IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2008/0120

BETWEEN:

ROSE MARY GARDENER
DERRICK BINGHAM

Claimants

and

SELWYN GILBERT

Defendant

Appearances:

Mrs. Brenda Wardally-Beaumont for the Claimants
R.C. Benjamin & Co. for the Defendant

2016: February 22.

JUDGMENT

[1] **AZIZ, J.:** This is an action in which the claimants engaged the defendant by way of written agreement[1] for the purpose of constructing their dwelling house for the sum of $300,550.00. The claimants contend that the defendant's failure to complete the contract within the time specified and for further failures in relation to the specification and bad workmanship amounted to serious breaches of the agreement and they therefore claim for the following:

[1] The date section of the agreement (pg 49 of the trial bundle) is blank but during the course of the trial the date accepted was the 16th July 2002. This date was also stated in the amended statement of claim filed on the 27th March 2008, at page 4 of the trial bundle.

1. A declaration that the defendant is not entitled to receive the retention money of $12,000.00.
2. The sum of $19,800.00 for damages for non-completion.
3. Damages for breach of contract.
4. The sum of $290.80 paid to NAWASA for the defendant's water usage.
5. The sum of $525.00 paid for report to Joseph John & Associates.
6. The sum of $35,820.00 cost of remedial works done on the claimants' house together with an additional 10% interest for every subsequent 6 months after the date of the first estimate.
7. Any further relief the court deems fit.
8. Costs.

[2] The defendant filed a defence and counterclaim on 24th day of April 2008 in which he sought the following:

1. Twelve thousand dollars ($12,000.00) being the retention sum held by the defendant's attorney.
2. Interest.
3. Such further or other orders as the courts deems fit.
4. Costs.

The Pleadings

[3] The amended claim form and amended statement of claim filed on the 27th March 2008 averred that the claimants together with the defendant entered into an agreement for the construction of their dwelling house at a price of $300,550.00 ECD or £80,000.00 pounds sterling which was to be paid on a specific payment schedule contained within the written agreement. There was also agreement between the parties that the claimants will retain the sum of $12,000.00 for any

defects which appeared within a three month period after completion and handing over of the building. Within the agreement was an express term that the claimants' agent, Mr. Trevor St. Bernard alone would be responsible for the disbursement of funds held by him. The claimants set out in their claim that there was an undertaking given by the defendant to complete the building within 7 months[2]. The claimants aver that the dwelling house was not done within the 7 months agreed but within 10 months and there was no written application for any extension of the completion date.

[4] The claimants therefore sought to claim the sum of $19,800.00 which, they submit, arose as a result of the dwelling not being completed within the 7 months agreed. The sum was calculated at the rate of $220.00 per day which the claimants say was set out in the written agreement under the heading Damages for Non Completion[3].

The claimants also set out in the claim that the defendant failed to use the stipulated material. One such material was the "ceramic 12" x 12", non slip, sand colour tiles, as per sample, on veranda and floors throughout"[4].

[5] The claimants also averred about the bad workmanship in the dwelling house and highlighted the following:

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[2] As far as the time for the completion of the dwelling house, the contract stipulated that on the signing of the agreement, complete and full possession of the said premises, so far as may be necessary for the extension of the works, shall in all respects be completed and made fit for its use within a period of seven months excluding all public holidays provided that in the case of any delay caused by the employer or weather pattern, further time may be allowed for completion thereof.

[3] "If the Contractor fails to complete the construction of the Building Works by the completion date (such date as fixed above) or by any extended period granted the Contractor shall pay to the Employer liquidated damages at the rate of $220.00 per day between the aforesaid said time for the extended period of completion and the date of actual completion. The employer may deduct such liquidated damages from any money due to the Claimant under this contract or he may recover them from the Contractor as a debt".

[4] See Paragraph 4, page 2 of the agreement, and at page 50 of the trial bundle.

1) The laying of tiles with a glaze finish were slippery when wet and were not the non skid non glazed as requested;
2) The tiles were installed unevenly in some places of the house and at some places the tiles sloped towards the inside edge in particular the verandah area which sloped towards the walls of the house instead of the edge of the verandah.
3) The verandah was not built according to the specifications. It was 6' 2.5" wide instead of 7' wide.
4) The electrical sockets were not 4 gang sockets as required but 2 gang sockets.
5) A window was installed in the 3rd bedroom/storeroom in the sidewall as opposed to the rear wall which would have had a sea view as specified in the plan.
6) There were exposed steel rods under the house.
7) There was a steep driveway constructed which made it impossible for the claimants to enter their home by vehicle.
8) There were numerous cracks appearing in the building

[6] The claimants also stated that the defendant had agreed with them before construction that he would pay for the water usage during the building of the claimants' house, and furthermore that he failed to pay the sum of $290.34, and therefore that sum remains due and owing.

[7] As far as the workmanship was concerned, the claimants averred that the defendant indicated that he would repair the defects but as far as the tiles were concerned, once the building settled, so would the tiles, which they (the claimants) said were built in unevenly. The claimants state that the defendant has not remedied the defects, although a request was made through the claimants'

Solicitor. As a result of the defects not being repaired, the claimants have failed to pay over the retention money.

Expert Report

[8] In October 2003, the claimants employed a consultant firm, Joseph John and Associates Ltd. to report and give an estimation on the defects of the house. The report was carried out and the claimants paid the sum of $525.00 for the same. As a result of the continued deterioration, according to the claimants, they instructed their agent, Mr. Trevor St. Bernard, who was the lone person authorized to disburse moneys under the agreement, to return the retention money to them to assist in employing a second contractor to remedy the defects at a cost of $35,820.00. The agent by letter dated 23rd May 2006, refused to hand over the retention money without an order of the court. The defendant also sought to have the retention money ($12,000.00) paid over to him, which was refused. For completeness it must be said that there were various communications between the parties through their legal representatives for release of the retention monies, none of which was successful. It is clear that the defendant denies responsibility for any of the defects in the house.

The Defence and Counterclaim

[9] The defendant denied owing any monies for damages for non-completion, and he averred that he certainly does not owe $19,800.00. There was a three-week passage of time in which the defendant did not work, and this was due to the passing away of his wife, and furthermore there was the hurricane (Lily) which had struck the island and caused some additional delay. The defendant averred that there was agreement that if the tiles were not available, then tiles which were close or similar in nature and look, can be used. He says that the tiles were

similar. The defendant also denied that he failed to follow the specifications. The defendant denies the water bill amount and avers that the claimants also used water during the relevant period which was approximately three months. The defendant states that all the claimants' concerns were remedied, he does not know about any cracked tiles, but the retention money was not released and therefore counterclaims for the $12,000.00 plus interest and costs.

Claimants' Evidence

Rosemary Gardener

[10] Ms. Rosemary Gardener the 1st named claimant filed a witness statement on the 30th September 2009, in which she set out that there was a contractual agreement between the claimant and the defendant for the construction of her dwelling house. The statement also referred to the fact that only Mr. Trevor St. Bernard (the claimants' agent) would be responsible for the disbursement of funds held in his possession on behalf of the claimants. The claimants state that the retention money of $12,000.00 is still held by the agent, and that there were various breaches of the agreement, already referred to above. The claimants' evidence is that within one year of the laying of the tiles, they lifted up in various places. Although the 1st named claimant lists a number of items of bad workmanship, she complains in particular about paragraph 4 of the agreement[5].

[11] When the 1st named claimant, Rosemary Gardener was cross-examined, the first matter that she was referred to was the agreement. When asked to look at the agreement, she replied:

[5] "Ceramic tiles 12" x 12", non slip, sand colour, as per sample, on verandah and floors throughout."

"*This doesn't look like the agreement that I've previously seen……this looks different to me. I don't see my signature; it seems to be the agreement I agreed to. I am relying on this."*

Furthermore when asked about the 7 months time estimate the witness was not initially clear about what the time scale of the 7 months was for, but then retorted that she assumed that it was for the completion of the house. The witness was also clear that she was not present in Grenada when construction on the house started. Ms. Gardener also indicated that no one else would be coming to court to say on what date the construction of the house started.

[12] Ms. Gardener was clear that when she returned to Grenada the house was not built to their satisfaction, but further agreed that they had appointed an agent in Grenada who was the sole person responsible for disbursement of monies in accordance with the agreement. Ms. Gardener was also very clear and unambiguous in her evidence of having someone to deal with stage payments of construction, in this case she referred to the person as a 'project manager'[6] who she believed to be Mr. Joseph John and whom she did not know before, and still didn't know by the time the construction had been completed.

[13] Ms. Gardener confirmed again, very clearly, that the project manager was responsible for making the staged payments or in four phases, as per paragraph 2 of her witness statement. It was further very clear, that the moneys were paid out to the defendant for the four phases as per the agreement. Mr. John had paid all monies out except for the retention sum of $12,000.00. Ms. Gardener also confirmed that she expected that moneys would only have been paid out when the

[6] "Stage payments for the construction works shall be made in the manner hereinafter appearing BUT only after consultation with an independent third party Engineer who ALONE will confirm whether or not a particular phase has been completed and the advances shall be made within one day of the Engineer's confirmation of the same and shall be in accordance with the specification in relation to each of the elements shown in schedule 1."

jobs were up to the specification, and further that Mr. John was recommended to them by their lawyer, Mr. Trevor St. Bernard, whose judgment they trusted. The claimants were also aware when the payments were made, and agreed rather importantly that all the payments were certified before monies were disbursed except for the retention money.

[14] On handing over the property it was inspected, and Ms. Gardener could not remember if she referred to the house as a beautiful house, but did express some concern about the tiles in terms of the glaze and unevenness in places, but again agreed that she did not take issue with the size or the colour of the tiles. As far as the tiles were concerned, it was clear again from Ms. Gardener that the tiles had not risen up throughout the house for 10 – 11 months. In her statement she referred to having an issue with the tiles one year after they were laid. Ms. Gardener was taken through the agreement, and seemed to suggest that she was happy or content with the majority of the items listed in the agreement between numbers 5 and 23. The following passage is instructive:

Q. Mr. John had to inspect everything and approve payment?
A. Yes.
Q. Would that include materials?
A. Yes.
Q Would that include the standard of work?
A. Yes.
Q Are you aware that Mr. John is a qualified engineer?
A. Yes.
Q. You left everything in the hands of Trevor St. Bernard and Joseph John?
A. Yes.

[15] When asked about how many times she had spoken to Mr. Gilbert in 15 months, Ms. Gardener could not remember but indicated maybe 2 or 3 times, but all in all Ms. Gardener could not state when the construction had started to establish that the building was completed out of the time stipulated and was not present when construction had began. Ms. Gardener was also not aware that her agent had been informed that the defendant's wife has passed away and caused some delay.

[16] As far as the other problems were concerned there was nothing exhibited to show how the verandah was different in specification. There was also no plan exhibited to show the electrical sockets or any other electricals. This was accepted by Ms. Gardener.

Water – NAWASA

[17] This can be dealt with quickly as, the claimants claimed for $290.34, and indicated in cross-examination that the bill was never in the defendant's name and they the claimants did not have any NAWASA bills for the period of construction. The amount of $290.34 was for the period up to May 2003, but although the claimants were not in the country, there was no evidence presented to the court that proved that this money was owed to NAWASA.

