GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 8 OF 2002

BETWEEN:

THE ROMAN CATHOLIC BISHOP OF GRENADA

Appellant

AND

RANDOLPH CAPE

Respondent

Before:

The Honourable Sir Dennis Byron	Chief Justice
The Honourable Mr Albert Redhead	Justice of Appeal
The Honourable Mr Ephraim Georges	Justice of Appeal (Ag)

Appearances:

Mr James Bristol for Appellant
Mrs Linda Grant for Respondent

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2002: July 1

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JUDGMENT

[1] GEORGES, J.A.(Ag.): In this case the appellant/defendant was sued by the respondent/claimant for $21,092.58 consisting of $4,500.50 being the balance due under a building contract for repair of Roof Nos. 1, 2 and 3 of the Roman Catholic Church at Grenville and $16,592.89 for additional work and labour which was done at the request of the appellant.

[2] The claim in respect of additional work done is admitted by the defendant at

paragraph 11 of the defence but the claim for the balance owing (4,500.00) is denied on the ground that the claimant failed to complete the sealing of Roof No. 3 as specified in the contract and by reason of the said breach the defendant had to employ another builder to do so at a cost of $500.00 for labour.

[3] The defendant (appellant) further averred at paragraphs 5, 6, 7 and 8 of his defence that:

> "5 By clause 3 of the said Contract the works specified therein were to be carried out in a workmanlike manner.
>
> 6. In breach of the said Clause 3 the Plaintiff failed to carry out the work in a workmanlike manner and the Defendant has suffered loss and damage.
>
> 7. It was an implied term of the said contract that the Plaintiff would carry out the works with reasonable care and skill.
>
> 8. In breach of the said implied term of reasonable care and skill the Plaintiff failed to protect adequately or at all the area immediately surrounding the work area by reason of which the Defendant has suffered loss and damage."

[4] The remedial work to Roof No.1 came to $2,886.61 and the replacement cost including installation of the marble altar/steps is put at $9,330.00 according to an estimated dated February 21, 1995. Those amounts plus the labour charge of $500.00 referred to at paragraph 3 above totalling $12,716.61 the appellant seeks to set off against the respondent/plaintiff's claim of $21,092.58

[5] Although the defendant's claim for damage to the marble altar and steps is resisted at paragraph 4 of his defence to counterclaim at trial liability was conceded with the plaintiff agreeing under examination-in-chief (at page 19 line 15) to pay for it if the broken marble was given to him. The claimant further acknowledged at trial that his workmen had negligently broken the marble altar. That aspect of the case is not therefore in contention.

[6] In entering judgment for the claimant/respondent the learned trial judge evidently erred when he concluded at paragraph 23 of his judgment that:

> "With regard to the broken marble I am not satisfied with the evidence adduced and no issue or claim was made prior to action being brought and even then some 22 months elapsed before the claim, but again the Claimant in his evidence admitted that some time in 1992 in a discussion he impulsively said he will pay for what he know as a broken piece of marble if he got it but there was no piece of marble available to him. However, merely on his expression of willingness to pay I will award $700.00."

With the greatest respect there can be no rational basis for that conclusion.

[7] The learned trial judge at paragraph 22 of his judgment further reasoned that:

> "On a review of the evidence I hold that there has been no breach of contract on the part of the claimant and he is entitled to be paid for his work. However, he admits that he did not seal Roof No. 3 and it was due to no fault of his and I accept his explanation for not sealing the roof. The Defendant has spent $500.00 to seal the roof. The Claimant who is an experienced builder says that is excessive, about $100.00 for labour will suffice. The fact that the Claimant has admitted it as part of his contract and expressed a willingness to seal the roof I will allow $350.00 to the Defendant on this item to be set off against moneys due to the Claimant.."

[8] Again with respect I find the allowance of $350.00 for sealing Roof No. 3 arbitrary. Notwithstanding that the claimant himself admitted it as part of the contract which had not been completed the learned trial judge still found that there had been no breach of contract on the part of claimant. Indeed the evidence clearly shows that the claimant never returned to complete the job and a certificate of completion was never signed. I therefore see no justification for reducing the defendant's counterclaim in respect of that head of damage.

[9] I now turn to the appellant's complaint regarding leaking of Roof No.1

[10} John Fletcher, a qualified civil engineer with wide experience in the Caribbean and elsewhere testifying on behalf of the appellant/defendant inspected the drains and put forward an estimate to stop the leaks in the drain consequent upon a visit in 1999 some eight years after the work had been completed by the claimant.

[11] He furnished a written report and testified thus (at page 35):

> "I actually climbed up and looked at the drain. It is correct as stated in the report that I sent a mason on the roof. I was on a scaffolding and looked at the drain. I did not climb up on the roof. I had seen on both sides of the church watermarks coming down the sides of the church. (Witness points to

watermarks on the side of the courtroom). I saw young cedar trees growing in the drain, they were about 18 inches. I saw a gel-like material which was put on the roof side of the drain and into the drain in an attempt to waterproof it. The material went underneath the roof, touching tiles. I think it was something good for the purpose. Notwithstanding this, however, there were still leaks. This report was written before I actually attempted and did carry out report, when I went up with two carpenters and discovered that the get-like material stopped some distance from the roof.

In my opinion, the tiles should come over the membrane as a first defence and the membrane should be the second defence. The tiles were over the ceiling but stopped short of going over the membrane so that the rain will go onto the membrane. The membrane proved not to be capable of taking the water as it became soft, it consists of a mesh and bitumen. The waterproof membrane I saw was not a proper waterproof membrane.

It is my opinion to extend the roof covering material - the tiles - into the drain and installing a proper waterproof membrane. Because of the steepness of the roof there will be an element of splashback.

The membrane is designed to cope with splashback. There are several products on the market, the bitumen is susceptible to ultra violet rays. Had the tiles covered the membrane properly it would have lasted a little longer.

I have carried out remedial work. I used Genesco. It is a fibreglass impregnated with bitumen and with chips on it. It has a warranty between 15 - 25 years. It is a good roof material if properly applied. The membrane used was problematic, the question is always, 'How does it bind with the concrete?.' Putting a gradient as suggested will not reduce the volume capacity of the drain. The smooth surface will reduce friction and run off will be faster.

If I had to do the repairs it will cost $14,000.00."

[12] The learned trial judge at paragraph 19 of his judgment stated that:

"His (Fletcher's) report coming some 8 years after the work was completed is of no assistance to the Court to ascertain whether there was defective or faulty work by the Claimant on the drain in 1991."

[13] Yet Walter Ogilvie the then President of the Parish Council had testified (at page 39) that:

> "I am aware of the contract with Mr Cape for the repairs. He drew up the contract for the church. We went over the contract.
>
> Was replacing the roof. We replaced the roof on the church. The roof had slate. We needed a new roof. The old roof, the slate was broken and leaking and difficult to repair, and we advised to put on a new roof.
> The work started in 1991 and somewhere in the latter part of the job he abandoned the work. He did not complete.
>
> We noticed in the latter part of 1991 there were heavy rains. We noticed leaks and the Parish Priest and the Council tried to arrange a meeting. He eventually agreed to meet with us in his home.
> At that meeting, Fr. O'Carol, Simon Charles, Pauline Andrews, Leah Charles, David Johnson and myself.
>
> We discussed the completion of the work that Mr Cape started. We mentioned leaks that appeared on the walls of the church from the main roof, the completion of the roof over the Sanctuary - Roof No. 3. We also mentioned some damages which were done to the structure of the altar and the step and we discussed the remainder of Mr Cape's money.
>
> We pointed some of the defects which we saw in the church and he promised to remedy the situation. He said he will come and see the leaks when there is a downpour. At that time it was dry weather. We awaited him but Mr Cape never showed up."

[14] And Walter Ogilvie's evidence in that regard is supported by the testimony of Pauline Andrews a member of the Grenville Roman Catholic Parish Council who assumed responsibility of overseeing the works after Father Edward Mc Laughin left about June - July 1991. The witness testified (at page 27 line 8)

that:

"After Mr Cape left the job in 1991, I do not recall the roof was leaking when he left the job. The church was not occupied.

We had a meeting at the home of Mr Cape. It was members of the Parish Council along with the Parish Priest, the new Parish Priest who took over from Fr. Ed, Fr. O'Carol. Fr. O'Carol came about 3 - 4 months after Fr. Ed left. When Fr. O'Carol came, most of the work was almost completed.

That meeting came about as a result of what Fr. O'Carol said to the council.

The meeting was to discuss the work done, its completion and faults found. Faults were found. These were leaking - No. 1 roof, and the broken altar at the steps.
A completion certificate was given to us. We did not sign it because we said the roof was leaking. It was agreed that the Plaintiff would come and look at it when it rained, and do the repairs. The repairs were never done by Mr Cape. We did not sign. We did not take the document."

[15] Mr Bristol, learned Counsel for the appellant submitted that Mr Fletcher's evidence confirmed that the roof tiles did not extend sufficiently and the water proof membrane installed by the claimant/respondent was not a proper waterproof membrane. These matters he pointed out were unaffected by time. Notably he added Mr Fletcher's evidence was never challenged. The compelling inference therefore is that there was negligent/defective workmanship in repairing Roof No.1 from the outset which the claimant failed to rectify/remedy.

[16] The estimated cost of repairing the leaks to Roof No.1 is quoted by Mr Fletcher as $3,500.00 as at 11th May 1999. This was the first time that the

cost of the work to be done to Roof No.1 was quantified according to Pauline Andrews. An estimated figure of $2,886.61 is mentioned in the appellant solicitor's letter of 27th March 1995 to the respondent's solicitor but this is wholly unsubstantiated.

[17] Pauline Andrews said in cross examination (at page 22 line 8):

> "We discussed Roof No.1 and No. 3. Mr Cape said we must await until rain came. By that time we got a letter from Mr Cape's lawyer. We then got someone else to fix it. It was done in 1994 as we could not allow the leaking roof to continue."

[18] Even so three years would in my view have been an inordinate length of time to have taken remedial action resulting in further deterioration and increase in the cost of repair of that roof. A reduction of the claim in that regard by fifty per cent to $1443.30 would therefore in my opinion be fully justified.

[19] One final point falls to be resolved and that is the award of interest on the judgment. The learned trial judge on entering judgment for the claimant for $21,092.98 less a set-off in the sum of $1,050.00 leaving a balance of $20,042.98 awarded 'interest at the rate of 10% per annum from date of writ until payment'. And whilst it is true that the award of interest on judgment is in the discretion of the Court an award of '10% from date of writ until payment' is high and not in line with the usual practice of these courts.

[20] I would accordingly enter judgment for the claimant/respondent in the sum of $16,502.39 less a 'set-off' of $11,273.30 leaving a balance of $5,319.09 with interest at the rate of 6% per annum from the date of filing of the writ (viz October 7, 1993) to date of judgment (i.e February 25, 2002) and thereafter at the statutory judgment rate of 5% per annum to date of payment. Costs to the respondent in the agreed sum of $6,500.00 both here and in the court below.

Ephraim Georges
Justice of Appeal (Ag)