

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2008 – 01971**

**Between**

**CUSTODIO DINO SANTORO**

**Claimant**

**And**

**REGINALD MAC LEAN**

**Defendant**

**Before the Honourable Mr Justice Ronnie Boodoosingh**

**Appearances:**

**Mr T. Milne for the Claimant**

**Ms K. Bharath for the Defendant**

Date: 14 July 2016

## **JUDGMENT**

1. The claimant wanted a home built for himself and his family at Alyce Glen, Diego Martin. He hired the defendant to build it. This was back in June 2004. The contract was partly

oral and partly in writing. The claimant had architectural drawings. It was to be a two storey residence with a swimming pool.

2. The house was built by the defendant. The claimant says there was poor workmanship and negligence by the defendant in the construction of it. This claim was filed on 28 May 2008. He said remedial work was needed. He claimed for the cost of materials necessary and the labour cost for the remedial work together with certain costs for work which he said was not done.

3. The defendant filed his defence on 6 October 2008. He denied allegations of poor workmanship and negligence. He said the building was altered to a three storey building instead of two. There were other changes. He said the claimant refused to purchase recommended materials because of the cost. He also said the claimant interfered with the work being done which caused difficulties. He said additional works were not paid for and he filed a counterclaim for additional work and claimed a set off of \$7,000.00 which he owed towards other work he did.

4. The claim came before the court. The parties agreed to use mediation as a means of resolving the dispute. This took some time. The claim was adjourned on many occasions for this process to take place. Eventually, on 14 March 2012 the attorneys informed the court that a compromise agreement was arrived at in the terms of attorneys' letter dated 7 March 2012.

5. This agreement provided for certain works to be done by the defendant and for certain payments to be made. The terms of that agreement are set out in full:

Reference is made to the agreement entered into by the parties in the captioned matter further to mediation hearing at the Dispute Resolution Centre on 7<sup>th</sup> June, 2010 and to the site visit attended by parties and their respective Attorneys at Law on 15<sup>th</sup> June, 2010.

With final reference to the meeting held on 13<sup>th</sup> February, 2012 held between parties and their respective Attorneys at No 24 Abercromby Street, Port of Spain and in order to address the claims of the Claimant and the Defendant respectively and arrive at a settlement which addresses these concerns, the parties have agreed to the following terms-

## **FOR THE DEFENDANT**

### **A CARRY OUT REMEDIAL WORKS AS LISTED**

#### **1. Concrete Roof Area and Metal Roof over Master Patio**

- a. Repair the leak in the metal roof over the master bedroom patio.
- b. Cut the necessary grooves in the grout lines at several areas close to parapet wall to allow drainage of surface settled water.

#### **2. Metal Roof Area – Eastern side**

- a. Repair the roof leak through ceiling in guest bedroom at the corner by installing an additional 3” guttering drain line next to the existing 3” drain line which will flow into the concrete drain below, cut out the 4 screws that are protruding into the two existing downpipes.
- b. Repair leak in metal roof in the guest bathroom behind the wall of the spiral staircase. It has been determined that additional sealant is required in certain areas to stop the wind from blowing the rain up and through the roof.

#### **3. Wood Flooring**

- a. Rectify floor joints that were butted with small pieces of wood and use longer lengths when are where necessary.
- b. In areas where it is determined that the spacing is too wide, the flooring boards shall be removed and reinstalled.
- c. Countersink screws and nails as necessary.
- d. Remove joint filler as necessary and repair and reseal with new filler.
- e. Sand entire floor and staircase area and varnish.

Parties have agreed that for repairs to be carried out on the wooden floor, all items of furniture, etc. must be removed from the affected areas, as well as all items in the closet areas in the following manner-

The two (2) back rooms and hall way to be finished then followed by master suite.

**4. Guest Room (first)**

- a. Install 1 roller catch in the end door.

**5. Guest Room (second)**

- a. Remove entry door, repair warp, and reinstall door.

**6. Master Bed Room, Closet, and Patio**

- a. Entry door has uneven spacing and is to be rectified.
- b. Rectify floor area below closet entry door.
- c. Install roller catches as necessary in the closet doors.
- d. Drill hole through tile for Patio door tower bolt.
- e. Groove tiles against the bedroom wall area in the patio so that the settled water can drain off through the three drain holes.
- f. Finish the three drain holes.

**7. Master Bathroom**

- a. Rectify concrete patch located near pipe under right sink.
- b. Install a 2 x 4 cover onto the open electrical box located next to tub and below window.
- c. Check and rectify bathroom entry door.

**8. Living Room Patio**

- a. Drill the necessary holes in the patio walls to create additional drainage points so that the settled water can drain off, and groove the tile grout lines as necessary to assist with the flow of the settled water.

**9. Driveway Gates**

- a. Grind and sand smooth.
- b. Rust proof as necessary.
- c. Prime affected areas.

- d. Repaint gates with the original pain as evidenced by invoice and in same colour.
- e. Change entry lock wire on pedestrian gate.

**10. Kitchen**

- a. Re-adjust and repaid kitchen doors as necessary.

**11. Driveway**

- a. Repair Grano work on driveway as necessary in the 4 sections.
- b. Cut a grooved drain as necessary.

**12. Telephone and Cable TV Wires**

- a. Check and test these wires so as to ascertain of they are functioning.\
- b. If not functioning, replace as necessary.

**13. Granite Subcontractor Fees**

- a. The \$7,000.00 that was held for the Granite Subcontractor that was hired by the Claimant will be deducted from the final payment of monies owed to the Defendant.

**14. Claimant fees for Master Bathroom Shower repair**

- a. The Defendant agrees to refund from the final payment of money owed by the Claimant the total sum of \$5,000.00 for repairs done to the shower.

**15. Pipe Repair**

- a. The Defendant agrees to refund from the final payment of money owed by the Claimant the total sum of pay \$1500.00 for payment towards water line behind laundry sink which was repaired on 12<sup>th</sup> September, 2007.

**16. Refund to the Claimant**

- a. The Defendant agrees to refund \$750.00 payment to the Claimant for the installation of an exterior laundry sink.

**B) PERFORMANCE OF REMEDIAL WORKS**

The Defendant agrees to complete remedial works enlisted above on or before 31<sup>st</sup> May, 2012.

**FOR THE CLAIMANT**

**A. ALLEGATIONS**

The Claimant is to withdraw all allegations of dishonesty on the part of the Defendant.

**B. PAYMENTS**

1. The payment claim for Grano work completed with Materials and Labour supplied by the Defendant to be paid to Defendant by the Claimant in the agreed sum of \$16,000.00.

2. Other Miscellaneous works and materials listed below as requested by the Claimant and completed by the Defendant for the sum of \$12,386.68. These items are-

a. Additional tiling at pool shower	\$ 400.00
b. Additional Electrical lock at pedestrian gate	\$ 750.00
c. Additional tiles purchased for basement bathroom	\$ 492.56
d. Two pieces of Mahogany next to Powder Room sink	\$ 350.00
e. Mahogany Architraves for door frames – Lumber	\$3,311.00
i. Transport of f. above	\$ 300.00
ii. Installation of f. above	\$1,000.00
a. Installation of basement storeroom window and cutting off the steel hangers in the storeroom, including jackhammer, labour, and materials. Window supplied by Claimant	\$1,100.00

b. Additional Kabakuli Floor boards from Star Lumber	\$1,876.80
c. Eleven lengths of 8' x 1/4 round moulding strips for The floor to cupboard edging as requested by the Claimant	\$ 253.00
d. Additional skirting for floor	\$ 195.00
e. Installation of skirting	\$1,734.00
f. Additional 8' x 1/4 round moulding strips	\$ 110.00
g. Additional Kabakuli floor lumber	\$ 39.12
h. Liquid Nails	\$ 27.60
i. Repainting of driveway and house walls after Grano Work was completed on driveway and around house	\$ 450.00

Please indicate your agreement of the said terms by initialling each page of this letter and signing below.

6. The defendant embarked on certain works. He completed some. However, further disagreements arose over the extent and quality of the work being done by the defendant. There were claims of interference once again. It is clear the parties were not seeing eye-to-eye.

7. A settlement conference was proposed, but the parties did not attend. The court therefore went ahead and gave directions for witness statements and the trial of the matter.

8. There was again delay in the filing of witness statements. The parties said they would talk again. A trial was set. The date of the trial was vacated on more than one occasion for different reasons. The trial was eventually held in 2015. It was completed in April 2015. The

attorneys agreed to file written submissions. Extensions were granted. None were filed. The court granted a final extension to 8 April 2016 for submissions to be filed. The defendant filed. The claimant asked for until May to file. None were filed. The court therefore considered it appropriate to consider the claims based on the evidence and to make its findings and determination.

9. By the time of the witness statements the real contest concerned what was agreed to in the mediation agreement. The parties did not set out evidence relevant to the original claim and counterclaim as filed. The court's consideration was therefore limited to considering matters raised in the witness statements as they related to the carrying forward of the mediation agreement. There was also limited evidence.

### **Claimant's Case**

10. I will turn therefore to considering the evidence of the claimant. He filed a witness statement and called one witness, Mr Herman Adams.

11. Paragraphs 1 to 8 of the claimant's witness statement set out the history of the claim. From paragraph 9 and continuing, the claimant said the defendant came onto the property on 8 May 2012 to begin the work listed in the agreement.

12. The defendant obtained a quotation from Mr Adams to do the flooring work. This began on 12 May 2012. The flooring was re-done in one bedroom but the quality was poor as it started splitting and cracking.

13. The defendant had some of the wooden floor removed from the upstairs hallway and one of the bedrooms and he abandoned the job after two weeks leaving the hallway outside the 3 upstairs bedrooms and one bedroom with boards removed in a dangerous manner.

14. Mr Adams had been brought by the defendant to do the work of laying the floor but did not continue it because, according to the claimant, the defendant wanted it done in a poor manner which would raise and split after it was done in addition to supplying uncured wood which would shrink and cause spaces between the boards.

15. As a result of the defendant abandoning the job, he got a quote from Mr Adams to do the work which the defendant had agreed to be done.

16. Mr Adams quoted a sum of \$96,676.00 to do the flooring work which was not done by the defendant. The work was done and the claimant paid Adams this sum. He attaches a receipt.

17. He said he paid Mr Adams \$7,000.00 to do work to fix the difficulties with the concrete floor and metal roof regarding paragraphs 1, 2, 4 and 7c of the Settlement Agreement.

18. The defendant had not done work in paragraph 6.

19. The defendant did 7 a and 7 b. He did the work at paragraph 9 but in a poor fashion, which is not specified. The defendant did the work in paragraph 10. Part of paragraph 11 was done. The work in paragraph 12 was not done. He paid \$1,200.00 for this to be done.

20. The claimant has asked Mr Adams for a quote of work to be done under the Settlement Agreement and this amounts to \$22,400.00.

21. Herman Adams gave a witness statement. He is a general contractor and wood and flooring installer.

22. He was asked by Mr Mac Lean for a quote to do works at the claimant's home. He provided two quotes in the sums of \$78,506.12 and \$86,676.80 for replacing and installation of wood floors comprising one master bedroom with closet, two bedrooms, one walkway and one staircase with 13 steps and two landings using certain kinds of wood.

23. The defendant did not accept his quotation. He wanted the floors repaired and not replaced. Mr Adams indicated this would cost \$25,000.00. He asked the defendant if the claimant considered this acceptable and the defendant told him he just wanted it to look good to show the judge. He told him when you put epoxy on a floor you cannot take it up without destroying the wood and the epoxy would get black and discoloured in the joints over time.

24. On the completion of the two smaller bedrooms the claimant was not pleased. You could see the difference between the filing and the wood in the spaces. Mr Adams told Mr Mac Lean that is not the type of work he did on new floors unless the customer agreed to it as it is usually done on old wooden floors to refurbish them.

25. The following weekend Mr Mac Lean contacted him to replace some boards on the room already done. The wood he bought was air dry wood that was still wet. Mr Adams said he told the defendant that it would shrink and the same shrinkage would occur again.

26. The defendant told him to do one bedroom and replace three boards and see how the claimant liked it and if he did not he would fight it in court.

27. Mr Adams was unhappy with what the defendant asked him to do and he reminded the defendant that he should pick up the existing floor boards and reuse and re-lay these same boards with a stronger sub-floor which would cause minimum damage and expense. He says “this would have cost no more than \$50,000.00 but he did not want to spend the money to do the job properly”.

28. He replaced the board in the one bedroom. He was paid and left.

29. The claimant contacted him in September and he told him he wanted the wood floors replaced as they were living uncomfortably in one bedroom.

30. He gave him a quote for the kiln dry wood normally used to lay floors and he included the cost of repairing some doors and putting back skirting board. The claimant accepted the quote and he did the work. He also fixed the leaks on the roof. The doors were badly installed.

### **Defendant’s Case**

31. The defendant gave evidence. He said he has been in the construction industry for over 20 years. He noted that the parties agreed to the Settlement Agreement above. He went to do the work with two workmen. He said the work had to be done in stages.

32. The claimant would be there and he would criticise the work being done.

33. When they started to do the work, the claimant was unhappy with the wood being used which was of the same type, kabukali, which was the same wood used in the original flooring. He complained that the wood was the wrong colour. He explained that the original wood was installed about 5 years before and it would vary in colour since age contributed to the colour of the wood.

