IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV425 of 2020

BETWEEN:

[1] SERGIO PEREZ

Claimant/Respondent

and

[1] ROMEO RENE ROSADO

[2] LEIDY ROCIO TRIMINIUS

Defendants/Applicants

Appearances:

Mr. Richard Bradley for the Claimant/Respondent

Mr. Jaraad Ysaguirre for the Defendants/Applicants

2023: November 14th;

2024: April 30th.

JUDGMENT

[1] **ALEXANDER, J.**: I order summary judgment on the claim and dismiss the counterclaim. The applicants filed their application to strike out the claim or, in the alternative, for summary judgment on the claim and counterclaim.

[2] This is a simple claim that, unfortunately, has had a long sojourn in the court for various reasons. A trial was fixed for 23rd and 24th November 2021, but did not proceed. Parties were allowed time to pursue a settlement of the matter but were unable to resolve it. The present application was filed on 17th February 2023.

[3] By its application, the applicants argued that the claim is as an abuse of process and one which discloses no reasonable grounds for bringing it. On these bases, the claim ought to be struck out or, alternatively, summary judgment should be granted on the claim and counterclaim as the respondent has no real prospect of successfully defending against the claim and counterclaim.

[4] In disposing of the applicants' notice of application summarily, I find that there was no substantive or weighty issues of law involved but it was a simple claim for damages for breach of an agreement in a specified sum, which simply was not substantiated.

[5] I will refer to the respondent as "Mr. Perez" and the applicants as "Mr. Rosado and Ms. Triminius".

The Claim

[6] Mr. Perez's claim is for damages for breach of an agreement in the sum of BZ$15,450. The matter involved a construction agreement, to be done in three phases i.e. (i) the foundation, (ii) the walls and (iii) the roof. The initial agreement was an oral agreement allegedly in the sum of BZ$149,758.70 for construction of the whole house. It commenced on 18th March 2019.

[7] When the agreement was in its third stage (the roof), Mr. Perez stated that the parties entered into a written agreement. The date and parties were unspecified. This agreement was not produced in court. There is no dispute though that the written agreement existed and was for labour cost to complete the roof i.e. the last stage of the project, although the roof cost was previously incorporated in the oral agreement. In effect, there was a variation in the terms of the oral agreement. The claim, therefore, related to the breach of the written agreement.

[8] Mr. Perez pleaded that the written agreement was necessary because Mr. Rosado and Ms. Triminius had brought a new contractor, whom they wanted to 'help out' with some work, to complete "the already started septic tank in the yard." The defence stated that it was because

the completion of the roof was behind schedule. Unfortunately, neither one of the parties provided me with the written agreement.

[9] In oral submissions, Mr. Richard Bradley, counsel for Mr. Perez, dismissed this failure to annex the written agreement by saying that the written contract is not with Ms. Triminius but is between Mr. Perez and Mr. Rosado (the first defendant). At this stage of the proceedings, Mr. Rosado was not participating in the proceedings as, allegedly, he and Ms. Triminius were estranged. The house belonged to Ms. Triminius and she was the one actively defending the matter.

[10] Mr. Bradley also raised, in oral submissions, the issues of the absence of evidence that Ms. Triminius had paid Mr. Perez any money, and that there is no privity of contract between them. These issues were not fleshed out in his oral submissions save to say that a trial was necessary. Privity was not raised in his written submissions or affidavit in response. It was unclear as to why Mr. Bradley was pursuing these arguments since his claim was against both Mr. Rosado and Ms. Triminius for breach of the written agreement. I assume that he was **not** making the case upfront that as against Ms. Triminius he had no case. If she was not a party to the written agreement on which Mr. Perez had sued, then she could not be in breach of it. Given the state of the pleaded case, I think it necessary that I delve deeper into the claim before me.

[11] The claim form was filed on 9th July 2020. Mr. Perez pleaded that Mr. Rosado and Ms. Triminius had failed to pay the full amount of BZ$23,000 for labour cost for completion of the roof. He was paid the sum of BZ$7,550 only from the agreed sum of BZ$23,000, leaving a balance of BZ$15,450. This claim was specifically linked to the breached written agreement regarding the roof.

