IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO: 483 of 2013

BETWEEN

SM CONSTRUCTIONS LIMITED **CLAIMANT**

AND

MAHEIAS UNITED CONCRETE & SUPPLIES LIMITED **DEFENDANT**

Keywords: Sale of Goods Act; Sale by Description; Sale and Supply of Concrete; Implied term as to Fitness for Purpose; Implied Term as to Quality; Breach of Implied Term as to Fitness for Purpose and as to Quality: Defective Concrete;

Evidence; Hearsay Evidence; Expert Evidence; Testing of Concrete; Admissibility of Expert Report; Opinion evidence on Quality of Concrete.

Before the Honourable Mr. Justice Courtney A Abel

Hearing Dates: 10th June 2014;
11th June 2014;
1st July 2014;
18th August 2014;
2nd December 2014.

Appearances:

Ms. Naima Barrow for the Claimant.

Ms. Stevanni L. Duncan and with her Ms. Tania Moody for the Defendant

JUDGMENT

Delivered on the 2nd day of December 2014

Introduction

[1] The present Claim has been brought by the Claimant against the Defendant for damages and loss which it allegedly suffered as a result of the breach of implied term or terms of a contract between them under the **Sales of Goods Act**[1], by the failure of the Defendant to deliver the contracted strength[2] of ready mix concrete to the Claimant.

[2] It is common ground that the concrete, under terms implied into the contract by the **Sales of Goods Act**, has to be reasonably fit for its purpose and ought to have been of satisfactory quality - which was the contracted strength.

[3] The Defendant denies the claim and has counterclaimed for the balance due for the contract price of the concrete and the pump supplied.

[4] The Defendant in its defence has essentially maintained, as it is entitled to do, that the Claimant has failed to discharge its burden of proving its case.

[5] The Defendant by its defence has mounted its challenge based on the means that the Claimant has employed to prove its case (principally its expert's report and the way in which the data for such proof was collected, stored and transmitted to the expert) and has contended that lack of proof has thereby resulted.

[6] The central issue for determination concerns whether the Claimant has proved that the concrete delivered was indeed defective. This is essentially a question of law (principally of evidence, sufficiency of proof and of inferences which can be drawn from the facts) and of fact (albeit based on the facts which may have to be found by the court).

[7] The questions of fact can be and have largely all been determined by me summarily by the findings of fact which I have found in what will follow, after I

[1] Chapter 261 Revised Edition 2000, Laws of Belize.
[2] Three thousand five hundred pounds per square inch (3500 p.s.i) to be achieved in 28 days.

set out the course the proceedings took. The inferences will be those that arise from such findings of fact.

The Court Proceedings

[8] On the 13th September 2013, the Claimant filed a Claim Form & a Statement of Claim for the sum of $78,245.11 for damages for loss and damage under the Sale of Goods Act arising from claimed defects of 27 cubic yards of concrete and for interest and costs.

[9] On the 16th October 2014 a Defence & Counterclaim was filed by the Defendant.

[10] At the Case Management Conference on the 9th December 2013 directions were given (including in relation to witness statements) and the claim was referred to mediation. The court also permitted the Claimant to call Mr. Douglas Walker as an expert witness and to file a report in the proceedings.

[11] On the 12th December 2013 a Reply and Defence to Counterclaim was filed by the Claimant.

[12] On the 16th January 2014, pursuant to directions given, standard disclosure took place

[13] A mediation session was held on the 20th January 2014 but although some issues were agreed upon the claim was not settled.

[14] An expert report of Mr. Douglas Walker was filed on the 19th March 2014.

[15] There was a Pre-trial Review on the 21st March 2014 and an extension of time granted for service of the expert report, and for the doing of other things in preparation for trial on the 10th and 11th June 2014.

[16] Pursuant to directions, a Trial Bundle was filed by the Clamant on the 30th May 2014.

[17] The Trial took place on the 10th June 2014, 11th June 2014 and 1st July 2014.

[18] At the trial the Claimant called 4 lay witnesses of fact (Mr. Gustavo Guerra, Mr. Kevin Petzold, Mr. Silvino Moya and Mr. Adrian Leslie) but central to the Claimant's case the Claimant called, with the permission of the court, Mr.

Douglas Walker, a civil engineer, to give expert evidence for the Claimant to substantiate its claim that the Defendant supplied concrete of a lesser strength than that which it was contracted to provide.

[19] The Defendant called 4 lay witnesses (Ms. Carla Hart, Mr. Codwell Maheia, Ms. Rosita Gillette and Mr. Julius Matus).

[20] The evidence of Mr. Gustavo Guerra and Mr. Kevin Petzold were largely corroborative and did not significantly add anything to the case. The latter witness in fact (and I so determine) did not provide any reliable evidence to the court.

[21] The Defendant did not call any expert witness but merely sought to discredit the evidence of the Claimant's expert and submitted, taking a preliminary objection, that his Report (including all the attachments to it) was not admissible on the basis that he did not have requisite knowledge of the facts in his report, which contained hearsay evidence.

[22] I ruled at first that the Defendant's Counsel had not evidentially laid a proper foundation for her objection and admitted the expert report subject to a determination of the admissibility of the test results.

[23] It was thereafter determined by me, after hearing the evidence of the expert, to make the most efficient use of the court's time, that the question of admissibility would be addressed in closing submissions and that I would rule on it along with my determination of the case.