34. The defendant explained that he would ensure there was an even tone by sanding, staining and varnishing the floor, and the newer wood, with age, would also age and darken. He tried his best to assure the claimant about the type of work being done but the claimant remained unhappy.

35. The claimant expressed dissatisfaction with the spacing between the battens and he was unhappy about the lengths of wood being used.

36. To ease the claimant's criticisms, the defendant incurred additional expenses to replace a significant amount of floor boards. There was constant abuse and criticism and his health began to deteriorate. He attached letters from his doctor showing him being treated for depression.

37. He contacted Mr Adams and paid him an additional \$14,000.00 to complete installation of the boards.

38. When the floor of one of the bedrooms was completed, the claimant insisted they remove and replace the entire floor and re-do the work. Mr Adams provided him with a quote to replace the entire floor.

39. The defendant told the claimant they should invite their attorneys to view the work because he was being unreasonable to ask that he replace the entire flooring.

40. Their respective attorneys visited on 3 July 2012. He also took a photograph. They were unable to come to any further agreement about the works to be completed and the claimant did not want him to repair or remedy but to replace.

41. He then noted he left the site. At that time he identified what he said he had completed as follows:

**Concrete Roof Area and Metal Roof over Master Patio**

1.a. Not completed

1.b. Completed

**Metal Roof Area**

2.a. Completed

2.b. Not completed

**Wood flooring**

3.a. – e. Partially completed

**Guest Room**

5.a. Not completed

### **Master Bedroom**

- 6.a. Not completed
- 6.b. Not completed
- 6.c. Not completed
- 6.d. Completed
- 6.e. Completed
- 6.f. Completed

### **Master Bathroom**

- 7.a. Completed
- 7.b. Completed
- 7.c. Not completed

### **Living Room Patio**

- 8.a. Completed

### **Driveway Gates**

- 9.a. Completed
- 9.b. Completed
- 9.c. Completed
- 9.d. Completed
- 9.e. Not completed

### **Kitchen**

- 10.a. Completed

### **Driveway**

- 11.a. Completed. The Claimant also requested additional 4 or 5 sections of grano to be redone which I did not agree to.
- 11.b. Completed

**Telephone and Cable TV wires**

- 12.a. Not completed – An analog system was installed and a digital system is being used by the Claimant, so this obviously cannot work. Flow is Digital and the original Analog system cannot be used.

**Granite subcontractor fees**

- 13.a. No payments issued

**Claimant fees**

- 14.a. No payments issued

**Pipe repair**

- 15.a. No payments issued

**Refund to Claimant**

- 16.a. No payments issued

42. He said in an effort to compromise, he did all he could to remedy any alleged defects. He did not agree that there was poor workmanship in the work he had done which had been done 5 years prior.

43. He is seeking money owed to him agreed in the settlement agreement together with additional money he expended in remedying the defects. He also wished allegations of dishonesty to be withdrawn.

44. He also called his workmen to give evidence. Witness statements were filed for Hubert Chanicka and Roland Lewis. Their witness statements were in almost identical terms. They essentially said they were hired to do work by the defendant. He said the claimant would tell them he was satisfied with their work but when the defendant came he would say he was dissatisfied. I did not consider they added much to the evidence.

### **Cross-examination of the Witnesses**

45. The witnesses on both sides were cross examined. The claimant said when the work was being done, the defendant would show him the work and he would say yes as the case may be. This was so for the material. The defendant showed him the type of flooring and he said ok. He said all the floors were badly done. The total flooring had to be replaced.

46. The workmen who came to do the work after the mediation agreement were not specialized and he did not like the quality of their work. He had problems with the whole floor. The claimant accepted that the defendant could have taken the whole flooring and put it back.

48. Mr Adams was cross examined. He noted there was a difference between air dry wood and kiln dry. The air dry can shrink if it is laid 'wet'.

49. He had given a quotation for \$25,000.00 for repairs to the floor initially. Because of the use of epoxy by the defendant in repairing it, the job had to be remedied. This involved replacing the floor.

50. The defendant was then cross-examined. He said he left the job when he realised that what the claimant wanted was to have the floor replaced, not repaired. He had gotten a quote for the replacement because he does not like to leave a job unfinished.

51. He said the patio roof was flat as requested. He noted that all woods shrink, whether air or kiln dried. He said the claimant agreed to use the air dried wood because it is cheaper. He said different people have different preferences to work with.

52. The defendant said they had grooved the joint lines. He said the claimant kept pointing out more than what they had agreed to do. When he was building the house he had smooth relations with the claimant for the most part. He said there were ups and downs with most projects.

