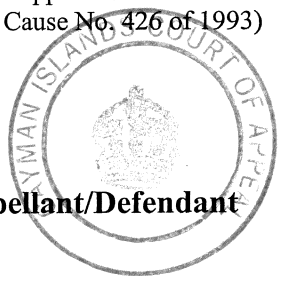
30-11-01

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 30 of 1998
(Grand Court Cause No. 426 of 1993)



BETWEEN:

GRAND CAYMAN GOLF RESORTS LTD.

Appellant/Defendant

- and -

EAST END AGGREGATE LTD.

Respondent/Plaintiff

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice I. Rowe, Justice of Appeal
The Honourable Mr. Justice M. Taylor, Justice of Appeal

Kenneth Farrow instructed by Quin & Hampson for the Appellant.
George Giglioli instructed by Giglioli & Co. for the Respondent.

Heard: November 19th 2001

Reasons released: November 30th 2001

REASONS FOR DECISION

TAYLOR, J.A.

This is an appeal from a judgment of Chief Justice Harre awarding the respondent paving company CI$ 219,118.50 plus interest and costs on a contract to pave the appellant's subdivision roads and for agreed pre-existing indebtedess.

All but two of the grounds of appeal originally raised were abandoned prior to the hearing. The issues remaining for our determination were whether the Chief Justice erred: (i) in refusing at the opening of the trial to permit the appellant (to whom I shall refer to as "the defendant") to adduce expert evidence by filing the required statement out of time; and (ii) in accepting figures advanced by the respondent (to whom I shall refer to as "the plaintiff") as to the area paved and quantity of asphalt used, and rejecting the defendant's figures.

We dismissed the appeal at the conclusion of the hearing and said that we would later provide our reasons.

(a) The Expert Report

By an order for directions dated October 6th 1994, each party was given leave to adduce expert evidence at trial provided that it disclosed the substance of such evidence to the other party "at least 60 days prior to the date fixed for such trial".

The defendant asserted by its defence and counterclaim that the paving failed to meet certain technical requirements of the specifications. Counsel for the plaintiff says that he anticipated that an expert would be called by the defence and that he retained an expert essentially to respond to whatever might be said by the defendant's expert. Had the defendant's expert's report been filed sufficiently ahead of the 60-day deadline before trial, the plaintiff would have had the opportunity to file a responsive report within the time limit. If the defendant's report was filed at or close to the deadline, the plaintiff would have had to seek leave to file a responsive report out

of time. If the defendant filed no expert report, the plaintiff would have no need of expert evidence. This was the plaintiff's original position.

Shortly before the trial, then set for October 30th 1995, correspondence took place between counsel for the plaintiff and the president of the defendant company requesting an exchange of expert reports, which would necessarily be then out of time. Counsel for the plaintiff says he made this proposal because the defendant was not at that stage represented by counsel and the plaintiff was eager not to lose its trial date. The same proposal was repeated by plaintiff's counsel to the defendant's newly - appointed counsel five days before the trial. The trial date was lost, however, when the registry took the case off the trial list.

Counsel for the plaintiff thereafter took the position that the original requirements of the order for directions must be adhered to - if the defendant intended to call expert evidence it must file the necessary statement of such evidence at least 60 days before the new trial date. No such statement was filed by the defendant prior to the date of trial. At trial, counsel for the plaintiff emphatically rejected the suggestion that there was a continuing agreement for simultaneous exchange of reports out of time. He said that he intended to call expert evidence only if necessary to rebut expert evidence called for the defence.

It appears that it was only when faced with the possibility of otherwise losing its trial date as a result of change of counsel on the other side that the plaintiff was willing to entertain simultaneous exchange of expert reports out of time - something which might result in the plaintiff's expert failing to meet the points made by the defendant's, so that the opposing opinions might pass as "ships in the night". Once that trial date was lost anyway, counsel stood on the terms

of the order for directions. This is made clear by counsel's letter of February 19th 1996, which emphasized the 60-day deadline for provision of expert statements, and again by counsel's letter of April 15th 1996 in which he says:

> I have again reviewed the terms of the Order for Directions made herein and I find that the provisions relating to expert's reports merely require the party wishing to rely on the report to file it. There is nothing regarding exchange of reports. Additionally, the matters on which the expert is providing a report have been raised by your client and therefore it would be more appropriate for my client to reply (by means of an expert's report) on those matters raised by your client's expert rather than to have our expert prepare a report which may not deal with matters referred to in your client's report (which would require a multiplicity of reports).