[12] Notably, the statement of claim did not contain any prayer for reliefs, but the claim form did. Unfortunately, there were no dates provided in the claim, documenting when the sums were paid for labour or materials or when the different stages of the project were commenced or completed or who made the part payments. The claim was poorly drafted but did contain a discernible and valid cause of action.

The Defence and Counterclaim

[13] By their defence filed on 12th November 2020, Mr. Rosado and Ms. Triminius admitted that they had entered into the written agreement for the roof, which varied the terms of the oral agreement. They did not provide this alleged written agreement. However, they denied owing Mr. Perez the sum of BZ$15,450. They also denied only partially paying Mr. Perez for the roof and provided an alternative version of the facts. In their answer, they stated that it was agreed that they would purchase and supply the roof materials to Mr. Perez and would only pay him for labour. The labour cost was BZ$23,000.

[14] Mr. Rosado and Ms. Triminius exhibited to their defence a receipt evidencing that on 6th May 2019, Mr. Perez had received the full sum of BZ$23,000 for labour for the roof.

[15] By their defence, they also gave an alternative version of the facts about the initial oral contract. Mr. Rosado and Ms. Triminius stated that the house was to be completed in five phases (not three). Payments were to be disbursed for works when done, and not in one lump sum. The final agreed price for the entire construction project was $137,658.70 (not BZ$149,758.70 as claimed) but Mr. Perez never completed the entire house. It seems that the unfinished portions of the work were the roof and the septic tank, both of which were behind schedule.

[16] During the construction, Mr. Perez fell behind schedule, so a contractor was brought on to dig the septic tank while Mr. Perez worked on the roof. Despite monies already being disbursed, Mr. Perez who had fallen so far behind schedule stopped working for a ten-month period, without an explanation. He eventually abandoned the work site, without completing the work and taking away materials purchased by Ms. Triminius, which were never returned. Ms. Triminius then hired another contractor to complete the project, which involved rectifying faulty work and additional purchases of materials.

[17] The counterclaim was for breach of both agreements in the sum of BZ$38,943.27. The counterclaim was that Mr. Perez had failed to complete the house despite being paid in advance. Ms Triminius incurred additional expenses to hire a new contractor to complete the

house and deal with faulty work. For additional materials and labour to finish the house, she paid the new contractor (BZ$7867 + BZ$6,228.05 respectively).

[18] The written agreement for the roof was for BZ$33,774.60 including materials and labour. She had purchased materials for the roof of BZ$8,446.38 from Koop Sheet Metal, which was paid via bank transfers dated 4th and 5th June 2019. These credit vouchers were provided. She gave the materials to the claimant. Despite this, Mr. Perez demanded and received the full sum of BZ$33,774.60. Ms. Triminius attached a series of receipts of payments made for labour and materials in 2019, some of which were indiscernible.

[19] Her counterclaim seemed to be based on a double payment for the roof materials. I was unclear as to whether the materials purchased from Koop Sheet Metal and given to Mr. Perez were used on the roof or not and how much were utilized or removed from the premises by Mr. Perez. I note only that by paragraph 18 of the counterclaim, it was stated that "The Claimant now owes the 2nd Defendant the cost of those **constructions (sic) supplies that he was given and used on the 2nd Defendant's home**. The payment for that was done by bank transfer to Koop Sheet Metal." [My emphasis]. Despite this clear pleading, there is a counterclaim to recover this sum of BZ$8,446.38.

