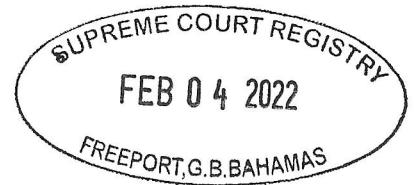


**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2018/CLE/gen/Fp/00208**



BETWEEN

**WAUGH CONSTRUCTION (BAHAMAS) LIMITED
Plaintiff**

AND

**ALBURY'S FREEPORT LIMITED
Defendant**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Wendell A. Smith for the Plaintiff
Mr. Jacy Whittaker for the Defendant

HEARING DATE: October 14, 2021

RULING

Hanna-Adderley, J

Introduction

1. This is an application by the Defendant by way of Summons filed June 11, 2021 and supported by the First Affidavit of Mrs. Sheila Taylor filed on September 6, 2021 ("**the Taylor Affidavit**"), seeking an Order that the Court issue further directions to the Court Appointed Expert, Mr. Adrian V. Rollins, and to allow him

to make a further or Supplemental Report. The Defendant relies on Skeleton Arguments filed on October 7, 2021.

2. The Defendant's application is met by the Plaintiff who relies on the Affidavit of Ms. Hope Bethel filed herein on September 28, 2021 ("**the Bethel Affidavit**"). The Plaintiff relies on Submissions filed on October 12, 2021.
3. The Plaintiff is a construction company duly incorporated and carrying on business in The Bahamas. The Defendant is an auto part supply company duly incorporated and carrying on business in The Bahamas. The Plaintiff agreed by a written Agreement dated February 29, 2016 to construct a single story auto parts supply store at Lot 2, Block SS-1 CIA, West Settlor's Way, Freeport, Grand Bahama for the consideration of \$1,063,956.00, to be paid by way of stage payments. On December 15, 2016 the Plaintiff obtained a Certificate of Occupancy and rendered a final invoice to the Defendant in the sum of \$265,989.00 for the "practically" completed works which the Defendant has refused to pay.
4. A dispute has arisen between the parties. The Plaintiff's position is that it completed the works pursuant to the Agreement. The Defendant's position is that the Plaintiff constructed the building with a defective roof not in accordance with the architectural drawings, a defective floor slab and that there were a number of outstanding Punch List items contained in a document entitled "Car Quest Punch List" and dated December 21, 2016.
5. Each party has retained and has furnished the Court with an Expert Report, that is, from Mr. Adrian Burbage for the Plaintiff and from Mr. David Lavine for the Defendant. These Reports are at odds or conflict with one another. On March 31, 2021, by the Consent of the parties, Mr. Adrian V. Rollins was appointed the Court Expert herein. Mr. Rollins filed his Court Expert Report on June 11, 2021. The Defendant seeks clarification with respect to several statements made in the report by Mr. Rollins, and seeks an order that said clarification be addressed by Mr. Rollins by way of a Supplemental Report, as opposed to being cross-examined at trial. He wishes to seek said clarification by asking Mr. Rollins a number of questions, the answers to which would be contained in said Supplemental Report. The Plaintiff

objects to further directions being given to the Court Expert simply because the Defendant does not accept a certain part of the Court Expert Report. That the Defendant has obtained leave to cross-examine the Court Expert and has already identified the issues that he wishes to challenge which he can do in cross-examination.

Statement of Facts

Affidavit Evidence

Instructions or terms of reference for Court Expert

6. I have gleaned from the Taylor Affidavit and the Bethel Affidavit that Mr. Rollins was advised of his appointment by the Court and requested to prepare an Expert Report and provided with a number of documents relevant to this action in a series of email correspondence from both Mr. Wendell Smith Counsel for the Plaintiff and Mr. Jacy Whittaker Counsel for the Defendant commencing March 31, 2021 and again on April 26, 2021. By email correspondence from Mr. Rollins's firm on May 25, 2021 Mr. Rollins advised both Counsel of his intention to conduct a site visit on May 26, 2021. Counsel for the Defendant responded via email that he should meet with a Mr. Siyyid Campbell, the Manager for Carquest as he was familiar with the defects. Subsequent to the site inspection, but on the same date, Mr. Rollins requested a copy of the architectural drawings from Mr. Smith prompting Mr. Whittaker to point out in a responsive email that a copy of the drawings were attached to the AIA contract previously sent to him. Mr. Rollins forwarded his Report shortly thereafter, on June 1, 2021.

Court Expert Report

7. The Court Expert Report is 9 pages long including the cover page and consists of 4 pages of photographs. The paragraphs excerpted from the Court Expert Report and referred to in the Taylor and the Bethel Affidavits are essentially the same and are as follows:

"The building was generally constructed as designed.

...

**Roof: ... The instructions on the drawings are in conflict...
the roof ... will function as constructed...**

...

