BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.8 OF 2001

BETWEEN:

LEONARD YATES CONSTRUCTION CO LIMITED

Appellant

and

EDWARD SILVER

Respondent

Before:

His Lordship, The Hon. Sir Dennis Byron — Chief Justice
His Lordship, The Hon. Justice Satrohan Singh — Justice of Appeal
His Lordship, The Hon. Justice Albert Redhead — Justice of Appeal

Appearances:

Mr. Terrance Neale for the Appellant
Mr. Sydney Bennett and Ms. Michelle Matthew for the Respondent

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2003: January 16;
March 10.

JUDGMENT

The Background

[1] **BYRON, C.J.**: This is an appeal against the decision of Smith J delivered on 10th April 2001 dismissing the claim and counterclaim of parties to a building contract, and ordering each party to pay the other's costs. The respondent, the building owner was a good friend of Sam Leonard, a building contractor and one of the principals of the appellant building construction company. The building contract, which is central to the issues in dispute, was drawn by Sam Leonard and executed in November 1992. Under the terms of the contract, the appellant was obliged to provide complete drawings and all materials and labour for the construction of

certain buildings, structures and facilities in Virgin Gorda for a total sum of $300,000.00. The relationship of the parties was reflected in clause 5 of the contract, which stated:

> "The Contractor agrees to build the buildings, pool, patios, downstairs storage area and pump room, as per what is laid out on the drawings. All as per the drawings for no extra cost to the Client, but the $300,000.00. agreed.
>
> However, both the Client and the Contractor agree to work together to make the project as economical as possible but not to ease on anything to do with the structural strength nor the good quality expected of the project".

[2] Over a period of two years, the appellant constructed the residence. The appellant turned over a guest apartment to the respondent in 1993 and the main residence in December 1994. The root of the dispute occurred, when shortly after, Sam Leonard unexpectedly died. The respondent did not enjoy the same relationship with the surviving co-director Christina Yates who took over the management of the project. The relationship eventually deteriorated until he initiated these proceedings by suing the appellant for damages for work not carried out in the sum of $7,260.00 and $10,745.00 for defective work. The appellant counterclaimed for the sum of $73,684.00 for the supply of extra items and extra work.

[3] The learned trial Judge found that the death of Samuel Leonard influenced the state of affairs, because at the time of his death the liability of the respondent to the appellant was $15,000.00, which was in fact paid in full and so the bill for extras was considered totally disproportionate particularly as most of the items covered the period when the building was under the control and supervision of Sam Leonard. On the other hand the respondent had delivered a to do list just about a week before Sam Leonard's death and this too was disproportionate to the list that was the basis of the litigation. Both men had been in close contact and the respondent had been living in the premises for about a year. This was a major factor in persuading the learned trial Judge that neither party was likely to have been entitled to the sums they claimed and after hearing evidence from five

witnesses over a three day trial, he concluded that neither had discharged the burden of proving their respective cases.

The Appeal

[4] The appeal encompassed four broad areas, the learned trial Judge's failure to give judgment on admissions on the pleadings, the learned trial Judge's interpretation of the contract, his perception of the evidence and his evaluation of the evidence.

Perception of the Evidence

[5] The case turned to a large extent on the learned trial Judge's perception of the evidence and his assessment of the witnesses. He described his task in this case:

> "The court was faced with the types of considerations that show up more often in criminal cases when looking at the evidence adduced by witnesses who testified in the case."

[6] A total of five witnesses testified. For the appellant there were Christina Yates, Sandra Jarrett and Malvin Matheson. In his carefully reasoned judgment the learned trial Judge rejected the testimony of Yates and Jarrett. He concluded that Ms. Yates, who represented the appellant, did not have the same type of relationship with the respondent as did Sam Leonard and that she did not have actual knowledge of the dealings between them, only assuming a role in the project towards the very end and after Leonard's death. In describing why he found her to be unreliable the learned trial Judge said:

