IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV02667/2010

BETWEEN	**SUNSHINE PUMP & SUPPLY LTD.**	**CLAIMANT**
AND	**ISLAND CONCRETE CO. LTD.**	**DEFENDANT**

Contract – Whether Defendant negligently supplied poured and finished concrete surface- Whether pour was done against defendant's advice- Whether Claimant to blame for condition of pour- Evidence – Witness unable to read – Witness statement was not read over to him before it was signed- Whether witness to be allowed to give oral evidence in chief.

Tavia Dunn and Deborah Dowding instructed by Nunes, Scholefiled, Deleon & Co. for the Claimant

Douglas A. B. Thompson for the Defendant

Heard: 20,th 21st, and 29th May 2014

COR: BATTS J.

[1] This Judgment was delivered orally on the 29th May 2014.

[2] The Claim Form in this matter avers that by an oral contract for services the Claimant engaged the services of the Defendant to supply, pour and finish concrete at premises in St. Andrew popularly known as "Putt & Play". Further that in breach of contract the Defendant carried out the pouring other than in a workmanlike or professional manner and other than with proper materials. It is alleged that within days of the pouring of the concrete large cracks and crevices developed. There was an alternative claim in negligence.

[3] The Particulars of Claim elaborated on this and importantly as a particular of negligence added that the Defendant took an inordinately long time to pour the various loads of concrete resulting in an inability of the concrete to bond and adhere.

[4] By way of Defence, negligence and breach of contract was denied. The Defendant alleged that in breach of contract the Claimant failed to prepare the ground surface area as agreed and merely dumped up the area with gravel. Further that prior to the pouring of the concrete Mr. Sheldon Ellis, the Defendant's agent, advised the Claimant's responsible officers, agents and/or contractors that pouring the concrete upon the unprepared surface would likely result in cracking. However the Claimant through its said agents demanded that the Defendant proceed with the pour as the Claimant's engagement schedule required the concrete to be poured as soon as possible.

[5] The Claimant called 2 witnesses. The first being Mr. Clinton Thompson its Managing Director and the other being Mr. Peter Gibson, an electrician. No expert evidence was lead. Mr. Peter Gibson in his witness statement which was allowed to stand as his evidence in chief observed that the frequency of delivery of concrete was "so inconsistent" that the Defendant's representative on site was consistently calling to find out how far away they were each time a load was poured.

[6] Mr. Clinton Thompson in his witness statement which also stood as his evidence in chief averred that within days of the pour cracks appeared. He said that Mr. Wayne Wright of the Defendant Company attended, observed the cracks and promised to correct the defect. This was never done. He then asserts at paragraph 21 that the

> *"concrete was poured in a defective manner as a load of concrete would be poured and then await delivery of another load. There were long delays in the delivery of the concrete and while awaiting delivery the concrete started to harden before the other load arrived."*

[7] Mr. Thompson was allowed to amplify his witness statement and when doing so stated that one Mr. Logan was not his employee or contractor. Mr. Logan he said was "charged with the responsibility for laying marl" and that the marl was rolled by Mr.

Hewitt. He said after the marl was laid, rolled and wet, the Defendant's representative one Mr. Wayne Wright came and saw it and there was no complaint. He spoke to no one apart from Mr. Wayne Wright from the Defendant Company.

[8] After cross-examination of the Complainant's witnesses however another picture of the scenario emerged. Mr. Thompson maintained, and he was firm on this, that the Claimant had no representative present when the pour was being done, i.e. on the 8th and 9th December 2008. Further that on the 8th and 9th December 2008, he, Mr. Thompson, did not even know when the pour occurred. He denied having a telephone conversation with anyone whilst the pour took place on the 8th and 9th December 2008. He admitted that in fact the job took more concrete than was ordered and at least one payment was made after the job was completed. He admitted that it was the Claimant's responsibility to prepare the surface prior to the pour. He admitted that one Mr. Logan signed a document on behalf of the Claimant indicating satisfaction. This document was not however put in evidence. He admitted when the pour was done there was a steel finish as per his request.

[9] When cross-examined and when allowed to amplify Mr. Peter Gibson, contrary to the evidence of Mr. Thompson, made it clear that Mr. Logan was the site foreman. Indeed he stated that he observed and heard the Defendant's representative telling the site foreman that something had to be laid. The Claimant's workmen had to lay some extra board to form a screed. He stated that the Defendant was saying they could not do the pour on what was laid. He even signed some of the delivery slips for concrete delivered. He did so on the instructions of Mr. Logan who had gone to lunch. He admitted that the screed about which the Defendant complained was on the surface on which the concrete was to be poured. Then the following surprising exchange occurred:

> *"Q: On surface that had been prepared while pouring did workmen have to put marl and gravel*
>
> *A: There was no marl but gravel."*

The witness made it clear that he was not privy to the discussions between Mr. Logan and the Defendant's representative but he saw wooden screeds laid.