At the time this last letter was sent the matter was set down for trial more than 3 months hence, on July 29th, 30th and 31st 1996.

At the beginning of the trial counsel for the defendant sought leave to adduce expert evidence on the basis of a report, until then undisclosed, which had been prepared almost a year earlier, in August 1995. Following extensive and repeated submissions, the Chief Justice twice refused applications by the defendant to admit the report out of time, and denied the defendant leave to adduce expert evidence.

Counsel for the appellant, who was not counsel at trial, argued before us that the Chief Justice gave undue consideration in his ruling to prejudice which would be suffered by the plaintiff should the defendant's report be admitted, and gave insufficient consideration to the prejudice caused by its exclusion to the defendant which absent expert evidence would be unable to establish its case on breach of the specifications. The matter could have been adjourned, if necessary,

counsel said, in order for the plaintiff to adduce expert evidence in reply, and was in fact adjourned by reason in part of the time taken up in submissions on this preliminary point, at the expiry of the three days for which it was set.

On a review of the correspondence, we find no basis on which it could be said that the Chief Justice erred in the exercise of his discretion. He was in our view correct in concluding that the plaintiff, having "prepared its case in a certain way on the basis that no expert's report from the defendant was to be put in", should not in the circumstances be called on at trial "to face a different case" – that "neither the plaintiff nor the court should be subjected to this".

(b) The Measurement Issue

The measurement issue revolved around competing estimates of the area paved; the plaintiff, through its managing director Joseph O'Brien, putting the figure at 12,516 square yards, while the defendant's president Huig Zuiderent put it at 11,232 square yards.

The significance of these measurements is two-fold. The contract called for a "tack coat" to be paid for at CI$ 1.00 per square yard. It called also for "hot mix", for which there were accepted invoices for 1,099 tons and which was "guaranteed" by the plaintiff to provide 11.5 square yards of paving per ton, to be paid for at CI$ 150.00 per ton in place. Mr. Zuiderent said he had measured the length of the roads with a rock and measuring tape and found it to be 4,212 feet. Applying to this the required width of 24 feet, he arrived at an area of 11,232 square yards, and by dividing this figure by 11.5 - the "guaranteed" coverage per ton - he concluded that only 975.69 tons of hot mix was required. Mr. O'Brien had not measured the road himself but gave in evidence

the record of measurements done with a professional measuring device for the company by his brother and an engineer. This showed the paved area to be 12,516 square yards, which applied to the delivered hot mix figure of 1,099 tons, indicated a coverage of 11.39 square yards per ton – close to the "guaranteed coverage" of 11.5 square yards per ton.

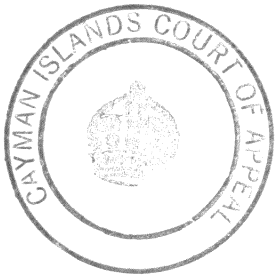
The Chief Justice was not persuaded by the evidence of Mr. Zuiderent, finding the evidence of the defendant as a whole to be "indicative of a determined attempt to avoid payment". Criticism had been made in cross-examination of the measurement method used by Mr. Zuiderent, and of certain of his assumptions including application of the 24-foot width at intersections. The judge observed that the defendant's case on failure to meet the specifications assumed that the pavement had been too thin, and that "its claim that too much material was used is the less likely". Accepting instead the plaintiff's figures, the Chief Justice found that "subject to the *de minimus* discrepancy" between coverage of 11.39 square yards per ton and the promised 11.5 square yard coverage, the plaintiff had met its guarantee.

Counsel for the appellant contended that Mr. Zuiderent's measurement evidence, although rough and ready, was the only evidence properly before the court, and ought to have been accepted. But it does not appear, however, that objection was taken at trial to Mr. O'Brien giving evidence based on the company's records and practice, and it is apparent from the judge's notes that Mr. O'Brien testified to 12,516 square yards as the area covered. Having rejected Mr. Zuiderent's evidence, the judge was in our view entitled, doing the best he could with what he had before him, to accept the plaintiff's figures, notwithstanding that these suggested some minor deviation from the guaranteed coverage of the "hot mix".

We were satisfied, in the words of s. 5 of the Court of Appeal Law, that the effect of the judgment appealed from was "to do substantial justice between the parties".

(c) Conclusion

It was for the above reasons that we dismissed the appeal, and awarded costs to the respondent, to be taxed if not agreed.



Zacca, P.

Rowe, J.A.

Taylor, J.A.