[20] I now set out the counterclaim for damages:

Particulars of Damages for Counterclaim

i.	Cost of labour for new contractor	=	$7867
ii.	Cost of material for new contractor	=	$6,228.05
iii.	Cost of labour and materials paid to Mr. Perez where no work was done	=	$16,401.81
iv.	Costs of supplies given to Mr. Perez	=	$8,446.41 (sic)
v.	**TOTAL**	**=**	**$38,943.27**

The Reply and Defence to Counterclaim

[21] In his reply to the defence and counterclaim, Mr. Perez did not deny receiving the sum of BZ$23,000. Instead, Mr. Perez stated that Mr. Rosado and Ms. Triminius actually owed him the sum of **BZ$33,770** for materials and labour costs for the roof. It was the first time that the

sum of BZ$33,770 was mentioned by Mr. Perez in his claim. He stated that from the BZ$33,770, he was only paid BZ$23,000. He used that sum to purchase roof materials. He did not exhibit any receipts. He maintained that the balance owing was, as claimed, BZ$15,450.

[22] In his reply, he also denied that Ms. Triminius had purchased materials for the roof and put her to strict proof.

[23] Interestingly, Mr. Perez did not deny receiving the sum of BZ$23,000 in his reply to defence and counterclaim. He simply advanced a different explanation for his claim for the sum of BZ$15,450. He had used the BZ$23,000 to buy roof materials. He produced no receipts evidencing such purchases. He did not address the defence that he had removed the materials from the premises. Mr. Perez also did not revisit or seek to amend his pleaded case. It remained his case that, under the written agreement, both Mr. Rosado and Ms. Triminius owed him BZ$15,450.

[24] In the face of the defence and receipts attached, he could not deny receiving the sum of BZ$23,000. If his reply now places the correct position before the court, it meant that the difference between the two sums was **BZ$10,770**, and not as initially pleaded the sum of BZ$15,450. Mr. Perez did not amend his claim to reflect that he was now seeking the sum of BZ$10,770.

[25] The matter proceeded to case management, directions were given for disclosure and evidence and a trial date was fixed on 23rd and 24th November 2021 at 9am before Young J. Parties did not proceed to trial but made attempts at settlement, which were not successful.

Issues

[26] The issues, as the court finds them, are:

i. Whether striking out or summary judgment is the appropriate procedure to dispose of the instant claim?

ii. Whether summary judgment should be granted on the counterclaim?

The Law

[27] Rule 26.3 (1) (b) & (c) of the Civil Proceedings Rules empowers the court to strike out a claim in specified circumstances. It reads:

> 26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) …
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; …

[28] CPR 15.2 (a) and (b) provide:

> 15.2 The court may give summary judgment on the claim or on a particular issue if it considers that -
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue.

[29] CPR 15.5 (1) and (2) provide:

> 15.5 (1) The applicant must –
>
> (a) file affidavit evidence in support with the application; and
>
> (b) serve copies on each party against whom summary judgment is sought;
>
> not less than 14 days before the date fixed for hearing the application.
>
> (2) If the respondent wishes to rely on evidence he must –
>
> (a) file affidavit evidence; and
>
> (b) serve copies on the applicant and any other respondent to the Application;
>
> at least seven (7) days before the summary judgment hearing.

Discussion

Strike Out or Summary Judgment

[30] The applicant seeks to strike out the claim and, in the alternative, summary judgment. I find it convenient to start by acknowledging and setting out the differences in these two

procedures, which will explain why I opted to grant one order as against the other on the claim. I do not find any fault with the application itself and accept that there is merit in seeking the alternative order as done here. I must, however, emphasize some short facts on the history of how the matter progressed before the court. This is to give context to the application before me as well as to my disposal order.

[31] By the time the application(s) came up for disposal before me, the case had progressed to the stage of trial, and all the evidence was in. It is for this reason that I find it necessary to examine the appropriateness of seeking both these orders at this stage.

[32] The jurisprudence is clear that applications for a strike out order and summary judgment do not bite at the same time or in the same way in proceedings. Basically, an applicant will not get both orders at the same time. The tests are different as are the requirements to be satisfied to get these orders from the court. Because of this, the procedures do not operate simultaneously. They are not interrelated or twinned procedures, though the rules show a close relationship. These applications are two distinct and separate procedures with different requirements to be used in different circumstances, which would lead to different legal consequences. One procedure allows a party to remedy its default and return to court while the other procedure grants a decision on the merits upon consideration of the evidence. See **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.**[1] where fulsome guidance on both procedures were provided.