[10] At the end of the Claimant's case therefore it is fair to say there were major inconsistencies on significant and relevant aspects of the evidence. Indeed it can be said that aspects of the Defendant's pleaded statement of case were confirmed. In particular the fact that concern was raised by the Defendant, prior to the pour, about the surface on which the pour was to be done. The evidence was also contradictory as to whether it was marl or gravel and as to whether the Claimant had a representative at the job site whilst the pour was done. At the end of the Claimant's case, on the evidence, the court was being asked to infer a breach of contract or negligence, because cracks occurred and the Defendant's agent had promised to repair them but never did. The promise to repair was not alleged to be contractual but was evidence from which the court was asked to infer an admission and hence ascribe liability.

[11] Whatever unenforceable promises the Defendant's representative may have made, the Defendant's sole witness gave largely unchallenged evidence explaining why the Defendant was not at fault. Mr. Sheldon Ellis is not a man of letters. Indeed he was unable to read the first paragraph of his witness statement or the date it was signed. I ruled that his witness statement would not be allowed to stand as his evidence in chief. Claimant's counsel sought an adjournment to go and do research and address me on what was next to occur. I refused the application as the matter was only set down for 2 days and I had no intention to waste judicial time. I asked that submissions be made ex tempore. Counsel then objected to Mr. Ellis being allowed to give viva voce evidence and relied upon Rules 29(4)(2)(a) and (b) of the Civil Procedure Rules, 2002.

[12] I decided that Mr. Ellis would be allowed to give oral evidence. I made it very clear that if he departed in any significant way from his witness statement while giving evidence in chief I would hear counsel on any need to adjourn to take instructions and costs would follow. My reason for this approach is that the Civil Procedure Rules are designed to facilitate, not hinder, the fair and efficient disposal of cases. It does no justice and quite likely will do an injustice if a party who is present, willing and able is prevented from giving evidence because he is unable to read or write. It is the more so because by the simple device of reading a statement to him prior to his signing it and of inserting a statement that that had been done, the witness statement would have

been admissible. Furthermore the new rules do not abolish oral evidence in chief. It says such evidence may be by witness statement. There is no rule in the Civil Procedure Rules 2002 of which I am aware that addresses the situation where at trial a witness discloses he is unable to read and write notwithstanding that he has signed a witness statement that lacks the appropriate notation. As such and in the absence of a practice direction from the Chief Justice, it is for the judge having conduct of the trial to exercise his discretion in the circumstances and to do what is fair and just and best for the efficient disposal of the case.

[13] In this matter, the issues are simple, not complex. There will be no injustice to the Claimant if Mr. Ellis gave oral evidence. If he departed in any meaningful way from the witness statement the Claimant would be allowed to take instructions adjourn and, if necessary , even call rebuttal evidence.

[14] As it was, Mr. Ellis' evidence was for the most part consistent with his statement. It is fair to say also that he was an impressive witness and his candour exceeded that of the other witnesses called. Mr. Ellis stated that he was in charge of the Defendant's crew that attended to do the pour. His evidence in its totality (in chief and cross-examination) revealed the following:

a) The person, Wayne Wright, with whom Mr. Thompson said he had discussions was a sales representative for the Defendant;

b) He, Mr. Ellis, was very experienced in the business of concrete pouring;

c) On the 8th and 9th he, Mr. Ellis, liaised with the Defendant's representative whose name he could not recall but it was the person in charge;

d) He identified Mr. Gibson as being one of the persons on the site that day but not the one in charge;

e) He observed when he arrived that: Gravel was loose, the site was too deep (would take more concrete than ordered) and the area to be screed was rough;

f) That he recommended the use of a pour truck;

g) He commenced the pour at the instructions of the Claimant's representative despite his recommendation to them that the 8th be used to properly prepare the surface and so the pour could be done on the 9th instead; Because the surface preparation/screed was worked on as the pour continued it led to delays particularly because the concrete could not remain more than 2 hours in the truck without being dumped;

h) Overnight the Claimant was instructed to make a construction joint. On the morning of the 9th that had not been done properly but the Claimant's supervisor insisted that he continue the pour;

i) That he did return to the job site some time afterwards and observed the cracks. He said he even observed the imprint of bumper car wheels which suggested that the facility had been used before the concrete was properly set;

j) In his opinion, the pour over the time period could cause cracking of the concrete. That is the delays between pours.

[15] I should note for the record that the Claimant's counsel successfully objected to evidence about the pump truck recommendation, as this was new and not alleged in the pleadings. Secondly, that at the end of Mr. Ellis' evidence in chief counsel requested 15 minutes to take instructions. We adjourned at 12:15pm and resumed at 2 p.m. in order to facilitate this prior to commencement of the cross-examination.

[16] I accepted Mr. Ellis as a witness of truth, not only because of his demeanour but also because he was corroborated in important areas by Mr. Peter Gibson. They both said that the Claimant had a site foreman and representative who was Mr. Logan (although Mr. Ellis could not recall the name) and they both spoke to gravel and that the inadequate preparation of the surface was pointed out to the foreman. I accept that the pour was reluctantly commenced on the 8th because of the instructions of the Claimant's representative and contrary to Mr. Ellis' advice.

[17] In these circumstances it cannot be said that the Defendant was in breach of contract or negligent. There is therefore judgment for the Defendant against the Claimant. The Claim is dismissed with costs to the Defendant to be taxed if not agreed.

David Batts
Puisne Judge