IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL APPEAL 0017/2018
G0101/2015

BETWEEN:

(1) Constantino Anggaway Aydoc
(2) Analyn Febrero Aydoc

Plaintiffs/Appellants

- and –

Lorimar Development Limited

Defendant/Respondent

Appearances: Mr Pramod K. Joshi of Brady Law for the Appellants.

Mr Clayton Phuran of Sonia Bush and Associates on behalf of the Respondent.

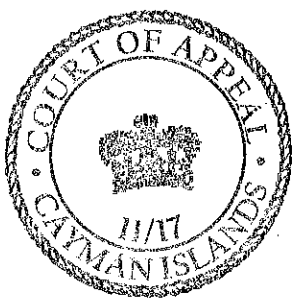
Before: **The Rt Hon Sir John Goldring, President**

The Hon John Martin QC, Justice of Appeal

The Hon C. Dennis Morrison, Justice of Appeal

Heard: 16 April 2019

Judgment delivered: 4 September 2019



Morrison JA

Introduction

1. This is an appeal from a judgment given by Carter J (Ag) ('the judge') on 28 June 2018. The judge ruled that the respondent ('Lorimar'), a building

developer, was not liable to the appellants ('the Aydocs') for damages arising out of Lorimar's alleged breach of a construction contract between the parties dated 1 February 2012 ('the contract').

2. Under the contract, Lorimar agreed to build a dwelling house ('the house') for the appellants for a total contract price of $165,000.00. The house was to be built as part of a development known as Lorimar Heights in the Savannah area.[1]

3. By clause 3(1) of the contract, the respondent undertook to build the house "in a proper and workmanlike manner and in compliance with all Government consents, regulations and statutory requirements in accordance with the [approved] plans, elevations and specifications ..."

4. The Aydocs contended that Lorimar failed to build the house "in a proper and workmanlike manner", as required by the contract. They had a number of other complaints, but the major item of damage alleged by them related to defective tiling in significant areas of the house. According to the Aydocs, the defects, which first manifested themselves two years and one month after they had taken possession, necessitated the retiling of the entire house. Mrs Aydoc also claimed general damages for the alleged aggravation of a pre-existing illness by the dust generated by the excavation of the defective tiles.

5. Lorimar defended the action, mainly on the ground that, rather than demonstrating poor workmanship on its part, the Aydocs had instead "provided only assertions, speculation and assumptions" in support of the claim[2]. Further, Lorimar contended that it was the Aydocs themselves who,

---

[1] In the contract, the lot on which the house was to be built was identified as Strata Lot 2 in the Strata Plan for Block 28C Parcel 523 H 2, Unit #10, part of a development known as the Lorimar Development.

[2] Defence and Counterclaim filed 3 July 2015, para 4

in preference to the tiles chosen by Lorimar, had selected the tiles to be installed in the house. And, further still, Lorimar maintained that the loss claimed by the Aydocs was not covered by any contractual warranty in their favour. Lorimar counterclaimed damages and costs, alleging that the Aydocs had "failed to consider the entire contract on which [they] took legal advice"; and had also "failed to mitigate losses"[3].

6. The judge found for Lorimar on the basis that the Aydocs had failed to prove their claim. The judge considered, firstly, that the Aydocs had failed to adduce any admissible evidence to prove what she described as "factual causation" - that is, "that damage has resulted from the breach of contract" [4]; and secondly, that no evidence was led by or on behalf of the Aydocs to prove "the poor workmanship which was at the basis of the claim". Accordingly, the judge concluded, in the absence of any evidence of causation, there was "a lacuna in the evidential chain led by [the Aydocs] at trial" [5]. The judge therefore dismissed the Aydocs' claim.

7. Lorimar's counterclaim was also dismissed on the basis that no evidence had been led in support of it.

8. As for costs, the judge's order was that Lorimar should have its costs on the claim, but that there should be no order as to costs on the counterclaim.

9. The Aydocs now challenge this judgment on two principal grounds. Firstly, that the judge failed to take into account the fact that, before trial, Lorimar "had admitted the claims in open correspondence to ['the Aydocs'] attorneys and to the Court"[6] ('the admission issue'). And, secondly, that the judge

---

[3] Defence and Counterclaim, paras 61 and 62
[4] Judgment of Carter J (Ag) released 24 May 2018, para 31
[5] Judgment, para 39
[6] Memorandum and Grounds of Appeal filed 25 September 2018, para 1.b.

wrongly excluded evidence given by Mr Aydoc of the opinion expressed by an "independent tile contractor" with regard to the likely cause of the defects in the tiling ('the admissibility issue').

Two preliminary objections to the hearing of the appeal

10. Lorimar took two preliminary objections to the hearing of the appeal. First, by notice filed on 11 April 2019, Lorimar objected to the hearing of the appeal on the ground that the Notice of Appeal was filed out of time on 12 July 2018. The notice recited that the judge's order was filed on 21 June 2018 and that accordingly, as required by section 19(1) of the Court of Appeal Law (2011 Revision) ('the CAL'), the Notice of Appeal should have been filed within 14 days of that date, that is, no later than 6 July 2018. While acknowledging the court's discretionary power under rule 8 of the Court of Appeal Rules (2014 Revision) ('the CAR') to enlarge time, Lorimar urged that the power should not be exercised in this case because, among other things, the Aydocs had not paid the costs ordered against them by the judge in the court below; and that, in any event, the appeal had no reasonable prospect of success.