[24] The Clamant filed its written submissions on the 22nd July 2014 and the Defendant filed its written submissions on the 11th August 2014.

[25] Oral Arguments took place on 18th August 2014 and the court reserved its decision.

The Facts

The Parties, Witnesses and Main Participants

[26] Both the Claimant and the Defendant are companies incorporated and doing business in Belize with the Claimant being a construction company and the Defendant retailing and supplying concrete.

[27] The Claimant was awarded a contract by the Social Investment Fund ("SIF"[3]) to build an extension to the All Saints Primary School in Belize City, Belize (the Project).

[28] The witness Kevin Petzold was the Claimant's Technical Unit Coordinator for SIF and responsible for the execution of projects funded by the Caribbean Development Bank ("the CDB") and the Government of Belize ("GOB") which included the Project.

[29] The witness Silvino Moya was the Managing Director of the Claimant.

[30] The witness Gustavo Guerra is an Architect who at all material times was assigned by SIF to administer the Project and was required to ensure that works were performed according to the design and specification, to engage contractors and to authorize payments.

[31] The witness, Adrian Leslie, is an Engineer and was at all material times the Project Manager for the Claimant.

[32] The witness Ms. Carla Hart was at all material times the Managing Director of the Defendant and had been working for the Defendant for over 30 years

[33] The witness Rosita Gillett at all material times was employed by the Defendant as its Logistical Coordinator.

[34] The witness Codwell Maheia was at all material times employed by the Defendant as its yard supervisor and had worked with them for over 20 years.

[35] The witness Julio Matus was at all material times employed by the Defendant as a driver and had been working for the Defendant for over two years.

[36] The expert witness Mr. Douglas Peter Walker P. Eng (Belize) C. Eng., M.I.C.E is a registered member of the Association of Professional Engineers of Belize in good standing in the field of Civil Engineering and also registered as a European Engineer Euring, with the European Federation of National Engineering

[3] A statutory body charged with the laudable responsibility to equitably and adequately respond to the human development needs of poor and vulnerable population of Belize in order to enable every citizen to fully develop, flourish and function in his or her maximum potential.

Associations and a Chartered Engineer and Member of the Institution of Civil Engineers in the UK. Mr. Douglas Peter Walker had been practicing continuously in Belize as a Consulting Civil Engineer for 25 years under his company doing business under the name Professional Engineering Services Limited ("PES") a company which at all material times operated a materials testing laboratory for the building industry.

[37] Mrs. Yorke-Gillett, who apparently has no qualifications in the materials testing field, worked with her employer, the expert witness Mr. Douglas Peter Walker and PES, for 13 years, and under Mr. Walker's supervision who personally trained her, and on whose behalf performed all field and laboratory tests relating to the present case. Mrs. Yorke-Gillett was not called as a witness.

[38] Mr. Kyle Taylor worked for the Claimant under Mr. Leslie and entirely handled the sampling and delivery of the concrete on behalf of the Claimant. Mr. Kyle Taylor was not called and did not testify in the case.

Background

[39] On or before the 6th December 2012 the Claimant ordered from the Defendant a total of 27 cubic yards of ready mix concrete at $168.000 per cubic yard totaling $4,536.00 and the rental of a concrete pump which together with sales tax was $5,778.00.

[40] At all relevant times the Claimant expressly made known to the Defendant the purpose of the concrete, which was for constructing the Project, and that it was required to be at the specific strength of three thousand five hundred pounds per square inch (3500 p.s.i) to be achieved in 28 days ("the contract strength").

[41] The Claimant duly paid for the order, the sum of $5,136.00, and so there is a balance of $642.00 outstanding to the Defendant as claimed by the Defendant on the counterclaim.

Design and Use of the Concrete

[42] On the facts and circumstances of the present case, in my view, nothing turns on the way in which the concrete was mixed and of the mix design which the

Defendant used, as the burden is on the Claimant to prove its case that the concrete sold and delivered was not the contract strength, and therefore defective, which the Claimant sought to do principally by its expert report.

[43] How the concrete was designed and mixed is irrelevant if it had reached the contract strength and in my view the Claimant did not sufficiently discredit the Defendant's system for designing and mixing the concrete and did not by such latter means establish a defect in the concrete.

[44] It was not for the Defendant to verify or prove that the concrete was of the contracted strength but the burden was at all times on the Claimant to prove, on a balance of probabilities, that the concrete supplied had not reached the contract strength.

[45] The concrete delivered was to be used and was used to cast pile caps and lower ground beams of the Project.

The Delivery and Pouring of the Concrete

[46] Excavation had taken place at the Project and at the site where the Defendant was to pour its concrete and there had been ground water which had been pumped out to a certain extent but there may still have been water where the pile caps were to be filled.

[47] On the 7th December 2013 the Defendant delivered by three batches or trucks to the Claimant's construction site at the Project the amount of concrete ordered and laid or cast it as directed by the Claimant's staff.

[48] These three loads of concrete were the only concrete poured on the 7th December 2012.

[49] The Defendant's pump truck, as agreed, was used in pouring the ready mix concrete into forms which had been positioned according to approved plans.

[50] Pictures were taken of the site by the witness Gustavo Guerra both before and after the casting and presented to the court.

