IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 4

MANUEL SOSA	**Appellant**
AND	
WILLIAM HOFFMAN **KELLI HOFFMAN**	**Respondents**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr. Justice Barrow	**-**	**Justice of Appeal**

Said Musa SC for the appellant.
Hubert Elrington SC for the respondent.

—

June 10 and October 4, 2010.

MOTTLEY P

[1] I have read in draft the judgment to be delivered by Barrow JA, with which I agree and have nothing further to add.

_____
MOTTLEY P

MORRISON JA

[2] I have had the advantage of reading in draft the judgment to be delivered by Barrow JA, with which I am in full agreement, and there is nothing that I can usefully add to it.

_____
MORRISON JA

BARROW JA

[3] This appeal is against the determination by Hafiz J, in a claim under a building contract, that the appellant builder was liable for the loss caused by the structural defects in a dwelling house that the appellant built from sketches provided by the respondent owners and without reliance on any detailed drawings or specifications of the proposed works.

Material facts

[4] There was no challenge to the findings of material fact made by the judge (in paragraphs 78 – 90 of the judgment) as distinct from conclusions she drew. The primary fact is that when the house was built in 2002 no engineer or architect was engaged and all the respondents gave to the appellant from which to work were sketches done by Mr. Hoffman (the respondent). The sketches were done on three sheets of 'Bristol Board' and on a sheet (or sheets) of typing paper. The latter sketch was put into evidence and showed the square footage of the house, placement of the kitchen, dining room, sliding door, deck and sizes of the rooms. The judge observed that though the sketches were called 'drawings' by both parties they were not design drawings because they showed no details of structural work. There

were no specifications describing or drawings giving the design of the structural work to be done such as the foundation, slab, beams and columns.

[5] The judge approached the question of who had the responsibility for the preparation of the design by observing there was no written contract. She reviewed the testimony of the witnesses, including the respondent and the appellant, and chose to believe the evidence of the respondent that the appellant indicated to him that the stated drawings would be sufficient for him to build the house given his many years of experience in construction. The judge noted the appellant admitted he agreed to work from a plan that was not a real plan. She concluded the appellant took on the responsibility of the design of the house.

[6] The judge also stated she did not find the appellant credible when he said the respondent always held himself out to be the architect and engineer of his house and he, the appellant, was merely the contractor who brought along his workers to do the work. The judge noted the appellant accepted in cross-examination that he did not know whether the respondent was experienced in construction. The judge further noted the appellant and his witnesses admitted the respondent did not give any instructions relating to the structural construction or the design of the building. The judge found that the respondent did not take on the role of architect or engineer by instructing the appellant where he wanted to be located items such as doors, windows, electrical outlets, sinks and other accessories.

[7] Counsel who appeared in the court below for the appellant (not the present counsel) had submitted to the judge that there was a duty of care placed on the respondent to ensure there was a proper plan and to have hired an architect and, once the construction started, to have gotten experts to review the construction as it progressed. The judge rejected this submission and found there was no agreement between the parties that required these. By providing the sketches the respondent did not take on responsibility for the design, the judge held. The judge further held the information provided on the sketch is what someone with no skill in designing or drawing or building gives

to an engineer or contractor when he wants to build a house. The appellant was an experienced contractor who knew what a proper plan was and could read one. The appellant therefore knew what the respondent gave him were not proper plans.

[8] In concluding on this aspect of the evidence the judge found the appellant chose to proceed on his own, without the benefit of design drawings. There was no evidence the respondent instructed the appellant on the design of the house. In the judge's view the sketch spoke for itself: "It lacks details and seems to be the work of a fifth grader. Why did the [appellant] use this sketch? The answer is simple. He did not find it necessary to get a plan because of his experience as a Contractor." The judge found the appellant was solely responsible for the planning and designing of the house that he built for the respondent for the sum of $136,999. 48.

[9] According to the respondent's witness statement, there were early indications of trouble but it took a while for the full extent to appear. After moving in the respondent said he asked the appellant to complete certain works but the appellant refused, saying he had done what he had been contracted to do and the two fell out. Even while moving in, the respondent said, it was dawning on him that he had gotten a bad job. Thus, neighbours who were helping him to move refused to use a wooden staircase until it was shored up with scrap lumber. The respondent said he and his wife borrowed money to finish the works and to repair the recently completed structure. Shortly after, the respondent called on the appellant to refer the dispute to arbitration. About a year after moving in large cracks in the foundation began to show. Eventually, the respondent stated, he got a retired building inspector to inspect the foundation and other problem areas. After the problem increased and "the house slowly began a steady fall to the ground [and] large, angry cracks appeared in the masonry of the house" the respondent employed a licensed building inspector to assess the building. That inspector advised that the structural defects were of such a serious nature that the house was unsafe and unfit for human habitation and should be pulled down.