[18] When one considers the global evidence of Ms. Gardener it is clear that there were a lot of uncertainties, as far as dates were concerned and what, to a certain extent, was being complained of, because she and the 2nd named claimant, Mr. Derrick Bingham, heavily relied on their lawyer and project manager in Grenada to follow their instructions and ensure they both were satisfied that payments were

properly made in accordance with the 4 phases of construction. This was properly done as the parties intended it to be. In addition, the retention monies were to be retained for a period of three months unless there were any defects within three months. In cross-examination Ms. Gardener accepted that after moving into the house Mr. Gilbert came to the house in May 2003, June 2003 he probably visited and for sometime after moving in, Mr. Gilbert visited the house and there was a cordial relationship, which even caused Mr. Gilbert to take the claimants to Grenville to organize a telephone.

[19] Finally as far as the $35,820.00 claimed, as costs for the remedial works, there was no evidence placed before the court about how this sum was derived or what works had been done. The question put was as follows:

Q. No where in your witness statement have you itemized this $35,820.00?
A. No, it's not in the witness statement.

[20] Finally the 1st named claimant confirmed that she was not sure about the date the agreement was signed, she was not sure about the date of final completion, that the third party engineer was the same Mr. Joseph John, the engineer, and he alone would confirm whether all the phases had been completed. The 1st named claimant accepted Mr. John's assessment, and she relied on him having communicated with them between 4 and 5 times. The court finds that Ms. Gardener would most likely have spoken to Mr. John at the beginning of construction and at the end of each of the 4 stages. The claimant in re-examination stated that Mr. Gilbert was paid by Mr. St Bernard and that Mr. John was paid also by Mr. St Bernard.

Derrick Bingham

[21] Mr. Bingham, the 2nd named claimant, indicated that he was present at the time that discussions were held for the construction of the dwelling house. He further confirmed that he did not know much about the agreement and the 1st named claimant was really the mover and shaker. Mr. Bingham confirmed that there was a meeting at Mr. St Bernard's place but before that there was an informal discussion between Ms. Gardener and Mr. Gilbert. Although Mr. Bingham accepted that this was some time ago, what became quite obvious to the court was that Ms. Gardener, was making gestures and giving signs to Mr. Bingham in the witness box, in an attempt to correct what she obviously didn't like to hear; what she believed would hurt their case, or was in her view, incorrect. This type of action in an attempt to influence a witness in the middle of their evidence is completely unacceptable, and amounts to an interference with the natural course of justice. Parties to cases before the courts must know that any course of conduct, designed to influence in any way any witness or other person directly involved in those proceedings, can face severe consequences.

[22] As far as his evidence-in-cross-examination was concerned, Mr. Bingham clearly stated that when he saw the house that had been constructed for them he was in love with it. It was put to him by Counsel for the defendant, that he exclaimed the house was very beautiful to which he agreed.

[23] Mr. Bingham confirmed that between May and August (the three month period) after the completion of the house, which is relevant to the retention period of which the $12,000.00 is concerned, both Ms. Gardener and Mr. Gilbert were friendly, and that all three had gone fishing together. It was confirmed that the defendant Mr. Gilbert gave the claimants a lift to Grenville and further there were no disputes between the months of May to August. Mr. Bingham confirmed that the defendant had brought two persons to work but they were the defendant's sons.

As far as ground digging was concerned the 1st named claimed suggested that they had not done any work or had any other work done themselves under the house, but Mr. Bingham confirmed that they did dig a drain under the house due to the water running under the house. Mr. Bingham in the end indicated that he first noticed tiles cracking about 3 months after moving in, and also stated that they had not retiled the verandah or any other part of the house but that they had done something. He was very vague in his responses and did not know when the construction on the house had commenced or completed.

Jefferson Frank

[24] The claimants also called on their behalf Mr. Jefferson Frank who gave evidence that he was a construction site supervisor and draftsman. He stated that he had studied building construction and draftsmanship after which he got an associate degree. He was working on a house in Bathway and was asked by the 2nd named claimant in the first instance to go over and see their house, this was in 2009. Certain things were pointed out to him by the claimants and he then made a statement. The statement referred to a lot of defects in the tiles area and a lot of cracks in the building, but this visit was not till 2009, which is important from a timeline perspective.

Juanita Pierre

[25] Finally, the claimants called Juanita Pierre on their behalf. She had a statement upon which she relied as evidence-in-chief. When cross-examined, she confirmed that she had arrived in Grenada in May 2005 and met Mr. Gilbert one year later. She had met the claimants soon after her arrival in Grenada as they had come to meet her as a new neighbor. As far as the contents of her statement were concerned and her concerns with the claimants' house, these were things that

were observed post 2005, and therefore she could not assist with the conditions at the material time in question.

The Defence Case

[26] Mr. Selwyn Gilbert relied on his statement as his evidence-in-chief. He was cross-examined and accepted the agreement and eventually the date of execution. Mr. Gilbert was adamant that completion was done on time and that the keys were handed over. He did keep a key, but the house keys were handed over to Mr. St. Bernard in February/March 2003. As far as delay in construction was concerned, the defendant indicated that he had notified Mr. St Bernard about the passing away of his wife, as it was Mr. St Bernard who was the person authorized to make payments. He was adamant and very clear that despite hurricane Lily and his personal loss, the house was completed on time and no extension was required as per the contract. As far as the 90 day claim was concerned, the defendant was of the opinion and gave evidence to the effect that Mr. St Bernard was authorizing payments, and if there had been any cause for concern including delay then, he would not have been paid and would have to account for the same. There was no delay says the defendant.

[27] As far as the tiles were concerned, the defendant stated that there were no complaints in May 2003, but there were complaints in relation to some steel rods under the house. The claimant says those concerns were raised around the same time that the retention money was due to be paid. Furthermore, at a later time there was a complaint about non skid and glazy tiles but the defendant was adamant that they were non skid and similar to the sample that he was shown, in addition he was just as adamant that the tiles did not break up within 3 months. What was interesting was the change in tact, and the questions illustrated this:

Q. Even if the tiles were the right specification, we say they were not put down properly?

A. Mr. Joseph John saw the tiling work while it was in progress.

Q. Was he there?

A. He comes to see if the work was done according to the specifications.

The issue of specification seemed to have been watered down to being not as material but there remained the issue of bad workmanship. It is, in my view, inconsistent to advance a case of breach of contract specifications but then to ask a question as stated above in relation to correct tile specification as per contract. The defendant remained adamant that all defects that came to his attention were repaired and there were no real issues with the tiles.

[28] The court finds that the evidence of the claimants was inconsistent, vague and there were at times doubt about the chain of events. Having heard and seen the claimants, it was clear that Ms. Gardener was and did try to coach Mr. Bingham in the evidence he was giving whilst he was in the witness box. This was because she was not happy with the truthfulness of the answers that Mr. Bingham was giving in his evidence. He was happy with the house, he went as far to say that he loved the house, and over the next few months after handing the house over the relationship was a good one and that they all went to Grenville and also went fishing.

[29] The witnesses called on behalf of the claimants were not of any added assistance as they came to the house and saw the condition of the house years after the completion, and in one witness's case, she only set out in her statement what she was told by the claimants.

[30] The legal contentions are that:

i. There is a breach of contract in that the defendant failed to complete the contract within the 7 month timeline.
ii. That the defendant is not entitled to the retention money.
iii. The defendant says that he did complete the dwelling house on time and fixed all issues that were raised and complied with the specifications, therefore entitled to the retention sum of $12,000.00 and not liable in any way to the claimants.
iv. That the sum of $35,820.00 claimed for remedial works is a claim for special damages and this but be pleaded, particularized and strictly proved.
v. The claimants claim is dismissed with costs

Breach of Contract

[31] The claimants have raised breach of contract and seek to establish that Clause 1.7 of the agreement provides for an extension of time for completion of the house as long as this is sought in writing, subject to weather and acts of God. The claimants say that the house was completed within 10 months of construction and not the 7 months as contracted. From the evidence adduced at trial it is clear that the claimants were not clear on when the actual construction started. The date given by Ms. Gardener was either June or July 2002. It must be recalled that when Ms. Gardener was asked about when the work was started she could not say because she was not in Grenada she says. The evidence adduced was as follows:

Q. When work started on the house, you were not in Grenada?
A. No.
Q. You can't say of your own knowledge exactly what date work started in the house?
A. No I wasn't here.