**Conflicts in information were noted on the roof and gutter
drainage issues only."**

**"The issues in dispute in my opinion are due to information
on drawings conflicting and in some cases missing. Albury's
Freeport Limited through its Architect is responsible for
issuing [sic] clear instructions via its contract documents,
drawings and specifications. Waugh Construction also had a
responsibility to request clarification or additional
information when conflicts are evident."**

Defendant's Additional Questions agreed and not agreed upon

8. The parties agree that the following questions found at page 119 of Exhibit "ST1" may be put to Mr. Rollins but as far as Mr. Smith is concerned, only by way of cross-examination and as far as Mr. Whittaker is concerned, by way of a Supplemental Report:

A. General

1. What are your professional credentials?
2. Please provide details of your qualifications.
3. Please provide details of any literature or other material which has been relied on in making your report.
4. Please confirm if any tests or experiments were carried out in aid of the report. If this answer is in the affirmative, please give the name and the process of which such tests and experiments.

B. Pleadings Specific

1. Did the architectural plans and/or structural drawings indicate that gutters and rainwater leaders were to be installed along both sides of the length of the building? If the answer is in the affirmative, was this done?

C. Other Expert Reports

1. Please set out our analytical process, differentiating between facts, assumptions, deductions and note inconsistent or contradictory features of the case.
9. The following are additional questions which the Defendant wants to put to Mr. Rollins and are found at pages 112 – 114 of Exhibit "ST1" which save as mentioned in paragraph 8 are not agreed upon by the parties:

"QUESTIONS FOR ANDRE ROLLINS

A. General

1. What are your professional credentials and why are they relevant to this situation?
2. What construction defect topics would you consider to be your comfort zone?
3. Do you handle a lot of work in Freeport, Grand Bahama – the "Port Area"?
4. Please provide details of the expert's qualifications.
5. Please provide details of any literature or other material which has been relied on in making the report.
6. Please provide a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based.
7. Please make clear which of the facts stated in the report are within the expert's own knowledge.
8. Please confirm who carried out any examination, measurement, in aid of the report.
9. Please confirm if any tests or experiments were carried out in aid of the report, give the name and process of such tests and experiments.
10. Do you agree that the defects are as claimed? If not, why?
11. Please state whether or not any of the defects are structural.
12. Please state the cause of the defects.
13. Please state the age, character, and prospective life of the property in the current state.

14. Please state the age, character, and prospective life of the property if built in accordance with the architectural plans.

B. Pleadings Specific

15. Please explain why the roof was not constructed as per the architectural plan.

16. Please explain why the construction defects notified on or before December 22, 2016 were not rectified. (6.d. of Defence)

17. Please explain why gutters and rainwater leaders were not installed along both sides of the length of the building per the architectural plans.

18. Please explain why the exterior steel doors are installed incorrectly causing water penetration.

19. Please explain the core sample that is cracked right thru whole slab and disintegrated.

20. Why did the contractor install guttering on the western side of the building where there was nothing on the drawings?

21. Why was the roof not constructed as per the architectural plans?

22. Why was the roof slab not laid to falls?

23. Why would this cause water penetration?

24. Why did the contractor install a metal flange on the South East corner of the Roof.

25. Please explain why rain water accumulated on the roof and leaked into the building. (6.e. of Defence)

26. Please explain why the bank surveyor's request for resolution of the defective roof construction was ignored. (6.g. of Defence)

27. Please explain why you had to fill a sink hole full of water in the showroom floor.

28. Please advise where the fill was purchased from to fill the foundation.

29. Please advise why the contractor installed a metal flange over the door and sealed the Southern Emergency exit door with silicone making it unusable.

30. Why did the contractor quote to install a sloped roof and then not have the correct slope and now the roof is flat with low spots?

31. Why the western side wall so dirty, the reason is that all the water drains the wrong way due to the wrong pitch?

32. Why the floor slab has excessive cracking in multiple locations?
33. Why are the floor cracks getting wider?
34. Please explain why the floor slabs contains numerous hollow spots between the slab.
35. Why didn't the contractor install the parking stops on the western side of the building even though it was quoted and on punch list.
36. Please explain why the "Defect List" dated December 12, 2016, was not acted upon.
37. Please explain the suggestion of the Bank's quantity surveyor's suggestion via email dated April 5, 2017, on reconstruction of the roof was not acted upon.
38. Please explain why the defects in the roof construction identified by Construction Cost Engineering (Bahamas) (CCB) in their letter dated March 23, 2018 was not acted upon.
39. Please explain why the rectification suggested by CCB on roof construction was ignored.
40. Please explain why no clarification was sought when they found conflict in designs (13 of Plaintiff expert report).
41. Please explain why the building was not constructed as per the specification and architectural plan.