The Pouring of the Concrete and taking of Samples of the delivered Concrete

[51] Two (2) cube samples were taken from each truck for the purpose of a curing process in water which it had to undergo for later testing to ensure it reaches the contract strength and they were labeled so as to identify the truck from which they were taken

[52] I accept the evidence of the witness Mr. Silvino Moyo who testified under cross-examination, that their employee, Mr. Kyle Taylor, who worked under Mr. Leslie, took the samples of the concrete that were poured and did the labeling – about 6 samples in all and the Claimant entirely handled and is responsible for any missteps.

[53] I accept the testimony of Mr. Adrian Leslie that he was present for the pouring of the concrete on the 7th December 2013 apart from at lunch time and that he supervised the pouring and the sampling.

[54] I am not satisfied, however, that the supervision of the sampling was entirely satisfactorily and effectively carried out by Mr. Leslie.

[55] Mr. Kyle Taylor (on behalf of the Claimant), was supposed to have taken the samples for testing, to PES, on the 8th December 2012.

[56] Although there is some difficulty associated with the chain of transmission of the samples, I am prepared to accept this evidence as having been proved for the purpose of this judgment.

Storage of Samples

[57] The samples taken from the trucks were stored in containers within the Claimant's warehouse at the Project and had to be properly compacted by vibrating it or by some other method.

[58] The samples were taken and were supposed to be stored in water to be cured to ensure that the samples gains strength in the same way the concrete gains strength in the structure and to be later tested at intervals (7 days, 14 days and 28 days); and if the samples are not fully compacted by vibration or some other method this could affect the compression test result.

[59] On the evidence before me I do have concerns about whether the samples were compacted and properly stored under controlled circumstances.

Testing of the Concrete Samples

[60] PES was the company engaged by the Claimant to test the concrete samples.

[61] As previously noted the concrete samples were supposedly taken to PES and compression tests were conducted at intervals by Mrs. Yorke-Gillett who conducted all other tests.

[62] As noted above although 6 samples were taken, compression tests were only carried out on 4 samples and I have concerns that the samples taken were not cross-referenced with the items which were tested by PES.

Compression Test Results of the Samples

[63] On or around the 17th December 2012 PES provided the Claimant with results of a seven-day strength (compression) test and the witnesses Adrian Leslie and Silvino Moya noticed that the strength results were below what was expected. They were both concerned with the results but decided to await further results as they had both had experience of seeing the strength of concrete results increase drastically over a short period of time.

[64] It was also on the 17th December 2012 in relation to where the concrete was poured, specifically at the pile caps, that another company poured concrete on top of the Defendant's concrete, at seven (7) days after the Defendant had poured theirs (on the same day but earlier than when the seven (7) day test results were received).

[65] On or around the 24th December 2012 PES provided the Claimant with results of a fourteen-day strength (compression) test and the result of the test was supposedly less than the seven-day testing; and the witnesses Adrian Leslie and Silvino Moya both were alarmed by the results. They did nothing, no doubt, one might surmise, because of the Christmas period.

[66] On or around the 6th January 2013 PES provided the Claimant with results of the final compression testing, at twenty-eight days after the sample was taken, which

confirmed the fears of the witnesses Adrian Leslie and Silvino Moya (so they testified) that the Defendant's concrete which was supplied to the Project, that after twenty-eight days it would be, and as it turned out, according to them, was below the specified strength.

[67] Both witnesses were determined to inform the Defendant about the results of the tests. As noted earlier by this time the Claimant had already poured the upper pile cap with ready mix concrete from another company and the Claimant had also placed back-fill to commence work on the ground floor slab of the building.

The Letter of 7th January 2013

[68] The Claimant alleges that under the hand of Adrian Leslie it sent a letter dated 7th January 2013 to the Defendant in which it informed the Defendant about the test results for each truck load of concrete delivered and independently tested; that none of them reached the strength required; that the upper and lower ground beams must be demolished, and that it was seeking the Defendant's cooperation in remedying this core concern.

[69] The Defendant denies having received any such letter.

[70] I am not satisfied, on balance, that the Claimant sent this letter, and much less, that the Defendant received any such letter. The Claimant in my view has not discharge its burden to my satisfaction (on the balance of probabilities) that this letter was delivered to the Defendant.

Other steps taken by the Claimant

[71] The Claimant had discussions with the SIF representatives and ceased work and it was decided to conduct additional testing before incurring the time and expense involved in demolishing and reconstructing the underground structural component of the building.

[72] According to the Claimant a further test, a "Schmidt hammer" test, which is a test designed to highlight weak parts of concrete and is not an accurate test, was undertaken by PES (in situ at the site) as well as a Core test (done in the laboratory by crushing in a machine the concrete from a sample drilled out of the

concrete on the building site) which is the most accurate test of all the tests. Both of these tests, done on the Defendant's concrete, according to the Claimant, failed. But it appears that only one sample was tested by the Core test and according to another type of test (ASTM) this should have been done on a minimum of three samples.

[73] The expert witness Douglas Peter Walker was not present when the Schmidt hammer" test or the core test was carried out.

[74] Mr. Adrian Leslie testified that on the 16th January he spoke by telephone with someone who identified herself as Ms. Hart about the matter and that the person simply stated that all they could do is to give the Claimant back the 278 cubic yards and said that they would reply to the letter.

