Case No: B2/2012/2125

Neutral Citation Number: [2013] EWCA Civ 1445
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON CIVIL JUSTICE CENTRE
(RECORDER CHAPMAN QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 15 October 2013

B E F O R E:

LORD JUSTICE McFARLANE

LORD JUSTICE LLOYD JONES

SIR STEPHEN SEDLEY

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DURSUN OGUTOGULLARI (1)
CETIN ERBIL (2)
ESSEX ROAD SUPERMARKET LIMITED (3)
Claimants/Appellants

-v-

MUHAMMAD SHER ZAMAN (1)
IMRAN ZAMAN (2)
Defendants/Respondents

- -

(DAR Transcript of
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Official Shorthand Writers to the Court)

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MR DAVID BROUNGER (instructed by Stuart Karatas Sols) appeared on behalf of the Claimants
MR ANDREW KASRIEL (instructed by Whitefields) appeared on behalf of the Defendants

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J U D G M E N T

1. LORD JUSTICE LLOYD JONES: This is an appeal against the decision of Mr Recorder Vivian Chapman QC, sitting at the Central London County Court, dismissing the claim by the claimants, now the appellants, in misrepresentation. It was the claimants' case below that they were induced to purchase a supermarket business at Essex Road, North London, from the defendants by misrepresentations made by the defendants about the financial state of the business. In particular it was alleged first that the defendants had represented to the claimants that the minimum weekly takings of the business were £24,000 whereas in fact they were £11,500 (that is just under half the sum represented); secondly, that the commission on PayPoint transactions was 5 to 6 per cent, whereas it was 1 to 2 per cent; thirdly, the quarterly electricity bills were in the region of £1,500, whereas in fact they were in the region of £6,000; fourthly, that the cost of refuse collection was £400 every six months, whereas in fact it was £900 every six months.

2. The judge decided the case on the basis of his findings of fact that the defendants did not make the first three misrepresentations and that the claimants did not rely on the fourth. On this appeal we are concerned only with the first alleged misrepresentation.

3. As originally formulated, the proposed grounds of appeal included a number of grounds to the effect that the judge was wrong in coming to his conclusions of fact. In refusing permission to appeal on these grounds, Sir Richard Buxton observed:

> "The application in its original form did no more than suggest other possible conclusions to which this judge, or another judge, might have come, without demonstrating that the actual conclusions were sufficiently obviously incorrect to justify the intervention of the court."

The application for permission to appeal on those grounds is not renewed. The appeal is now limited to a single ground of appeal linked to an application to call fresh evidence. It is said that the fresh evidence demonstrates that the judge was wrong to make his actual conclusions in relation to the alleged overstatement of turnover.

4. Sir Richard Buxton granted permission to appeal and remitted to the full court in the context of the grant of permission the issue of whether and on what terms the fresh evidence should be admitted. He drew attention to the fact that that was the course adopted by this court in Transview Properties v City Site Properties Limited [2009] EWCA Civ 1255. In the particular circumstances of this case it has been a sensible use of the resources to hear the application and the full appeal at the same time.

5. There are further applications before the court. By notice dated 30 April 2013 the respondents have applied for an order that the appellants' proposed witnesses attend court for the purpose of cross-examination if required and that the respondents be given permission to rely on the evidence of three further witnesses in response to those whose evidence the appellant now seeks to adduce; and that the respondents be given permission to rely on the hearsay evidence of a former employee referred to as "Zia", whose name is in fact Mohamed Ahedzai. By a further application of September 2013, the appellants seek to rely on a statement by Mr Ahedzai.

6. We consider that the appropriate course is for this court to consider the application to this case of the established legal principles in relation to adducing further evidence. If the stringent criteria are fulfilled and a retrial ordered, there would then be an opportunity to test the evidence and to call further evidence in rebuttal at that trial. For similar reasons, the court refused an application made by the appellants late last week for an adjournment of the hearing of this appeal on the ground that one of the proposed new witnesses would not be available to attend to give evidence.