Q. Are you bringing someone here to tell us?

A. No.

Q. When this house started you were in the UK?

A. Yes.

[32] In addition to this, there was also a project manager who was in Grenada and overseeing the project and authorizing payments for the various stages. There was no evidence or any expert evidence placed before the court to suggest that there was a breach or any breaches of contract in terms of laying the tiles or using inferior material. I reiterate that the claimants had instructed a project manager who was visiting the site and authorizing payments for the various stages of the construction.

[33] The claimants in their submissions set out that the driveway had to be redone; there were issues with the water outlets, cracks in the walls, and cracks in the tiles which included the raised tiles. The submissions that the defendant's work was sub standard is contradicted by the evidence of Mr. Bingham, and the fact that it was agreed that for sometime after the construction, there was a good relationship between the parties and no issues were raised, until the time came to pay over the retention money.

Damages for breach

[34] I have been referred to the Chitty on Contract, 27th Edition, under the Heading of Building Contracts. The passage that I have been referred to on behalf of the claimants deals with whether the client owes a duty of care as a result of a special relationship to give information to a builder. This isn't an issue in the case at bar but upon further reading, the Australian High Court held that it was not possible to rule out the plea that a special relationship existed between a builder and a client

merely on the basis of contractual documents. Whether in fact such a relationship exists had to be determined by the full examination of the facts, the background and the relationship between the parties, and factors that might be relevant to this issue, which did not appear from the contract documents. This in itself is of some limited assistance as the court can look at the relationship between the parties and determine what the intention of the parties was at the time of the making of the contract.

[35] In this case there was a third party who was acting as an agent for the claimants. This was a project manager, who was also involved in the construction by approving of the various stages and payment for the same.

[36] In the case of **Lennard Williamson and John Bertrand**[7] there was an issue as to when the payment for a certain stage ought to have been paid, and more so when there is no provision as to when such payment ought to be made. The case of **H. Dakin & Co. Ltd. V Lee** [1916] 1 K.B. 566, p 570 was stated to be clear. Lord Ellenborough stated what in his opinion was the proper course to be pursued in cases similar to the present (Dakin Case). He said:

> "This action is founded on a claim for meritorious service". The claim was for work and labour done, and materials found, with the common counts. The plaintiff is to recover what he deserves **…**
>
> Lord Ellenborough adopted what seems to me to be a more just rule, for he went on to say: I have since had a conference with the judges on the subject**;** and now I consider this as the correct rule, that if there has been no beneficial service, there shall be no pay**;** but if some benefit has been derived, though not to the extent expected this shall go towards the

[7] Civil Suit No. 245 of 1995

plaintiffs demand, leaving the defendant to his action for negligence. The claim shall be coextensive with the benefit."

Ridley, J went on to say that the principle is that the builder is to recover what he deserves for the work done.

[37] When one consider these principles, and having due consideration to the fact that there was a project manager in Grenada who was tasked with the periodic/staged payments upon approval of the contracted works, and the full monies were paid in accordance with the contract, it is evident to me on that basis, that the works were considered done by the claimants' authorized representative to the requisite standard and specification. If the project manager acting with full instructions on behalf of the claimants was not satisfied then the monies would not and ought not to have been paid over. I find that there was no breach of the contract by the defendant.

Special Damages

[38] As far as the claim for $35,800.00 which is the cost of the remedial damage, the defendant argues that this is essentially a claim for special damages. It is the law that special damages must be specifically pleaded and proved. See **British Transport Commission v Gourley** [1956] A.C. 185 at p. 206. Special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized, it is plain law that one can recover in an action only special damage which has been pleaded and, of course proved. See Lord Diplock L J in **I K I W v Samuel** [1963] 1 W.L.R 991 at 1006.

[39] The claim for special damages has been pleaded on behalf of the claimants, but they have not been proved as required by law.

[40] One simply has to refer to the claim form and the amended statement of claim which set out the various specific sums being sought for various expenses. There were the following specific sums claimed:

1. $35,820.00 for remedial works
2. $290.80 for water usage payable to NAWASA
3. $525.00 for a report prepared by Joseph John and Associates

[41] There was no evidence during the course of the trial to prove any of these specific sums or specific damages.

[42] It would be worthwhile to mention that this matter was commenced by way of claim form filed on the 28th February 2008. On the day of trial[8] an issue was raised about the case management. The issue concerned a "supplemental" trial bundle being filed on the 14th May 2015, a mere 4 days[9] before the trial despite having case management and pre trial review[10]. Counsel for the claimants sought to have admitted the supplemental trial bundle to which Counsel for the defendant took strong objection.

[43] The court in its inherent jurisdiction sought to look at the case management orders and also the timelines leading up to trial. There was an application to admit the witness statement of John Adams which was heard in July 2010. The court granted leave to apply to amend the case management order made in June 2009, and such application should be heard at the next hearing of the matter.

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[8] Monday 18th May 2015

[9] Two of the four days included a weekend.

[10] There was case management on the 8th June 2009, at which it was ordered that standard disclosure take place between the parties on or before 31st July 2009 and witness statements to be filed and exchanged on or before 30th September 2009. The trial was due to be fixed for a date within January 2010. A Pre Trial Review was also fixed for 16th October 2009. The lists of documents had been filed in 2009 and a supplemental list filed on the 13th May 2015, signed by counsel for the claimants.

[44] On the 15th July 2013 there was a status hearing, at which both Counsel for the claimant and defendant appeared. The claimants were given leave to amend their trial bundle on or before the 19th September 2013, and in default the Registrar was to fix the matter for trial.

[45] A notice of application was then filed on the 7th November 2013, which was heard on the 23rd January 2014, in which both Counsel for the claimants and defendant were again present. This application was to amend the witness statements of the claimants and also to attach documents listed in the claimants' list of documents and also to file a witness statement of John Adams. This application was dismissed and assessed costs in the sum of $350.00 ordered.

[46] There were a number of other applications before the court, and a status hearing was held on the 12th January 2015. At the status hearing the matter was adjourned for a Pre-Trial Review on the 12th March 2015, where the matter was once again listed for trial.

[47] Mr. Benjamin, Counsel for the defendant, indicated that there were many opportunities for the various applications to be made, but nothing was done. Counsel for the defendant was adamant that he was not agreeing to any further documents admitted at this late stage and that all these matters ought to have been raised properly at the Pre-Trial Review. He further contends that at the status hearing the matter was said to be ready for trial. The court took everything into consideration and the fact that a supplemental trial bundle had been filed which contained photographs, letters, reports, floor plans and Counsel for the defendant had not seen it up to the morning of the trial. This matter was ongoing for some time and there is a point in which the guillotine must fall.

[48] There were sufficient opportunities for these matters to be raised before the court and nothing was done. Ms. Wardally Beaumont did indicate that they could not find Mr. Benjamin's office, but at the end of the day the case had to be managed and was.

[49] The parties ought to have their day in court, and there was a Pre-Trial Review at which time the issue of the supplemental trial bindle could have been dealt with, but simply put it wasn't. Therefore the court took the view that the trial ought to proceed, the guillotine fell on the supplemental trial bundle, so the bundle was excluded, and as mentioned earlier there was therefore no evidence before the court to prove these expenses or special damages.

Conclusion

[50] In view of the premises, it is hereby ordered that there will be judgment for the defendant Mr. Selwyn Gilbert against Rosemary Gardener and Derrick Bingham in the following terms:

a. The sum of $12,000.00 being the retention sum with interest, and
b. Cost agreed in the sum of $6,000.00.

I take this opportunity to thank Counsel for their helpful submissions.

Shiraz Aziz
High Court Judge