25.8.98 C/S

GRAND COURT CAYMAN ISLANDS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 426/93

BETWEEN: EAST END AGGREGATE **PLAINTIFF**

AND: GRAND CAYMAN GOLF RESORTS **DEFENDANT**

For the Plaintiff: Mr. George Giglioli
For the Defendant: Norman Hill Q.C. and Mr. Steve McField

BEFORE HARRE CJ

JUDGMENT

By an agreement between the parties which is recorded in a letter written on behalf of the defendant and dated 13th April 1993 the Plaintiff was required to pave certain roads in Phase 2 of the Defendant's development known as Patrick's Island. The agreement provided that payment would be made by five instalments, first of which was due fifteen days after the receipt of the final approval of the Government's Public Works Department (PWD) for the roads with the final instalment being due 75 days thereafter. The Plaintiff claims CI$219,118.50 of which $164,850 was for 1099 tons of AC 20 Hot Mix which was the material used by the Plaintiff to pave the roads.

The letter of agreement is of such importance that I now refer to the text in full -

> "We have agreed that you will pave our roads in Phase 2 of Patrick's Island, commencing on April 15, 1993, with Hot Mix Asphalt, which has been produced with AC 20, and the quality will be of the minimum design presently in force by the Cayman Islands Public Works Department for asphalt roads in sub-divisions.
>
> We wish to inform you that we have calculated that 855 tons are needed for our road at 4200 feet long with an asphalt pavement of 24 feet, however, final length will be determined after completion.

The 855 tons are calculated at 1.5 inch thick. We have determined at this stage the total area to be paved is 11200 sq. yards, but this will be subject to final measurement after completion of the job.

The price agreed upon shall be CI$150.00 per ton in place, with a guarantee that you will pave a minimum of 11.5 yards per ton.

If the total sq. Yardage is more than our calculations we will you (sic) CI$150.00 per ton paved, based on the minimum of 11.5 sq. yards paved per ton.

We also have agreed that you will place a tack coat of AE 200 on the base of the to be paved road, the price agreed is CI$1.00 per sq. yard in place.

We will pay the invoices with regard to the foregoing works on the following payment schedule:

15 days	CI$41,752.50 previous balance owed
30 days	CI$25,000.00
45 days	CI$25,000.00
60 days	CI$25,000.00
75 days	Balance outstanding

We wish to bring to your attention that you do need to notify Mr. Noel Mowbray of the Cayman Islands Public Works Department to comply with P.W.D. standards at various stages of the works.

We have received approval for all the base works, we do, however recommend that you do roll the entire road before commencement of the works.

For you information Mr. Dick Christiansen of Quarry Products will be our agent on the site and will be allowed to sign all weigh tickets at the point of batch."

The Defendant alleges that the asphalt did not correspond to the PWD specifications for sub-division roads in respect of the compacted thickness and the compacted density of the pavement.

There was also an issue over the area of road paved and the amount of asphalt used in relation to it. The Plaintiff claims to be entitled to be paid for 1099 tons of asphalt but the Defendant says that because the Plaintiff guaranteed 11.5 square yards of asphalt laid per ton and to a tack coat at $1.00 per yard it would only be entitled to payment for 976 tons if it was not in breach of the agreement.

The evidence for the Plaintiff was given by Mr. Joseph O'Brien. He is its Managing Director. He testified that he was an investor and did not have technical experience in the production of asphalt or the operation of an asphalt plant. Indeed it was clear from his evidence that he had not had direct involvement in the technical aspects of the transaction which has given rise to this case. He had not measured the road, had no direct knowledge of what had been put in place on it, was not aware if any testing equipment had been purchased by the Plaintiff and acknowledged that without testing nobody would know whether the minimum specifications were met or not. He did, however, say that the measurement was done by his brother and, for a second time, with the company's engineer, Paul David, using a measuring wheel and mathematical calculations. The Plaintiff's case is simply that the obligation to pay arose on the approval of the works by PWD and it is therefore entitled to payment. That approval was given on 4th May 1993.

The Defendant had already received approval from the PWD for the base works, as the letter of 13th April 1993 records.

The requirements of the PWD's Minimum Design and Construction Specifications for Subdivision Roads are very detailed. I refer only to paragraphs 10.6 and 10.8. Paragraph 10.6 includes the following requirements relating to minimum compacted thickness and density -

> "ASPHALTIC CONCRETE
> This should have a minimum compacted thickness of 1.5 inches, and should achieve a minimum compacted density of 97% of the laboratory density. This should be based on the average of at least five (5) tests.

Paragraph 10.8 reads as follows -

> TESTING
> The Public Works Department may require the developer to submit appropriate documentation to substantiate compliance with the preceding specifications."

Mr. O'Brien's evidence was that he was not required to have any approval of a mix design and was not asked by the Defendant to give one. That is consistent with the evidence given on behalf of the defendant by Mr. Koehn, the PWD Executive Engineer Roads, to which I shall refer later.

Mr. Zuiderant gave evidence that he had sent samples to a consultancy firm called Caltech Testing Inc. ("CALTECH") in the United States by the 27th April 1993. That is consistent with the first of the CALTECH reports to which I need to refer which is dated the 30th April 1993 and refers to the company having received three asphalt cores and one asphalt slab for density and contents test by Federal Express on the 27th April. An extraction analysis and density test data are given but in a further report

designated No. 4 and dated 4th May 1993 reference is made to the first report having been based on a wrong mix design. Moreover, the report goes on to say that there was only sufficient mix left after performing the extraction analysis to perform theoretical specific gravity of the mix and was substantially qualified in other respects.