54. Lewis and Chanicka were cross-examined and pointed to the similarity in their versions.

### **Findings and Determination**

55. The Settlement Agreement is of paramount importance in resolving this claim. The main disagreement at that stage related to the flooring.

56. These were as follows:

- a. Rectify floor joints that were butted with small pieces of wood and use longer lengths when and where necessary

b. In areas where it is determined that the spacing is too wide, the **flooring boards shall be removed and reinstalled.**

c. countersink screws and nails as necessary.

d. Remove joint filler as necessary and repair and reseal with new filler.

e. Sand entire floor and staircase area and varnish.

Re Master Bedroom:

b. Rectify floor area below closet entry doors.

57. From these items of the agreement it is clear that the agreement was to repair the flooring and not replace it. Further, it was not the entire flooring that had to be rectified, but part of the flooring. It was limited to rectifying floor joints; replacing floor board where the spacing was too wide, and in the master bedroom, rectifying the floor area below the closet entry doors.

58. Any expectation that the entire floor was to be replaced or repaired was unrealistic and completely outside of the scope of the settlement agreement. The defendant cannot therefore be liable for the cost of the removal and replacement of the flooring. The fact that this was done by the claimant, he having hired another contractor, Mr Adams, is not within the terms of the Settlement Agreement. I accepted, in this regard, the defendant's evidence that the work being proposed by Mr Adams in terms of replacing the type of wood and finishes was inconsistent with the type of work done by the defendant earlier. Thus, the approach of Mr Adams would not have realised the terms of the Settlement Agreement. It was a different type of work that was being contemplated. The defendant could not therefore be liable to do it and the claimant cannot recover for it.

59. The claimant under the agreement was to pay \$24,386.68 (\$12,000.00 (not \$16,000.00 as stated in the Settlement Agreement) plus \$12,386.68). This was not done. This was therefore due to the defendant.

60. The defendant was, however, to refund \$2,750.00 for pipe repair and laundry sink. There was also an agreement to deduct from what was owed to the defendant the sums of \$7,000.00 for the granite sub-contractor and \$5,000.00 as deposit for repairs done to the shower. These items added up to \$14,750.00. Thus, after deducting this from what was owed to the defendant, the sum of \$9,636.68 was due to the defendant by the claimant under the Settlement Agreement.

61. Two additional sums were paid to Mr Adams in the amounts of \$7,000.00 for roof and other works and for the telephone and wire cables to be done in the amount of \$1200.00. There was a quote of \$22,400.00 for other works to be done by Mr Adams which the claimant says the defendant did not do. However there was no breakdown of this so there would be no basis for the court to award damages on these works because they have not been proved. Further, assuming these works were necessary, the value of these works would, more or less, have cancelled out what was owed to the defendant.

62. A key question is was the defendant within his right to walk away when the claimant insisted on the floor being replaced. It is clear that the settlement agreement broke down at this stage. The parties had the option of renegotiating it. But this was not done. Faced with this dilemma, the defendant cannot be faulted for walking away. He had already paid \$14,000.00 to Mr Adams for the repairs which were done, which however was not to the satisfaction of the claimant. The defendant had also expended monies in having other aspects of the work done.

63. Mr Adams had given as estimate of \$50,000.00, which was not broken down, if the entire floor was to be removed and reinstalled. However, it was also never within the contemplation of

the settlement agreement that the entire floor would be removed and reinstalled. This was limited to where it was determined the spacing was too wide.

64. It is unfortunate that the remedial work was not to the satisfaction of the claimant. However, the remedy could not be that the entirety of the floor would have to be removed and replaced. This was an unrealistic expectation not covered by the Settlement Agreement.

65. Given this stalemate, the defendant was placed in a position where he was unable to complete the work. His walking away cannot be said to be unreasonable in the circumstances.

66. Both parties were and are dissatisfied. But both parties did not live up to the settlement agreement. There is nothing that the court can do at this stage in terms of any orders. The claimant has taken other measures to have the work he wanted done, which was the substantial cost of replacing the floor. But the court cannot compensate him for this loss.

67. It also cannot be said that the defendant was unwilling to do the other work which was not completed. However, when the relations broke down it was no longer realistic that he would have continued on. By that time there had been too much bad blood between the parties. I have already determined that based on what was owed by the claimant to the defendant and what was not done by the defendant that the respective claims have effectively been cancelled out.

68. The result of all of this is that this claim is a draw. The both claims are therefore dismissed. Each party will bear his own costs.

Ronnie Boodoosingh  
Judge