GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.13 OF 2005

BETWEEN:

ISAAC PETERS

Appellant

and

GRENADA ELECTRICITY SERVICES LTD.

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Cajeton Hood for the Appellant
Mr. James Bristol and Mr. Dickon Mitchell for the Respondent

2006: May 30;
September 18.

JUDGMENT

[1] BARROW, J.A.: The appellant succeeded both in the High Court and the Court of Appeal on the issue of liability on his claim for damages for the destruction of his house by fire due to the negligence of the defendant. Damages were assessed by the master[1] as follows:

Loss of house	$706,250.00
Loss of contents	$100,000.00
Interest on loan	$75,000.00
Demolition and removal	$5,000.00
Total	$886,500.00

[1] Grenada Civil Suit No GDAHCV 1997/0189; master's judgment dated 17 June 2005

The master quantified prescribed costs, which had been ordered by the court, at $90,375.00. The appellant seeks an increase in the quantum of the damages awarded under each head, except for demolition and removal, as well as an increase in the costs. It will be convenient to consider the arguments on appeal under the various heads of award.

Loss of house

[2] The appellant's claim has been impacted in a number of ways by the claim he made for indemnity upon his insurers. It turned out that the appellant's house and contents were insured by the same company which insured the defendant. Byron CJ noted in the appeal on the liability issue ("the earlier appeal") [2] that this was unknown to the respondent and neither the loss adjuster nor anyone else disclosed this to the appellant during the investigation process.

[3] The reason that the master gave[3] for awarding $706,250.00 to the appellant for the loss of his building was that the claimant "in his evidence … accepts the valuation of Mr. Williamson a local builder and architect" who placed that value on the house. Counsel for the appellant submitted that it was not true that the appellant accepted that figure. The record shows that counsel is correct. What the appellant said in cross-examination was "The cost of rebuilding was $706,250.00 according to Mr. Williamson." It is true that the appellant had earlier said, also in cross-examination, that "the value was $706,250.00." However, the record of proceedings is not a verbatim transcript so it is not known to which question this statement was a response, nor is it clear whether this was exact speech or a paraphrase. What is clear is that both in his witness statement and in cross-examination the appellant asserted that the value of his house exceeded

[2] Grenada Civil Appeal No 10 of 2002, judgment delivered 28 January 2003, at paragraph [10]
[3] Paragraph [4] of the master's judgment

$900,000.00. He never departed from that figure. There is a touch of irony in how the appellant arrived at that figure.

[4] Attached to the appellant's witness statement and marked "IP1" was a letter dated May 20, 1996 from the loss adjusters who represented the insurers. Both parties had agreed in advance of the hearing that the master should have regard to this letter. In the letter a Mr. Paul Thornber told the appellant the figure the insurers were prepared to pay. Mr. Thornber stated in the letter that he considered the appellant's claim should be based on Mr. Williamson's estimate of $706,250.00 and that he, the loss adjuster, would adjust it upwards by $20,000.00 for external works. That, said Mr. Thornber, was the value of the claim but it needed to be considered against the value at risk. In other words, Mr. Thornber was telling the appellant, the sum for which the appellant insured his house ($700,000.00) was not necessarily the sum that represented the true value of the house. This is a proposition that is well known in insurance law.

[5] Mr. Thornber then proceeded to arrive at a valuation of the house of $783,000.00 by multiplying its area of 4,350 square feet by $180.00 per square foot. He added $67,000.00 for the swimming pool that was also destroyed, which gave a total of $850,000.00. The value of the fencing and the garage took the figure up to in excess of $900,000.00, according to Mr. Thornber. There should also be added to that figure, Mr. Thornber stated, the fees for the reconstruction work that could amount to 12 ½% to 15%.

[6] The absolute minimum figure for the value at risk that he was prepared to accept was $850,000.00, stated Mr. Thornber, and he was not prepared to shift from this figure. Mr. Thornber then calculated the loss to be compensated under the policy as follows:-

$$\text{Claim EC\$706,250} \times \frac{\text{EC\$700,000 sum insured}}{\text{EC\$850,000 value at risk}}$$

$$= \text{EC\$581,618}$$

[7] On the very firm footing that the appellant's house was under-insured at a value of $700,000.00, the insurers applied the law of average and paid the appellant the percentage of the sum insured that that sum bore to the actual value of the house. The appellant accepted that sum in satisfaction of his claim upon his insurance policy. It is therefore the compelling fact that the value of his house that the appellant accepted (to the extent that he could truly be said to have accepted) was not the value advanced by Mr. Williamson of $706,250.00, but the value of $900,000.00 determined by Mr. Thornber.