He advised it was a 'constructive total loss' that required reconstruction of the house.

[10] Ultimately the respondents moved out of the house. They sold off items that had gone into the construction such as doors, windows, burglar bars, zinc and wood for about $30,000.00. In January 2004 the respondents commenced action in the Supreme Court for damages for breach of contract and in September 2008 they obtained judgment for damages of $106,999.48 with interest and costs.

Expert's report on structural defects

[11] The outcome of the appellant's efforts was the subject of a report by an engineer, Mr. Michael Moody, appointed as an expert by the court to examine the structural defects in the building. The appellant did not challenge at trial or on appeal the findings in that report. Mr. Moody testified that when he inspected the building it was three years old and that in his opinion two factors affected the building (1) it was poorly designed and (2) It was poorly constructed. This contributed to most of the problems encountered.

[12] The report stated:

> "*Our inspection of the building indicated that the building was poorly designed and constructed and had severe structural problems.*
>
> *Ground floor slab had failed and had numerous cracks to it. Indication was that it lack reinforcement. Several beams had failed in deflection and showed several cracks through the beams.*
>
> *Most beam to column connected failed because it was poorly designed.*
>
> *Cantilever beams supporting the verandah had failed and has severe cracks to them.*

Upper level concrete floor showed several deflection and is breaking away from the external walls. The deflection of the floor is also lifting and breaking the ceramic tiles on the floor.

The timber section of the floor was poorly designed, with excessive spacing of the floor joints. Based on the span of the supporting beams the spacing of the floor joists should be at 16" center to center.

Presently, they are spaced at 2' – 8 to 3'0 center to center.

Because of this, the floor bounces when walk upon. The timber T& G flooring used was not properly cured and therefore, shrinked leaving openings in the floor.

The external concrete blockwalls had severe cracks to them, which, in our opinion was due to failure of the supporting beams.

This movement has also caused shifting of windows and doors creating openings between windows and wall.

Cantilevers were discontinued at the columns and therefore, created severe deflection in the columns which developed cracks at the joints between the cantilever and column.

***It is our opinion that the structural members of the building, namely foundation, slab, beams and columns were under designed and the quality of work was poor**. Attached are pictures of the building showing the problems.*

We have also estimated the cost of carrying out the remedial works to correct the problems which are attached.

*It must be noted that because of so much failure of the structural members, **it is our opinion that others will also fail over time as the quality of the work is the same."***

[13] Mr. Moody testified that it would cost $65,888.50 to do corrective works to the house; that is to remedy the defects. In cross examination by counsel for the respondent he said, as he had stated in his report, even if steps were taken to remedy the defects this would not have stopped other damage occurring. He stated that at the time he did the inspection of the house some improvements had been done to the building.

Responsibility for the design

[14] The gist of the appellant's first ground of appeal was that the judge erred in holding the appellant to a standard of construction expected of a qualified engineer when the agreement between the parties required the appellant to construct a house based on sketches provided by the respondent and at a cost that was acknowledged to be significantly below the going rate. As part of this ground the appellant contended the judge erred in holding the appellant responsible for the design of the building and in finding the appellant held himself out as a specialist contractor who saw no need for an architectural plan.

[15] Reduced to its barest, what occurred in the building of the house for the respondent is that no one told the appellant any detail of the building he agreed to construct. No one. It was, therefore, left to the appellant to either refuse to build without those details being provided to him by someone else or to proceed to build by deciding on those details for himself. The appellant chose the latter course: he proceeded to construct the building that was depicted in sketches by deciding on the details for himself. What the appellant did is demonstrated by following the report of the expert reproduced above.

[16] The report stated the "ground floor slab had failed and had numerous cracks to it. Indication was that it lack[ed] reinforcement." In short, the appellant built the ground floor slab without proper reinforcement. No one told the appellant what reinforcement to use, so it follows he used such reinforcement as he thought fit to use. He alone made that decision. It is in that sense the judge found the appellant took on responsibility for the design of the building. As a matter of clear inference, it was the appellant who decided on how much (if any) steel to use in the ground floor slab, the strength of the concrete mix and whatever other aspects go into constructing a slab.

[17] The report continued: "Most beam to column connected failed because it was poorly designed." There is no need to search for the details of this

statement because it is a clear inference from the evidence that the appellant is the one who decided how to construct or connect beams to columns.

[18] A particularly clear demonstration that it was the appellant who designed what he built is provided by the following extract from the report: "The timber section of the floor was poorly designed, with excessive spacing of the floor joists. Based on the span of the supporting beams the spacing of the floor joists should be at 16" center to center. Presently they are spaced at 2' – 8 to 3' – 0 center to center." Since, on the evidence, no one told the appellant what spacing to leave between joists it follows that he was the one who decided to use the spacing that was used. In other words, the appellant designed the laying of the floor joists, including the spacing.

