



Neutral Citation Number: [2009] EWCA Civ 1326

Case No: B2/2009/0819/0819(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM

Miss Recorder Sadd sitting in the Central London County Court
on 26 March 2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE CARNWATH
and
LORD JUSTICE WALL

Between :

DHAMI & ANR	<u>Appellant</u>
- and -	
LLOYDS TSB GENERAL INSURANCE LTD	<u>Respondent</u>

Sami Rahman (instructed by Messrs Elc - Solicitors) for the Appellant
Stuart Benzie (instructed by Messrs Eversheds - Solicitors) for the Respondent

Hearing date: 25th November 2009

Approved Judgment

Lord Justice Wall :

1. This is an appeal by Sucha Singh Dhani and his wife Gurmej Kaur Dhani (the appellants) against an order made by Miss Recorder Sadd sitting in the Central London County Court on 26 March 2009. The recorder had dismissed the appellants' claim against Lloyds TSB General Insurance Limited (the respondent) and had ordered the appellants to pay the respondent's costs. She also refused permission to appeal.
2. Permission to appeal was, however, granted by Sir Richard Buxton on paper on 11 June 2009 on the following terms:-

In this unusual case, I do not think that the judge can be criticised for finding as she did on the evidence before her. I have however, concluded that the full court should be given an opportunity to consider whether the fresh evidence should be admitted. The evidence if accepted is likely to have a significant effect on the outcome of the case, and in view of Mr. Sukhdev Dhani's explanation of his social attitudes is not necessarily inconsistent with his previous evidence. The evidence was, however, in existence at the time of the trial, and the issue remains whether it was obtainable by or accessible to the claimants. Those issues remain open to argument in a case where the failure to produce the evidence is explained by non-cooperation by a witness who is associated with the claimants.

3. On 25 November 2009, we heard argument from counsel instructed on the appellant's behalf. We unanimously refused the application to admit the fresh evidence, dismissed the appeal and ordered the appellants to pay the respondent's costs to be assessed if not agreed following receipt of our judgments. We reserved our reasons. This judgment explains why I would refuse to admit the fresh evidence and dismiss the appeal.

The facts and the issue to which they give rise

4. The facts are within a relatively narrow compass, which I am content to take from the Recorder's judgment:-
 1. This claim is brought by (the appellants) against their insurance company (the respondent). The claim has a number of heads. The primary ones are the costs of repair and refurbishing of their home at 20 Roxeth Green Avenue (the property) following a fire on 15 March 2004, the loss they sustained as a result of a burglary in March 2004 and the costs of repair to the garage following a fire to the garage at the property in February 2005, together with a loss of goods and the costs of alternative accommodation. The total claim amounts to almost £129,000.
 2. The defence is essentially that the (respondent) was entitled to repudiate the policy, which it did by letter of 1 September 2004 on the basis of the failure of (the appellants) to disclose the criminal convictions of their son Mr. Sukhdev Dhani (Sukhdev).

3. In addition, quantum is in dispute on a number of grounds.
4. At the outset of the hearing, it was decided that the court should deal first with the issue of whether or not (the respondent) was entitled to repudiate the policy. This judgment deals with the issue only.
5. The appellants had taken out a building and contents policy relating to the property with the respondent on 28 October 1999, and the policy was renewed each October. As part of the application for the policy, the appellants were asked whether anyone normally living with them had ever been convicted of any criminal offence other than a motoring offence. The answer to that question from the appellants was, at all material times, in the negative.
6. On 15 March 2004, the property was damaged by fire whilst the appellants were in India, whence they returned on 22 April 2004. It was common ground that at the time of the fire, Sukhdev and another of the appellants' sons, Barinder Dhani were occupying the property.
7. On 24 March 2004, both Sukhdev and Barinder Dhani were interviewed by Mr. Ronald Stark, a loss adjuster instructed by the respondent. Each made a formal statement containing the words "I make it knowing that if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true." Sukhdev gave the property as his address and said: "I have lived at (the property) on and off for about 20 years apart from when staying with my girlfriend and such". He also stated that he was living in the property around the time of the fire. Barinder Dhani stated that Sukhdev "lives there most of the time".
8. Sukhdev has a number of criminal convictions, some of which relate to motoring offences, and some of which were spent by the time the policy was initially taken out by the appellants. The Recorder deals with Sukhdev's relevant convictions in the following way:-
 14. Subsequently, (Sukhdev) was convicted of the following: assault on 31 May 1996, for which he received a sentence of nine months imprisonment; criminal damage on 18 October 1996 for which he was fined and ordered to pay compensation; possession of a bladed article on 3 November 1997, leading to a sentence of community service and probation; and threatening behaviour on 19 October 1998 resulting in community service.
 15. After the policy was taken out, (Sukhdev) was convicted of the following matters: 1 June 2000, threatening behaviour and possession of a bladed article, for which he was fined; and on 13 June 2003, ABH, leading to a twelve months prison sentence, and common assault, leading to a three months prison sentence.
 16. (Sukhdev) also has other convictions for motoring offences including four sentences of imprisonment for driving whilst disqualified. Police records show (Sukhdev) as having, on release from prison, been made the subject of a home detention curfew to the property on three

occasions in 2002 and 2003, including from 6 January 2003 to 14 February 2003, and from 15 September 2003 to 10 February 2003, the last curfew following a sentence of imprisonment in June 2003 for assault. During the latter period, the insurance policy would have been renewed.