7. This is essentially an appeal on the facts. In Transview Properties, Mummery LJ referred to the Sisyphean aspects of an appeal by a party wanting another trial on the ground that first time round the judge got the facts wrong. At paragraphs 17 to 18 he said this:

> "17 ...In reviewing the decision of the lower court an appellate court will, as a general rule, leave alone the trial judge's assessment of the credibility of the witnesses and his findings of primary fact when they are based on, or significantly influenced, by the oral evidence. The appellate court should only interfere with his findings if it is satisfied that the trial judge has not taken proper advantage of the opportunity, which is available only to him, to assess the soundness of the oral evidence, and that his findings of fact were plainly wrong: Assicurazioni Generali Spa v Arab Insurance Group [2002] 1 WLR 577 at paragraphs 14-17; Datec Electronic Holdings Ltd v UPS Ltd [2007] 1 WLR 1325 at paragraph 46.
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> 18. A quest for a re-trial runs into severe difficulties if it is obvious from reading the judgment and the transcripts of evidence that the trial judge paid careful attention to detail both during the trial and in his reflective evaluation and treatment of all the evidence."

8. Under CPR 52.11(2), the appellants have to obtain this court's permission before they can adduce any evidence which was not before the lower court. Referring once again to Mummery LJ's judgment in Transview, he explained as follows at paragraphs 22 to 23:

> "22. ... That permission should only be granted if, in accordance with the overriding objective, it is just to admit evidence on appeal which was not produced at trial. The party bringing forward more evidence on an appeal must have a very good reason for not having obtained it in time to use at the trial. It is usually too late, after the trial is over, to produce evidence to an appellate court, which is not itself equipped to try or to re-try cases.
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> 23. In the exercise of its discretion to admit fresh evidence the court has to consider carefully all the relevant factors, such as whether the evidence could, by reasonable efforts, have been obtained for use at the trial; whether the fresh evidence is apparently credible; and whether, if given, it would probably have an important influence on the outcome of the case. The interests of the parties and of the public in fostering finality in litigation are significant..."

He then referred to the judgment of Hale LJ in Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318 at 2324C. It is clear, therefore, that the pre-CPR authorities on adducing new evidence on appeal such as Ladd v Marshall [1954] 1 WLR 1489 remain highly persuasive.

9. In his judgment, the judge dealt expressly with the approach he had adopted to fact finding in this case. At paragraph 112 he said this:

> "This is not a case where the claimants can prove their case by documentary evidence. It depends wholly on accepting the claimants' case about oral misrepresentations. Nor is this a case where I have found it possible to say that, having seen all the witnesses (except for Mr Fehmi), I am satisfied that the witnesses for one side are all telling the truth and the witnesses for the other side are all telling a pack of lies. Indeed, the general impression that I got was that I could not be confident that any of the witnesses that I saw were telling the truth, the whole truth and nothing but the truth. In forming my judgment about the facts, it seems to me that I have to place particular weight on:
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> • The undisputed documentary evidence, and
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> • The common sense probabilities of the situation."

10. At trial, it was contended on behalf of the appellants (the claimants) that the defendants falsely represented the turnover of the business. In particular, it was alleged that at the time of the negotiations for the sale of the business, the defendants were falsifying the till rolls to create the impression that the sales were far greater than they in fact were. It was also maintained that the defendants were asking their staff to do the same thing.

11. The evidence of Mr Kamrul Khan, who was called on behalf of the claimants at trial, was that at the beginning of 2006 the shop was taking around £18,000 a week. That did not include the money taken for PayPoint. However, in 2006 the takings started to deteriorate and by the end of 2006 takings had reduced to between £10,000 and £12,000 a week. His evidence was that ever since he started working at the premises, Mr Zaman had been trying to sell the premises. There was a lot of interest. He estimated around a hundred potential buyers came to see it in the time that he was there. Around 2005 he remembered one Pakistani man who came to the shop when he was working there being very interested and he said that Mr Zaman had told him that the shop was taking £30,000 a week.