11. Then, in a second objection taken by Mr Phuran for Lorimar more or less on his feet on the morning of the hearing before us, it was further submitted that the Aydocs' memorandum of the grounds of appeal, though filed on 25 September 2018, was not served until 15 October 2018 and was therefore served out of time. The consequence of this default, Mr Phuran submitted, in reliance on section 19(5) of the CAL, was that the Aydocs' right of appeal had ceased and determined.

12. In response, Mr Joshi for the Aydocs pointed out that Lorimar's notice of intention to rely upon preliminary objection, filed on 11 April 2019, was itself out of time, in the light of rule 15(1) of the CAR, which requires that a respondent intending to rely on a preliminary objection to the hearing of the

appeal give the appellant "three clear days notice thereof ... [and] file such notice ... within the same time". But Mr Joshi further submitted that, in any event, the appeal was in fact in time, it having been filed on 12 July 2018, which was within 14 days of the date the order on the judgment was sealed, which was 28 June 2018. As regards the date of service of the memorandum of the grounds of appeal, Mr Joshi acknowledged that it was in fact served some 10 days later than the time laid down in section 19(5) of the CAL. However, he submitted that the court has a discretion to excuse the default and should do so in this case in light of the fact that Lorimar suffered no prejudice as a result of it.

13. The relevant provisions of the CAL and the CAR may be summarised as follows:

(i) an appeal from a judgment of the Grand Court in a civil matter must be brought within 14 days "after the date of the judgment", by the appellant lodging a written notice of appeal with the Registrar and the Clerk of the Grand Court and serving same on the opposite party[7];

(ii) the time within which an appeal must be filed "shall be calculated from the date upon which a judgment or order (whether final or interlocutory) is filed in accordance with GCR Order 42, rule 5"[8];

(iii) at the time of lodging the notice of appeal, the appellant is required to deposit the sum of $50.00 in the Grand Court as security for the due prosecution of the appeal, together with any further sum as security for the costs of the appeal as a judge of the Grand Court may direct[9];

(iv) upon the appellant complying with (i) and (ii) above, the judge of the Grand Court whose judgment is being appealed against shall draw up a statement of the reasons for the judgment and lodge same with the

[7] Section 19(1)
[8] CAR, rule 11(4)
[9] Section 19(2)

Registrar, who will then give notice to the parties and allow them to take copies of it[10];

(v) within 21 days of receiving the notice referred to at (iv) above from the Registrar, the appellant shall "draw up and serve upon the respondent and file with the Registrar a memorandum of the grounds of appeal and, should he fail so to do, his right of appeal shall, subject to section 25, cease and determine"[11]; and

(vi) the court may at any time, upon application made in such manner as may be prescribed by rules of court, extend the time within which, among other things, notice of appeal may be given or served[12], or a memorandum of the grounds of an appeal may be filed or served[13].

14. Section 25 of the CAL is a general provision. Speaking to the powers of this court in relation to civil appeals, it provides as follows:

> "The provisions of this Law conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any provision of this Law shall have been inadvertently, or from ignorance or necessity omitted to be observed, the Court may, if the justice of the case so requires, with or without terms, admit the appellant to impeach the judgment or proceeding appealed from despite such omission."

15. In addition to the power given to the court under section 24, section 25 therefore confers a wide and seemingly unfettered discretionary power to forgive or excuse any omission or default by an appellant, whether on terms or otherwise, as it sees fit, in complying with the procedural steps prescribed by the CAL. The section is complemented by rule 8(1) of the CAR, which specifically empowers the court to enlarge or abridge any time period fixed

---

[10] Section 19(4)
[11] Section 19(5)
[12] Section 24(a)
[13] Section 24(c)

by the rules "upon such terms, if any, as the justice of the case may require". Rule 8(1) also provides that "the Court may direct a departure from these Rules in any other way where this is required in the interests of justice".

16. The first question is whether we should consider Lorimar's objections at all, given the failure in respect of both of them to comply with rule 15(1) of the CAR, which requires notice of such objections to be filed three clear days before the date fixed for the hearing. In this regard, I observe in passing that, while there is no definition of "clear days" in the CAR, O.3, r. 2(4) of the Grand Court Rules 1995[14] (GCR) states that "[w]here the act is required to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date". By this measure, it would seem that Lorimar's notice of preliminary objection, which was filed on 11 April 2019 for a hearing scheduled to take place on 16 April 2019, may in fact have been just within time.

17. But, in any event, the Aydocs do not appear to have been prejudiced or inhibited in any way in their ability to respond to the preliminary objections. I will therefore proceed to consider them for what they may be worth, notwithstanding any defect in the making of them.

18. Despite Mr Joshi's somewhat faint attempt to suggest otherwise, it is clear that the notice of appeal was in fact filed more than 14 days after the date of filing of the order on 21 June 2018. It is equally clear - and on this point Mr Joshi did not even seek to contend otherwise - that the memorandum of the grounds of appeal, although filed within time, was served late. However, in terms of time, neither default was in my view a sufficiently egregious

[14] Cayman Islands Grand Court Rules 1995 (Revised Edition), Volume 1

departure from the relevant provisions to justify our refusing to hear this appeal altogether; or, as section 19(5) would have it, treating the right of appeal as having ceased and determined.

