ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 2002

BETWEEN:

LAURIE TAYLOR

Appellant

and

DAVID MILLIKEN-SMITH

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Justice Ephraim Georges	Justice of Appeal [Ag.]
The Hon. Mr. Justice Brian G.K. Alleyne, SC	Justice of Appeal [Ag.]

Appearances:

Mr. John Fuller for the Appellant
Miss Ann Henry and Miss C. Debra Burnette for the Respondent

2003: February 5;
September 29.

JUDGMENT

[1] ALLEYNE, J.A.[AG.]: At the commencement of the hearing of this appeal Mr. Fuller for the appellant made an application for leave to admit and rely on additional evidence. He submitted that there was an absence of evidence on which the trial Judge's finding could be based, and that the additional evidence was vital to the justice of the case. Learned Counsel cited the White Book at paragraph 52.11.4, and the case of Ladd v Marshall [1954] 1 WLR, [1954] 1 All ER 745. Counsel submitted that the respondent's case was based on estimates, and that the significance of the evidence being tendered, and of the fresh

evidence, could not have been appreciated at the time. He said that the evidence is crucial to the appellant's case, and would have an important influence on the result. Counsel contended that none of the items reflected in the judgment was strictly proved, and the admission of the fresh evidence will show that the figure claimed and awarded is greatly exaggerated.

[2] In reply, Ms Burnette submitted that the evidence sought to be admitted clearly could have been obtained with reasonable diligence at trial. The claimant/respondent's expert gave evidence at trial and was available for cross-examination, and every opportunity was available at trial for the appellant to counter the evidence of the respondent and his witnesses. There was discovery to counter the evidence of the respondent and his witnesses. There was discovery of all the documents, including the estimates. The factual issues were known.

[3] In addition, learned Counsel pointed out that the witness who swore the affidavit being tendered is a law clerk, and is not equipped to give such evidence. The information in the affidavit is second-hand, and the source is not disclosed. Also, unsupported opinion evidence is offered without the deponent having the requisite expertise to express such opinions.

[4] The court was of the view that the application was late, that the deponent lacked the necessary expertise to enable him to offer the opinion evidence sought to be tendered, and that the evidence could and should have been produced at trial. In Ladd v Marshall Lord Denning set out three conditions for the reception of fresh evidence, the first of which is that "it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial". That condition clearly was not satisfied in this case. The application to admit the additional evidence was dismissed, and the court proceeded to hear the appeal.

[5] By an agreement in writing Laurie Taylor allegedly agreed to build a dwelling house for David Milliken-Smith on his land at Turtle Bay, Antigua.

[6] Mr. Milliken-Smith claimed that Mr. Taylor, in breach of the contract, failed to build the house in accordance with the contract, and failed to construct the house in a workmanlike manner. Further, Mr. Milliken-Smith claimed that Mr. Taylor failed to do or to complete certain of the works required to be done under the contract.

[7] Mr. Milliken-Smith listed 29 items which he claimed were not done, not completed, or not done in a workmanlike manner and according to the contract. He claimed $150,000.00 as the costs of restoration works, and he claimed damages, interest and costs.

[8] Mr. Taylor denied that he was a builder, and denied that the contract was for him to build the house. He claimed that by the contract he agreed to manage the building project. He further alleged that his liability under the agreement came to an unconditional end on the 3rd day of February 1995 when Mr. Milliken-Smith absolutely discharged him from any liability in respect of the agreement. He denied that he failed to perform his obligations under the agreement as alleged or at all.

[9] At the trial the learned trial Judge gave judgment for the Mr. Milliken-Smith under the following heads:

Replace roof shingles which were fastened with ½ inch nails only	$17,250
Replace solar panels which were insecurely fixed	$ 6,900
Replace entire water heating system	$ 7,390
Total	$31,540

It is to be noted, however, as the parties have agreed, that the trial Judge made an error in stating the above particulars, and that the true position, as intended by the learned Judge, was that the figure for roof shingles was $6,900.00 and for solar panels, $17,250.00. The trial Judge also awarded $9,000.00 for the supervision of

items of incomplete work and other items of defective work that Mr. Milliken-Smith had proved to the satisfaction of the court can be blamed on Mr. Taylor. The grand total of the award was therefore $40,450.00, and costs of $9,500.00. Mr. Taylor has appealed against the Judge's finding that there be judgment for the claimant for $40,500.00 and $9,500.00 costs.

[10] The details of facts against which Mr. Taylor has appealed are:

[i] That Mr. Milliken-Smith in consideration of extra work turned over ownership of a yacht.

[ii] That the roof shingles, solar panels and water heating system were inadequately installed.

Mr. Taylor also complains that the learned trial Judge contradicted himself in mixed findings of fact and law, without being specific.

[11] The grounds of appeal are that the learned Judge erred in finding the facts stated in sub-paragraphs (i) and (ii) of paragraph [6] of this judgment. However, Mr. Taylor filed additional grounds of appeal, by which he complained that Mr. Milliken-Smith purchased only 10 – 12 bundles of 30 shingles each after the hurricane, representing a roof coverage of a maximum of 384 sq. ft., and that the sum of $6,900.00 in respect of this was excessive. It was in respect of this matter that Mr. Fuller, appearing for Mr. Taylor, had sought unsuccessfully to introduce new evidence. In the circumstances of the additional evidence having been ruled inadmissible, there is no factual basis on which this ground could be argued, and that ground is dismissed.

[12] In the additional grounds, Mr. Taylor also contended that the water heating system was in good working order in August 1995 long after the appellant had completed the works. This is merely an elaboration of ground (ii) in the original grounds, and is treated together with that ground.

[13] The issues in the appeal concern findings of fact only, and the question is whether there was evidence before the trial Judge on which he could reasonably have found as he did on those issues.

[14] On the issue of whether Mr. Milliken-Smith compensated Mr. Taylor for additional work by transferring to him ownership of a yacht, relevant evidence was given by Mr. Milliken-Smith in re-examination, and can be found at page 57, lines 14 to 18 and page 58, lines 1 to 3 of the record. The learned Judge had evidence on which he could base his finding and there is no reason to interfere with this.

[15] With regard to the roof shingles, solar panels and water heating system, Mr. Milliken-Smith gave evidence that he employed people to remedy various incomplete and unsatisfactory works, including electricians to work on the solar panels, and the installation of a completely new hot water system in place of the original which he described as completely useless, a makeshift affair constructed by Mr. Taylor's workmen. Receipts were admitted into evidence.

[16] The only evidence concerning the roof shingles that I was able to find on the record was in the cross examination of the Engineer Roland Francis at page 71, and at page 78 and 79, the evidence of Mr. Milliken-Smith. This evidence does not in any way suggest that the roof shingles were defectively fitted. On the contrary, this expert witness for Mr. Milliken-Smith says only "You have to replace all the shingles after a hurricane because you cannot get the same shade to patch."

[17] The learned trial Judge found that in September 1995 Antigua was struck by "the powerful hurricane Luis, which caused widespread devastation in Antigua and the islands around." He also found that the claimant's house is on the coast, and as a result of the hurricane suffered damage.

[18] The inference from the evidence is that the damage to the shingles arose from the force of the hurricane winds. Mr. Francis added that after years in the sun the tiles fade and in order to preserve uniformity, all the tiles, even those undamaged, are replaced. At page 71, this witness said that it is normal to use shingle nails, and the tarpaper is affixed by ¼ inch nails usually, but he cannot say if this was done in

this case. He said the shingles are usually affixed by ¾ inch felt nails, but gave no evidence as to whether this was done in this case or not.

[19] The onus of proof that the damage was due to faulty materials or workmanship is on Mr. Milliken-Smith. He has not discharged that onus.

[20] The learned trial Judge held that the defendant "did not seriously question that the shingles had not been properly fixed, only that the amount charged for the repair was excessive". The only reference by Mr. Taylor to the roof tiles that I have been able to find is at page 78 of the record, where he says, in reference to his neighbourly visit to the house after the hurricane, "The white patch on his roof shown (sic) the bare patch of plywood where the tiles and tarpaper were gone", and again at page 79, where the witness refers to tiles missing over the second bedroom. The learned Judge's conclusion on this issue does not appear to be supported by the pleadings or the evidence, and it seems to me that the appeal succeeds in relation to that item.

[21] I would reduce the learned trial Judge's award by the sum of $6,900.00, in respect of the replacement of roof shingles, resulting in a total award of $24,640.00 with the further sum of $9,000.00 awarded by the learned trial Judge for supervision reduced to reflect the reduction in the works necessitated by defective materials and/or work to the sum of $6,000.00, resulting in a grand total of $30,640.00. The costs below thus have to be adjusted to $7,760.00. The appellant is entitled to the costs of the appeal in the sum of $2,070.00.

Brian G.K. Alleyne, SC
Justice of Appeal [Ag.]

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Ephraim Georges
Justice of Appeal [Ag.]