[33] Generally, a strike out order is not merit based but is granted on the parties' pleadings. It means that a strike out order does not involve a final determination of the substantive issues between the parties. Because strike out applications are decided solely on the parties' pleaded cases, no additional evidence needs to be adduced. Thus, a claim can rightly be struck out early in the proceedings, in circumstances where a party to an action is faced with a statement of case which is plainly just bad in law. This is not the case with the present claim. The rule allows for a claim that is on its face unsustainable or defective in law to be deemed an abuse of the process and appropriately be struck out.[2] I am not satisfied that the

[1] SLUHCVAP2014/0024 ECS, Court of Appeal.
[2] Baldwin Spencer v The Attorney General Antigua and Barbuda Civil Appeal No. 20A of 1997, Dennis Byron CJ (Ag).

pleaded claim was defective in law to constitute an abuse of process.[3] On scrutiny, Mr. Perez's claim has a valid cause of action for breach of a written contract.

[34] I am also unconvinced that the statement of claim discloses no reasonable ground for bringing or defending it. I accepted that Mr. Perez's claim as initially pleaded (i.e. for BZ$15,450) was reduced, impliedly, in Mr. Perez's reply to a lower sum of BZ$10,770. Once Mr. Perez was presented with the receipt of the payment of BZ$23,000 in the defence and counterclaim, he had no choice but to revisit his claim in his reply. He admitted that he had received the sum of BZ$23,000 but used it for materials (no receipts provided) and that he was actually owed BZ$33,770 for materials and labour. This admission is accepted. It was the first time that the sum of BZ$33,770 was mentioned in the pleadings by him. Despite the contradiction between the reply and the pleaded case, Mr. Perez did not seek or obtain permission to amend his statement of claim at the case management conference. On the pleadings, I cannot say that Mr. Perez had no reasonable grounds for bringing the claim. I was not persuaded that, in the circumstances, the appropriate order was to strike out the case on the pleadings. I turn now to discuss the summary judgment procedure.

[35] A summary judgment order is merit based, so the evidence forms the crux of the summary judgment procedure. A summary judgment order can determine the whole case or any issue(s) in dispute. If it is granted on an issue(s) only, the case is to be treated thereafter as a case management conference: see CPR 15.6(2).

[36] In short, a party applying for summary judgment to be entered on a claim is required to file affidavit evidence in support of the application and so too must a respondent who wishes to rely on evidence. See paragraph 29 supra where the rule on the requirement for filing affidavit evidence is set out. Indeed, affidavit evidence forms the basis for the court's application of the legal test for entry of summary judgment. Thus, where the pleaded case is proper yet in the face of the defendant's defence is hopeless or has no real prospect of success, summary judgment can be granted. Similarly, if the defence is bare or hopeless or cannot stand up to the pleaded claim, summary judgment can be ordered. Basically, to dispose of a claim summarily, the court must consider the legal issues in the case, and determine, on a balance

[3] AG v Barker [2000] 1 FLR 759, para. 19.

of probabilities and based on the affidavit evidence of both parties, whether one party or the other has no real prospect of succeeding on the claim. If satisfied, it will enter judgment. This is a judgment on the merits.

[37] I think it is appropriate to quote in full the statement of Pereira CJ in **Didier** on the divergence between the two procedures. At paragraph 29, page 19 of **Didier**, Pereira CJ states:

> **One cannot contemplate that both a strike out and a summary judgment application can be successful at the same time since, due to the nature of the two procedures, if the legal test of one is satisfied, then the legal test of the other will necessarily not be satisfied.** If a party's claim or defence is struck out on the basis that it discloses no reasonable ground for bringing or defending the claim (respectively), then it follows that the claim or defence will not satisfy the higher threshold of being a 'properly constituted' claim or defence, albeit one which has no real prospect of succeeding on, or successfully defending, the claim or issue. **And of course, if a claim or defence is properly constituted and the legal test for summary judgment can properly be applied to it, then necessarily, it will not be a claim or defence which is suitable to be considered for the strike out procedure.** Also, in the particular case of a strike out application made by a defendant, if the claim is struck out, then there are no proceedings remaining for summary judgment to be entered in favour of the successful defendant. [My emphasis].

