

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Civil Appeal No. 8 of 2010

BETWEEN

ROBERT GRIFFITHS

FIRST APPELLANT

ANGELA GRIFFITHS

SECOND APPELLANT

AND

NICCOLLS & EDGHILL

(CONSTRUCTION) LTD.

RESPONDENT

Before: The Honourable Madam Justice Sandra P. Mason,

Professor The Honourable Justice Andrew D. Burgess and

The Honourable Madam Justice Kaye A.C. Goodridge, Justices of Appeal.

2012: October 1, 11, 19;

2013: January 14, 31, February 13, 19

2013: July 3

Ms. Dawn Williams Attorney-at-Law for the Appellants

Mr. Alrick Scott with Mr. Raphael Saul Attorneys-at-Law for the Respondent.

JUDGMENT

MASON JA:

Introduction

- [1] This appeal is against the order of **Richards J** made on 3 June 2010 in which she dismissed the appellants' application for an order striking out the respondent's Statement of Claim.
- [2] On 1 October 2012 at the conclusion of the arguments by counsel, and after discussion among ourselves, the Court was of the opinion that the appeal should be dismissed and thereby affirmed the trial judge's reasons for her decision. We then announced our decision and reserved our reasons to be set out in writing at a future date. In coming to this decision, and being in agreement with the trial judge about the length of time the case had taken to reach this Court, we took the view that the hearing of the substantive matter ought to be expedited and so ordered. We also deferred the question of costs and requested counsel to make written submissions.
- [3] We now set out our reasons for dismissing the appeal and our decision on the award of costs.

Factual and Procedural History

- [4] The appellants who are normally resident in England, are the owners of a property called Lascelles House situate in the parish of St. James. The respondent, a building contracting firm, is a company incorporated under the **Companies Act, Cap. 308**. As a result of an oral agreement sometime in or about March/April 2004, the respondent agreed to carry out renovations to the appellants' property for an agreed sum.
- [5] In order to facilitate the operation of this oral agreement, the appellants employed a firm of architects, Architects Morrison Associates, to design and supervise the renovations. They also employed a firm of quantity surveyors, Cooper Kauffman Ltd, to carry out valuations for the renovations as well as to issue certificates for payment to the respondent.
- [6] Over the course of the renovations, the certificates were duly paid when issued. However, on 22 December 2004, when the respondent submitted to the quantity surveyors a "draft final" account for payment, the appellants instructed the quantity surveyors not to certify or value this account. On 5 January 2005, the respondent delivered to the appellants' quantity surveyors an "amended" final account. It may be added parenthetically that there is dispute between the parties as to the meaning of "draft final account" and "amended final account".
- [7] When payment was not made, the respondent through its UK solicitors, demanded payment from the appellants by letter dated 9 February 2005. Again by letter dated 23 March 2005, this time from its Barbadian attorneys-at-law, the respondent demanded payment from the appellants. The sum demanded was not paid.
- [8] By notice filed on 18 April 2005, the respondent sought and was granted leave on 4 May 2005 to serve the appellants outside the jurisdiction a Writ of Summons, Statement of Claim and Affidavit. These documents were duly served and an Acknowledgment of Service as well as an Affidavit of Service filed.
- [9] In its Statement of Claim, in addition to setting out the particulars of the sum being claimed as payment on final account as reasonable remuneration for works carried out for the appellants, the respondent claimed damages in a particular sum, alternatively that said sum on a *quantum meruit*, interest on the said sum and costs.
- [10] In their Defence and Counterclaim filed on 5 July 2005, the appellants contended that the respondent's Writ of Summons and Statement of Claim should be struck out as an abuse of process for lack of production to the

appellants of information to substantiate the respondent's claim and for inconsistency in amounts demanded by the respondent. The appellants counterclaimed that the renovations carried out by the respondent were not well and efficiently done in a proper and workmanlike manner. As a result since they had to employ other persons to complete the renovations and to remedy defects, they, the appellants", had incurred expense for which they were claiming damages, repayment of sums overpaid to the respondent, interest and costs.

[11] On 1 September 2005, the respondent filed a Reply and Defence to Counterclaim essentially denying the appellants' allegations.

[12] When this Court dismissed the appellants' appeal on 1 October 2012, we were of the view that, given the nature of the case being considered and the history of the matter, it would be particularly helpful if the parties were requested to file an agreed chronology of the steps taken in the action and of relevant events. The Court then requested the parties to file an agreed chronology by 8 October 2012. Despite this request, the parties filed separate documents: the respondent on 19 October 2012 and the appellants on 31 January 2013. An examination of the documents reveals the events to be similarly recorded. That chronology is now set out below:

NO.	EVENT	DATE	LENGTH OF TIME/DELAY
1	Alleged oral agreement	March/April 2004	
2	Commencement of works	9 June 2004	
3	Alleged completion of renovation works	20 December 2004	Renovation works completed approximately 6½

			months after commencement
4	Draft Final Account prepared and dated	22 December 2004	2 days after completion of renovation works
5	Amended Final Account delivered by the Respondent to the Appellant's Quantity Surveyors, Cooper Kauffman Limited	5 January 2005	Approximately 2 weeks after preparation of Final Account
6	Writ of Summons and Statement of Claim, and Affidavit for leave to Issue Writ for service outside of Jurisdiction filed	18 April 2005	Approximately 3½ months after Final Account delivered to the Appellant's Quantity Surveyors
7	Attendance before the Registrar, Madam Sandra Mason, on hearing of Application for Leave to serve Notice of Writ outside of Jurisdiction, order granting Leave	4 May 2005	Approximately 2 weeks after Writ of Summons filed
8	Notice of Writ of Summons and Statement of Claim filed	19 May 2005	15 days after Order of Registrar
9	Acknowledgement of Service of Notice of Writ of Summons		
10	Service of Notice of Writ of Summons on the Appellants/Defendants	3 June 2005	Approximately 13 days after Notice of Writ filed
11	Affidavit of Service of David Allan Kramer	17 June 2005	Approximately 2 weeks after service of Notice of Writ on the Appellants/Defendants
12	Defence and Counterclaim filed by the Applicants/defendants	5 July 2005	Approximately 1 month after service of Notice of the Writ of Summons
13	Reply and Defence to Counterclaim of the First and Second Defendants/Appellants	1 September 2005	Almost 2 months after filing of Defence and Counterclaim
14	Summons for	3	Approximately 2

	Directions	November 2005	months after Reply and Defence filed
15	Summons to Strike out the Action filed by the Appellants/Defendants, on grounds of abuse of process	25 November 2005	Approximately 3 weeks after Summons for Directions filed
16	Rejoinder of the Appellants/Defendants filed	25 November 2005	
17	Take Notice filed by Fitzwilliam Stone & Alcazar, giving notice that they ceased to be attorneys for the Defendants/Appellants	29 November 2005	
18	Request for Further and Better particulars made by the Defendants/Appellants; at same time affidavit of the First Defendant/First Appellant filed in support of application to strike out filed on 25 November 2005	1 December 2005	Approximately 1 month after Summons for Directions filed
19	Attendance before Deputy Registrar Madam Kristie Cuffy-Sargeant on hearing of Summons for Directions, orders made on Summons for Directions	2 December 2005	Approximately 1 month after Summons for Direction filed
20	Order of Deputy Registrar made on Summons for Directions filed	8 December 2005	
21	Appellants'/Defendants' List of Documents filed; affidavits of the Defendants/Appellants filed verifying list of documents	28 December 2005	Approximately 3 weeks after order of Registrar on the Summons for Directions
22	Respondent/Claimant's List of Documents filed	16 January 2006	Approximately 6 weeks after the order of the Registrar on the Summons for

			Directions
23	Further and Better Particulars filed by the Respondent/Claimant	16 January 2006	
24	Affidavit of Kevin Boyce, Attorney-at-law, filed verifying List of Documents	17 January 2006	
25	Plaintiff's amended List of Documents, and affidavit of Kevin Boyce verifying amended List of Documents	8 December 2006	Almost 11 months after the Respondent/Claimant filed its List of Documents
26	Motions Day Notice, Request for Hearing, Trial Record filed. Motions Day fixed for 5 March 2007	27 February 2007	
27	Attendance at Motions Day Hearing, when case fixed for hearing for 5 days, 3 rd to 7 th December 2007	5 March 2007	Dates for trial fixed and case set down for hearing approximately 23 months after Writ of Summons filed
28	Take Notice from Supreme Court Registry to counsel for parties to action informing of the dates for trial – 5days, from 3 rd to 7 th December 2007	28 June 2007	
29	Supplemental List of Documents filed by the Appellants/Defendants	16 November 2007	Approximately 23 months after the Appellants/Defendants filed their List of Documents
30	Affidavit of Dawn Williams, verifying Supplemental List of Documents	19 November 2007	
31	Case adjourned because Senior Counsel for the Respondent/Claimant and Judge before whom case was set were involved in an urgent application	3 December 2007	Approximately 2 years, 7 months after the Writ of Summons was filed
32	Death of Malcolm	January	Approximately thirteen

	Barber	2009	(13) months after adjourned hearing
33	Letters from Respondent/Claimant to the Appellants, enclosing Certificate of Readiness for signature by the Appellants, annexed to affidavit of Paul Niccolls filed on 30 March 2012 as PDN 15	3 April 2009	Approximately 16 months after case adjourned.
34	Letter from Appellants to Respondents, annexed to the Affidavit of the First Appellant filed on 24 March 2010 RG 5	14 April 2009	Approximately 1½ weeks after letter from Respondent/Claimant's letter referred to in the preceding column.
35	Notice of Change of Attorneys and Notice of Intention to Proceed filed by the Respondent/Claimant	21 April 2009	
36	Letter from the Respondent/Claimant's counsel in response to the First Appellant's letter of 14 th April 2009, annexed to the Affidavit of Paul Niccolls filed on 30 March 2012 as PDN 16	27 April 2009	
37	Letter from the First Appellant to counsel for the Respondent//Claimant exhibited to the affidavit of the First Appellant as RG 7	28 April 2009	
38	Letter from the Respondent/Claimant's counsel to Ms. Dawn Williams, Attorney-at-law for the Appellants, exhibited to the affidavit of Paul Niccolls filed on 30 March 2010 as Exhibit PDN 13	18 May 2009	
39	Letter from the Respondent/Claimant's	21 October 2009	Approximately 5 months after initial