12. It was the evidence of Mr Khan that in or around the end of 2006 Mr Zaman was getting increasingly concerned about the reduction in takings. Mr Khan remembered the claimant, Mr Ogutogullari, and his daughter coming to the shop as interested buyers. Some time after he had first seen the claimant at the shop, the first and second defendants, Mr Muhammad Zaman and Mr Imran Zaman, had asked him to manipulate the till by adding sums to the takings. He said that on days that he was working he saw Imran manipulating the till, adding figures to both tills. Mr Zaman and Imran would telephone him and ask him to manipulate the till. They would telephone him in the

evening and ask him to add a sum, usually between £500 or £600, to each of the grocery tills. This, he explained, would have the effect of increasing the takings on each of the Z reports printed at the end of the day by the sum keyed in. (I should explain that if the key was turned to the "Z" position, the till printed out the total of sales rung up on that till since the last Z reading, and zeroed the sales figures. If it was turned to the "X" position, it printed the total of sales rung up on that till since the last Z reading but did not zero the sales figures.)

13. Mr Khan said that he would only do that when they telephoned him, but that they were generally telephoning him every day and that that continued until the shop was sold. It would often be the case that he would see Imran adding takings to the till during the day. He would then telephone Mr Khan later and ask him to add further sums and he also saw two other employees known to him as Clevio and Kay, adding sums to the till. They told him that they were asked to add these sums by Mr Zaman and Imran.

14. He remembered seeing Mr Ogutogullari come, shortly before the shop closed, to view the till reports, and when he came in he saw Imran show him the till reports. Mr Khan said that he had added figures to the till on those days on which he saw the claimant come to the shop to view the reports. However, it was the evidence of Mr Kamrul Khan that when the requests were made he was not sure why Imran and Mr Zaman were asking him to add figures to the till. It was only after the claimants had purchased the shop and the claimants questioned why the takings were so low that the claimants told Mr Khan that they had been told by the Zamans that the takings were twice that. He says that it was then that he first realised why he had been asked to add figures to the till.

15. The judge dealt with the issue at paragraph 113 and following of his judgment. In particular, he found it improbable that such a gross misrepresentation of turnover would be made when the purchasers could be expected to examine the accounts. He found that the appellants had in fact been shown accurate accounts. He referred to the inconsistent statements on behalf of the appellants as to their case on the manipulation of the tills. He rejected the evidence of Kamrul Khan, the witness on whose evidence the till rigging allegation turned. There was evidence before the court below that he had told Muhammad Zaman that he was willing to give a statement to the defendants, but only if they paid his brother £3,000 which was owing to him. On cross-examination, Mr Khan had said that he had lied to Muhammad Zaman, that he had not really intended to give a statement to the defendants. The judge considered Kamrul Khan to be a thoroughly unreliable witness.

16. The judge also referred to correspondence between the appellants and Costcutter immediately after the purchase which shows that the appellants had an accurate understanding of the turnover of the business. The judge also found that there was an explanation for the Olay advertisement in that a genuine error had been made on the part of the newspaper.

17. The judge concluded at paragraph 127:

> "I think that the probability is that the defendants did tell Durson [Mr

> Ogutogullari] and his daughter that takings were £11,000 to £15,000, that Durson and his daughter did appreciate from seeing the accounts and till readings that the average was only about £10,000, but that they felt that the business was run down and that they could achieve £15,000 weekly takings with the Costcutter franchise. When their hopes did not materialise and the claimants were in difficulty with the rent, they remembered the mistake in the Olay advertisement and thought that they could run a misrepresentation argument as a tactic to renegotiate the rent. The misrepresentation story grew and developed from there."