19. When pressed by the court to name any specific prejudice which his client had suffered as a result of the defaults complained of, Mr Phuran was completely unable to do so. In these circumstances, considering as I do that the Aydocs' appeal may not be unarguable, I think that, in the interests of justice, this is a case in which the court should exercise its discretion to excuse the late filing of the notice of appeal and the late service of the memorandum of the grounds of appeal. In my view, therefore, both preliminary objections should be dismissed.

The background to the claim

20. There is no verbatim record of the evidence given at the trial. However, as the judge observed, Mr Aydoc's evidence-in-chief "did not differ significantly" from what was set out in the Particulars of Claim[15]. The summary which follows is therefore based on that document.

21. Although the contract was not signed until 1 February 2012, work on the construction of the house had actually begun from sometime in October 2011. It was substantially completed in the third week of April 2012, thus allowing the Aydocs to move in and take up residence at that time.

[15] The actual Particulars of Claim are undated. However, it appears that they were filed at the same time as the Writ of Summons on 22 June 2015

22. After taking possession, the Aydocs complained to Lorimar of a number of problems with the house. Among them initially were issues relating to the air-conditioning system and a leaking toilet in one of the bathrooms. These issues were in due course addressed by the respondent and the problems were partially rectified to the appellants' satisfaction, although there remained an issue relating to the leaking toilet.

23. In May 2014, two years and one month after moving in, the Aydocs heard a 'popping' sound in the master bedroom. As it turned out, several floor tiles had popped up from their base. When contacted by Mr Aydoc about this development, Lorimar arranged for the delivery of 12 replacement tiles to the house, with a promise to send workmen to lay them. However, this was not done.

24. The following month, the Aydocs discovered that a further 16-20 tiles had popped up in the kitchen area and that some of them were broken. Lorimar again arranged for the delivery of replacement tiles to the house. This time, Lorimar also gave the Aydocs the sum of $100.00, with instructions that they should arrange for someone to lay the new tiles. However, when the Aydocs attempted to do this work in the kitchen area, other tiles from surrounding areas also popped up, with the result that all the tiles in the kitchen and dining room area had to be removed. The sum of $100 turned out to be insufficient to do the work required to rectify the problem and, despite further discussions, no agreement was reached on an increased figure. One result of this, the Aydocs alleged, was that they were left "having to sleep in a house full of dust and debris due to the work done"[16].

[16] Para 6

25. The Aydocs went on to state the following in their Particulars of Claim[17]:

> "[Lorimar's] independent tile contractor attended the ... property on Tuesday 24th June 2014 and concluded that the thin set was defective and that the contractor had used regular thin set rather than multi-purpose. He then advised [Mr Aydoc] that the whole house would need to be retiled."

26. Further discussions, negotiations and consultations followed between the Aydocs and various representatives of Lorimar. The discussions eventually led to an offer from Lorimar, made "strictly on an ex gratia basis", to address the problems. By letter dated 27 June 2014, Lorimar's principal, Mr Kel Thompson, conveyed this offer in the following terms:

> "Dear Mr Aydoc
>
> We understand from our Building Manager Carlos Sinclair, that you have experienced a number of tiles lifting from the floor of your house. While we note that this event is occurring in excess of some two years since you took possession of the house and is clearly not covered by any warranty, it is always our intention to assist our customers.
>
> Before going any further therefore, let us make it clear that any assistance rendered is being rendered by the developer strictly on an ex-gratia basis.
>
> If you do not wish for our assistance in this matter, then we will respect your decision. On the other hand, if you would like our assistance, we are requesting permission to have our own personnel or nominees inspect the property with a view to working with you in finding a resolution. Please let us know by contacting either Carlos on 5256731 or my assistant Joanne on 5268811 or by email ... to arrange an inspection of the premises, at your earliest convenience.
>
> Allow us to point out to you in the first instance, that the quotes you have obtained for removal of the tiles and

---

[17] Para 9

replacing them, is [sic] far in excess of the price that is normally available to us in the market.

We also trust that the janitorial company we sent to your house yesterday, in order to clean the dusty atmosphere in the home, which we understand may have affected your wife's medical condition, cleaned the home to your satisfaction, but if this is not the case, we will be happy to rectify for you."

27. Despite this offer, the parties were unable to reach agreement. There were issues between them regarding the cost, colour and quality of the replacement tiles to be used in the house. In addition, Mr Aydoc continued to express concerns about what he described as Mrs Aydoc's "pre-existing medical condition", which made her particularly susceptible to "shortness of breath and sinus [sic] due to dust"[18]. Subsequent cleaning of the house by industrial cleaners engaged by Lorimar failed to fix the dust problem.

The proceedings

28. In due course, after a letter before action, dated 12 August 2014, to Lorimar from the Aydocs' attorneys-at-law, followed by abortive summary court proceedings, these proceedings were issued in the Grand Court on 22 June 2015. The claim was for:

"1) CI$18,980.00 to replace the tiling and fix the toilet
2) CI$25.00 on materials purchased for the bathroom toilet
3) Filing fee in the sum of CI$250.00
4) Accommodation while work proceeds with cost to be assessed
5) Storage cost for furniture with costs to be assessed
6) General Damages to be assessed

[18] Undated e-mail, Aydoc to Thompson

7) Legal costs of CI$1600.00 to date of filing"

29. Although replete with factual detail, the Particulars of Claim did not identify the actual legal basis of the Aydocs' claim. However, as the judge explained[19], the trial proceeded on the basis that this was a claim for breach of contract.