> "When Ms Yates testified for the defendant however she made a point of giving the court the impression that she was knowledgeable of what went on between the plaintiff and Mr. Leonard as Mr. Leonard himself would have been. And she thus testified as positively as if she were herself in the position of Mr. Leonard. She convinced herself that she could have testified as positively as she did on matters which would have been clearly and completely outside of her direct knowledge by informing the court that she knew Mr. Leonard to be an extremely sensible businessman and would not have done certain things which appeared to have been done, that she worked out certain figures when the contract was being negotiated, that the defendant had built more than one hundred houses in Virgin Gorda and had thus set up such norms as would have been

> followed in the execution of the plaintiff's contract even if those norms were not spelt out or identified in the contract documents for the plaintiff's work; and finally that she herself was responsible for the electrical work done on the plaintiff's dwelling house."

[7] The witness Sandra Jarrett stated that she had been the respondent's fiancée for a number of years. The respondent described her as a secretary. At the time she gave evidence for the appellant, Ms. Jarrett was engaged in litigation against the respondent claiming that he had built the house in dispute for her. In dismissing her the learned trial Judge stated:

> "That evidence of Miss Jarrett is not the evidence of a witness at whom the court could look as a paragon of pristine probity … [t]here was an element to her testimony that tainted her evidence."

[8] With regard to the respondent the learned trial Judge also expressed his inability to accept his testimony totally. He said:

> "The plaintiff naturally testified to support his case and except in a few instances when he appeared to make concessions to the arguments for the defendant his whole story was of a matter that the main witnesses for the defendant gainsaid; …"

[9] This is the type of case where the finding is based on the learned trial Judge's perception of the credibility of the witnesses and an appeal court must be reluctant to interfere with his conclusions. In this case, I can see no reason to upset these perceptions of the learned trial Judge. I would simply refer to the words of Luckhoo JA in the case of **Abdool Hack v Rahieman** 27 WIR 109 at 116:

> "Though this is a court of rehearing it should be borne in mind that we, sitting here, see only the recorded testimony in cold print, coming, as it were, at second hand, and are deprived of the advantages of the recorder who obtained it at first hand. We are robbed of that appeal which only a live version can have on the senses, robbed of the ring of truth in the spoken word which only the trained sensitive ear can detect, robbed of the manner in which the testimony was given which only the keen judicial eye can perceive, robbed of the whole atmosphere in which the examiner and cross-examiner elicited that testimony. We are called upon to assess and analyse that evidence which in print might look formidable but which when given must, indeed, have been devoid of the qualities of conviction."

Interpretation of the Contract

[10] This heading of the appeal related to the interpretation to be put to Clauses 3, 4 and 7 of the agreement between the parties. I do not think it necessary to deal with clauses 3 and 4 under this head as they are dealt with under admissions. Clause 7 reads:

> "However, the client further agrees to from time to time during the project to choose good quality materials like floor and roof tiles, windows and doors or any other materials for the project but not to exceed regular cost to the Contractor. If the Client choose anything above or over, the Contractor regular cost, the client will pay the difference".

[11] The dispute arose over the meaning of "regular cost to the Contractor". The appellant contended that the respondent ordered items that were extras and incurred costs that were over or above the regular contractor costs. While admitting that there was some room for ambiguity because the agreement was not drafted with sufficient specificity, the appellant contended that for that reason the court should interpret it to ensure that it had business efficacy. The respondent contended that a basic principle of construction was that where there was ambiguity the document should be construed against the drafter.

[12] In the premises, I did not think that the learned trial Judge needed to do more than he did, in giving the words of the contract their ordinary meaning. The point is that the appellant agreed to deliver the project for a fixed price. There were no bills of quantities or any indication of rates or units or measurement for the contract work. It was a simple lump sum contract, which obliged the contractor to carry out any work, which is indispensably necessary for the completion of the contract work and also any work contingently necessary for the completion of the said work. See Hudson's Building and Engineering Contracts 11th Edition Para; 4-139; 4-044. The solution to this became a matter of evidence. The learned trial Judge resolved it by his finding of fact that the appellant had not discharged the burden of proving that the regular cost to the contractor had been exceeded as he concluded that the questioned expenditure had been authorized by Mr. Leonard in accordance with the terms of the contract.