18. The proposed fresh evidence consists of evidence from employees of the defendants at the time of the negotiation of the sale of the business that the defendants were adding false purchase sums to the tills and were also asking the staff to do so. It is said that this fresh evidence supports the account given by Mr Kamrul Khan who was considered by the recorder to be an unreliable witness. Furthermore, it is said that the evidence of Mr Jillani casts doubt on the evidence of Adnan Zaman in that it is stated that Mr Jillani hardly saw him in 2007, whereas Adnan Zaman asserted that he visited regularly at this time and did the cashing up most evenings.

19. There is before the court a witness statement of Mohammad Mangal Jillani in which he states that he was first employed at the store between August 2001 and February 2004. He soon started working as a cashier on the tills. He says that from 2003 until he left in 2004 he remembered Imran "overing" the till. By that he had meant adding sales to the till when no sale had been made. On the first occasion, he saw him add a £300 sale to the till. He asked him why he did that and he said that Mr Zaman was trying to sell the premises and was exaggerating the takings to make it easier to sell. Imran asked him to do it but he refused. He said at the end of the day he would write "Imran overing" and then add the figure that had been added on the closing slip. He saw a number of interested buyers come into the store. He remembered two of them asking if they could stand on the tills and Mr Zaman refusing.

20. He worked in the store again between June 2005 and May 2006 and started to work there again in January 2007 for a period which ended in October 2007. He says that in January 2007 there were a number of new people working at the store. He recalled three employees named Clevio, Kamran and Debbie also working at the tills. He said that as soon as he returned he noticed overing was taking place. Soon after he started he was asked by Mr Muhammad Zaman to add £500 in sales to the till. He refused to do it. Mr Zaman then added £500 himself. Mr Jillani said that he saw a number of potential buyers coming to look at the shop at the time. His evidence is that when Mr Zaman saw one of the potential buyers come in, he would quickly come and tell somebody to add more money to the till. He would then print an X report and show it to the customer. Mr Jillani says he also saw Imran do this on a few occasions.

21. He remembered Mr Ogutogullari coming in. Mr Zaman and Imran told Mr Jillani not to talk to Mr Ogutogullari. He remembered Mr Ogutogullari and his daughter coming in on various occasions in early 2007. He remembered seeing him on four or five occasions. His evidence is that during that period Mr Zaman increased the overings. Mr Jillani said that when he cashed up the till at the end of the day the till would be

short if Mr Ogutogullari had come in. He said that Imran always knew when Mr Ogutogullari was coming. He was not aware if Clevio and Kamran were adding sums to the tills. Sums would be added to the tills shortly before Mr Ogutogullari came in. He would then be shown the X report. He would also be shown the previous day's Z report.

22. In addition, the appellants seek permission to adduce evidence from Suppiah Thiagarajah. In his witness statement Mr Thiagarajah states that he first worked in the store between 2000 and 2002. He went back there in 2005 and continued to work there until a month after the sale to the appellants. He remembered Mr Ogutogullari and his daughter coming into the store and being shown around by Muhammad Zaman and Imran Zaman. Either Mr Muhammad Zaman or Imran would show them the till roll. He saw them come in nine or ten times. At that time Kay, Clevio and Jillani all worked on the tills. Suppiah Thiagarajah also states that while Adnan Zaman came into the store on a few occasions, he did not work there.

23. In his witness statement, Mr Thiagarajah states that he is aware that sales were being added to the tills when Mr Ogutogullari was coming to the store. He says he knows that because Clevio told him that Mr Zaman and Imran wanted to show the store was doing more business to encourage Mr Ogutogullari to buy the store. He says that Clevio told him that Mr Zaman and Imran were both adding sales to the till, although he accepts that he did not himself see that happen. His evidence is that Clevio and Kamran would sometimes say that the tills were short the night before and that the reason for this was that sales were being added.

24. Mr Thiagarajah states that he was aware from what Clevio and Kamran were telling him that sales were being added throughout the time that Mr Ogutogullari was interested in buying the store, but that they would increase on the days that he came in.