[8] The observation of Byron CJ in the earlier appeal, to which I previously referred, about the appellant not having been informed by anyone during the claim investigation period that his insurers were also the insurers for the respondent, was made by the chief justice in reviewing the trial judge's finding on the credibility of a witness for the respondent, who testified against the appellant's case that the fire was caused by the negligence of the respondent. That witness who testified against the appellant and in favour of the respondent was none other than Mr. Thornber. When, therefore, the appellant relies on the opinion of Mr. Thornber as to the value of his house there can be no doubting its credibility and cogency as evidence in support of the appellant. I should also repeat that it is evidence that the parties specifically agreed the master should regard.[4] Therefore, in my view, the master clearly erred in his finding that the appellant accepted a value for his house of $706,250.00 and the master further erred in not accepting the value of $900,000.00 that the appellant clearly asserted and supported with the evidence of Mr. Thornber.

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[4] See the case management order dated 19th March 2004 and entered 26th March 2004

[9] In the skeleton argument for the appellant on this aspect counsel submitted that the appellant should also be awarded the fees of 12 ½ % to which Mr. Thornber referred. In IP1 Mr. Thornber stated:

> "I also add that on your claim you are including two items of fees and no provision is taken by either of your consultants in arriving at your Value at Risk for fees. Full fees on a major reconstruction work could add up to 12 ½ to 15% and an account of this should be taken also in arriving at the Value at Risk."

[10] There are two aspects to this evidence that I consider. On the one hand, by agreeing to the reception of IP1 into evidence the respondent agreed to the reception into evidence of this opinion - that the value of the house needed to be increased by the amount of the reconstruction fees. On the other hand, the appellant was aware of this opinion when he gave his witness statement which served as his examination in chief (in fact, as noted before, IP1 was attached to his witness statement) and he nonetheless asserted a value of "in excess of EC$900,000.00" without mentioning the 12 ½ % reconstruction fees. Further on this hand, in cross-examination he restated that "my house was valued at more than $900,000.00" but again made no reference to the 12½ % reconstruction fees.

[11] Related to this aspect is a point concerning amendment to the particulars of damage on which counsel for the appellant submitted and which counsel for the respondent conceded. At a case management conference[5] the appellant had sought and been refused permission to amend his statement of claim to increase his claim for the loss of his building from $710,000.00 to $1,035,000.00. (I reckon that the latter figure comprises $900,000.00 + $135,000.00 (being 15% reconstruction fees) = $1,035,000.00.) The refusal of permission to amend[6] occurred before the filing of the appellant's witness statement[7] so the respondent would have been entitled to conclude from the absence in the witness statement of a claim for, or even reference to, the 12 ½ to 15% reconstruction fees that this

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[5] Held on 19th March 2004; see the order at note 3, above
[6] 19th March 2004
[7] 30th April 2004

component was not being claimed. The respondent did not have any opportunity to cross-examine the appellant on this component and, indeed, I consider that had the respondent sought to do so the master would have been entitled to stop that line of questioning as irrelevant. In the circumstances I would hold that the appellant is not entitled to seek to recover on appeal compensation for reconstruction fees that he did not claim before the master. I am satisfied, however, that the appellant was entitled to damages in the amount of $900,000.00 as the value of the house that was destroyed.

[12] Remarks that the master made about pleading and proving special damages led the appellant to conclude that the master had held that the appellant was not able to recover damages for loss in an amount greater than the amount of $710,000.00 pleaded in the statement of claim. The appellant submits that this was wrong and relies on the post CPR edition of McGregor on Damages[8] to argue that, whereas it was previously necessary to amend before an award in excess of the amount particularised in the statement of claim could be made, it is now no longer necessary to amend. As indicated, counsel for the respondent does not dispute the point and, on that basis, I accept the position under our CPR 2000 to be as submitted. Actually, I do not think the point arose from the master's decision[9] because the master determined the amount to award for loss of the house purely by reference to his erroneous finding that the appellant had accepted Mr. Williamson's figure as being the value of the house.

Loss of contents

[13] The amount that the appellant claimed for the lost contents was $520,000.00. The master awarded $100,000.00 under this head. The master stated that the appellant admitted in cross-examination that $275,000.00 of the amount he

[8] 17th edition (2003) at 43-027

[9] Although, but for the respondent's concession that the court may award a sum greater than that stated in the claim, it could have arisen in this court in light of the increase in the award that this court is being asked to make.

claimed was for items that did not belong to him. I am unable to find in the record that the appellant admitted to any figure. What I find is that the appellant accepted in cross-examination that clothes for his wife, daughter and son and daughter-in-law that were lost belonged to them and not to him. These items had a total value of $100,000.00. They were included on the main list of "particulars" of loss, headed "List Of Furniture, Fixtures And Household Effects" ("the main list"). The total figure given in that main list was $420,000.00. In a separate list of "particulars", headed "Additional List of Household Effects" ("the additional list"), the appellant included jewellery valued at $100,000.00 that belonged to his wife, jewellery valued at $45,000.00 that belonged to his daughter, and jewellery valued at $30,000.00 that belonged to his son and daughter-in-law. The total for jewellery was given in the additional list at $175,000.00. However there is a handwritten note beside the figures of $45,000.00 and $30,000.00, "deducted". I do not, of course, accept this note as evidence of the fact, but the note accurately reflects the fact that only $100,000.00 was added to the figure of $420,000.00 stated in the main list, to bring the claim made in the statement of claim to $520,000.00. Therefore the master erred when he found that the appellant admitted that $275,000.00 of the sum claimed was for loss of contents that did not belong to the appellant. The appellant had already excluded from his statement of claim the sum of $75,000.00 for jewellery for his children and daughter-in-law. The master should have found, instead, that the appellant accepted that $200,000.00 was claimed for loss of contents that did not belong to him.

[14] The master decided that the appellant could not recover compensation for the loss of items that did not belong to him. Counsel for the appellant has urged this court to reverse that decision of the master. However, counsel advanced no basis in reasoning or in law for the proposition that a party can recover damages for loss sustained by a non-party to proceedings and, accordingly, I would dismiss the argument out of hand.

[15] That still leaves, however, a claim for loss of contents for which the appellant gave a value of $320,000.00 but for which the master awarded only $100,000.00. The master's reasons for doing so are to be seen in the following extract from his judgment:

> "Additionally the claimant was a very poor witness. He did not seem to know the value of many of the items he now seeks to be compensated for. He could offer no rational basis for some of the values he offers. Some items such as the carpets (wall to wall) and the kitchen cupboard are properly fixtures and form part of the house. He cannot say what kind of paintings he lost, nor the cost, nor whether they were originals or prints. He ascribes an arbitrary value of $20,000.00 for his paintings, curtains and household accessories but does not say why. I find his evidence to have been unreliable.
> "[6] The claimant describes himself as a successful businessman. Yet he chose to insure the contents of his home for $100,000.00. He says that he decided not to increase his cover from that amount because the premiums had gone up. I do not accept this. The claimant recovered the sum of $100,000.00 from his insurers for the contents of his house. He made a claim for that amount.
> "[7] To compensate the claimant for the contents of his house, I find myself in the position that I must consider his evidence before me. As I have said I found him to be an unreliable witness. In the circumstances I think the best I can do is accept the amount that the claimant asked his insurers to refund him as representing the value of his lost contents."

[16] As stated above the appellant provided a listing of contents in his main list; beside each item he placed a value. In cross-examination the appellant was challenged on a number of the values. He said in relation to a number of items that he could not remember certain details; thus, he could not put a value to his crystal, he could not remember how many pants he lost, how many shirts and ties, how much the toaster cost, whether his paintings were originals or prints and so on. In cross-examination the appellant said that to arrive at the figures (presumably given on the main list) "I remember what I paid for them. I put down what I thought it was worth at the time."

[17] There is nothing to show that the master gave any consideration whatever to the fact that the appellant was being cross-examined in April 2005, in relation to items lost in a fire that occurred on 9th April 1996 and on values recalled or estimated for

inclusion in a list that was dated 14th July 1997. Quite frankly I think the master would have found it surprising and, indeed, suspicious if the appellant had been able to recall, at the date of the hearing, more than he did. Had the master focused on the reliability of the appellant's list, prepared shortly after the fire[10], and not on the reliability of the appellant's recall on the day of the hearing, some 9 years after the fire, I do not believe he would have decided as he did.