[19] It does not matter whether or not it was accurate for the judge to say that the appellant held himself out to be a specialist contractor who saw no need for an architectural plan. It does not matter what the judge meant by the description 'specialist contractor'. The undisputed fact is the appellant decided to proceed with constructing the building without a design of what he would build from an architect or an engineer. The result is the appellant designed the various parts of the building as he went along. The designs the appellant made were poor and along with poor quality of work caused the failures that were reported to the court. This was never disputed.

Warranty of fitness

[20] The introductory part of the appellant's first ground, that the judge held the appellant to a standard of construction that was too high in the stated circumstances, seems better treated as part of the appellant's second ground. That ground is that there was no warranty, expressed or implied, that the house would be fit for human habitation other than in accordance with the sketch plans and supervisory instructions given by the respondent as the works progressed. The appellant elaborated on this ground with particulars.

[21] Counsel for the appellant took as his departure point the proposition stated in volume 4 (3) of **Halsbury's Laws of England** 4th ed. reissue at para 76 that a warranty of fitness is implied unless it is displaced by the express terms or other relevant circumstances. The acceptance by counsel that a warranty of fitness is implied unless it is displaced leads, therefore, directly to the question whether the warranty was displaced, in this case. It was not displaced by express terms of the contract, because there were no such terms in this oral contract. Hence, to support this ground of appeal counsel is left to rely on the assertion that the warranty of fitness was displaced by relevant circumstances. What, if any, circumstances could have displaced the implied warranty of fitness?

[22] The argument was not pursued in counsel's submissions but it is as well to mention the contention in the grounds of appeal to the effect that the 'rock bottom price' the appellant charged entitled the respondent to a quality of construction significantly lower than could have been expected if the job had been given to a qualified engineer. Mr. Musa S.C. was quite right not to advance that argument because it could succeed only on the footing that an owner who agrees to pay a low price to a contractor who is an unqualified engineer impliedly agrees to accept a building that is unfit for human habitation. It is an argument that could make no sense. A person who agrees to pay a low price to a builder who is not formally qualified may be thereby implicitly agreeing to accept a building constructed to a lower quality or standard than would be due from a highly paid and formally qualified builder. But he does not thereby agree to accept a building that is unfit for the purpose for which it is built and therefore useless and simply a waste of money.

[23] Instead, counsel argued in reliance on the decision in **Lynch v Thorne** [1956] 1 All ER 744 that a warranty of fitness may be excluded where the express terms of the contract are inconsistent with such an implication or the circumstances are such that the employer has not relied exclusively on the skill and judgment of the contractor. As previously observed, there were no express terms which it could be argued were inconsistent with an implication of fitness for human habitation. As to the other limb of this argument, the

evidence does not support the argument that the respondent did not rely exclusively on the skill and judgment of the appellant to construct a building that was fit for the purpose. The positive formulation of that last statement is readily found in the testimony of the appellant himself, who answered questions on this aspect in cross-examination, as follows:

> "Q. And, your role, as you said, was simply the person building. You didn't have the responsibility of the quality of the work, you were just building?
> A. I had the responsibility of the material that was used.
> Q. Who would you say had the responsibility of the quality of this job?
> A. Yes, that was my job. He was there every day with husband (sic).
> Q. You are saying that you had the responsibility as to quality of the work, quality of how the work would turn out?
> A. Yes."
> (p. 142 of the transcript)

[24] In light of that clear admission by the appellant that he bore the responsibility for the quality of material used and the quality of how the work would turn out, this ground of appeal could not succeed. Counsel sought to buttress this ground in oral submissions by arguing that it was not every defect, no matter how serious, that would amount to unfitness. With respect, this takes the appellant's case on appeal no farther because there was not the slightest challenge to the evidence of the court appointed expert as to the extent of the structural defects in the building. Neither was there in the evidence for the appellant or cross –examination of the witnesses for the respondent any indication that the appellant challenged the clear assertion of the respondent that the building was unsafe and should be abandoned, as he stated in his witness statement (at paragraph 20, p. 36 transcript) he had been specifically advised by a 'licensed building inspector'. Because the appellant did not take issue at trial with the premise, clearly asserted by the respondent, that the building was unfit for human habitation the judge was

obliged to conclude on a balance of probabilities, as she did, based on the evidence of the expert as to future failure of the structure, that the building was unfit for human habitation – the purpose for which it was built.

Opportunity to remedy defects

[25] Ground 3 of the appeal asserted that the appellant should not have been held liable for structural defects discovered three years after completion and occupation of the building and that the respondent had the obligation to ask the appellant to remedy whatever defects were discovered within a reasonable time after occupying the premises.