25. Mr Jillani explains in his witness statement the reason he did not give evidence at the trial. Essentially he states that he was out of the country between 27 April 2012 and 13 August 2012. He confirms that he had moved from his previous address at which the appellants had sought to contact him. He explains that on the weekend after he returned to the United Kingdom, that is in August 2012, he looked in at the store. Mr Ogutogullari came to talk to him. He explained that he had recently lost a court case and that he believed that the takings of the store had been exaggerated to him. At that point Mr Jillani states that he told Mr Ogutogullari that he was aware that sales had been added to the tills and agreed to make a statement.

26. Akbar Khan and Durson Ogutogullari have produced witness statements stating that as part of the preparation of the trial, Mr Ogutogullari had asked the staff whether they were aware of previous members of staff who might have relevant information. Akbar Khan told Mr Ogutogullari that he had contact details for Mr Jillani. Mr Ogutogullari tried to phone him but the number was disconnected. Mr Ogutogullari asked Akbar Khan to contact Mr Jillani at his address, but he had moved and there was no forwarding address. Akbar Khan and Mr Ogutogullari have both produced statements confirming the account of the visit of Mr Jillani to the store in August 2012.

27. Suppiah Thiagarajah states that when asked to give evidence he said that he did not want to get involved. Mr Zaman and Imran, he said, knew where he lived and he was concerned what they might do if he gave evidence against them. However, when he had heard that the case had been lost, he agreed to give a statement because he felt there had been an injustice and he should assist Mr Ogutogullari in putting that right.

28. Similarly, Mr Ogutogullari states that Mr Thiagarajah had refused to give a statement prior to the court case despite being asked to do so on a number of occasions. At one stage he got very angry with Mr Ogutogullari and confirmed that he would have nothing to do with it. However, after he had been told that the case was lost, Mr Thiagarajah had stated that he felt there had been an injustice and agreed to make a witness statement supporting the appellants' case.

29. On behalf of the appellants, Mr Brounger submits that this new evidence would probably have had an important influence on the outcome of the case. He submits that the recorder is more likely to have been willing to accept the evidence of Kamrul Khan if it had been supported by other witnesses. He submits that, as far as apparent credibility is concerned, there is no apparent connection between Mr Jillani and Mr Thiagarajah and the claimants, and there would be no reason why their accounts should be invented. He submits that it is imperative in the interests of justice that this evidence is considered in that it suggests that the findings of the recorder that it was unlikely that there were instructions to ring up fictitious sales were incorrect. He submits that if they were, it is likely that a finding would have been made that this manipulation was done to support a misrepresentation of the figures. If the evidence is not considered, he says, there is a real risk that a miscarriage of justice will be allowed to stand.

30. It seems to me that the possible relevance of the fresh evidence has to be considered in the context of the case as a whole. Having regard to that context, and in particular to the following considerations, I am unable to conclude that if admitted at a retrial this fresh evidence would probably have an important influence on the result of the case.

31. First, the alleged misrepresentation as to the turnover of the business (that is a turnover of £24,000 a week as opposed to a turnover of less than half that figure) would have been such a gross misrepresentation that it is highly improbable that it was made. Any prudent purchaser would be expected to check the business accounts and the value added tax returns as a matter of course, and on such examination the extent of the misrepresentation would have been obvious. Here it is highly material that the judge found that the accounts and the returns did accurately state the true turnover of the business.

32. Secondly, the judge found moreover that the accounts were disclosed to the appellants. The judge rejected the submission that they had been fobbed off with an explanation that the accounts did not show the true picture. As the judge observed, had the purchasers been told that the accounts concealed profits from Her Majesty's Revenue & Customs, there would be all the more reason for them to insist on examining the accounts. To my mind, the unchallenged findings that the appellants had been shown accounts which accurately stated the turnover strikes at the core of this allegation of misrepresentation.