30. On 3 July 2015, Lorimar, which had previously been represented in the action, filed notice of its intention to act in person, in place of its previous attorneys-at-law. On that same day, Lorimar also filed a Defence and Counterclaim on its own behalf.

31. I have already indicated[20] the basis of the defence, but I should mention specifically Lorimar's response to the Aydocs' averment[21] that Lorimar's independent tile contractor visited the property on 24 June 2014, "and concluded that the thin set was defective and that the contractor had used regular thin set rather than multi-purpose". At paragraph 38 of the Defence, Lorimar stated the following:

> "Paragraph 9 is denied save and except a contractor may have attended the [Aydocs]. [Lorimar] further states that any statements made by just looking on the dried up thin set which generate a comment that 'the thin set being defective' is mere speculation."

32. In a Reply filed on 24 June 2015, the Aydocs joined issue with Lorimar on the Defence. In particular, the Aydocs stated[22] that "there was no fault with the

---

[19] Judgment, para 28
[20] See para 5 above
[21] At para 9 of the Particulars of Claim – see para 25 above
[22] At para 2

tiles themselves but with their installation". And further, with respect to paragraph 38 of the Defence[23], that, "along with an independent contractor, Mr. Carlos Sinclair was present when the poor work was examined and opinions given as to the state of the work to be redone".

33. At a directions hearing held on 27 October 2015. McMillan J (Ag), as he then was, made orders in terms of the parties' combined summonses for directions[24]. The upshot of these orders was to establish a detailed timetable for the filing of witness statements, further witness statements and affidavits, within a total of 28 days following 27 October 2015.

34. By Notice of Hearing issued on 20 April 2016, the Listing Officer of the Grand Court, Ms Yasmin Ebanks, advised Mr Crister Brady of Brady, Attorneys-at-law, who represented the Aydocs, and Mr Kel Thompson of Lorimar in person, that the matter was set down for hearing in the Grand Court on 19 July 2016.

35. In an affidavit filed on 10 October 2017, Mr Aydoc brought to attention an e-mail sent by Mr Thompson to Ms Ebanks on the same day of the notice of hearing. In that e-mail, Mr Thompson stated that, "[b]y copy of this e-mail I am informing Mr Brady that I will not be defending the case". Mr Thompson then followed up this e-mail with another e-mail dated 26 April 2016, this time to Mr Brady himself, stating that, "[f]urther to my email of 20 April, we will not be defending the case". But, despite this clear indication, Lorimar obviously had second thoughts, successively engaging two different sets of attorneys-at-law[25] to represent it in the litigation. In his affidavit, after pointing

---

[23] At para 7
[24] Plaintiffs' Summons for Directions filed on 26 August 2015 and Defendant's Cross-Summons filed on 19 October 2015
[25] HSM Chambers and Sonia Bush and Associates

out that the case had been adjourned several times, Mr Aydoc added that "I can only hope that the repeated changes of attorney are not an attempt to again frustrate the hearing of this case". By the time the matter finally came on for trial on 24 October 2017, Lorimar was represented by Mr John G. Meghoo, attorney-at-law, who conducted the trial on its behalf.

36. On the first date of trial,[26] Lorimar sought to introduce two witness statements. The judge took the view that, given the timetable set by McMillan J (Ag) at the directions hearing on 27 October 2015, both statements were out of time. Noting that no application had been made in the interim to extend the time for filing witness statements, the judge considered that it would not be fair to allow Lorimar to introduce these statements at this late stage of the proceedings. And, albeit for different reasons, the judge also refused an application on behalf of the Aydocs to rely on an affidavit sworn to by Mrs Aydoc, who was not present at the trial and therefore not available for cross-examination. Neither ruling is challenged in this appeal.

37. In the result, Mr Aydoc was the only witness to give what the judge described[27] as "live evidence" at the trial. No witnesses were called on Lorimar's behalf.

38. In written submissions to the judge after the evidence had been taken, counsel for the Aydocs submitted that the claim had been amply proved; and that, in the absence of any evidence from or on behalf of Lorimar, "there [was] in reality no defence, and there certainly is no evidence in rebuttal to

[26] Judgment, para 10
[27] At para 12

[the Aydocs'] claims"[28]. Although brief reference was made to "the admissions made directly by Mr Kel Thompson twice in April 2016"[29], it does not appear that anything was urged on the judge as to their legal effect, if any.

39. For its part, Lorimar maintained that the Aydocs had not "shown either factual or legal causation in this matter"[30] and had failed to prove their case on a balance of probabilities.

How the judge saw the case

40. The judge considered[31] that, "[a]t the heart of this matter is whether [the Aydocs] can properly claim that [Lorimar] has not constructed the house in 'a proper and workmanlike manner' in relation to defects that arose some two years after it was turned over to [the Aydocs]". The judge accepted[32] that there was "no 'time embargo' against bringing this claim two years after the date of completion of the contract". But she rejected Mr Aydoc's evidence of what the independent tile contractor had told him as regards the reason for the tiles having popped-up. She ruled that, in the light of the provisions of section 44 of the Evidence Law (2018 Revision) ('the Law'), evidence of that conversation was not admissible of any fact stated in it.