[26] This ground of appeal and the submissions in support do not purport to state a principle of law; it is not suggested there is an applicable limitation period of which the respondent fell afoul in allegedly failing within a reasonable time to require the appellant to remedy defects. There is no doubt, at this stage, that the defects were caused by the poor design of what was built and I have already expressed my view that the judge was right to find the appellant was responsible for the design of what he built and, therefore, for the result of that design. Following from that determination the question arises: what difference could it have made if it were the fact (as to which there is no need to conclude) that the respondent failed to ask the appellant within a reasonable time to remedy defects? There was not even the suggestion that the appellant could have prevented further defects occurring if he had been given the earliest possible notification. The expert testified that even if the remedial works to address the defects he described had been carried out this would not have stopped further failure of the structural members over time. He identified the structural members of a building as foundation, slab, beams and columns and concluded these had been under designed and the quality of the work on them was poor. Therefore, it does not appear the alleged delay in notifying the appellant of the defects or the alleged failure to give him the opportunity to correct defects made or could have made the slightest difference to either liability or damages. It is true the appellant said to the judge if he had been made aware of the structural defects he could probably

have remedied them – if he could have been advised by an architect or engineer. The judge apparently gave no weight to this statement and its speculative nature justified that treatment, especially in view of the expert's evidence that was distinctly to the contrary.

Quantum of damages

[27] The remaining ground of appeal was that the damages awarded were excessive, wholly unreasonable and disproportionate to the cost of the remedial works. The judge found the respondent was entitled to damages of US$68,499.74 as monies paid to the appellant less US$15,000.00 being the sum received for items the respondent removed from the house and sold after the date of the expert's report and after deciding to treat the house "as a constructive total loss". The total award made was thus US$53,499.75 or BZ$106,999.50. The judge had refused to award other sums claimed by the respondent. The respondent had claimed US$17,119.25 as the cost of completing works left undone and to remedy some defects already showing when the respondents moved in to the house but the judge held the respondent failed to support this claim in his evidence. The respondent had also claimed US$450.00 paid to consultants, US$9,540.00 cost of deconstruction and US$3,520.00 cost of removal and accommodation during the period of deconstruction and reconstruction. The judge similarly held the respondent had failed to prove these claims. From these decisions the respondent has not cross - appealed and no more need be said about these claims.

[28] Counsel's first challenge to the sum awarded to the respondent was that the respondent testified that he sold windows, doors, zinc and board from the house for $30,000.00 but had failed to testify as to the rest of the house. In fact the evidence went further than that; the testimony of the respondent (at p. 110) was that he sold everything for about BZ$30,000.00. Other things that remained to be sold at the date he testified included things that the respondents purchased in Florida, the price of which was not included in the sums paid to the appellant. and for which no credit was due to the appellant

[29] The second challenge to the sum awarded was that the judge had wrongly applied the principle she correctly identified as governing an award of damages, which was approved by the House of Lords in **Ruxley Electronics and Construction Ltd v Forsyth** [1995] 3 All ER 269 at 274 b as follows:

> "The measure of the damages recoverable by the building owner for the breach of a building contract is…the difference between the contract price of the work of the building and the cost of making the work or building conform to the contract …"

[30] Counsel submitted the judge should have acted on the further principles that the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the good to be obtained and the appropriate measure of damages in such a case is the difference in value even though it would result in a nominal award.

[31] The difficulty with this submission, based on a passage in **Ruxley Electronics v Forsyth** (at p. 283 c per Lord Lloyd of Berwick) is that those principles have no application to the facts of this case. The facts of Ruxley's case, to which those principles were applied, were that contractors built a swimming pool to a maximum depth of six feet nine inches when the contract called for a maximum depth of seven feet six inches. The issue arose whether the owner was entitled as damages to a sum equivalent to the cost of basically destroying the pool and building it over. It was decided that the swimming pool as built was perfectly safe to dive into and its value was no less than would have been the value of a pool that was built to the agreed specifications. It did not help the owner's case that it appeared he did not intend to apply the damages he was seeking, to rebuild the pool to the required depth. On those facts the House of Lords applied the principle that it would have been out of all proportion to the good to be obtained to destroy and rebuild the pool and so the owner should not be awarded the cost of reinstatement.

[32] There is a vast difference between the perfectly suitable swimming pool in the **Ruxley** case and the distinctly useless structure in the instant case. On the present facts the passage from **Ruxley**'s case that is applicable is the following statement by Lord Jauncey of Tullichettle (at 275 e): "Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing." As stated, there was no appeal (rightly so, I think) against the judge's finding that the house was unfit for the purpose. In that circumstance it simply does not arise for consideration that the measure of damages could have been anything other than the cost of reconstructing.

[33] In my view the appeal should be dismissed with costs to the respondent, to be taxed if not agreed within 21 days of the date of this judgment.

_____
BARROW JA