33. Thirdly, it is correct that the judge considered that the allegation of manipulating the tills depended essentially on the evidence of Kamrul Khan, as it clearly did, and that he rejected that evidence on the ground that he was an unreliable witness who had admitted lying and who wanted to sell his evidence to the respondents. However, several of the grounds on which the judge rejected his evidence have a wider significance. Fictitious sales of the sort alleged would have created an unnecessary and very substantial liability to tax and value added tax. Instructing Kamrul Khan to act in this way would have given him a powerful lever over the respondent. It is difficult to see how the respondents could accurately manipulate an X reading by ringing up fictitious sales unless they knew exactly when the X reading was going to be required and they would have had to have known in advance of the visits of Mr Ogutogullari and his daughter. These points were all made by the judge in his judgment. A further consideration here, as Sir Richard Buxton pointed out in granting permission to appeal, is that very considerable manipulation of the tills would have been required to support a turnover double that which was actually achieved.

34. Fourthly, at paragraph 118 of his judgment, the judge analysed the different versions given by the appellants in relation to the alleged manipulation of the till. In particular, accounts varied as to the amount of takings said to have been represented to the appellants; accounts varied as to when the appellants had inspected the till readings; accounts varied as to whether documentation was supplied to them or only shown to them. As the judge observed, these are the building blocks of the appellants' case on misrepresentation. The judge found that inconsistency on these fundamental matters could not be explained on the grounds of misunderstanding by the appellants' solicitors.

35. Fifthly, on 13 December 2007, a week after they started running the business, the appellants made an application to Costcutter for a franchise in which they stated that the weekly sales were £15,000. If they had just purchased the business under the impression that the turnover was twice that, there would be no good reason for them to light on that figure. On the other hand, as the judge pointed out, if they had been told by the sellers that the best weekly takings were £15,000, it is entirely understandable that they should include that figure in the new account form.

36. Sixthly, the judge attached some weight, and so do I, to the consideration that the 21-year lease granted by the respondents to the appellants meant that they would remain in a close business relationship after the completion of the transaction. This seemed to the judge to be a further consideration which made it improbable that the respondents would make so egregious a misrepresentation as to the worth of the business.

37. Having regard to all of these considerations, I consider it improbable in the extreme that a court on a retrial would come to any different conclusion in relation to the alleged misrepresentation.

38. I should add that the evidence of Suppiah Thiagarajah is largely hearsay. Moreover, if the matter were to go back for a retrial, it is clear from the submissions that we have heard this morning and from the applications which have been made to put in further

evidence in response and in reply, that there will be questions for Mr Jillani to answer in relation to his credibility.

39. In these circumstances, it is not necessary to consider whether the new evidence could by reasonable efforts have been obtained for use at the trial. Furthermore, it is not necessary to say anything about the two further applications, one made by the respondents and one made by the appellants.

40. In the light of my conclusion on the application to adduce further evidence, I consider that the appeal must fail, there being no other subsisting grounds of appeal. I should add, however, that the recorder in his judgment below was meticulous in his examination of all aspects of the evidence and in his analysis of the competing submissions. The parties have most certainly had their day in court; both sides have received a fair and full hearing and their competing submissions have been given the most careful consideration by the recorder. For these reasons, I would dismiss the appeal.

41. SIR STEPHEN SEDLEY: I agree. I take the liberty of adding two comments. One is my appreciation of Mr Brounger's realistic and well-ordered submissions, which I am certain my colleagues share.

42. The other is that the reasons for the high standard of new evidence which is demanded by this court before a retrial will be ordered include the cost risk and added complexity of a retrial at which previous witnesses now face cross-examination about what they said last time; of which the outcome remains uncertain; and at which the only certainty is that the costs will now be quite astronomical, whoever has to pay them.

43. This is why this court would be doing no favours if it granted a retrial in any but a clear case, and for the reasons given by my Lord I agree that this is not one of them.

44. LORD JUSTICE McFARLANE: I agree with each of the judgments given by my Lords, and I too, therefore, would dismiss this appeal.