[38] The instant matter is at the stage of trial. All the evidence is in, and the length and breadth of the parties' cases are laid out before me. Given the above judicial pronouncements, I see my obligations at this stage of the proceedings as being to determine whether the claim should proceed to trial or is to be disposed of summarily. In the process, I did consider if the strike out procedure, sought by the present application, is applicable or not. At paragraph 34 above, I concluded that it was not and outlined my reasons for my conclusion.

[39] In determining the matter, I considered that the application for summary judgment will be inappropriate where there are disputed issues of material facts or where material facts need to be ascertained by the court and cannot confidently be concluded from affidavits. I considered also that the summary judgment procedure is inappropriate where the final determination turns on a judgment that is only able to be properly arrived at after a full hearing of the evidence.

[40] In the present proceedings, the affidavits before me have set out the full ambit of the facts and evidence to enable me to determine the matter. In my view, summary judgment is

suitable for cases where an abbreviated procedure and affidavit evidence have sufficiently exposed the facts and the legal issues. I am satisfied that in the instant case, given the evidence and on a balance of probabilities that the summary judgment order should be deployed to dispose of the matter in its entirety. In the instant matter, Mr. Rosado and Ms. Triminius in their defence have provided a clear answer to Mr. Perez's claim which was not contradicted by the evidence so that the proceedings can be summarily dismissed.[4]

[41] Despite having a claim with a valid cause of action, Mr. Perez did not produce any proper evidence in support of his case. He is claiming damages of BZ$15,450, which is a quantifiable and verifiable sum that should be buttressed by the necessary documents in support. He brought no proof of monies expended on materials and did not provide the written agreement on which his claim rests. He made no proper attempt to prove his case. Mr. Bradley, his counsel, argued that the court and parties can wait for any clarification at the trial. I wholly rejected this argument. Mr. Perez's claim cannot succeed due to insufficiency of evidence. No amount of cross-examination will assist him to produce receipts that he did not put before the court through his witness statement.

[42] In his witness statement at paragraphs 6 & 7, Mr. Perez maintained that his claim was for damages in the sum of BZ$15,450 as pleaded.

> 6. I did not agree with this change in our oral agreement therefore, the Defendants and I entered into a written agreement for the Defendants to pay me $23,000.00 for labour costs for completion of the last phase of construction, namely the roof.
>
> 7. The Defendants have paid me $7,550.00 of the agree (sic) $23,000.00, leaving an unpaid balance of $15,450.00 on the written agreement outstanding.

[43] At paragraph 17, Mr. Perez continues:

> 17. The Defendants owe the sum claim for the roof of $33,770.00 for material and labour costs to which only $23,000.00 was paid. The $23,000.00 received was used by me for purchasing roof material. The Defendants still owe me for the labour for the roof work, plumbing and two additional roof design requested for the interior.

[4] Westpac Banking Corporation v MM Kembla New Zealand Ltd [2001] 2 NZLR 298.

[44] Mr. Perez has brought a claim for a quantifiable and easily verifiable sum in damages. He says that he is owed BZ$15,450 for labour on the roof, plumbing and two additional roof designs requested for the interior. He had used the BZ$23,000 to purchase materials for the roof. He did not disclose receipts or other documents in his pleaded case, during disclosure or in his witness statement. Mr. Richard Bradley submitted that Ms. Triminius can seek to get clarification at trial. He argued that although there is no documentary evidence submitted by Mr. Perez, "it is not to say that there is no evidence at all. If the defendant wishes, **she could enlist further evidence or try to see what she could get from the claimant in cross-examination at trial**." [My emphasis]. I assumed from his submission that proof of damages or a specified sum is only to be made available at trial. I reject this approach to litigation. In my view, it is against the overriding objective to have proof and secret it away for strategic revelation at a trial. We have long since gone pass the practice of litigation by ambush in Belize. In any event, it is not the responsibility of Ms. Triminius to prove the case for Mr. Perez or to "try to see what she could get from (Mr. Perez) in cross-examination at trial." It is trite law that he who alleges must prove his case.

[45] Mr. Perez has made a claim for damages of BZ$15,450 for which he has provided no documentary evidence. There is no receipt of payment received by him and he did not produce the written agreement. He called the evidence of Ms. Cherami Interiano but instead of corroborating, it contradicted his pleaded case. It is accepted, therefore, that there is no documentary evidence to prove Mr. Perez's claim for a specified sum of money as damages. Despite this and for completeness, I will look at the evidence of Ms. Cherami Interiano since Mr. Perez is relying on this.

[46] Ms. Cherami Interiano stated in her witness statement that the following estimated costs for building the roof included labour of BZ$13,000 and materials of BZ$20,774. She made deductions to the material costs on the basis that Mr. Rosado and Ms. Triminius would supply materials to Mr. Perez. She also stated that Mr. Perez had received the sum of BZ$33,659.05 for labour, materials and plastering for the roof. Mr. Richard Bradley argued that clarification of this evidence can be obtained at trial, rendering the present application irrelevant. I disagree.

[47] Based on Mr. Perez's own evidence, he has no real prospect of succeeding on a claim for damages in the amount of BZ$15,450 or even for a lesser sum. In full answer to Mr. Perez's claim, Mr. Rosado and Ms. Triminius have produced documentary evidence in the form of a receipt that Mr. Perez was paid BZ$23,000. Mr. Perez has confirmed receipt of this sum. Ms. Triminius has given evidence, and produced other documents, that showed Mr. Perez was paid for the roof work.

[48] In disposing of this application, I considered that a judgment entered on a summary judgment application is one on the merits and operates as an issue estoppel. This means that no further litigation on the same issue(s) will be entertained by the court. Therefore, summary judgment is a power that must be exercised cautiously and only ever in the proper context, in the appropriate case. Appreciating the limits to the exercise of the power to make an order for summary judgment, I accepted that the procedure is not meant to substitute for a trial where the full investigation of the issues can be ventilated. Summary judgment is really to enable cases that have no real prospect of success to be disposed of summarily. I am satisfied that this is such a case.

[49] In **Swain v Hillman et al**,[5] Lord Woolf, MR at para. 7 describes summary judgment as, "a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful." He later stated at para. 20 that, "Useful though the power is … it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial."

[50] In **Swain**, the seriousness of the summary judgment procedure was captured by Lord Justice Judge who stated:

> To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. **The interests of justice overall will sometimes so require.** Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where on the evidence, the claimant has no real prospect of succeeding. This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, **the discretion to give summary**

[5] [2001] 1 All ER 91, paragraphs 7 & 20.

judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court.[6] [My emphasis].

[51] Mr. Ysaguirre pointed to the case of **Social Security Board v Ida Herrera dba Belmopan Cleaning and Sanitation Services**[7] where Justice of Appeal Morrison stated the applicable test for summary judgment:

> … the appropriate test for the court on an application for summary judgment under rule 15.2 is to determine whether, on the material available to the court at that stage, the party against whom it is sought has a realistic, as opposed to a fanciful, prospect of success. If she has no prospect, then the court should use its power of disposing of the matter summarily. However, in considering such an application, **the court should be mindful of the seriousness of the step of disposing of a claim or a defence without a trial, and it should decline to do so where the material discloses that there are issues which should be investigated at a trial**, after all its attendant preliminaries such as witness statements, disclosure and inspection of document and the like, have been completed. [My emphasis.]

[52] Mr. Ysaguirre argued that the present application was brought "after all its attendant preliminaries" have been completed. These have shown that Mr. Perez clearly cannot substantiate his claim for damages of BZ$15,450. Mr. Perez failed to amend his claim or to produce any evidence to substantiate the sum he maintains he is still owed for labour. The evidence is incontrovertible that Mr. Perez did in fact receive the entirety of the sum of BZ$23,000.

[53] It follows from the discussion above that the test for summary judgment was satisfied and a judgment on the merits is available in this case. It follows also that the strike out test was not satisfied. This claim is a factual matter involving no weighty or complex issues of facts or law. I am satisfied that it is a simple case of whether the sums pleaded as damages have been paid or not. The evidence shows that the sums have indeed been paid and received by Mr. Perez. Mr. Perez called evidence that effectively corroborates the other side's case. No cross examination is likely to change the colour or complexion of the evidence before me: see **Citco Global Custody NV v Y2K Finance Inc**.[8]

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[6] Swain paragraphs 28 & 29.
[7] Civil Appeal No. 39 of 2010.
[8] BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).

[54] I will grant the order for summary judgment and not the order for strike out. As stated at paragraph 37 above, it is not possible to get both summary judgment and strike out orders simultaneously.

Whether summary judgment should be granted on the counterclaim?

[55] The counterclaim of BZ$38,943.27 is for breach of both agreements. It appears from the evidence that Mr. Perez left the work site, without completing the work, despite having been paid for his labour. He also allegedly removed materials purchased by Ms. Triminius for the roof. Ms. Triminius' evidence is that she hired other contractors to complete the project, which also involved rectifying faulty work and additional purchases of materials. She called the evidence of Mr. Alvara Erick Valle and Mr. Jaime Alfonso Rosado who confirmed the state of the premises, as they found it, and the costs of completing and rectifying works done to the ceiling and walls on the property.

[56] I was not satisfied with the evidence in terms of the claim for materials in the sum of BZ$8,446.38 allegedly for materials that Mr. Perez left with. Ms. Triminius stated in evidence that, "We also gave Mr. Perez supplies amounting to $8,446.41 (sic) to be used on the house. He abandoned the job prior to use of all the materials." I was unclear as to the amount of materials Mr. Perez left with or had failed to use on the house, given their pleaded case that he had used all the materials bought for the roof (see paragraph 19 above). I was not prepared to make this award.

[57] Also, the claim for BZ$16,401.81 was not properly made out. Ms. Triminius did provide receipts for labour and materials to complete the work on the roof and house and she counterclaims for the sum of BZ$14,095.05. She too did not annex any written agreement to her counterclaim. It was unclear how much of the BZ$14,095.05 was spent on the roof or for remedial work on the house. I was also mindful of her evidence that payments to Mr. Perez for work done was not by lump sum but to be made in stages based on the progress of the work. In the circumstances, I was unpersuaded that she would have made the full payment if the works were not completed.

[58] I considered if it was appropriate to dispose of this claim without a trial? I considered that summary judgment is a serious matter. I needed to be mindful of whether the evidence disclosed issues that ought to be investigated at a full trial. I agree with Mr. Ysaguirre that at this stage, all the preliminaries have been completed. Despite this, neither party has produced the written agreement for the roof. Ms. Triminius did attempt to provide evidence to support the counterclaim, both documentary and in the witness statements of the contractors who did the remedial work. The receipts included sums for purchases of paint and shower rods, which the evidence did not show that Mr. Perez left with. Like the substantive claim, the counterclaim itself involves no weighty or complex issues of facts or law. There was a specific plea for damages based on an undisclosed written agreement and receipts, some indiscernible, were provided. There was a failure to connect some of the receipts to the works done or justify their reasonableness. Mr. Ysaguirre also did not address me on the counterclaim or demonstrate how in the absence of the written agreement it was made out. I am not persuaded that on the evidence, the counterclaim was made out and I refuse to grant the order for summary judgment on the counterclaim.

[59] I grant summary judgment on the claim and dismiss the counterclaim.

Costs

[60] Costs usually follow the event, and in the circumstances of this case, I will order the parties to bear their own costs.

Disposition

[61] It is ordered as follows that:

i. Summary judgment is granted to the applicants on the claim.

ii. The counterclaim is dismissed.

iii. Each party is to bear their own costs.

Martha Alexander

High Court Judge