C. Other Expert Reports

42. Please summarize other experts' views.
 43. Please give reasons for your own opinion.
 44. Please state your opinion and state the qualification of that opinion.
 45. Please set out your analytical process, differentiating between facts, assumptions, deductions and note inconsistent or contradictory features of the case."
10. Mr. Whittaker referred the Court to the following case law:
- (1) Riva Properties Ltd. V Foster & Partners Ltd [2017] EWHC 2754 (TCC);
 - (2) National Museums and Galleries on Merseyside (Trusttes of) v AEW Architects and Designers Ltd. [2013] EWHC 2403 (TCC); and

- (3) Imperial Chemical Industries Ltd. v Merit Merrell Technology Ltd. [2017] EWHC 1763 (TTC);

11. Mr. Smith referred the Court to the following case law:

- (1) Abby National Mortgages Plc v Key Surveyors Nationwide Ltd [1996] 1 W.L.R. 1534, CA
- (2) Daniels v Walker (Practice Note) [2000] 1 W.L.R. 1382.

Analysis, Discussion and Conclusion

The Law

12. Order 40 of the Rules of The Supreme Court ("RSC") states:

"1. (1) In any cause or matter which is to be tried without a jury and in which any question for an expert witness arises the Court may at any time, with or without the consent of the parties, appoint an independent expert or, if more than one such question arises, two or more such experts, to inquire and report upon any question of fact or opinion not involving questions of law or of construction. An expert appointed under this paragraph is referred to in this Order as a "court expert". This rule applies both to proceedings in open Court and in Chambers.

(2) Any court expert in a cause or matter shall, if possible, be a person agreed between the parties and, failing agreement, shall be nominated by the Court.

(3) The question to be submitted to the court expert and the instructions (if any) given to him shall, failing agreement between the parties, be settled by the Court.

(4) In this rule "expert" in relation to any question arising in a cause or matter, means any person who has such knowledge or experience of or in connection with that question that his opinion on it would be admissible in evidence.

2. (1) The court expert must send his report to the Court together with such number of copies thereof as the Court may direct, and the proper officer must send copies of the report to the parties or their attorneys.

(2) The Court may direct the court expert to make a further or supplemental report.

(3) Any part of a court expert's report which is not accepted by all the parties to the cause or matter in which it is made shall be treated as information furnished to the Court and be given such weight as the Court thinks fit.

Discussion

Role of the Court Expert and Instructions given to the Court Expert

Submissions

13. Mr. Whittaker submits, in part, that the Expert Report does not assist the Court in any way. The Report has not commented or confirmed whether or not the roof was built as designed or built in a different manner and that is the substance and the reasoning that the Defendant needs further clarification on. That what has been provided is normally what is seen from a quantity surveyor, identifying the costs associated with what is presently before him. The Court Expert did not properly understand his scope. He was not tasked to visit the "as built" structure to determine what the costs to repair would be. His job was to provide the Court with independent expert opinions based on the issues that led to the construction of the building. He argued that these matters can be addressed in a Supplemental Report in line with the questions proposed by the Defendant. That these matters do not need to be addressed on a cross examination.
14. Mr. Smith referred the Court to Order 40 of the RSC and submits, in part, that the Court based on the report submitted by Mr. Rollins, *should require a further or supplemental report*. A supplemental report should not be required as a result of the Defendant herein not accepting a part of Mr. Rollins' report. The Defendant has raised its concerns, as such the Court should treat the Report as information furnished to the Court and give such weight to it as the Court thinks fit. Moreover, should the Court order a supplemental report the Defendant may still raise additional concerns, resulting in both reports being treated as information.
15. Mr. Smith further submitted that the Defendant having already been granted leave to cross-examine the Court Expert, and by way of its Skeleton Arguments, has already decided the parts of the expert's report it wishes to challenge. Moreover,

the architectural plans are a part of both Bundles of Documents herein, it is submitted that the Defendant by way of cross-examination can adequately challenge and address the issues it has with the report.

16. This case largely centers around whether what actually happened during the construction of the building was as a result of design/architectural errors or omissions or defective construction OR construction practices. I do not possess the relevant expertise and so, when the parties' Expert Reports came to be at odds or in conflict (as they usually do), and as is evident by the Expert Reports of Messrs. Burbage and Lavine, it was thought that it would be helpful to the Court to have its own Expert to assist the Court in **evaluating the conflicts in the Expert Reports and by furnishing an independent opinion on the areas of conflict and drawing his own conclusions on the areas of conflict, including the basis for those conclusions.** The question for the Court is, does the Court Expert Report assist the Court in this way and if not, will a Supplemental Report be necessary (**Emphasis mine**).

