BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL No. 9 of 2000

BETWEEN:

RAINBOW'S END LIMITED

Appellant

and

GEORGE TURNBULL

Before:

Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert Matthew	Justice of Appeal

Appearances:

Mr. G. Farara Q.C for the Appellant, Miss T. Small with him
Mr. J. Archibald Q.C. for the Respondent, Miss M. Matthew with him

---

2001 : January 17,18
March, 12.

JUDGMENT

[1] REDHEAD J.A: The respondent, Mr. George Turnbull, for seven [7] years, from 1975 to 1982, he was a building superintendent, in St. Thomas and for 18 years, from 1982 to present, he has been a building contractor in the British Virgin Islands {BVI}.

[2] The learned trial judge referred to him as a good builder. On 25th June, 1990 the appellant and the respondent entered into a written contract whereby the respondent undertook to construct a dwelling house for the appellant.

[3] Article 2 of the contract provides that the work should have begun on 26th June, 1990 and "be substantially completed on or before 31st December, 1990"

[4] By Article 4 of the contract the appellant was to make periodic payments to the respondent against certificates of appellant's architects, Messrs. Onions Bouchard and Mc.Culloch.

[5] Article 4 also provides:

> "When the architect determines that the work under the contract is substantially completed as defined in Article 64 of Supplementary General Conditions he shall promptly issue a certificate of substantial completion……."

[6] Article 5 of the contract provides inter alia:

> "Final payment shall be due within ninety {90} days after substantial completion of the work provided that the work is fully performed……."

[7] The learned trial judge found as a fact that work progressed smoothly and to the satisfaction of the architects appointed by Mr. Ruffel Smith.

[8] The evidence reveals that Mr. Ruffel Smith and his family moved into the house in December 1990.

[9] Mr. Archibald, Learned Queen's Counsel, argued on behalf of the respondent that Article 64 does not exist. He referred to Article 57:-

> "Substantial completion – The date of substantial completion of a project or specified area of a project is the date when the construction is sufficiently completed, in accordance with the contract documents, as modified by any variation orders agreed to by the parties, so that the owner can occupy the project or specified area of the project for the use for which it is intended."

[10] Mr. Archibald, Learned Queen's Counsel, argued that substantial completion would have taken place in December, 1990.

[11] Learned Queen's Counsel, Mr. Farara argued on the contrary that this was not so because when Mr. Ruffel Smith moved into the house he was living in, as Mr. Farara termed it, "a construction site" as work was going on all around him.

[12] After the respondent completed the job and moved off the work site the appellant was dissatisfied with the work.

[13] On 5th November, 1991 the appellant's Architects wrote to the appellant

"Attention Mr. Hugh-Ruffle Smith
Dear Mr. H. Ruffle Smith

> It is some 10 months after the original contract completion date and many months since George Turnbull vacated the site.
> We are led to believe that the property is completed and valued accordingly.
> Substantial completion has never been issued as you are aware.
> We therefore propose a final "statement" in accordance with our understanding of the situation.
> Please acknowledge/confirm that our assumptions are in accordance with records.
> Yours sincerely
> David Brindley B Sc B. ARCH; Onions Bouchard and Mc.Cullcoch Ltd"

[14] Attached to that letter was a document marked "certificate 14B".

[15] That document listed itemized deductions from contract sum such as, minor defects relating to electrical work; Housing for pump room and gas cylinder; filing re-work, materials and labour… in accordance with H.R.S. memoranda dated 8th May, 1991 and 31st May, 1991. There was a total deduction of $4,721.93.

[16] That document also represented that the balance outstanding and owing to be paid to the respondent on the contract price was $25,121.93.

[17] The appellant refused to pay that sum.

[18] The respondent issued a writ against the appellant on 1st June 1995 claiming the said amount.

[19] The appellant filed a defence and counterclaim on 20th June 1995 initially claiming $52,725.73 as the cost for remedying defective work which it alleged was done by the respondent.

[20] By an order of court dated 16th September 1998, the appellant was given leave to amend its defence and counterclaim.

[21] In that amended defence and counterclaim the appellant was now claiming $179,052.15 as the cost of remedying defective work.

[22] The matter came before Moore J. who gave judgment for the respondent in the amount claimed and dismissed the appellant's counterclaim.

[23] The appellant now appeals against the decision of the learned trial judge.