The Evaluation of the Evidence

[13] A major complaint of the appellant was the learned trial Judge's finding that there was no documentary or other sufficient evidence to support the claim for extras. The learned trial Judge had to determine the scope of work. The learned trial Judge concluded on the evidence that none of the items claimed fell outside the scope of the agreement. In addition, a number of the items claimed related to the fact that when Ms Yates went over the books she concluded that some items were inconsistent with the practice of the firm and she made claims on the basis that they exceeded the regular cost of the contractor.

[14] The learned trial Judge rejected all claims on this basis as an attempt to claim for extras that were never performed by Mr. Leonard and to inflate the claims. In addition, and more importantly to the learned trial Judge, the contract had provided that any differences between the parties would have been "worked out on site by both parties in a neutral (sic) understanding". The learned trial Judge concluded that it was more likely than not that the issues with regard to regular contractor's costs had been worked out over the two years of the contract. In particular, the quality of the relationship of the parties at the time of Mr. Leonard's death was a circumstance from which he felt that he could infer that no outstanding claims for extras were contemplated at that time, because that clause had been effected and all differences had been worked out. This was one of the factors from which the learned trial Judge concluded that no reliance could be placed on Ms. Yates in this matter.

[15] Whereas the court of appeal is in as good a position to evaluate the evidence and draw inferences from it as the learned trial Judge, in this case, I am satisfied that there was ample evidence to support both the primary findings of the learned trial Judge and the inferences he drew from them.

Admissions

[16] I come to the only ground of appeal, which seems to hold any merit. The appellant had included in its claim for extras the sum of $5,457.36 representing 50% of the cost of relocating a staircase, which had been erroneously placed on a neighbour's land. The respondent in his defence to the counterclaim admitted agreeing to absorb 50% of the cost of the relocation but stated the sum involved was $3000.00. The appellant also claimed the sum of $1118.00 in respect of labour for installation of wood and rubber floors in the master bedroom and gym. The respondent pleaded liability for this item in the sum of $400.00.

[17] The respondent also admitted liability to pay $150.00 for the sale of a used bed and two chairs. This was the dispute under clause 3 and 4 of the agreement. The arrangement required the appellant to demolish the house that the respondent had on the land. It had been agreed that the respondent could take what he needed to use in the new house and everything else would belong to the contractor. The appellant had claimed that the respondent wrongfully sold used beds and chairs that were not needed for the new house for $240.00 and it was entitled to that sum. The respondent admitted the sale but at a price of $150.00.

[18] The appellant contended that the learned trial Judge should have awarded damages in the amount admitted and costs. The respondent contended that the learned trial Judge was entitled to his own view on the contract and to come to a different legal conclusion to that held by the respondent on the areas where he had made factual admissions. In my view, the appellant was clearly entitled to judgment on the admissions in the sum of $3,550.00.

[19] The order made by the learned trial Judge that each party should pay each other's costs could be revisited on the basis of the judgment on the admissions, without doing violence to the learned trial Judge's view that each party should pay part of the costs of the trial. It is true that the appellant could have entered judgment on the pleadings and saved costs in that way. It is also true that the respondent could

have paid the sum admitted into court although this could hardly have been a reasonable expectation as the amount of their claim exceeded the amount they admitted owing. I think that it is also clear that a party should not be penalized in costs for making admissions on the pleadings. I would think however that the appropriate costs order would be to make the respondent pay the costs that flowed directly from their admissions. In the circumstances the order of the learned trial Judge should be varied to reflect this.

Order

[20] Other than the points raised with regard to admissions by the respondent, I do not find any merit in this appeal. Accordingly, the appeal is dismissed with prescribed costs to the respondent in accordance with Part 65.5 and Part 65.13 of the Civil Procedure Rules 2000 in the sum of $12,017.86.

[21] The order of the learned trial Judge is varied as follows: "***the respondent is ordered to the pay the appellant the sum of $3550.00. and prescribed costs in accordance with Part 65.5[2] and Appendix B of the Civil Procedure Rules 2000 in the sum of $1065.00***".

Sir Dennis Byron
Chief Justice

I concur.

Satrohan Singh
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal