar enactments were, respectively, (a) "where the debt or damages claimed does not exceed.." and (b) "where...the...damage claimed exceeds...". Such wording cannot assist in respect of a statute in a different jurisdiction which is so differently worded. Matters might have been otherwise had the pursuer cross-appealed the decision on quantification of the claim. But where there is no such cross-appeal, it would seem entirely against the spirit of the legislation – which clearly seeks to limit the right of appeal by reference to value – to interpret the provision as allowing an appeal merely because of an earlier issue which is no longer live. It is of note that the decisions to which we were referred observed that, without amendment of the sum sued for, that sum remained the amount in issue. Here, without a cross-appeal, the amount in dispute is undoubtedly £100.

14. Further, in *Allan v Pratt* (1888) 13 App. Cas. 780, the Privy Council considered a case of special leave. Earl Selborne, delivering the advice of the Board said, in guidance (which has never, to our knowledge and research, been doubted and which we consider apposite in our task in interpreting the Guernsey Law):

> "Their Lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the question of the right of appeal is, in their judgment, the amount which has been recovered by the Plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of *Macfarlane v. Leclaire* (2), that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as Plaintiff or has been adjudged to pay something or to do something as defendant."

15. In our view, therefore, and as the Appellants now accept, section 15 is engaged. As noted above, the wording of the proviso, which allows a right of appeal without leave, is "unless there was in contest in the suit a question of law."

16. Before going further, it is to be observed that, in the correlative wording in Section 24, which makes provision in respect of rights of appeal in criminal matters, there is a right of appeal against conviction "on any ground of appeal which involves a question of law alone.". On the other hand, leave for appeal against conviction is required "on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal."

17. By that comparison, it can be seen that the criminal provisions concentrate on the grounds of appeal, whereas the civil provisions concentrate on the proceedings below. It is, at first sight, perhaps surprising that the two provisions are not more closely mirrored. For example, there would appear no reason why Section 15(d) could not have been set out in similar fashion to Section 24(a) and (b). However, each of the two sections is, indisputably, set out in a different way and one cannot interpret Section 15 by reference to Section 24.

The Case for the Appellants

18. On 28 May 2010 the Appellants presented a document headed "Appellants' Case". That single sheet contained one sentence in the following terms:

> "The Appellants' contentions in support of its appeal are contained in the Notice of Appeal, and are repeated and adopted as if they were set out fully herein."

19. An appeal bundle had been lodged on 23 February 2010 comprising a Notice of Appeal of that date, the judgment below, the pleadings below, the contract relied upon and two drawings.

20. The Notice commenced by indicating that the Appellants proposed to ask the Court of Appeal for orders that:

> "1. The Judgment be set aside in respect of the findings set out in paragraphs 49, 51, 84 and 85 therein.
>
> 2. That a finding that there was no breach of the express terms of the contract be now made.
>
> 3. As a consequence of 1. and 2. above, a verdict be entered in favour of the Appellants including removal of the award of nominal damages.".

21. The Notice then proceeded to indicate that what followed constituted the grounds of appeal.

22. In Advocate Dunster's hands, the Appellants' case was somewhat volatile; and we have some sympathy with Advocate Ferbrache's complaint that he was faced with a moving target in which no issue of law was satisfactorily isolated.

23. During the course of oral argument it seemed to us that whereas in the Appeal Bundle the Appellants appeared to contend that the Jurats' findings in fact were perverse, on a true analysis their complaint was that their construction of the contract was incorrect.

24. Advocate Dunster's submissions, in their final form, were that the drawings and Specification both dealt with sound insulation and thus covered the same subject matter and that it was evident that there were differences between the two. As this was duplication, clause 5 of the Contract designedly gave priority to the Specification.

25. The dispute in relation to breach of contract turns on a difference between two types of floor systems. In the court below, shorthand phrases came into use. These were "type 1 floor system", being what was said to be embraced in certain drawings and "type 2 floor system", being what was said to be contained in the Specification.

26. Whilst Clause 2 of the contract provided that any variation of the provisions of the Specification had to be in writing and signed by both parties, Advocate Dunster submitted that the Specification contained the requirements for the "type 2 flooring system" and that was what had been installed. The Jurats however, as recorded in paragraph 49 of the judgment, had found, by a majority, that "they were satisfied that the change to a type 2 design … was a deliberate variation" in respect of which the Defendant was "at fault" in not advising the Plaintiff as required by clause 2.

27. Clause 5 of the contract provided:

> "THAT in the event of any duplication giving rise to a difference between the detail given in the Specifications contained in the First Schedule hereto and the detail shown on the said drawings, the detail shown in the said Specifications shall form the basis of this contract."

28. Advocate Dunster, therefore, sought to attack the finding of the majority, as set out in paragraph 49 of the judgment, that the change in design "could not be described as a duplication between the plans and the Specification". The contention for the Appellants was that any move from type 1 to type 2 flooring systems did not engage Clause 2 of the Agreement in the whole circumstances of the present case as the Specification contained the requirements for the "type 2 flooring system".

Discussion

29. As to jurisdiction, we commence with the words of the proviso "unless there was in contest in the suit a question of law". What is meant by the words "question of law" can vary with context. It might be an issue as to what is the substantive law in a particular matter. In addition, it can cover the issue as to the proper construction of a contractual term. In relation to the consideration of certain judicial or administrative decisions it can be said that, where a determination is manifestly perverse, there must have been a misdirection and, accordingly, an error of law. Finally, the question of whether there was any evidence to support a material finding of fact also raises a question of law: *Guille v Mackay,* Guernsey Court of Appeal, 14 June 1967

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30. It seems to us important to start, here, with the context given by the proviso. The proviso, as we have said, looks not to the ground of appeal but to the contest below. In our opinion, accordingly, the context required is a question of law being debated between the parties before the court below, as opposed to a failure of some sort in the determination below. Further, in our view, there appears no basis for restricting the issue to an issue of pure law as opposed to a question of law embedded in a question of mixed law and fact.

31. In our view, however, the section must be given a reasonable construction and it seems to us that this requires not only that a question of law was being contested before the court below, but further that the question was expected to be determined by the court below and, finally, that the question remains live in the grounds of appeal. There could be no sense in providing for a right of appeal merely where there had been a question of law but the decision on that question was not being appealed against.

32. Against this background, we now turn to appraise what we understand to be Advocate Dunster's final position.

33. It appears that there was no issue below between the parties as to the proper construction of Clause 5. That notwithstanding, the learned Deputy Bailiff directed the Jurats, as a matter of law in respect of interpretation of the terms of the contract, particularly with regard to Clause 5.

It is not suggested in this ground of appeal that the direction with regard to clause 5 was erroneous.

34. We therefore turn to paragraph 49 and Advocate Dunster's contentions which appraise a straightforward issue of fact, namely, whether there was a difference in the details given in the Specification and the details shown on the drawings. On this, paragraph 49 records that the majority of the Jurats agreed with the Plaintiff's submissions. Those submissions, as recorded at paragraph 44, were that the only duplication between plans and Specification was that the former required skim finishing of the ceiling and the latter dry-lining. Only the plans set out details of sound insulation.

35. For the Appellants, the salient evidence had come from Mr Falla, their Architect. As recorded in paragraph 43, his evidence was that the reference in the Specification to 'first floor' beam and block construction, rock floor and decking was also to be read as Specification for the second floor and that it dealt with sound insulation. This construction, if accepted, might give rise to a situation which engaged Clause 5.

Leave

36. As we have indicated, the Appellants now accept that they require leave to bring this appeal.

37. As this court indicated in *HM Revenue and Customs v Gresh and Another* 2009-10 GLR 2239, at paragraph 13, leave to appeal will be granted only where there are legal grounds clearly arguable and where any appeal would have a reasonable chance of success.

38. In our opinion there are no prospects of success for this appeal.

39. The majority of the Jurats clearly agreed with the present respondent's submissions upon construction of the provisions of the Specification as to the type of flooring system to which it refers. The Jurats accepted the present respondent's approach and must be taken to have rejected Mr Falla's evidence as to the proper construction of the Specification. We find no basis upon which it could sensibly be argued that the Jurats' analysis was wrong. Mr Falla's analysis seems to us a piece of special pleading calculated to avoid the conclusion which the Jurats correctly reached in point of fact, namely, that the way the floor system was constructed was indeed a variation of the agreement.

Conclusion

40. For all these reasons we refuse leave to appeal.