17. National Identification Service records shows that the address given for (Sukhdev) in respect of each occasion was the property. Similarly, they recall that he was resident at the property on the following dates: 22 September 2003, 13 June 2003, 16 October 2003, 25 February 2002, 16 March 2000, 19 May 1999, 13 December 1998, 24 June 1997, 7 March 1997 and 23 March 1995. (Sukhdev) also receives all correspondence at the property.
9. The appellants' case before the Recorder was twofold. Firstly, they said that Sukhdev was not living at the property. Secondly, they said that in any event they had no knowledge of his criminal record.
10. Sukhdev himself made a statement in the proceedings and gave oral evidence to the Recorder. He was not the subject of a witness summons. In his statement, which is dated 20 December 2008 he gives his address as 464, Whitton Avenue West in Greenford, Middlesex, and says that he has a partner and two children. He also says that he has no fixed address. He says he has been living out of his parents' house since the age of 16. He accepts that he was living in the house at the time of the fire in March 2004, but says that he was asked by his mother "to come once in a while" to look after the house while his parents were away. His parents, he says, were not aware that he had moved in. He accepts that he has a criminal record and that he has served terms of imprisonment. He also accepts that he used the property as "a correspondence address" and that he had been both bailed and tagged to the property. Despite this, and even when bailed to the property he says he has not stayed there. He says that he never informed either his parents or his siblings about his criminal convictions and adds:-

It is true that there were curfews imposed on me over the period of time at my parents' house and I did not know whether the police had contacted my parents. When my parents asked, I told them that this was as a result of repeated driving convictions.
11. The reason Sukhdev gives for not using his partner's address as his bail address was his "volatile" relationship with her, although he does say that apart from the property, he has also given the addresses of one of his cousins in Greenford and his sister in Letchworth as well as a bail hostel in Ealing. He concluded by stating that he had never "normally resided" at the property.
12. I do not propose to rehearse Sukhdev's oral evidence, of which we have a transcript. Suffice it to say that the Recorder did not find him to be a credible and honest witness. In reaching her conclusion to dismiss the appellants' claim she stated in paragraph 100 of her judgment:-

I have taken into account that the statements and evidence of the family who stated that it is not the case that (Sukhdev) normally lives with his parents at

the property. I take into account that this is a family who, with the exception of (Sukhdev) does not have previous convictions, and that (the appellants) are a respectable retired couple. However, the difficulty I have here is that. I was frequently concerned about the reliability of the evidence given. This, coupled with the clear evidence in support of a finding of (Sukhdev) living at the property, and the lack of any alternative accommodation details provided, leads me to draw the conclusion that (Sukhdev) was normally living at the property throughout the relevant period.

13. The Recorder went on to find that the appellants were aware of Sukhdev's convictions; that the convictions were relevant and that the appellants' non-disclosure was material.
14. As Sir Richard Buxton says, it is, in my judgment, impossible to fault the Recorder's findings, and since the case turned essentially on them, it is to my mind plain that, without the reception of fresh evidence by this court, and a re-trial being ordered, there is no basis upon which an appeal against the Recorder's judgment could possibly succeed. I certainly did not understand Mr Raman, for the appellants to suggest anything different.

The CPR and relevance of Ladd v Marshall

15. It is, therefore, necessary to examine the fresh evidence which the appellants seek to introduce. Before doing so, however, it is necessary briefly to refer to the context in which any application to adduce fresh evidence falls to be made. CPR 52.11(2)(b) states that : "Unless it orders otherwise, the appeal court will not receive- evidence which was not before the lower court". As is pointed out by the editors of ***Civil Procedure*** (2009 edition, paragraph 52.11.2) the CPR is a departure from the previous RSC Order rule 10(2) which stated that this court would only receive further evidence on "special grounds" – those grounds being essentially the principles set out in ***Ladd v Marshall*** [1954] 1 WLR 1449.
16. The cases which follow the implementation of the CPR make it plain that the ***Ladd v Marshall*** principles remain relevant, although any application to adduce fresh evidence must be decided in the context of the overriding objective set out in CPR Part 1.
17. In the instant case, ***Ladd v Marshall*** has a particular resonance on the facts. In that case, the plaintiff in the original action called the defendant's wife. She said she could not remember a particular transaction. The plaintiff and his witnesses were disbelieved, and judgment was entered for the defendant. Some time later, after she had obtained a decree nisi of divorce from her husband, the defendant's wife gave a statement to the plaintiff's solicitors, accepting, in effect, that she had lied to the judge. The plaintiff sought to appeal out of time, and also asked for a re-trial. He was unsuccessful in both applications.
18. The principles to be applied for the introduction of fresh evidence are well known, but nonetheless bear repetition. They appear in the judgment of Denning LJ ([1954] 1 WLR 1489 at 1491) as follows:-