The next report was dated 10th May 1993 and designated Report Number 5. It contained the following -

> "After issuing report No. 4 some additional data has been furnished that will be covered in this report. The paving company used an AO 20 rather than an AE 60. The mix was to the upper side of optimum on asphalt content. It appeared to be reasonably uniform based on the extracted analysis.
>
> The lab density information is attached with an average value of 138 pounds per cubic foot. The in place core density data is then from 97% to 100%. The theoretical density indicates an air void percentage of 4.4% based on the theoretical density of 144.4 pounds per cubic foot.
>
> I would need to see the roadway prior to making a determination of softness and it appears, based on the test criteria that the mix meets the specifications."

There then followed a test table and there was attached to the report a summary of tests known as Marshall tests on various dates. Mr. Zuiderant testified that this information did not reach CALTECH from him.

The last of the CALTECH reports was dated 7th June 1993. It was report No. 6. While the extraction analysis lends support to the view that the slabs sent did not meet the specification the report contains the following important qualification -

> "There were hairline cracks evident in the slabs possibly damaged either while sampling or shipping. I do not feel this is representative of the roadway pavement. Probably should cut cores and test these locally."

Like the Plaintiff, I attach considerable significance in terms of analyzing Mr. Zuiderant's credibility to the fact that on the 14th May 1993, four days after the date of CALTECH report no. 5 Mr. Zuiderant wrote to Mr. O'Brien a letter in which, after making various observations about measurements and tonnage he included the following passage -

> "We have informed you that the pavement seems to be very soft, we have sent off two slabs of asphalt to CALTECH to be tested."

That was disingenuous in two respects. No mention of the report that Mr. Zuiderant had just received, in which a finding that the mix appeared to meet the specifications was made. Moreover, the report also said that the writer would need to see the roadway before making a determination of softness.

The burden of proof is upon the party who asserts the affirmative of an issue. It was for the Defendant who asserted breach of the obligation of the Plaintiff with regard to the compacted thickness and the compacted minimum density of the material laid to prove it. The Defendant's difficulty in this regard was recognized by his counsel who attempted to address it by an ingenious but in my view untenable argument. It was that the requirement that the Plaintiff provide asphalt which complied with the minimum specification of the Public Works Department was a condition precedent,

which involved complying with all mandatory provisions of the specifications including, but not limited to, the provision of a mix design for approval by PWD which had in at least five tests satisfied the minimum requirements of density and thickness. It was submitted that the legal burden of proof of compliance with such a condition precedent rested on the Plaintiff after all the evidence had been heard, both on the construction of the contract and from the fact that all matters of fact relating to compliance with the mandatory provisions of the specification as well as the provisions of this information to PWD for approval would be peculiarly within the knowledge of the Plaintiff. I reject that.

Mr. O'Brien's evidence did not bring to light any procedural defect which was in itself probative of a defective product. He was an investor who employed a management team. Mr. Koehn's evidence with regard to PWD procedures and policies did not meet the plaintiff's argument that the event which gave rise to the liability to pay under the contract was the approval of the paving works by PWD.. There are indeed mandatory requirements as to compacted thickness and density of compacted concrete in the PWD Minimum Design and Construction Specifications for Subdivision Roads. They are to be found in paragraph 10.6 of the Specifications which calls for at least five tests to be made and averaged. Paragraph 10.8 of the Specifications requires that the PWD may require the developer to submit appropriate documentation to substantiate compliance with the preceding specifications. That is clearly discretionary and it is the developer not the contractor who may be called upon for the documentation. An extraordinary feature of Mr. Koehn's evidence was that in spite of the nature of the complaint in this case and his role as a witness in it he had

never visited or arranged for a PWD representative to visit the roadworks in question. He was not present at the view of the site by the Court at which Mr. Zuiderant pointed out what he said were defects. These were not of such a nature as to be, to the Courts inexpert eye, indicative some three years after the road was laid, of defective work. In my judgment the evidence of the defendant as a whole was indicative of a determined attempt to avoid payment.

The Plaintiff has proved its case with regard to the liability for payment which arose by reason of the approval of the works by PWD on 4th May 1993.

There is, however, a separate issue with which I must deal. The Defendant says, rightly that his letter dated 13 April 1993 called for a guarantee of 11.5 square yards of laid asphalt per ton and a tack coat at CI$1.00 per yard and that if the Plaintiff paved 11,232 square yards of road it would only be entitled to be paid for 976 tons. Mr. Zuiderant, testified that he had measured the road by himself, using a rock and a measuring tape, and that the length of the road was 4,212 feet. As the agreed width of the road was 24 feet, he arrived at a paved area of 101,088 square feet, or 11,232 square yards. 11,232 divided by 11.5 comes to 975.69 tons as the maximum tonnage which the Plaintiff should have charged for. The plaintiff's calculation is that 12,516 sq. yards were paved and 1,099 tons of asphalt used. That comes to 11.39 sq. Yards per ton - 0.96% less than the guarantee of 11.5 sq. Yards called for by the defendant. I regard that as de minimis. Moreover, as the defendant claims that the minimum compacted thickness was not achieved, its claim that too much material was issued is the less likely.

The road was not a straight road. Calculations were produced by the plaintiff to counter those of Mr. Zuiderant. I accept them and find that, subject to the de minimis discrepancy to which I have referred the plaintiff met its guarantee.

Judgment is for the plaintiff in the principal sum of CI$219,118.50 and the defendant's counterclaim is dismissed. This was a claim for a fixed debt which was strenuously resisted and I award interest on the principal sum at the rate of 8 3/8% from the 14th day following the service of the writ and statement of claim up to 31st January 1998 and 7 7/8% from 1st February 1998.

25th August 1998

G.E. Harre
Judge

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