17. The Court Expert Report in its present form does not assist the Court as outlined above. Needless to say that this is partly due to the fact that neither the Court nor the parties agreed the terms of reference or instructions to Mr. Rollins prior to his commencement of the work. I am confident that had this been done he would have taken a different approach. The Court, pursuant to Order 40 Rule 2 (2) of the RSC, has the power to Order that a Supplemental Report be prepared. There are far too many areas of conflict between the parties and their Experts that Mr. Rollins has not addressed in the detail and analysis required by the Court to leave such issues to be addressed in Cross-Examination as opposed to being contained in a Supplemental Report. I am minded to order that the additional questions be addressed in a Supplemental Report but I have also concluded that some of the questions raised by Mr. Whittaker are either inappropriate for this Witness or in some instances can be asked on cross-examination. If after receiving the Supplemental Report, pursuant to Order 40 Rule 2 (3) of the RSC, any part of the

Court Expert Report is not accepted by the parties will be treated as information and the Court will determine what weight will be attached to it.

Expert's Qualifications

Submissions

18. Mr. Whittaker stated that the Defendant had started to question the expert on his experience and being an expert. These included whether this is his first time being an Expert or if he is a more experienced Expert. That these are all important considerations that the Court should be aware of when relying on someone as an independent court expert.
19. Mr. Smith submitted that the parties herein by *Consent* on the 4th of March, 2021 agreed to the appointment of Mr. Adrian Rollins as the Court Expert pursuant to Order 40 of the RSC.
20. Although the parties agreed on the appointment of Mr. Rollins as the Court Expert any Expert adducing evidence in judicial proceedings should state for the Court and for the record his background, qualifications, training and experience, including his experience as an Expert Witness, if any. This is a reasonable "question" and should now be addressed in the Supplemental Report.

Disposition

Additional Questions to be addressed in the Supplemental Report as opposed to Cross-examination

21. Most of the questions set out in at pages 112-114 of the Taylor Affidavit are expressed as though based on facts already in evidence and tested under cross-examination or which should be put to other witnesses in the case. This cannot be permitted. The Supplemental Report shall address the following questions found at pages 112 – 114 and together with the questions agreed upon at page 119 of Exhibit "ST1" as slightly amended by the Court and questions not on the list can be put to the Court Expert under cross-examination and are subject to be objected to by the Plaintiff:

A. General

1. What are your professional credentials including your background,

qualifications, training and experience, and your experience as an Expert Witness, if any?

2. Please provide details of any literature or other material which has been relied on in making the report.
3. Please provide a statement setting out the substance of all facts in your knowledge and if not in your knowledge the source of the information and instructions as you understand them which are material to the opinions expressed in the report or upon which those opinions are based.
4. Please confirm who carried out any examination, measurement, in aid of the report at the site inspection or otherwise.
5. Please confirm if any test or experiments were carried out in aid of the report, give the name and process of such tests and experiments.
6. Do you agree that the matters complained of by the Defendant in its claim are defects? If yes, why?

B. Pleadings Specific

7. Was the roof constructed as per the architectural plan?
8. Were gutters and rainwater leaders installed along both sides of the length of the building per the architectural plans?
9. Were the exterior steel doors installed incorrectly resulting in water penetration?
10. Was the core sample cracked right through the whole slab and disintegrated?
11. Did the contractor install guttering on the western side of the building and was this noted on the architectural drawings?
12. Was the roof constructed as per the architectural plans?
13. Was the roof slab laid to falls and if not, would this cause water penetration?
14. Did the contractor install a metal flange on the South East corner of the roof?

15. Did rain water accumulate on the roof and leak into the building? If yes, can you opine on why this may have happened.
16. Was a sink hole filled with water in the showroom and if yes, why?
18. Did the contractor install a metal flange over the door and seal the Southern Emergency exit door with silicone and as a result, was the door unusable?
11. Did the contractor contract to install a sloped roof and did the contractor install a correct slop? Was the correct slop installed? Is the roof now flat with low spots?
12. Did he inspect the western side wall and did he notice that the western side wall was dirty? Could this be as a result of the water drains being the wrong way due to the wrong pitch?
13. Did the floor slab have excessive cracking in multiple locations? Did he notice this and what conclusion did he draw as the cause for this?
14. Did he notice that the floor cracks are getting wider? What could be the cause of this?
15. Did he notice whether the floor slabs contain numerous hollow spots between the slab? If yes, what would be the cause of this?
16. Were parking stops installed on the western side of the building? Was a quote for the installation on the punch list?
17. Was the building constructed as per the specification and architectural plan?

C. Other Expert Reports

18. Please address the opinions and conclusions expressed in the other Experts' Report and give your opinion and conclusions on them and the basis for those conclusions, particularly where they differ from yours. Please set out your analytical process, differentiating between facts, assumptions, deductions and note inconsistent or contradictory features of this case.

Costs

22. Costs of this application are in the cause.

Dated this 31st day of January, A. D. 2022


Petra M. Hanna-Adderley
Justice