The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, 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: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

The fresh evidence

19. In the instant case, the fresh evidence which the appellants seek to introduce comprises the following material:-
 - i) a further statement from the first appellant;
 - ii) a further statement from Sukhdev with a number of exhibits;
 - iii) a statement from one Surjit Singh Bains;
 - iv) a statement from one Deborah Jane Vira.
20. The statement from the first appellant states that since the trial he has had a discussion with Sukhdev, as a result of which the latter has agreed to give information which he withheld at trial.
21. Sukhdev's further statement, which is dated 30 April 2009, gives his address as "464, Whitten Avenue, Greenford in Middlesex". In paragraph 7 he gives five addresses at which he says he lived with his partner and their two children between 1988 and 2009. He also sets out the dates he was in prison. He goes on to say that all relevant documents are in the name of his partner, from whom there is no statement. He says that his first statement did not give full details of his living arrangements because of the volatile nature of his relationship with his partner, and because he felt that his personal life was something which he would not want to disclose to anyone. He also records a number of addresses at which he worked as a decorator and where he lived whilst he was so working.
22. Exhibited to the statement are letters to Sukhdev, two of which are addressed from 3, Yewtree Close in North Harrow and two of which have envelopes on the back of which is written an address at 30, Byron Road in Harrow. These are addresses which Sukhdev gives for his partner, and where he says he was living between 1988 and 1992 (30 Byron Road), and 1994-9 (3 Yewtree Close). There is also a letter from the National Identification Service addressed to him at the property dated 14 May 2004 setting out the details of his convictions. There are also photographs of Sukhdev and children; a letter from the Law Society dated 23 May 2005 addressed to "Mr. S Dhani" at 15, Elverdon Road in Feltham; a letter from his solicitors dated 12 January 2006 addressed to him at 464, Whitten Avenue, and three documents in February and

March 2007 dealing with an appearance at the Harrow Magistrates Court. These are addressed to Sukhdev at 20, Lea Road, Perivale.

23. The statement from Mr Bains states that Sukhdev resided at 219 Waye Avenue in Cranford, (a property owned by Mr Bains) from three dates between May 2002 and the end of 2004, although he received no rent from Sukhdev on account of “services rendered”. Ms Vira’s statement is to like effect in relation to properties at 66 Kings Road and 29 Betchear Road Harrow.
24. It will be immediately apparent; (1) that there is no objective, independent documentary evidence of where Sukhdev was living at the material time; and (2) that this fresh evidence plainly contradicts both the statement Sukhdev gave to Mr. Stark immediately after the fire and the statement which he made on 20 December 2008, for the purposes of the proceedings. Furthermore, although the periods in which he says he was living in accommodation owned by Mr Bains and Ms Vira coincide with what they say (it would be remarkable if they did not), his latest statement (dated 30 April 2009) also gives addresses at which he says he was living with his partner at these times.
25. Apart from these inadequacies, nothing in the fresh documentation goes to either of the Recorder’s other critical findings, namely (1) that the appellants were aware that Sukhdev had a number of convictions for offences other than motoring offences; (2) that the non-disclosure by the appellants was material; and (3) that had disclosure been made, insurance would have been declined.

Discussion

26. In my judgment, the fresh evidence falls foul of all three *Ladd v Marshall* principles. Taking them in reverse order, the evidence from Sukhdev is simply not credible – alternatively, to put the matter at its lowest, it does not advance the evidence from the position it was before the Recorder. Secondly, had the Recorder had this evidence before her, I think it would have reinforced rather than altered her decision. Finally, I am unconvinced that the evidence, such as it is, could not have been obtained by the appellants prior to trial. The fire was in March 2004. Liability was repudiated in 1 September 2004: the trial did not take place until March 2009. On any view, the whereabouts of Sukhdev’s residence were put fairly and squarely in issue in the original defence filed in September 2007.
27. Although the matter is now governed by CPR, the factual analogy with the *Ladd v Marshall* is strong, and that case remains highly influential.
28. Furthermore, it would not in my judgment, for the reasons which I have already given, be either in conformity with the overriding objective in CPR, or proportionate to admit the fresh information.
29. These, accordingly, are the reasons why I agreed that we should (1) refuse to admit the fresh evidence and (2) dismiss the appeal.

Lord Justice Carnwath

30. I agree.

Lord Justice Waller

31. I also agree.