

STEWART, (Jan) Ltd



(2-1981)

THE SUPREME COURT

Walsh J.
Griffin J.
Hederman J.

Between

JAMES STEWART LIMITED

Plaintiff
Respondent

and

THOMAS J. CALLAGHAN

Defendant
Appellant



28th July 1982

Walsh J. Hederman ✓ *concurring*

The appellants in the course of carrying out a scheme of development at Devon Court in the City of Galway piled rubble and clay against a wall which was the property of the plaintiff. The wall collapsed as a result of the piling of the rubble and clay against it. The wall was one which divided Devon Court from another area of property known as Devon Mews. In the High Court the appellant contested the causation but the High Court judge found that the cause of the collapse was the action of the appellant in placing the clay and rubble against the wall. This finding of liability is not the subject of appeal to this Court.

It has not been possible to put a precise date upon when the rubble and clay was piled against the wall but it appears to have been a number of years before 1975.

In that year the wall was noticeably bulging or tilting with the result that the local authority served a notice on 14 July 1975 to have the matter put right. As nothing was done in response to that notice the wall was demolished in about October 1975.

This appeal has been concerned with when the respondents ought to have set about rebuilding the wall.

The respondents, who were the plaintiffs in the action in the High Court, are developer builders and therefore in a somewhat different position from the ordinary private owner who has suffered a like damage. A builder is in a better position to set about restoring the damaged property and, of course, there is a legal obligation imposed by the Civil Liability Act 1961 upon plaintiffs to mitigate the damage caused by the wrongful act of another party, in this case the appellants. Failure to do so can be held to be contributory negligence on the part of the injured party.

In the present case the learned High Court judge thought it was reasonable for the plaintiff to wait until 1978 to rebuild the wall and, upon that basis, he assessed damages in the sum of £8,000. The case was

heard by him on 16 December 1980.

The appellants have claimed in this appeal that there was no evidence upon which the judge could have determined £8,000 as being the cost of properly restoring the wall in 1978 and that in any event it should have been done in 1975 when, according to the appellants, the cost would have been only £2,300. There was evidence that the cost would have been somewhere in the region £11,000 in January 1980. When the statement of claim was delivered in 1978 the amount claimed in the particulars of special damage for the cost of repairing the wall was £7,000. The evidence also disclosed that in fact the respondents had themselves submitted a quotation to their solicitor for £6,000 as being the cost of carrying out the work in September 1977.

The respondents in this case were the victims of a wrongful act on the part of the appellant. By reason of that wrongful act their property was damaged in that the wall, injured by the wrongful act of the appellants, had to be demolished and replaced. The respondents were therefore entitled to damages in the form of compensation which would as far as possible put them back into the position they were in if the wrong had not been committed. In tangible form this means sufficient compensation to

replace the wall by another equal, or as near as possible equal, to the one demolished and which, in the words of the learned trial judge, would be as satisfactory and visually acceptable and safe for persons passing. Naturally in times of increasing prices the longer the restoration work is delayed the more costly it is going to be. There is a duty upon the injured party to set about undertaking the necessary work at the earliest date at which the work could reasonably be undertaken. In any particular case that date will depend upon the circumstances of the case as various factors may intervene which may justify a delay in the carrying out of the necessary work as well as delays which may legitimately be occasioned by the repudiation of liability by the wrongdoer or other reasonable grounds justifying the postponement of the restoration work.

I agree with the view of the learned trial judge that it was not reasonable for the respondents to have waited until the disposal of the action. Up to the date of the hearing of the action the work had not been undertaken.

In the present case the appellants have submitted that the work ought to have been undertaken when the wall was demolished when, they say, the work could have been done for very much less than the sum awarded. In support

of this proposition counsel for the appellant relied upon a number of decisions but in particular upon an English decision, Dodd Properties & anor v Canterbury City Council & ors in the Court of Queen's Bench. In that case the High Court judge decided that the date of the occurrence of the damage was the date upon which the damage should be assessed or, where the damage was not reasonably discoverable, the date when it was reasonably discoverable. That decision was given on 26 July 1978 but, however, it was overruled by the Court of Appeal, Civil Division, on 21 December 1979. It was decided that the correct test was that the cost of repairs was to be assessed at the earliest date when, having regard to all the circumstances, they could reasonably be undertaken rather than the date when the damage occurred. That decision is to be found at 1980 1 A.E.R. 928.

Bearing in mind that the respondents were entitled to some time to consider their position and to try to negotiate the matter with the appellant I think the date of the actual demolition of the wall would be unreasonable to fix as a date for the assessment of compensation. Compensation in this case in fact amounts to the cost of replacing the wall.

Possibly the learned trial judge was somewhat

generous in allowing them up to 1978 but in terms of practical results I think it makes very little difference. I myself think that 1977 should have been the date from which compensation would be assessed provided all other things were equal. The cost of replacing the wall then was about £6,700.

However, all other things were not equal. Firstly and most importantly, the defendants were contesting liability and that is a factor to which some weight must be attached even in relation to the fixing of the date. However, it is not necessary to examine that particular point any further having regard to the total result. In cases of this nature the courts have recognised the effects of inflation and the effect of the passage of time on inflation. If, therefore, in 1977 the plaintiffs had laid out the sum of £6,700 in replacing this wall and did not succeed in recovering it by action until 1980 or even later, namely the date of the result of this appeal they would in fact lose fairly substantially on the total transaction.