	Attorney-at-law to Mr. Mark Murray, requesting that the matter be set down for a case management hearing, exhibited to the affidavit of Paul Niccolls filed on 30 March 2010 as Exhibit PDN 18		letter from the Respondent/Claimant's Attorney-at-law to the Appellants/Defendants, and approximately 22 months after trial of case adjourned
40	Letter from Respondent/Claimant's Attorney-at-law to Ms. Dawn Williams, attached to affidavit of Paul Niccolls filed on 30 March 2010 as exhibit PDN 17	1 December 2009	
41	Notice of Application filed by the Respondent/Claimant for Pre-Trial Review, which was fixed for hearing on 19 th February 2010	9 December 2009	Approximately 2 months after letter to the Senior Legal Assistant requesting date be fixed for case management conference, and approximately two years after trial of case adjourned
42	Letters from counsel for the appellants seeking an adjournment of hearing of Pre-Trial Review, attached to affidavit of Paul Niccolls filed on 30 th March 2010, exhibited as PDN 21	17 February 2010	Approximately 9 weeks after Notice of Application filed for Pre-Trial Review
43	Attendance of counsel for Appellants and Respondents at Pre-Trial Review, which was adjourned to hearing on 19 th March 2010	19 February 2010	
44	Letter from counsel for the Appellants/Defendants to counsel for the Respondent/Claimant, attached to the affidavit of Paul Niccolls filed on 30 th April 2010 as exhibit PDN 21	15 March 2010	

45	Letter from counsel for the Respondent/Claimant to counsel for the Appellants/Defendants, in response to letter at No. 41, attached to affidavit of Paul Niccolls filed on 30 th March 2010 as exhibit PDN 22	17 March 2010	
46	Attendance at adjourned hearings, further adjournment to permit Appellants to file application	19 March 2010	Approximately 4 months after Notice of Application for Pre-Trial Review
47	Notice of Application to strike out the Respondent/Claimant's Statement of Claim filed by the Appellants/Defendants, along with affidavit of Robert Griffiths	24 March 2010	5 days after last adjourned hearing, one month short of five years after Writ of Summons filed
48	Take Notice issued by Supreme Court Registry, fixing date for Case Management Conference for 28 th May 2010	24 March 2010	Approximately 6 months after the Respondent/Defendant wrote to the Senior Legal Assistant asking that the matter be set down for case management
49	Affidavit of Paul Niccolls filed on behalf of the Respondent/Claimant in opposition to the striking out application	30 March 2010	6 days after Appellants/Defendants filed application to strike out
50	Affidavit of Mark Pearson filed on behalf of the Respondent/Claimant	21 May 2010	Approximately 1 month after Appellants/Defendants filed application to strike out
51	Two affidavits of First Appellant in response to affidavits filed on behalf of the Respondent/Claimant	31 May 2010	Approximately five weeks after application to strike out
52	Hearing of the application to strike out filed by the Appellant	2 and 3 June 2010	Approximately six weeks after the Appellants/Defendants'

			application to strike out
53	Order of Madame Dr. Sonia Richards, dismissing application to strike out, reasons given orally	3 June 2010	Approximately five years, 1½ months after Writ of Summons filed
54	Appellants/Defendants' Notice of Appeal filed	17 June 2010	Approximately 14 days after the order of Court dismissing application to strike out
55	Attendance before the Deputy Registrar, Madam Kristie Cuffy-Sargeant on settling the Record of Appeal	27 September 2010	Approximately 10 weeks after Notice of Appeal filed
56	Written Reasons given	During 2011, at a time before item immediately following	
57	Appellants/Defendants filed Record of Appeal	29 November 2010	Approximately 2 months after settling of the Record of Appeal before the Deputy Registrar
58	Respondent/Claimant filed written submissions	17 August 2011	Approximately 8½ months after settling of the Record of Appeal
59	Respondent/Claimant filed Notice of Application for Case Management Conference of appeal	9 May 2012	Almost 23 months after appeal filed, and almost 9 months after the Respondent/Claimant had filed written submissions
60	Attendance before the Hon. Madam Justice Sandra Mason, on hearing of the application for Case Management of the appeal, order, inter alia, fixing appeal for hearing on 1 st and 2 nd October 2010, and directing Appellants/Defendants to file written submissions	14 June 2012	Approximately 5 weeks after Notice of Application for Case Management filed