[24] A multiplicity of grounds of appeal were filed on behalf of the appellant but, in my view, for a determination of this appeal it is not necessary to consider all of these grounds,

[25] The learned trial judge in giving judgment for the respondent said at paragraph 5 of his judgment:-

> "Attached to the letter of the 5th November 1991 was certificate #14B which showed a net balance of US$25,121.93 which is the sum claimed by the plaintiff. On all the evidence before me in this case both oral and documentary, I am satisfied that certificate #14B is the final certificate as contemplated by the parties under the contract; and that therefore that sum, admittedly not having been paid by the defendant, the plaintiff is entitled to judgment upon his claim."

[26] A great deal of time and emphasis were spent on this aspect of the case by learned Queen's Counsel for the appellant.

[27] Mr. Farara, Learned Queen's counsel, drew attention to Article 5 of the contract which provides inter alia:-

> "The Architects upon receipt of the written notice that the work is ready for final inspection, and acceptance, and where they find the work acceptable under the contract fully performed, they shall promptly issue a final certificate over their own signature stating that the work provided for in the contract has been completed and is accepted by them under the terms and conditions thereof and that the entire balance found to be due, the contractor and noted in the said final certificate is due and payable……."

[28] Learned Queen's Counsel, Mr. Farara argued that the document is not even described by the Architect as a final certificate but rather a proposed "final statement".

[29] It does not conform to the format of previous certificate issued by the Architects. It does not certify anything. All previous certificates were worded "This is to certify that the sum of $x is now due to George Turnbull as a progress payment for work on Rainbows End house"

[30] For these reasons, learned Queen's Counsel contended that it is difficult to glean what material the learned trial judge relied on to make such a concise finding of fact that the document is the final certificate contemplated by the parties under the contract.

[31] Mr. Archibald, learned Queen's Counsel, on the other hand, argued that the building contract agreement does not provide for the form of a certificate to be in any specific form whether the certificate 14B in issue constitutes a certificate for the purpose of the contract is a question of judicial construction.

[32] He further argued that the certificate was made by the appellant's appointed architects whose professional duty in this respect was to act impartially and independently; and in doing so they meticulously followed the appellant's specific instructions to deduct amounts claimed by the appellant against the builder for defects out of moneys due.

[33] In Halsburys Laws of England 4th Edition Volume 4(2) paragraph 425.

> "Form of Certificate – Generally each contract will provide for the form of certificates required under it but, subject to an express provision to the contrary, a certificate need not be in writing, whether the document or statement relied on constitutes a certificate for the purposes of the contract is a question of construction.
> If the contract requires only that the architect should certify his satisfaction with the works, it is not necessary that the certificate should state a balance due and, if an amount is stated, neither party is bound by it. Similarly a statement by the certifier approving the contractor's account may be taken as an expression of satisfaction."

[34] Mr. Archibald argued that a reading of Article 1, Article 4 and Article 57 of the General Conditions of the of the Contract, coupled with the admission by Ruffel Smith that he has not seen supplementary General Conditions or Article 64 would lead to the inevitable conclusion that substantial completion occurred in December 1990 as a question of fact.

[35] However, the respondent did say in answer to a question from the court that substantial completion was effected in May, 1991.

[36] In my view for the purpose of this case it matters not whether substantial completion was effected in December 1990 or May 1991 as the document marked "certificate" which was issued under the cover of a letter by the appellant's architect was issued well beyond ninety days after May 1991 as contemplated by Article 5 of the contract.

> "Final payment shall be due within ninety days after substantial completion of the work……"

[37] It was not until November 5, 1991 that the architects issued that document headed "certificate" which the appellant disputes that it is a final certificate which document made itemized deductions for minor defects etc.

[38] It is significant, in my view that the deductions made by the Architects on 5th November 1991 were $4,721.93.

[39] On 13th January, 1991 Ruffel Smith wrote to the Architects saying inter alia:-

> "……As promised, please find a summary of remedial works, warranty works and agreed expenses for George Turnbull Construction as at 31st December, 1991 for work on the house."

[40] Attached to that letter was "Summary of Remedial warranty works as at 31st December 1991." One year after Ruffel Smith moved into the house. This showed a total of $4,907.31 which was $185.38 more than the deductions made by his architects.

[41] It is of vital importance for the determination of this matter to note that the evidence reveals that Ruffel Smith made no complaints to the respondent about defective work, prior to his visit with the respondent to the house of a Mr. West, which the respondent was constructing. This led the learned trial judge to opine at paragraph 17 of his judgment:-

> "He {Ruffel Smith} struck me as being a mean spirited parsimonious and envious man. He appears to have had no serious complaint with Mr. Turnbull or his work until he saw the beauty of the building, which the plaintiff was constructing for another client at Greenbank. But that was a much more expensive building and no sensible comparison could be made between them."

[42] Under grounds 2 and 18 of the appeal Learned Queen's Counsel, Mr. Farara, argued that the learned judge made a fundamental error in coming to the conclusion that the document was the final certificate and that the respondent is entitled to judgment on his claim.

[43] He Submitted that the law is well settled in that the fact of the issuance of a final certificate which states that the work has been completed to the satisfaction of the Architects does not deprive the owner of his right of challenging whether the work has been done to specification in accordance with the contract.

[44] In support of this submission, Mr. Farara, Q.C. referred to:

> Beaufort Developments [N.I] Ltd. v Gilbert Ash & Anor. 2 ALL ER 778 at 785-792
>
> National Coal Board v William Neil & Son (St. Helen) {1985} 1 Q.B.300
>
> Hudsons Building and Engineering Contracts 10th Ed. P.425

[45] In my opinion the above two cases turn on their facts. In Beaufort for example, the parties entered into a contract, which was in the standard JCT form for contract for the construction of a nine-storey office blocks in Belfast. "By Article 5 of the JCT agreement, the parties agreed to refer any disputes arising thereunder or in connection therewith to arbitration and by Clause 41 any such arbitrator was expressly empowered to open up, review and revise the architects' certificates."

[46] National Coal Board {supra} turned largely on the construction of clause 4(1) of the British Electrical and Allied Manufacturers' Association conditions (1956), which provided that all work to be done under the contract should be executed in the manner set out in the specifications and to the reasonable satisfaction of the plaintiffs' engineer. The defendants completed the work and the engineer issued a certificate which stated that the work had been done to his satisfaction and authorized final payment of the contract sum to the defendants.

[47] Certain of the structures erected by the defendant under the contract later collapsed. In an action against the defendant for damages for beach of contract the plaintiffs argued that the defendants failed to carry out the work according to specifications and were therefore in breach of clause 4(1) of the conditions. In their defence the defendants alleged that the certificate issued by the plaintiffs' engineer was conclusive of the completion of the work in accordance with the contract and that the plaintiffs were debarred from alleging otherwise.

Held: that there was no special rule of construction applicable to building contracts to the effect that when work was required to be carried out in accordance with specifications and to the satisfaction of the employer's architects or engineer, the contractors fulfilled the conditions, regardless of any non-compliance with the specifications, if he satisfied the employer's architects or engineer of the sufficiency of the work, that applying the ordinary rules of contraction of contracts and having regard to the contract as a whole and, so far as possible giving effect to each part of it, the proper construction of clause 4(1) was that it imposed two cumulative obligations on the contractor, namely to execute the works to the satisfaction of the employer's engineer, and, in addition, to execute the works according to the specifications; and that accordingly, the defendants had failed to disclose a defence to the plaintiffs' pleaded claim.

[48] At page 314 Piers Ashworth Q.C. (sitting as Deputy Judge of the High Court) quoting Mc.Carthy J in:

> Major v Greenfield {1965} N.Z.L.R 1035 at 1061 said:
>
> "Some of the conflicts to be found in these and other areas are frankly irreconcilable, and I am satisfied that a way can be found through this jungle only if one keeps steadily in mind the principles of construction of building which were clearly stated in the judgment of this court delivered by Cleary J comparatively recently in Stratford Borough Council V.J.H. Ashman (N.P) Ltd {1960} N.Z.L.R. 503. That judgment emphasizes the necessity to decide primarily whether the contract is one where the satisfaction of the architect is to be the overriding requirement as to the sufficiency and quality of the work done, or whether on the other hand conformity with the specifications and the satisfaction of the architect are cumulative requirements. The former interpretation is the one favoured in construing modern building contracts. As a result, even in the absence of express provision that the architect's certificates are treated as such. The issue of a formal certificate may not be necessary for a certificate is only a mode of expressing the satisfaction. Each case, however, depends finally on its own documents….."