41. Taking all things together, the judge concluded that the Aydocs had failed to discharge their burden of proving by admissible evidence that, on a balance of probabilities, the loss and damage for which they claimed was caused by poor workmanship on the part of Lorimar. This is how she put it[33]:

> "37. On the evidence before this Court the Plaintiffs have not satisfied that burden. The admissible evidence led by

---

[28] Closing Submissions on behalf of the Plaintiffs dated 21 November 2017, para 6
[29] Para 5
[30] Para 15
[31] Judgment, para 27
[32] Ibid, para 30
[33] Ibid, paras 37-38

> the Plaintiffs does not satisfy this Court, on a balance of probabilities, that it was poor workmanship that caused the issues with the tiles as claimed. The Plaintiffs have the burden not only of identifying the defect but of proving that it was the fault of the Defendant in order to establish breach of the contract. The Plaintiffs have not led sufficient evidence to establish to this Court that the tiling issue was a result of the failure of the structure due to poor workmanship at the time of completion.
>
> 38. There is no other basis advanced upon which the Plaintiffs could claim against the Defendant. The Plaintiffs have advanced no claim in negligence. No duty has been referred to, shown or pleaded in the Particulars of Claim. As such, the Plaintiffs cannot avail themselves of the principle of *res ipsa loquitur*. Without the evidence of causation, there was, on this contractual claim, a lacuna in the evidential chain led by the Plaintiffs at trial."

The admission issue

42. The Aydocs contend that, by Mr Thompson's e-mails to the court and their attorneys-at-law dated 20 and 26 April 2016, Lorimar admitted the claim[34]. This contention arises out of Mr Kel Thompson's e-mails to the listing officer, Ms Ebanks, on 20 April 2016 and to the Aydocs' attorney, Mr Brady, on 26 April 2016. In both e-mails, as has been seen[35], Mr Thompson advised that Lorimar would not be defending the case.

43. Mr Joshi invited us to treat Mr Thompson's e-mails as admissions of liability by Lorimar. However, he readily accepted that the Aydocs had done nothing in relation to them before or during the trial and that it had therefore proceeded without reference to them. For his part, Mr Phuran submitted that neither e-mail amounted to an admission, Lorimar did not withdraw its defence and the matter therefore proceeded to trial in the usual way.

---

[34] Memorandum and Grounds of Appeal filed 25 September 2018, para 1.b.

[35] Para 33 above

44. Although, as I have already pointed out[36], the Aydocs did make passing reference to Lorimar's "admissions" in their written closing submissions at the trial, the judge did not mention them at all in her judgment. In my view, she cannot be faulted for not doing so.

45. Needless to say, given that by the time of writing of both e-mails the matter was already set down for trial, the contention which the Aydocs now make as to their effect formed no part of their pleaded case. Nor, after the e-mails were received, was any application made on the Aydocs' behalf for permission to amend the Particulars of Claim to include a reference to them. Even in the affidavit dated 10 October 2017 to which Mr Aydoc exhibited both e-mails, he was principally concerned about the impact that Lorimar's shifting position might have on the matter proceeding to trial. To that extent, therefore, Lorimar would have had no notice that the Aydocs intended to rely on them as part of their case. As a result, Lorimar would not have been in a position to seek permission to adduce evidence at the trial with a view to, as it was entitled to do if it could, explaining Mr Thompson's e-mails away[37]. In these circumstances, I do not think that it would be fair to take the e-mails into account at the appellate stage in assessing the strength of the Aydocs' case against Lorimar.

46. In any event, even if I were inclined to consider the effect of the e-mails, I strongly doubt whether Mr Thompson's bare indication that Lorimar "will not be defending the case" can be taken, without more, to be an admission of "the truth of the whole or any part of the case of [the Aydocs]"[38].

---

[36] At para 37 above

[37] See Keane & McKeown, The Modern Law of Evidence, 9th edn, pages 675-676

[38] The definition of an admission given in O.27, r.1 of the GCR, albeit in the context of a formal admission.

The admissibility issue

47. This issue arises from the judge's exclusion from her consideration, based on section 44 of the Law, of Mr Aydoc's evidence of Lorimar's independent tile contractor's statement as to what caused the popping-up of the tiles. Not without some encouragement from the court, Mr Joshi challenged the judge's ruling on this point, enquiring rhetorically whether the evidence might not in fact have been "otherwise admissible".

48. Section 44 provides as follows:

> "In civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of this or any other law or by agreement between the parties, but not otherwise."

49. Section 44 therefore allows reception in evidence of a statement other than that of a witness giving oral evidence in the case as proof of any fact stated in that statement, provided that it is admissible for that purpose under the Law, or any other law, or by agreement between the parties. There was no agreement between the parties in this case that the statement attributed to the independent tile contractor by Mr Aydoc should be admitted. It is therefore necessary to look to the provisions of either the Law or any other law to determine its admissibility.

50. Happily, for present purposes, it is unnecessary to look further than section 45 of the Law itself. Under the rubric, 'Admissibility of out of court statements', the starting point is section 45, which provides that:

"45. (1) In civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, is, subject to this section and to rules of court, admissible as evidence of any fact stated therein of which oral evidence by him would be admissible.