[18] The master also misled himself in his decision that the appellant was not to be compensated for items lost in the fire that were fixtures because these formed part of the house. With respect, it cannot matter whether the items were chattels or fixtures because this was no dispute between landlord and tenant as to what was or was not removable upon the expiration of a tenancy. The sole question was whether the appellant would have already been compensated for these items in the award made by the master under the head of loss of the house. There was no evidence that he was. The evidence is simply that the value of the house was calculated on the basis of a rate per square foot to rebuild. There is no suggestion that the cost of reconstruction included replacing carpets and kitchen cupboards. I therefore see no justification for withholding compensation for these items.

[19] Counsel for the respondent sought to support the master's award of $100,000.00 as being the sum for which the appellant insured the contents of his house by reliance on the doctrine of estoppel. Before dealing with estoppel I should say that when the master refused, purely as a matter of probability, to believe that the appellant would have underinsured the contents of his house the master did so in complete inadvertence to the fact that the appellant had underinsured his house. Again, I do not believe that the master would have reached the decision as to the improbability of underinsurance of contents that he did had he adverted to the fact, not just probability, that the appellant had underinsured his house.

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[10] This appears in the testimony of the appellant ,in the transcript of the earlier trial, at pages 3 and 6

[20] As regards the matter of estoppel, the respondent argued that on the insurance claim form in respect of contents that the appellant signed, and on the discharge form that the appellant signed when he accepted payment of the sum of $100,000.00 from the insurers, that the appellant accepted the total value of the contents of his house was $100,000.00. The appellant cannot approbate and reprobate, counsel for the respondent argued, so the appellant is estopped from now asserting that the value of the contents was greater than the sum he accepted. Counsel further argued, in reliance on a passage in 16 Halsbury's Laws of England[11] that a stranger can take advantage of an estoppel.

[21] In my view no estoppel arises from the appellant's claim for $100,000.00 as the sum for which the contents were insured, or from his acceptance of that sum in full and final discharge of his claim. As I understand what occurred, the appellant claimed the maximum that he could possibly have claimed under the policy and was paid the maximum that the insurers were obliged to pay him. An estoppel is said to arise when a party is precluded as a matter of law from saying that a certain statement of fact is untrue, whether in reality it is true or not. By claiming the maximum that he could recover under the policy the appellant was not making any statement that this was the amount of his loss.

[22] Counsel for the respondent advanced his submission that the appellant should be estopped from approbating and reprobating in respect of the value of the contents by arguing that at the time the appellant was settling with his insurers the appellant had two choices open to him: accept the value of his contents as being $100,000.00 or insist on a value of $520,000.00 and be paid a percentage of his claim upon the insurers applying the law of average. The short response to that argument is that counsel did not establish the factual premise: there was no evidence, and as a matter of logic I cannot see, that there was ever an option for the appellant to have insisted on a value of $520,000.00. There could be no

[11] 4th edition, paragraph 961

possibility of doing that when all that the appellant could claim was the maximum for which he was insured.

[23] Further, the principle that a person cannot approbate and reprobate can have effect only where a person has chosen between two inconsistent courses of conduct and, in addition, has shown an intention to abandon the other of them.[12] There was nothing inconsistent in the appellant claiming and accepting from the insurers the maximum that he could recover from them and claiming the true amount of his loss from the respondent. Indeed, it is stated in the clearest language on the discharge form the appellant signed that "It is understood and accepted that any agreement as to the value of the property insured for the purpose of the adjustment of this claim *is not to be regarded as a valuation of the property at risk*." (Emphasis added) In light of that conclusion it is not necessary for me to consider the respondent's argument that a stranger can take advantage of an estoppel.

[24] In cross-examining the appellant on the value of the contents stated in the main list counsel for the respondent addressed the value of individual items. Counsel elicited from the appellant that there were three sets of prices to consider: acquisition price, current (depreciated) price, and replacement price. If one considers each item in relation to which counsel cross-examined it is revealed that the appellant was not consistent in the basis of the values that he gave. Thus, to use as an example the first page of the main list, the price he gave for the Westernhouse (sic) refrigerator was what he paid; the price he gave for the Ignis refrigerator and the deep freeze were current values; the price he gave for the living room set was the replacement value; and, the price he gave for the dining room set was the value for a used replacement.

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[12] 16 Halsbury's at 957

[25] Before the master, in his written closing submissions, counsel for the respondent had suggested a value of $275,000.00 to the master at which he arrived by taking the price that counsel submitted the appellant testified he had actually paid to replace all items ($145,000.00) except the hi-fi set, the piano and the appellant's clothes, and by adding the replacement costs of those three items ($130,000.00). However, counsel suggested that this figure should be depreciated by 50% to arrive at the depreciated value of the items, which would yield a figure of $137,500.00. Counsel would then have deducted the value of the fixtures being the carpets, cupboards and chandeliers, amounting to $37,500.00, which would leave a final figure for contents of $100,500.00.

[26] Disaffection for this approach quickly sets in with recognition of the serious flaws that it contains. It is not true that the appellant testified that he had replaced all items and that only the hi-fi, piano and clothes remained to be replaced. In an earlier, aborted trial before St. Paul J held on 8th May 2000,[13] the appellant had testified, "The cost of furniture replaced was $104,355.11 up to 30th September 1997. Since then I spent an additional sum of about $45,000.00. At the time of fire I submitted a list of $420,000.00. *I did not replace all furniture and fittings I had lost in the fire.*" (Emphasis added) It may be noted that the appellant was at that time asserting the total value of $420,000.00 that he gave in the main list. In addition, since a number of values given for individual items were depreciated values there can be no justification for an across the board depreciation nor, in any event, is there any justification for a rate of depreciation of 50%. Further, for the reason I stated earlier, there is no justification to deny the appellant compensation for the value of the fixtures.

[27] Implicit in the approach proposed by counsel is the premise that all the appellant can recover as compensation is the depreciated value of the lost contents. Nothing was said to establish that premise; counsel for the respondent simply proceeded as if it were correct. On the other hand counsel for the appellant submitted that the

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[13] At page 6 of the transcript

values that the appellant gave in the main list were actually unchallenged and that what counsel for the respondent challenged was the replacement costs of certain items. While this was not apparent from reading the transcript of the cross-examination of the appellant, on looking again at the respondent's closing submissions before the master this analysis by counsel for the appellant does appear to be sound. The actual submission by counsel for the respondent was "In replacing his contents, the Claimant bought new items and the money spent must be discounted to take in[to] consideration the fact that second hand items were being replaced with new ones." It is following from that argument that counsel for the respondent made the suggestion, earlier referred to, that an across the board discount of 50% be applied.

[28] Counsel for the appellant was correct in his submission that the normal measure of damages is the market value of goods destroyed at the time and place of destruction. This proposition appears in McGregor on Damages[14] at 32-045 and the discussion that follows shows the more fundamental principle to be that the claimant is entitled to *restitutio in integrum*, meaning that the object of the award of damages is to put him in the position that he was in before the fire. It is important in this case to refer to the basic principle because it was not established in this case that there was a market value for the goods that were destroyed. As was decided by the English court of appeal in Dominion Mosaic and Tile Co Ltd v Trafalgar Trucking Co Ltd[15] if it is reasonable in the circumstances of a particular case for a claimant to replace destroyed used items with new ones, as in a case where there were no used goods available on the market, the claimant is perfectly entitled to the cost of replacement. In that case the claimants had bought the items that were destroyed at a special price and the replacement cost was five times the price they had paid and the court of appeal confirmed that they were entitled to recover that replacement cost. There is, therefore, no general principle of law,

[14] 17th edition
[15] [1990] 2 All ER 246

such as counsel for the respondent premised, that a claimant may not be awarded replacement cost without depreciating the award to take account of new for old.

[29] In the end the position is that none of the reasons that the master gave for limiting the appellant's claim for the value of the contents that were lost can be upheld. I can see no other reason for disallowing the values that the appellant gave. Accordingly I would allow the appeal under this head and award him the sum of $320,000.00 for loss of contents.

Interest on loan

[30] The master accepted that the appellant was entitled to be compensated for the cost that he incurred by borrowing money to rebuild his house. The master accepted the evidence that the appellant produced that the appellant borrowed $500,000.00 to rebuild his home and that the interest the appellant had incurred was $305,000.00. However, the master found, the appellant was paid by his insurers $581,618.00 as indemnity for the loss of his house. The master then repeated his erroneous finding that the cost of rebuilding the house was $706,250.00 and, indeed, came close to a finding that appellant in fact rebuilt his house for $706,250.00. Just how wrong was this conclusion or apparent conclusion could have been seen in the transcript of the testimony of the appellant at the aborted trial before St. Paul J where he repeatedly stated and produced documentation to show that he actually spent $900,000.00 to rebuild. The appellant said so at least 4 times. It does not matter whether or not the appellant's testimony at the earlier trial was evidence on the assessment before the master, as it seems to have been treated; the transcript was placed before the master, referred to and used by counsel for the respondent to cross-examine the appellant. The appellant's testimony in the transcript should at least have alerted the master to the fact that the appellant did not rebuild his house for $706,250.00.Unsurprisingly, given that false premise, the master said he was unable to see why the appellant needed to borrow as much as $500,000.00 and,