[48] In Law and Practice of Building Contracts 3rd Edition by Donald Keating page 87 the learned author says:-

> "It is a question of construction in each case to determine whether it was intended that a particular certificate should be conclusive upon the matter with which it purports to deal."

[49] It is of some importance, in my view, that the respondent said under cross-examination that he did not expect to receive a certificate of substantial completion as the owner had moved into the house.

[50] In the case at bar the learned trial judge determined and found as a fact that the certificate 14(B) is the final certificate as contemplated by the parties under the contract.

[51] There was nothing, in my opinion, that was advanced to us to change that finding of fact as found by the learned trial judge I therefore agree with the learned trial judge and uphold his finding that the certificate was the final certificate as contemplated by the parties.

[52] This finding in my view has a direct bearing on the appellant's counterclaim to which I now turn.

[53] The appellant when it first served its defence and counterclaim alleged that the cost of remedying defective works was $52,725.73. This was on 20th June, 1995. Three years later on 17th September, 1998 the appellant alleged that the total cost of remedying the defective works was $179,052.15. This increased claim of $179,052.15 was as a result of a report by Paul Ferraras a Civil Engineer. From the evidence it is quite clear and quite alarmingly this report was compiled before he visited the appellant's house in July 1998.

[54] Paul Ferraras in cross-examination in relation to the counterclaim said that the works carried out by the respondent were not worthless. He also agreed that nowhere in his report or in his evidence before the court did he say that he saw inferior material used on the project {the house}.

[55] The appellant had pleaded by paragraphs 6 and 7 of the Amended Defence and Counterclaim:-

> "6 wrongfully and in breach of contract the plaintiff carried out defective work using inferior material and failed to carry out certain of the contracted works."
> "7 In the premises the works carried out by the plaintiff are worthless and worth no more than the sum of money already paid by the defendant to the plaintiff in respect thereof and the defendant will set up the aforesaid breaches of contract by way of diminution or extinction of the plaintiff's claim."

[56] There is also evidence that Paul Ferraras when he inspected the appellant's property spent forty-five minutes on the site taped the roof with a coin and produced his predated report. The learned trial judge in rejecting his evidence said:-

> "I find Mr. Ferraras completing lacking in objectively Partisan and unwilling to assist the court with unbiased testimony. I attach title credibility to his evidence which does not, where credible, assist the defendant's case"

[57] What is of great significance, in my view, in light of this finding by the learned trial judge, is the failure of the appellant to call his architect to give evidence in support of his claim.

[58] Mr. Hugh Ruffel Smith admitted in cross- examination that his claim before the court amounted to 71 per cent of the revised contract.

[59] He admitted in cross-examination that this was so despite the fact that his architects where not supporting him in his case and the refusal of the architects to withdraw their final statement for $25,000.00.

[60] Clause 25 of the contract provides in part:-

"The Architect may withhold, or, on account or subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may be necessary to protect the owner from loss on account of:-

(a) Defective work not remedied

(b) –

(c) –

[61] It is abundantly clear that the plaintiffs' architects never supported the plaintiffs' claim. I am fortified in that view because the evidence reveals that the architects and Ruffel Smith are on good terms up to the time, he Ruffel Smith, was giving evidence in this case. In my view therefore there is no apparent reason why the architect was not called to give evidence in support of the plaintiff's case. That together with other aforementioned reasons clearly support the view that the architect does not support the plaintiff's case.

[62] The Respondent said under cross- examination that he did first class work on the plaintiff's house. This is supported by the evidence in my view that the house is built at the top of a hill with a 360 degrees view yet it was able to withstand three disastrous hurricanes, Marilyn Louis and George with its roof intact.

[63] There is also evidence that the house which was built at a contract price of $271,254.97 was valued by reputable realtors, Smith Gore for $750,000.00.

[64] The evidence is as follows:

> "Q. How much was the house valued for? The house that Mr. Turnbull built.
> A. I can't answer that, Sir I don't have the document that splits it.
> Q. Seven hundred and?
> A. I think it was $750,000.00."

[65] The learned trial judge accepted the submission of learned Queen's Counsel, Mr. Archibald, that the appellant did not produce any documentary proof of expenditure or loss to sustain or prove the pleaded damages in this action; and held that the particulars of special damages have not been proved.

[66] I agree with the learned trial judge and would dismiss this appeal with costs to the respondent to be taxed, if not agreed.

Albert J. Redhead
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice

I Concur

Albert N.J.Matthew
Justice of Appeal