(2) ...

(3) Where, in civil proceedings, a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made is admissible for the purpose of proving it ..."

51. Subject to its provisions and to rules of court, section 45(1) therefore permits evidence to be given of a statement made by a person not called as a witness, whether documentary or oral, as evidence of any fact stated therein in respect of which oral evidence by that person would be admissible. And section 45(3) makes it clear that, in civil proceedings, where the statement in issue was made otherwise than in a document, that is, orally, it can only be proved by the direct oral evidence of the maker of the statement or a person who heard or otherwise perceived it being made.

52. Section 49(2) and (3)(a), under the rubric 'Provisions supplementary to section 45, 47 or 48', is also relevant for present purposes:

"(1) ...

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 45, 47 or 48 the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including in the case of a statement contained in a

document, the form and contents of that document.

(3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 45, 46, 47 or 48, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular —

(a) in the case of a statement falling within section 45(1), 46(1) or 47(2), to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts ...;"

53. Section 49(2) and(3)(a) therefore permits the court to take into account a number of factors in (i) deciding whether to admit a statement under, among other sections, section 45; and (ii) assessing the weight to be attached to the statement. Those factors include such reasonable inferences as may be drawn from the circumstances in which the out of court statement was made and its contemporaneity with the existence of the facts stated.

54. Then, though perhaps less relevant for present purposes, given the facts of this case, I should also mention briefly section 50 of the Law. In summary, that section provides that where a statement made by a person not called as a witness is given in evidence in any civil proceedings by virtue of section 45, any evidence which would have been admissible had he been called may be admitted (a) "for the purpose of destroying or supporting his credibility as a witness"; and (b) to prove that he has made a previous inconsistent statement.

55. And finally, as far as the Law goes on this point, I must mention section 56(1), which empowers the Chief Justice to make Rules of Court "as to the procedure which, subject to any exceptions provided for in the rules, must be followed and the other conditions which, subject as aforesaid, must be fulfilled before a statement can be given in civil proceedings by virtue of section 45, 47 or 48".

56. The applicable Rules of Court are now contained in O. 38, rr 20-30 of the GCR. They may be summarised as follows. Firstly, a party who desires to give in evidence at the trial or hearing of any matter any statement admissible by virtue of sections 45, 46 or 47 of the Law must give notice in the prescribed form of his intention to do so to all other parties within 21 days after the matter has been set down for trial or an appointment has been obtained for a first hearing[39]. Secondly, if the statement upon which it is intended to rely is admissible by virtue of section 45 of the Law and was made otherwise than in a document, the notice must contain particulars of (a) the time, place and circumstances at or in which the statement was made; (b) the persons by and to whom the statement was made; and (c) the substance of the statement or, if material, the words used[40]. Thirdly, if the party giving the notice alleges that the person of whom the requisite particulars have been given cannot or should not be called as a witness at the trial or hearing because he is dead; beyond the seas; unfit because of his bodily or mental condition to attend as a witness; or that, despite diligent efforts, it has not been possible to find him; or he cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement to which the notice referred, the notice must contain a statement to that effect specifying the reason relied

[39] O.38, r.21(1)
[40] O.38, r.22(1)

on[41]. Fourthly, the party upon whom a notice of intention to adduce evidence without calling the maker has been served may in certain specified circumstances serve a counter-notice on the party giving notice requiring him to call the witness to give evidence at the trial or hearing[42]. Fifthly, the party giving notice in respect of a statement falling under section 45(1) or section 47(1) may apply to the court for directions as to whether he will be permitted to give evidence of the statement and the manner in which this is to be done[43]. And sixthly, the court has a discretion to allow evidence to be given of a statement falling within, among others, section 45(1) of the Law, notwithstanding non-compliance by any party with the rules relating to service of a notice or a counter-notice, as the case may be[44]; in particular, the court may exercise its power to allow the statement to be given in evidence at the trial "if a refusal to exercise that power might oblige the party desiring to give the statement in evidence to call as a witness at the trial ... an opposite party or person who is or was at the material time the servant or agent of an opposite party"[45].

57. These provisions of the Law and the GCR were obviously modelled on and closely resemble the equivalent provisions of the UK Civil Evidence Act 1968 ('the CEA')[46] and RSC Ord. 38, Part III, (Rules 20-34). Against the background of the traditionally restrictive approach to the reception of hearsay evidence, the provisions of the CEA and the relevant rules took what the learned editors of Phipson described[47] as the "relatively radical step ... of permitting the use of hearsay evidence in limited circumstances".[48]

---

[41] O.38, r.22(3), read in conjunction with O.38, r.25
[42] O.38, r.26
[43] O.38, r.28
[44] O.38, r.29(1)
[45] O.38, r.29(2)
[46] See CEA, sections 2, 4 and 5
[47] Phipson on Evidence, 17th edn, para 11-01
[48] As is well known, the UK law on the topic has now gone well beyond the CEA – see the Civil Evidence Act 1995

58. In my respectful view, it follows from all of the above that, despite the careful way in which the judge obviously approached the case, she was wrong to treat section 44 as a blanket exclusion of evidence of out of court hearsay statements. The clear objective of the section is in fact inclusionary rather than exclusionary: such statements are admissible if permitted by other provisions of the Law, any other law or agreement between the parties. Section 45 permits evidence of such statements to be given, subject to its provisions and to rules of court, while sections 49 and 50 explain the manner in which such evidence is to be treated and assessed. O.38, r.21 and the rules following make detailed provision for the service of notice on other parties by the party wishing to rely on such a statement of his intention to do so and his reasons for doing so. And, significantly, O.38, r.29 expressly permits the court, in the exercise of its discretion, to allow evidence of the statement to be given notwithstanding the failure by the party seeking to rely on it to follow the procedure set out in the rules.