If the defendants had admitted liability instead of contesting it then they should have made an offer of a reasonable amount and if that were refused it would have been the plaintiffs' misfortune if they insisted upon

looking for more than they were reasonably entitled to. However, by contesting liability and making litigation inevitable it meant that whatever sum the plaintiff might recover could not be recovered until the termination of that litigation. In all the circumstances I think the sum awarded by the learned High Court judge probably falls short of the appropriate figure, particularly when there was evidence in the case that the cost at the date of the hearing of the action was already very substantially higher. But taking into account the effect of inflation and the comparison of real values I think the sum fixed by the High Court judge is not one in respect of which the appellants can legitimately complain.

The damages were awarded on the assumption that the wall is going to be restored. This Court is not concerned with the liability of the respondents to persons for whom they built houses in so far as this wall is concerned. However, it does not appear to have been contested, either at the appeal or at the hearing, that the wall will be rebuilt and the damages therefore were deemed to be awarded on the basis of restitutio in integrum. See the decision of this Court in Munnelly v Calcon Ltd, Sisk & Son and Doyle, 1978 I.R. 387.

I would dismiss this appeal and affirm the order of the High Court.


28.7.82.

STEWART (Jan) Lu

THE SUPREME COURT

Walsh J.
Griffin J.
Hederman J.
(2/1981)

JAMES STEWART LIMITED

v.

THOMAS J. CALLAGHAN



JUDGMENT delivered on the 28th day of July 1982 by

GRIFFIN J.

The only question for determination in this appeal is the amount of damages to which the plaintiffs are entitled for the wrongful act committed by the defendant, whereby part of the boundary wall between the property of the plaintiffs and that of the defendant was rendered dangerous and had to be demolished in October 1975. In the High Court, McMahon J. held that the damage to the wall was caused by the wrongful act of the defendant and assessed damages at £8,000, being his estimate of the amount which (due to inflation) the rebuilding would have cost in 1978. The defendant contends that the damages which should have been awarded was the sum of £2,300, being the cost

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of rebuilding in October 1975 when the wall was demolished.

The fundamental principle as to damages is that the measure of damages is such sum of money as would put the injured party in the same position as that in which he would have been if he had not sustained the injury. As a general rule such damages are assessed as at the date of the breach. But although that is the general rule, the authorities stress that it is not a universal rule and that it is subject to many exceptions and qualifications. In a case such as this, the true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all the relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages, and what is reasonable has to be looked at from the point of view of both parties and a balance struck - see Dodd

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Properties Ltd. v. Canterbury City Council, 1980

1 W.L.R. 433, per Megaw L.J.

Applying these principles to the facts and circumstances of this case, I would agree with McMahon J. that 1978 should be taken as the time at which the rebuilding work should have been undertaken by the plaintiffs, but I do so for a reason somewhat different to that at which he would appear to have arrived. The damage to the wall was caused by the defendant at some time prior to the beginning of April 1975. At that time, the Borough surveyor of Galway Corporation inspected the wall, found that it was dangerous to members of the public passing along the adjoining road, and on the 4th of April 1975 he wrote to both the plaintiffs and the defendant enquiring as a matter of urgency what steps they proposed taking to make the wall safe. Nothing was done in pursuance of that letter, and on the 10th of July 1975 he caused to be served on the plaintiffs and on the defendant a notice under the Local

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Government (Sanitary Services) Acts requiring the necessary work to make the wall safe to be carried out not later than the 14th of July. As a result of the service of this notice, negotiations took place in July and August 1975 between the plaintiffs and the defendant's nephew, who was employed by the defendant and was nominated by him to carry out the discussions. The attitude of the defendant was that he would not take any responsibility for the damage to the wall or for its rebuilding. Negotiations broke down and were not renewed at any time after August 1975.

As no work had been carried out by either of the parties to make the wall safe, the dangerous portion was demolished by employees of Galway Corporation on the 3rd of October 1975.

These proceedings were instituted on the 9th of February 1978. In the pleadings, not only did the defendant deny that the wall in question was the property of the plaintiffs, but he counterclaimed that

the wall was his property, that the collapse of the wall was due to excavation work carried out by the plaintiffs, and that the damage to the wall constituted a trespass by the plaintiffs to his property, and he claimed damages against the plaintiff. He persisted in this claim right up to and during the course of the hearing of the action in the High Court. In these circumstances, it would in my view be wholly unreasonable to expect the plaintiffs to undertake the repair and rebuilding of the wall before the respective claims were determined by the Court. The hearing in the High Court took place in December 1980. The plaintiffs should have commenced and prosecuted these proceedings with all reasonable expedition. But proceedings were not instituted until February 1978. If the proceedings had been instituted at the end of 1975 or early in 1976, as in my view they should have been since negotiations had come to an end before the wall was demolished, the hearing would have taken

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place in 1978 and not in 1980, and the damages to which the plaintiff would have been entitled would have been assessed as of that time. It was unreasonable for the plaintiffs to delay the issue of proceedings until February 1978 and, in my opinion, the time when, with reasonable expedition, the proceedings should have been determined is the time by reference to which the cost of rebuilding should be taken in assessing damages in this case. That time was 1978, and was in fact the time at which McMahon J. assessed the plaintiffs' damages.

I would accordingly dismiss this appeal.

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