[75] There was undoubtedly a telephone call to the Defendant's telephone number, lasting a minute or less, but Mrs. Hart, denies having had any such conversation with the Claimant. On balance, I am not satisfied with the Claimant's evidence of the contents of the phone call with Ms. Hart and preferred the Defendant's version that no such conversation took place. The Claimant has not in my view discharged their burden to my satisfaction on this point.

[76] I am however satisfied that when the technician for PES did the later tests (Smitt Hammer test done on the hardened concrete) Mr. Leslie was present.

[77] On the 28th January 2013 the Claimant, in order to prevent the loss of the contract with SIF and the destruction of its reputation, employed its overdraft facility and commenced demolition and reconstruction of the works done with the Defendant's concrete.

[78] Mr. Silvino Moyo admitted under cross-examination, which I accept, that he was responsible to SIF for the work and that he put in a claim to his insurance which did not succeed, and that he did not inform the Defendant about the poor test results when SIF ordered the demolition of the concrete poured by the Defendant. Any attempt by the Defendant to suggest that the present claim was filed by the

Claimant to collect monies which it could not secure from the insurance claim was in my view unsuccessful.

[79] The Claimant, by the evidence of Silvino Moya, proved that the costs of demolition and reconstruction was $71,247.19 and is paying (and claiming) interest at the rate of 15% per annum. This was neither challenged nor contradicted and as such if the Claimant succeeds on its claim it is entitled to damages on this basis.

Report and testimony of the Expert Douglas Peter Walker

[80] To prove its case the Claimant has had to heavily rely on the Report and testimony of the Expert Douglas Peter Walker.

[81] It is clear from the Report and testimony of Mr. Douglas Peter Walker that:

(a) He did not physically carry out the field and laboratory tests.

(b) The following tests were performed:

I. Compressive testing

II. Schmidt hammer testing of concrete in the field

III. Laboratory compressive testing of drilled concrete cores.

(c) The samples for the first test were collected from the truck of the Defendant whereas the samples for the other two tests were collected from the hardened concrete in the ground or in situ.

(d) The testing produced a consistent result which was a strength significantly below that of the contracted strength.

[82] According to the evidence of Douglas Walker his involvement in the tests was limited to a supervisory one which he testified to being "she [Mrs. Amy Yorke-Gillett] brings the test results to me for review. I review the result. She signs the results indicating she performed the test and I countersign". He vouched for the tests results but did not vouch for how they were prepared. He employs technicians who he has trained to do the work over the years. The technician in question [Mrs. Amy Yorke-Gillett] performed the tests, brought the results to him for review, which he did, she signed the results stating that she performed the test

and he acknowledged the test and results by signing them and taking responsibility for the results.

[83] Douglas Walker in his evidence also testified that the collection, treatment and storage of concrete samples is a technical process as external variables could contaminate the concrete and ultimately affect the results when tested.

[84] During re-examination Mr. Douglas Peter Walker testified that:

(a) He and his wife own PES.
(b) There was one technician working with PES at the time of the testing on which his report was based.
(c) The tests were conducted in accordance with procedures he established.
(d) He reviews the results of all testing before signing the reports.
(e) He signs the reports because he takes responsibility for all the tests done at PES.

[85] I am satisfied that the Defendant has proved its counterclaim in the sum of $642.00 and is entitled to this sum and interest at the rate of 6% per annum if it were to succeed.

The Issues

[86] There is a dispute as to whether the Defendant breached the terms of fitness for purpose and quality.

[87] The Claimant is alleging that the p.s.i of the concrete was below the contracted quality and was not satisfactory and the Defendant is alleging that the Claimant has not proved its case and that any suggestion that the concrete was unsatisfactory resulted from the Claimant's negligence.

[88] The Defendant is alleging that the testing carried out by PES on behalf of the Claimant was improperly carried out by them that they are wholly responsible for such testing.

[89] The Defendant also alleges that it was not contracted, nor engaged to perform the testing of the concrete in question and nor was it part of the testing process and that it is completely unaware of how the samples taken for the testing of the

concrete were collected, stored and tested; and they also deny that the Claimant has proved that the concrete was defective and otherwise puts them to strict proof of same.

[90] The Defendant also denies that it was notified of any defect in the concrete and maintains that if it had been notified it would have itself investigated the allegation and incurred the cost of any remedial work.

[91] The Defendant denies that the Claimant has suffered any loss or damage by reason of any breach by the Defendant of any implied term as to fitness and quality.

[92] The Defendant alleges that the Claimant caused or materially contributed to any loss that it suffered.

[93] The Claimant denies that the Defendant has proved any counterclaim or established any loss or damage that it suffered as a result of any negligence on its part.

[94] Specifically the following issues arise:

(a) Is the Report of the expert Douglas Walker admissible?
(b) What were the factors which can affect the outcome of a test?
(c) Was the sample collection and testing of the concrete properly conducted?
(d) Were the samples collected and tested contaminated?
(e) Was the Defendant the only supplier of the concrete engaged by the Claimant to lay concrete and is there a way to confirm that the samples collected and tested were purely concrete laid by the Defendant?
(f) Was the laid concrete tested properly to verify the cubic strength?

[95] In addition, the issue arises whether the Claimant by its own negligence caused or materially contributed to any loss and damage suffered by the Claimant in the following respects:

(a) By failing to collect and test proper samples of the concrete laid by the Defendant.