59. Mr Phuran submitted that, in order for the Aydocs to rely on the statement of the independent tile contractor as to the cause of the tiles popping up, they would have been required by O. 38, r. 21(1) to notify Lorimar of their intention to do so in the prescribed form within 21 days after the date on which the matter was set down for trial. That not having been done, Mr Phuran submitted that it was now too late for them to seek to rely on that evidence. He pointed out further that the identity of the independent tile contractor was in any event unknown.

60. It is clear that the procedure set out in the GCR for the admission of hearsay statements under section 45(1) of the Law was not followed. On the face of it, therefore, Mr Aydoc was not entitled to give evidence of what the independent tile contractor told him. But, given the explicit discretion

conferred on the court by O.38, r.29 to admit the evidence despite non-compliance with the rules, that was plainly not the end of the matter. Had the judge followed the scheme of the Law and the rules, she would have been obliged to consider whether, as a matter of discretion, the evidence of what the independent tile contractor said ought to be admitted; and, if so, what weight she should attach to it.

61. While I was initially detained by Mr Phuran's submission that the identity of the independent tile contractor was unknown, it seems to me on further reflection that this is precisely the kind of question which a court asked to exercise its discretion under O.38, r.29 to admit the evidence would be obliged to consider. In any event, it seems clear from Lorimar's pleaded response to the Aydocs' statement[49] that the independent tile contractor "attended the ... property on Tuesday 24th June 2014 and concluded that the thin set was defective ...", that Lorimar took no issue with the identity of the independent tile contractor to whom reference was being made. To the contrary, Lorimar's response[50] was more geared towards the suggestion that "any statements made by just looking on the dried up thin set which generate a comment that 'the thin set being defective' is mere speculation".

62. My conclusion on the admissibility issue is therefore that the judge, by misreading section 44 of the Law, failed to consider whether, as a matter of discretion, Mr Aydoc's evidence of what the independent tile contractor was alleged to have said should be admitted in evidence. This omission obviously had a negative impact on the Aydocs' case since, as the judge herself

[49] Particulars of Claim, para 9 - see para 25 above
[50] See para 31 above

observed[51], "[t]here was no other evidence led as to the poor workmanship which was the basis of the claim".

Resolving the case

Liability

63. How then to resolve the appeal in the light of my conclusion on the admissibility issue? One possibility would, of course, be for this court to take the matter in hand itself by considering whether, on the basis of the material before it, the evidence of the independent tile contractor's statement ought to have been admitted and, if so, to what effect. This is an option which is open to the court under rule 17(2) of the CAR, by virtue of which the Court of Appeal enjoys "full discretionary power to receive further evidence upon questions of fact ..."; and rule 17(3), which gives the court the power "to draw inferences of fact and give any judgment and make any order which ought to have been given or made, and to make such further order as the case may require".

64. The other possibility is to set aside the judge's order on liability and remit the single issue of the admissibility of the evidence of the independent tile contractor's statement to the judge under rule 18(3) of the CAR. That rule permits the Court of Appeal to order a new trial "on any question without interfering with the finding or decision upon any other question". By this means, the matter could be sent back to the judge with a direction to, in the light of the discussion on admissibility of out of court hearsay statements in this court's judgment, (i) consider specifically the question of whether, as matter of discretion, the evidence of the independent tile contractor's statement should be admitted; (ii) if it is so admitted, what weight should be

[51] Judgment, para 36

given to it; and (iii) what effect it should have on the ultimate question of Lorimar's liability to the Aydocs on the claim.

65. It seems to me that each of these possibilities has its advantages. One obvious advantage of the first is the prospect it would offer the parties of an immediate resolution of the litigation, without the need for any further proceedings. The advantage of the second, on the other hand, is that it would restore carriage of the matter to the judge, who, having heard all the other evidence in the case, should by that means be best placed to assess the range of discretionary factors which must inform the decision whether to admit the evidence or not, as well as its potential impact on the case as a whole.

66. On balance, despite the obvious attractions of the second approach, I prefer the first, or perhaps a modified version of it. In the particular circumstances of this case, it seems to me that the prospect of an earlier resolution of the matter, without driving up the costs of this already protracted litigation too much further, must outweigh the significant factor of the judge's familiarity with the case.

67. So the question is whether the independent tile contractor's statement should be admitted in evidence, despite the fact that the requirements of O.38, r.21 were not satisfied. I think it is clear that the detailed notice provisions contained in that order are designed to secure fairness to the party against whom it is proposed to put in evidence a hearsay statement. As the editors of Phipson explained[52] in relation to the identical regime established by the CEA, "[a]ll these provisions are designed to give the other party the opportunity to

[52] Phipson on Evidence, 12th edn, para 649

consider what action to take in response to the desire to give in evidence hearsay statements."