consequently, why the defendant should be called upon to pay the cost of that borrowing. By his calculation, the master said, the appellant needed to borrow only one quarter of the amount that he borrowed "to completely rebuild his home." The master decided that the appellant was thus entitled to one quarter of the interest he paid on his loan of $500,000.00 and therefore the master awarded $75,250.00 for interest.

[31] It is to a limited extent that the appellant has chosen to appeal this aspect of the decision. In his notice of appeal the appellant contended that the master erred in not awarding interest on the total amount found due to the appellant and in not determining the period over which the interest should be calculated. In his skeleton argument before this court counsel for the appellant stated that the master erred when he rejected the appellant's claim for interest in the sum of $305,000.00. However, in oral submission counsel urged that the master should have awarded interest on the difference between what the insurers paid to the appellant and what the appellant needed to borrow to replace the house. Therefore, I did not understand the appellant to be challenging any longer the master's decision to award interest only upon that difference. That difference, however, is not the difference that the master found but is the difference between the amount for which the appellant rebuilt his house and the amount that the insurers paid for the loss of the house ($900,000.00 - $581,618.00 = $318,382.00).

[32] In his closing submissions on the assessment before the master counsel for the respondent accepted that the appellant should be awarded interest at the commercial rate of 10.5%. Counsel submitted this should be for the period before judgment beginning with the date that the appellant borrowed money to rebuild his house (2 September 1997) and ending with the date of judgment. Thereafter, counsel submitted, the appellant should be awarded interest at the rate of 6% per annum.

[33] I did not gather that counsel for the respondent disputed the claimant's entitlement to interest on the damages due for the loss of contents because section 27 of the West Indies Associated States Supreme Court Act (Grenada)[16] upon which counsel relied to support his submission as to the pre- and post- judgment rates of interest confers jurisdiction upon the High Court and Court of Appeal to award interest on damages before judgment. Counsel for the respondent's acceptance of the commercial rate of interest of 10.5% was made in the context that the appellant had to borrow money to rebuild his house. The evidence is clear that the appellant borrowed more money than he needed to rebuild the house but the appellant did not say that he used the borrowed money to replace the contents. I suspect that might have been the case but it does not matter because there is no principle that interest on damages may only be awarded if the claimant has borrowed money to use until he collects his damages. The true principle is that interest is awarded because damages were not paid at the proper time.[17] In the circumstances I see no reason to award a different rate of interest on damages for loss of the house and on damages for the loss of the contents. Accordingly I would award interest at the rate of 10.5% per annum on all damages awarded.

[34] There is no inflexible rule as to the period from which interest should run; s. 27 of the Supreme Court Act says that it may be given for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. Section 27 of the Supreme Court Act reads:

> "27. In any proceedings for the recovery of any debt or damages, in the High Court or the Court of Appeal, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment …"

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[16] Cap. 336 of the Laws of Grenada, 1990

[17] This is the famous dictum of Dr. Lushington in The Amalia, cited in McGregor on Damages, 17th ed., at 15-038.

However, it is now the established practice to award interest from the date of the claim form. In this case the writ was issued on 4th April 1997.[18] I would use that as the starting date for the award of interest. The respondent accepted in its submission before the master that interest at the commercial rate should run until judgment. Although there are two judgments in this case, the one on liability and the other on damages, it seems clear from the language of the section, that the court of appeal may include interest "in the sum for which judgment is given", that interest should run until the date of judgment of this court since it is this judgment that fixes the sum for which judgment is given.

Costs

[35] Counsel for the respondent accepts that the master erred in quantifying prescribed costs at $90,375.00 because he failed to comply with the order made by the court of appeal to assess the costs of the trial, appeal and assessment hearing. Counsel for the respondent told this court that the appellant need not have appealed that aspect of the master's decision since it was a slip on the master's part and compliance with the order of the court of appeal was a mere matter of mathematics. That is good to know. In addition there now needs to be added to those costs the costs of this appeal.