(b) By failing to notify the Defendant of any defect in the concrete so that the Defendant could have performed any reasonable remedial work.

(c) By continuing construction works before the concrete was tested and determined to be of the requisite psi.

The Law

Sale of Goods Act

[96] The Claimant has instituted this claim pursuant to **the Sale of Goods Act, Chapter 261 of the Laws of Belize, R.E. 2000 ("The Act").**

[97] **Section 15** of **the Act** provides as follows:

> *"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."*

[98] **Section 16** of **the Act** provides as follows:

> *"Subject to this Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows-*
>
> *(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose*
>
> ……
>
> *(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade"*

[99] **Section 54** of **the Act** provides the remedy for breach of warranty as follows:

"(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may-

...

(b) Maintain an action against the seller for damages for the breach of warranty

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty"

[100] The present claim does not require a detailed consideration of the authorities relating to the Sale of Goods Act and of the applicable learning as they are uncontroversial.

Evidence Generally

[101] It is trite law that it is for the Claimant, as the person who brought its claim, likewise on the Defendant in relation to its counterclaim, on whom it lies to prove its case in the present civil claim[4] on the balance of probabilities.

[102] Facts in issue in the present case, may be proved by what has been categorised as direct or indirect evidence (both of which may be admissible and with varying degrees of cogency) and which has been described in the following manner:

"By direct evidence is meant that the existence of a given thing or fact proved either by its actual production, or by the testimony or admissible declaration of someone who has himself perceived it. By indirect or presumptive evidence is meant that other facts are thus proved, from which the existence of the given fact may be logically inferred.[5]"

Hearsay Evidence

[4] McGregor on Damages, Sixteenth Edition Paragraph 2051.
[5] Phipson On Evidence Fifteenth Edition Paragraph 1-06

[103] Courts have devised rules which govern the admissibility of evidence in its proceedings and this includes the rule against hearsay.

[104] The rule against hearsay as a general principle has been described as follows:

> *"Assertions of persons other than the witness who is testifying are inadmissible as evidence of the truth of that which was asserted*[6]*"*

[105] Whether a document offends the rule against hearsay may best be determined by examination of the purpose for which the evidence is being tendered and as such a statement contained in a document will be considered hearsay and therefore inadmissible:

> *"when the object of the evidence is to establish the truth of what is contained in the statement*[7]*"*

[106] **The Evidence Act, CAP 95 of the Laws of Belize, R.E. 2000** makes no provision as to hearsay evidence in civil proceedings.

[107] The only statutory exceptions to the rule against hearsay evidence are made with respect to criminal proceedings.

[108] **Part 39 of the Supreme Court (Civil Procedure) Rules 2005** prescribes procedural matters with respect to evidence and in no way modifies the legal position with respect to admissibility of evidence.

[109] I accept the submissions of Counsel for the Defendant that the common law position is thus applicable and that the examination of **Myers v DPP**[8], provides a useful framework for application of the rule in the instant circumstances, with the result that unsworn written assertions or statements, whether contained in documents or otherwise, made by persons who did not testify before this court (who may or may not be alive) and which are being put forward as proof of the truth of those statements, constitutes hearsay evidence and is not admissible.

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[6] Cross on Evidence, pg 381
[7] Phipson on Evidence, 12th Edition, para. 629 [TAB 2] based on dicta from Subramaniam v Public Prosecutor [1965] 1 WLR 965, 969
[8] [1965] A.C 1001

[110] Arising from this case I also accept that the contents of documents cannot be brought within the exception relating to public documents open to inspection by the public or any other established exception. Such contents of documents would not be admissible as evidence except for the purpose of tending to prove what they recorded to be true (which cannot be done) and they ought not to be accepted to corroborate other evidence unless they could stand on their own feet.

[111] Such material is also not admissible on the ground that a trial judge has a discretion to admit such a record in a particular case if satisfied that it was trustworthy and that justice required its admission, for that would be an innovation on existing law which decided admissibility by categories and not by apparent trustworthiness.

[112] The rule against hearsay is similarly applicable with respect to the opinion of experts.

[113] The position at law has been summarized as follows:

> *"where the opinion of the expert is based on reports of facts, those facts, unless within the expert's own knowledge, must be proved independently. An expert's evidence is necessarily founded on his training and experience, both of which involve the acceptance of hearsay information. It is, however, permissible for him to give an opinion on the basis of such hearsay, provided that it relates to specific matters on which he does have personal knowledge, or of which admissible evidence will be given by another witness. He may not, however, give details of a particular transaction unless he has personal knowledge of it."*[9]

Hearsay and Expert Opinion

[114] The legal position with respect to hearsay and expert opinion has also been be summarised in the case of **English Exporters (London) Ltd v Eldonwall Ltd**[10] where Megarry J expressed the position in law as it relates to hearsay evidence

[9] Paragraph 54 of Blue Sky. Phipson on Evidence, 16th Ed., Sweet & Maxwell, 2005 at pg 971 however states ""He cannot give evidence of any particular transaction if he has no knowledge of it"
[10] [1973] Ch 415 at pages 420 to 421

and expert opinion generally. He confirmed that the expert cannot give hearsay evidence as to the facts of transactions of which he has no firsthand knowledge and that:

> *"…basically, the expert's factual evidence on matter of fact is in the same position as the factual evidence of any other witness. Further, factual evidence that he cannot give himself is sometimes adduced in some other way, as by the testimony of some other witness who was himself concerned in the transaction in question…"*

[115] Megarry J further outlined the mischief against which such a rule was a safeguard being that, what an expert may have been told or given may be inaccurate or misleading, and he further stated:

> *"It makes it no better when the witness expresses his confidence in the reliability of his source of information; a transparently honest and careful witness cannot make information reliable if, instead of speaking of what he has seen and heard for himself, he is merely retailing what others have told him. The other party to the litigation is entitled to have a witness whom he can cross-examine on oath as to the reliability of the facts deposed to, and not merely as to the witness's opinion as to the reliability of information which was given to him not on oath, and possibly in circumstances tending to inaccuracies and slips."*

[116] A recent decision coming out of the Court of Appeal of Belize, **Blue Sky Belize Limited v Belize Aquaculture Limited**[11], which is binding on me, reinforces the position that an expert cannot give details of a particular transaction unless he himself has personal knowledge of it.

[117] I accept the submissions of Counsel for the Defendant that the facts of the case of **Blue Sky** is directly relevant to the present case.

[11] Civil Appeal No. 8 of 2012.

[118] In **Blue Sky** the appellant was a supplier of blended fuel oil, and sold and delivered such oil to the Respondent pursuant to an agreement between the parties. The Appellant claimed the purchase price was due and owing from the Respondent. The Respondent, by its defence and counterclaim, said that the Appellant's fuel did not correspond with the agreed specifications so that the Respondent was entitled to reject the fuel and att trial, the Respondent sought to have tendered into evidence the report of its expert witness and several appended attachments. Objection was then made on behalf of the Appellant to the admission of such evidence on the basis that it was inadmissible hearsay based on the description that the expert, Dr. Kassinger, gave as to the way tests were done in his lab where he said;

> *"Now as to how a sample gets analyzed, DNVPS, our laboratory in Houston, to put this in perspective, we analyze on a typical weekday about 120 samples a day. 120 samples a day means that we produce about 2500 different tests results, about 20 per analysis. We have 13 lab technicians. Those lab technicians are assigned to particular tests routines…After they do the test result the information is electronically transferred to a central database and at the end of the day the lab manager examines all the results, approves the results, says these meet the criteria. Those results are then produced to a technical expert to produce a report…I mean in a sense it is sort of like a heart surgeon or an MD. He gets an EKG. He does not run the EKG. Some little girl in a back office puts the little electrodes on, presses the button and produces the EKG. It is the same in our system. We have lab technicians that are qualified to run the tests and report the results.*[12]*"*

[119] At the trial the actual test results were compiled by the lab technicians, and not by Dr. Kassinger, that the Respondent sought to have tendered through Dr. Kassinger. The trial judge upheld the objection on behalf of the Appellant.

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[12] Ibid. At paragraph 24.

[120] The Court of Appeal of Belize, in a carefully considered Judgment of Morrison JA, having reviewed the factual back ground, the pleaded cases, the trial and outcome, the grounds of appeal of both sides, the admissibility of Dr Kassinger's evidence, and reviewed the authorities authoritatively concluded:

> *"Putting these case on one side, therefore, the authorities appear to support two – complementary – propositions on the issue of the admissibility of expert opinion evidence based on hearsay. The first is that, where the opinion of an expert is based on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion, that fact must be proved independently by admissible evidence, either given by the expert himself if it is within his own knowledge, or by some other witness. But secondly, once the primary facts on which the expert's opinion is based have been proved by such evidence, the expert may draw on the general body of knowledge in the particular area of expertise comprised in the work of others.*[13]"

[121] Morrison JA on the point of admissibility in such circumstances, stated:

> *"Attachment 3, which was the compilation of data…collected and analysed by others not called as witnesses, was the basis upon which Dr. Kassinger formed an opinion for the purposes of his report. If the contents of attachment 3 had been the subject of independent proof, then no issue could have arisen…but this was plainly not what happened in this case*[14]"

[122] Morrison JA then concluded that the trial judge could not be faulted for his conclusion that:

> *"the test results contained in attachment 3 are inadmissible hearsay evidence, because the cogency of the evidence depends on what [an]*

[13] Ibid at paragraph 57
[14] Ibid. At paragraph 58.

unidentified person or person said in the attachment 3 who were not called to give evidence[15] *".*

[123] I will now set out the contentions as they apply to the facts as I have found them. For convenience, because of the nature of the challenge which has been made to the Claimant's case, I will set out the Defendants contentions first. This is not, however, to suggest that the court has reversed the burden of proof, which it has not, but merely to bring into sharp focus the nature of the challenge which has been raised and the issues which the Claimant has to strictly prove.

[124] Needless to say that the burden remains on the Claimant to prove its case on the balance of probabilities.

The contentions of the parties on the Admissibility of the Expert's Report

The Defendant's Contentions

The Admissibility of the Expert Report

[125] The Defendant contends that Douglas Walker was not physically present when the tests were being done; he was not managing or overseeing the conduct of the tests; he did not perform any of the tests upon which his report is based; he did not prepare the test results tendered into evidence and he had no first-hand knowledge of the various tests performed in this claim or the results.

[126] The reports are therefore no more admissible simply because Douglas Walker is the owner of PES and may be knowledgeable of the procedures typically employed in the testing of material.

[127] It is submitted by the Defendant that Mr. Douglas Walker's answers in re-examination did not speak directly to the particular tests in the present case but merely spoke to the way in which such tests are generally to be performed.

[128] The Defendant submits that the court ought not to be concerned with the typical way materials are tested but the particular circumstances surrounding the particular tests done in the present case which the witness Douglas Walker could not speak to as he was not involved in the testing. Also of the results he could not

[15] Ibid. At paragraph 60.

specifically attest to nor vouch for them in terms of their accuracy; as he did not have first-hand information to do so. That in relation to such tests they were conducted and their reliability, source of samples, accuracy of results entered, chain of custody etc, at best, Douglas Walker was only able to relay what he was told or shown by Mrs. Amy Yorke-Gillett, a person not called to give evidence and thus was hearsay.

[129] The Defendant submitted that there are no exceptions to the hearsay rule which would allow for the tendering of Douglas Walker's report and the attachments; and that the report and attachments are sought to be used by the Claimant to establish the truth of the contents in support of their claim that the Defendant's concrete did not meet, and as a matter of fact was below, the contracted strength.

[130] The Defendant submitted that the above-mentioned portions of Douglas Walker's report are hearsay and the attachments are hearsay and in light of the foregoing, the Defendant's objection ought to be upheld; and the Claimant's case cannot succeed as without the evidence of Douglas Walker there would be absolutely nothing before the court tending to prove that the Defendant's concrete was defective.

The Claimant's Contentions

[131] The Claimant maintains that the Evidence of Douglas Walker is admissible and not hearsay because the primary facts on which Douglas Walker's expert report was based (the test reports) was within his own knowledge as he could give direct evidence of the testing done as he:

(a) Owned the lab.
(b) Employed the only technician.
(c) Supervised the tests done.
(d) Examined all the results of testing before approving and signing the test reports to say that they meet the criteria.
(e) Signed and took responsibility for the test report which was sent to the client and on which his expert report is based.

[132] Alternatively the Claimant contends that the Douglas Walker can give indirect evidence of the testing done and that his knowledge of the test reports can and ought to be inferred.

The Court's Conclusion on the question of Admissibility of Expert's Report

[133] I have concluded that as Mrs Yorke-Gillett undoubtedly performed all field and laboratory tests in this case and the expert witness, Douglas Peter Walker's involvement was not able to provide any direct evidence[16] or material or admissible indirect evidence of such testing being done, that such testing has not been proved[17].

[134] I have also concluded that there is no basis on which the testing in this case could be inferred and that the purpose for which the testing has been included in the Report of Mr. Peter Walker is to prove or establish the facts of such testing.

[135] I have therefore concluded, on the facts of the present case, that the truth of the results of the testing is hearsay and could only be legally admissible to prove or establish such facts of the tests performed and the results.

[136] If, Mrs Yorke-Gillett, as the person who could give direct evidence of the tests and of their results, and was the source or maker of the report concerning such tests, had been called and had given a full description of the tests carried out and the results, then, and only then, in my view, Mr. Walker, would have been in a position to, and may have expressed an opinion, on such tests and results.

[137] I have determined, as submitted by Counsel for the Defendant, that there is no common law or statutory exception applicable in Belize which alters the position as expressed above with respect to evidence in civil proceedings which would render admissible the tests and results as evidence now sought to be tendered.

[16] As he did not give evidence of having participated in such testing or of having actually perceive with his own senses such testing being done.
[17] From other facts of which direct evidence has been given or of which he was the direct and actual supervisor by observation.

[138] The documents are not admissible, in my view, simply because Mr. Douglas Peter Walker, the expert witness, is the owner of PES and may have been conducted in accordance with procedures which he established (which in the particular case may or may not have been followed) and that he reviewed the results and signed it and took responsibility for it. Or even on the basis that he had confidence in the reliability of the source of the information or can vouch for it. Such evidence on which he has confidence and can vouch for has to be capable of being proved independently and tested in cross-examination which it clearly is not.

[139] Douglas Walker cannot attest to the tests performed as he was not involved in the testing and he cannot attest to the results of those tests for the truth of those results. He did not have personal knowledge of the tests and their results and admissible evidence has not been given in court by Mrs York-Gillet and who was available to be cross-examined on the tests.

[140] To allow Mr. Douglas Peter Walker to put in such evidence on the basis of the stated connection with PES would, in my view, be allowing inadmissible hearsay evidence through the backdoor in circumstances where it could not be admitted, as it were, through the front door of admissibility.

[141] I cannot find any basis on which the expert witness, Douglas Walker, can give indirect evidence of the testing done nor any basis on which his knowledge of the tests reports can be inferred. Any such evidence would be given in an evidential vacuum, as it were, and would be devoid of any kind of admissible proof or logical foundation.

[142] I have therefore concluded that to admit said report and attachments would violate the rule against hearsay and on this basis I would exclude such evidence as being inadmissible.

[143] It follows from this then that in my view the Claimant cannot succeed on its claim as without the evidence of such evidence by the expert Peter Douglas Walker there would be absolutely nothing before the court tending to prove that the Defendant's concrete was defective.

[144] My findings in relation to this critical aspect of the claim is sufficient to dispose of the claim in its entirety as without the report of Douglas Walker the claim could not be maintained.

[145] For completeness I will nevertheless go on to consider the other aspects of the claim and contentions of the parties in the event that I am found to be wrong about this crucial matter.

The Contentions of the Parties in Relation to the Other Evidential Matters

The Defendant's Challenges and Contentions

[146] As noted in the issues above, and also in the Submissions of Counsel for the Claimant, the Defendant has respectively in its Defence and by its cross-examination raised and mounted the following issues and challenges namely that:

(a) The concrete samples taken by the Claimant were not property collected.
(b) The concrete samples taken by the Claimant were not properly stored.
(c) The concrete samples tested by PES were not of the Defendant's concrete.
(d) The Core sample provided was not from the Defendant's concrete.
(e) The Schmidt hammer tests were not conducted on the Defendant's concrete.

[147] The Defendant contends that the combined effect of the collection and storage (including the lack of supervision of same and the risk of contamination involved in the process), the pouring of concrete by a different concrete provider after the Defendant had poured its concrete, and the break in the chain of transmission of the samples due to the fact that Kyle Taylor did not give evidence, all on balance made the results of the tests unreliable. This is all separate and apart from the admissibility of the expert report because of the hearsay difficulties already dealt with and associated with it, as all of the same were inconsistent with proper procedures and were therefore questionable.

[148] The Defendant contends that the Claimant is responsible for its own loss and damage, through no fault of the Defendant as a result of a combination of poor administrative decisions and lack of professionalism on the part of the Claimant which significantly contributed, if not entirely, to the damages which the Claimant alleges it has suffered.

[149] The Defendant points to the following in support of this last mentioned contention:

(a) The Claimant decided to proceed with construction even before the preliminary 7-day test results were obtained and after the 14 day result was obtained.

(b) The Claimant advanced to the next stages of construction using a different supplier of concrete.

(c) After the Claimant received the final test results the Claimant failed to notify the Defendant so that it could be given the opportunity to independently test the concrete and verify whether its concrete was defective and, if so, determine how the situation could be remedied.

(d) The Claimant moved on to demolish the structure without involving the Defendant.

[150] While the Claimant in its Statement of Claim pleaded and particularized special damages allegedly suffered, it failed to prove same in evidence, whether by receipts or invoices or otherwise, in the amount of $78,245.11 and what such amount relates to.

[151] That in all the circumstances of the case the Claimant has failed to establish its claim.

The Claimant's Responses and Contentions

[152] The Claimant relies on the evidence in the case and on inferences which can be drawn from such evidence to support its contention that it has made out its case.

[153] The Claimant also contends that while it was open to the Defendant to resist the allegation of defect by proving the strength of its concrete, the Defendant chose not to do so and submits that by its own evidence, the Defendant did not have any expert, scientific or other means of proving the strength of its concrete.

[154] The Claimant contends that the Defendant had no verifiable proof that the concrete provided to the Claimant was of the contracted strength and failed to

discredit the reports which assert that it was not, and that therefore on a balance of probability, it is more likely than not that the concrete provided by the Defendant was defective.

[155] The Claimant contends that the Defendant failed to prove and substantiate that as a matter of fact reasonable mitigation was required.

The Court's Conclusion on the question of Other Evidential Matters

[156] Generally in relation to these matters I found the evidence and the submissions of Counsel for the Defendant to be substantial and convincing and correspondingly those of Counsel for the Claimant weak and unconvincing.

[157] Also in many respects I noted that the Claimant, in relation to its claim, oftentimes wrongly reversed the burden of proof in relation to the Defendant and attempted to shift it on the Defendant. This no doubt arose as a result of the Defendant's case being mainly that of challenging the Claimant to prove its case without necessarily seeking to prove an alternative case or narrative.

[158] The Defendant did not have to prove the strength of its concrete, as suggested by the Claimant, it was for the Claimant to prove that the Defendant's concrete was not of the contracted strength and even when looked at from the most favourable vantage point to the Claimant, I found the Claimant's case on these matters very lacking in the finer points of evidential proof and of tying in and weaving the case from an evidential point of view, even on a balance of probabilities.

[159] Specifically, I found that the Claimant's case was not evidentially tight due to the failure to call crucial witnesses, not only Mrs Gillett-Yorke, but specifically in relation to other matters than the testing for example, Mr. Kyle Taylor who was a crucial witnesses for the Claimant in order for it to prove its case in relation to the collection, storage and delivery of the samples to PES.

[160] Also as a result of effective cross-examination of the Claimant's witnesses, on balance, I have serious concerns about the reliability of the evidence of the Claimant about its management of the whole process of the sample collection,

storage and transmission prior to the tests being done and the compliance with proper procedures to ensure a reliable result.

[161] As a result, even if the expert's report and the results of the tests were admitted into evidence, which I have already found they ought not to be, the Claimant was not able to prove its case and its claim for loss and damages pursuant to the Sales of Goods Act and is dismissed.

Costs

[162] I find that the Claimant shall pay the Defendant's costs in the sum agreed by the parties which is $15,000.00.

Disposition

[163] For the reasons given above, I will therefore make the following orders:

(1) The Claimant's claim is dismissed with costs in the sum of $15,000.00 to be paid by the Claimant to the Defendant.

(2) Judgment is granted on the Defendant's counterclaim in the sum of $642.00 with interest at the rate of 6% per annum.

The Hon Mr. Justice Courtney A. Abel