68. In deciding whether to admit hearsay evidence despite non-compliance with the rules, the court must as always consider all the circumstances. In **Ford (an infant) v Lewis**[53], for instance, a case decided in the early days of the CEA regime, the court took the view on the available evidence that non-service of notice was the result of a deliberate decision not to comply with the rules so as to gain some tactical advantage. As Edmund Davies LJ observed[54], "[a] suitor who deliberately flouts the rules has no right to ask the court to exercise in his favour a discretionary indulgence created by those very same rules ... Slackness is one thing; deliberate disobedience is another".

69. There is nothing in this case to suggest that non-service of the required notice stemmed from anything other than slackness on the part of the Aydocs' legal advisors. In these circumstances, it seems to me that the court's principal concern must be, as it was put by Megaw LJ in the later case of **Morris v Stratford-upon-Avon Rural District Council**[55], "to make sure ... that no injustice will be done to the other party by reason of the statement being allowed to be put in evidence".

70. No question of Lorimar being taken by surprise arises in this case. Nor, as I have already pointed out[56], is there any issue as to the independent tile contractor's identity. And, as has also been seen, Lorimar did not deny the statement attributed to the independent tile contractor as to the cause of the

---

[53] [1971] 2 All ER 983
[54] At page 991
[55] [1973] 3 All ER 263, 267
[56] See para 61 above

tile damage: rather, it dismissed it as "mere speculation"[57]. In these circumstances, I consider that the independent tile contractor's statement should be admitted for such probative value as it may have.

71. I would only add this. O.38, r.29(2) provides that the court may also exercise its power to admit a hearsay statement, despite non-compliance with the rules, "if a refusal to exercise that power might oblige the party desiring to give the statement in evidence to call as a witness at the trial ... an opposite party or person who is or was at the material time the servant or agent of an opposite party". Although the independent tile contractor's actual status is not known and was never explored, it could well be that, despite his having been characterised as 'independent', he was in fact an agent of Lorimar, thereby providing a further basis for exercising the court's discretion in favour of admitting the statement in this case.

72. In estimating the weight to be attached to the statement, section 49(2) of the Law enjoins the court to have regard to "all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement". The court is also required to keep in mind the contemporaneity of the statement and any incentive which the maker might have to conceal or misrepresent the facts.

73. Nothing at all has been put forward to suggest any motive or untoward intent on the part of the independent tile contractor. In assessing the value of his statement, I bear in mind as well that it was allegedly made in the presence of Lorimar's Building Manager, Mr Carlos Sinclair and that, save for dismissing it in a pleading as mere speculation, Lorimar did not deny or otherwise refute

[57] See para 31 above

the statement; nor, save for the pleaded assertion that the Aydocs were the ones who selected the tiles to be installed in the house, did it offer any alternative theory of what might have caused the tile problem at the Aydocs' home. In any event, the independent tile contractor's evidence was that it was the thin set rather than the tiles themselves which caused the problem.

74. Having dismissed the independent tile contractor's statement as inadmissible hearsay and therefore "not evidence of any fact stated therein"[58], the judge concluded[59] that "[t]he admissible evidence led by the [Aydocs] does not satisfy this Court, on a balance of probabilities, that it was poor workmanship that caused the issues with the tiles as claimed". But a reading of the judgment as a whole plainly suggests that, had it not been for her mistaken view on the admissibility of the independent tile contractor's statement, the judge would have considered that evidence sufficient to establish Lorimar's liability for failure to build the house in a proper and workmanlike manner on a balance of probabilities. And so do I.

Damages

75. In their Particulars of Claim, the Aydocs claimed special damages of $18,980.00 (to replace the tiling and fix the toilet); $25.00 (for materials purchased for the bathroom toilet); and $250.00 (filing fee). They also claimed for the costs of accommodation while the work on replacing the tiles was underway and storage for furniture, both costs "to be assessed". Finally, the Aydocs also claimed general damages "to be assessed".

76. Unfortunately, due to the manner in which the judge dealt with the claim, we do not have the benefit of her views on the claim for damages, despite the fact that there was some evidence placed before her in this regard. Nor, due

[58] Judgment, para 34
[59] At para 37

to the wholly unsatisfactory way in which the appeal was conducted on both sides, have we had any assistance from counsel on appeal on the question of damages, either in their skeleton arguments or their oral presentations. Notwithstanding the desire to save on costs and further court time, I therefore think it is inevitable that we should make an order for damages to be assessed, if possible by the judge herself, at the earliest convenient time. Given the nature of the evidence, I can see no reason why such an assessment should consume more than two hours of court time, if so much.

77. However, now that the Aydocs' entitlement to judgment against Lorimar has been established, and given the relatively modest sums involved in this claim, I would strongly urge the parties to consider entering into discussions with a view to settling the matter without the need for further court involvement.

Disposal of the appeal

78. I therefore propose that the appeal be allowed and that part of the judgment of the court below dismissing the Aydocs' claim be set aside. In the light of my conclusion on liability, I would remit the case to the judge or, failing her, another judge of the Grand Court, for damages to be assessed.

79. On the question of costs, unless a contrary submission is received from Lorimar within 21 days of this judgment, I think that the Aydocs should have their costs, both in this court and in the court below, such costs to be taxed if not sooner agreed.

Goldring, President: I agree.

Martin, JA: I also agree