[36] So far as material rule 65.13 of CPR 2000 states that the costs of any appeal must be determined in accordance with the rules that govern prescribed costs. Rule 65.5 is the principal rule governing the quantifying of prescribed costs and its language makes clear that it states a general rule. Implicit in that statement is that there may be departure from a general rule. Rule 64.6 contains an express statement to this effect; it is specifically stated in rule 64.63)(c) that the court may order a person to pay only a specified portion of another person's costs.

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[18] See the judgment of Sylvester J in Grenada Civil Suit No 189 of 1997, dated 25 February 2002, at paragraph [6]

[37] The general rule is that the costs of an appeal should be 2/3 of the costs in the court below. I would depart from that rule in the special circumstances of this case. Apart from the costs of this appeal the appellant is already entitled to the costs of the first trial and of the assessment of damages, at the prescribed rate, upon the total damages.[19] He is also entitled to prescribed costs of the earlier appeal at the usual rate of 2/3 of the costs awarded in the court below. This is clearly stated in the judgment of Byron CJ in the earlier appeal.[20] I find it would be disproportionate to again award costs of 2/3 of the costs below when the respondent did not challenge the quantum of damages awarded by the master and there was never any risk that these could be reduced on appeal. I would therefore be minded to award costs of this appeal only on the increase in the sum that the master awarded.

Conclusion

[38] In summary, I would allow the appeal in relation to each head of the award that is challenged. The awards that I would make are as follows:

Loss of house	$900,000.00
Loss of contents	$320,000.00
Interest at 10.5% p.a. from 4th April 1997 (date of writ) to 18th September 2006 (date of judgment) on:	
- $318,382.00 (difference between money borrowed	
- to rebuild house and money insurers paid)	$316,258.00
- $320,000.00 (the award for contents)	$317,865.21
Total	$1,854,123.21

[39] To bring finality to this matter I would proceed to assess costs based on the total damages of $1,854,123.21 as follows. On the trial of the issue of liability and on the assessment of damages, I would assess prescribed costs in accordance with

[19] By the expression "total damages" I refer to the award made by the master as I would vary it
[20] At paragraphs [35] to [39]

Appendix B to Part 65 of CPR 2000 at $122,123.70. I refer to that figure as "the costs below". On the first appeal, I would assess prescribed costs (being 2/3 of the costs below) at $81,415.80. On this appeal, I would not assess prescribed costs on the basis of 2/3 of the costs below. Instead, by reference to the fact that the appellant gained by bringing this appeal (approximately) 50% of the total damages that I would now award him, I would award him 50% of 2/3 of the costs below, amounting to $40,707.90. These figures produce a total award of costs of $244,247.40. in accordance with the order of this court on the earlier appeal there must be deducted the interim payment of costs of $38,333.33, which leaves total costs payable of $205,914.07.

[40] For the sake of clarity I would refer to the impact upon these proceedings of the insurers being the insurers of both the appellant and the respondent. In the normal case a victim claims against the tortfeasor and recovers from the tortfeasor all damages for which the latter is liable. In such proceedings it is immaterial that the claimant was insured, that he has recovered from his insurers, how much he has recovered and when he was paid. Those are matters between insurer and claimant to be dealt with according to principles of subrogation. In the normal case it does not matter whether or not the claimant needed to borrow money from the bank to rebuild or if he used insurance money to rebuild since the liability of the tortfeasor to compensate the claimant includes paying interest for withholding money that was owed; see Tate & Lyle Food Distribution v Greater London Council.[21]

[41] In the instant case the claimant was content not to claim interest on that portion of his damages for the loss of his house for which the insurers have already paid him. No doubt this makes practical sense if, as I suspect, the insurers will be paying the damages and interest on behalf of the tortfeasor to the claimant and may, at the same time, have a subrogation lien upon that portion of the damages they have already paid and the interest attached to it.

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[21] [1982] 1 W.L.R. 149

[42] There was no indication that the claimant is similarly content to not claim interest on that portion of the damages to be awarded to the claimant for the loss of contents for which the insurers have already paid him. There are a number of reasons that probably explain this. I advert to this aspect but it is not for me to make provision for it and to withhold interest on damages for loss of content, because of what I think the parties and the insurers will work out. I must leave it to the parties and the insurers to work out.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal