COMMONWEALTH OF THE BAHAMAS **2019/CLE/gen/FP/0218**

IN THE SUPREME COURT

Common Law & Equity Division

BETWEEN

MOSS & ASSOCIATES
(A Law Firm)

Plaintiff

AND

THOMAS & NORMA CONSTRUCTION CO. LTD
T/A T & N CONSTRUCTION CO.

Defendant

Before: **The Honourable Madam Justice Ntshonda Tynes (Ag.)**

Appearances: **Mr. Gregory K. Moss for the Plaintiff**

Mr. James R. Thompson for the Defendant

Hearing Dates: **31st October, 2022 and 1st November, 2022**

RULING

Tynes, J (Ag.)

1. This Ruling concerns a submission of no case to answer made on behalf of the Defendant at the close of the Plaintiff's case at trial. Central to the submission were the rules governing the procedure by which witness statements become evidence-in-chief as well as the manner in which documents are entered into evidence.

Background

2. The Plaintiff law firm commenced the action on the 15th November, 2019 by way of a specially indorsed Writ of Summons claiming unpaid legal fees from its former client the Defendant. In July, 2011 the Plaintiff agreed to act on the Defendant's ("T & N")

behalf with respect to an extant action filed in the Supreme Court by T & N against one Yasmine Stubbs ("The Stubbs Action"). By its engagement letter dated the 6th May, 2011, the Plaintiff indicated that the terms under which it would act for T & N included that it would be paid for legal services at the rate of $500.00 per hour and $5,000.00 per day for court appearances; that interest on unpaid invoices would be charged at the rate of 1% per month; and that an initial retainer of $10,000.00 was required. The retainer was paid by the Defendant in July, 2011 and several months later in March, 2012 the Plaintiff accepted T & N's further instructions in respect of a second matter involving a claim against the Grand Bahama Development Company Limited ("Devco") for damages for breach of contract based on facts that coincided with those of the Stubbs action ("The Devco Action"). The Plaintiff undertook significant legal work on behalf of the Defendant in both actions and subsequently rendered to the Defendant four invoices: two in August, 2012 and two in October, 2015.

3. The Plaintiff contends and the Defendant denies that after the deduction of payments made by the Defendant (i.e. the initial Stubbs retainer of $10,000.00 and a November, 2012 payment of another $10,000.00 for the Devco action) the outstanding sum due from the Defendant to the Plaintiff in respect of the actions was $48,342.33.

4. The Plaintiff made repeated demands for payment of the outstanding sum but to no avail. Consequently, on the 20th November, 2015 the Plaintiff vacated the 23rd November, 2015 trial date for the Stubbs action, advised the Defendant that it had done so and that it would undertake no further legal work in either of the two actions until the invoices had been settled or satisfactory arrangements had been made for the payment of the same.

5. The Plaintiff alleges and the Defendant denies that by a letter dated the 1st December, 2015, the Defendant's agent Mr. Brian Smith wrote to the Plaintiff acknowledging the Defendant's indebtedness to the Plaintiff.

6. Also on the 1st December, 2015, the Defendant paid to the Plaintiff the sum of $23,798.23. The Plaintiff alleges that no further sum was paid by the Defendant and

the sum of $24,544.10 together with interest at the contractually agreed rate of 1% per month from the 1st January, 2016 remains outstanding.

7. By a Defence and Counterclaim filed on the 9th December, 2019 the Defendant admits the Plaintiff's pleaded version of the manner in which it initially engaged the Plaintiff and also admits to paying the $10,000.00 retainer for the Stubbs action. However, throughout its Defence and Counterclaim the Defendant contends that it was not necessary for the Plaintiff to commence a second action, the Devco action, and that only one court action was necessary, required or merited as the dispute involving Ms. Stubbs and Devco is but one dispute. By its Defence, the Defendant admits that the Plaintiff undertook significant legal work on its behalf (as particularised at paragraph 7 of the Statement of Claim) but repeats its contention that only one court action was necessary and that it paid the Plaintiff a reasonable amount for the one necessary action.

8. By its Counterclaim the Defendant alleges that the Plaintiff either negligently or deliberately separated the disputes with Ms. Stubbs and Devco "*so as to charge the Defendant for two Court Actions instead of one*". The Defendant alleges that due to the fault of the Plaintiff, the Devco action was struck out for lack of prosecution and the Defendant has had to appeal to the Court of Appeal. According to the Defendant, by reason of the Plaintiff's professional negligence or deliberate action, the Defendant has suffered loss and damage.

9. In a Defence to Counterclaim filed on the 2nd December, 2021, the Plaintiff denies the allegations in the Counterclaim and pleads in detail that the claims by T & N in the Stubbs action and the Devco action respectively were not separated but were two distinct claims based on two distinct causes of action.

10. Having regard to the pleadings, the principal issues to be determined at trial are:

    1. Whether the Defendant is indebted to the Plaintiff in the sum of $24,544.10, or any other sum, as the balance due for legal services rendered by the Plaintiff pursuant to the engagement letter dated the 6th May, 2011 from the Plaintiff to the Defendant;

2. Alternatively, whether the Defendant is indebted to the Plaintiff for damages on a quantum meruit basis for legal services rendered by the Plaintiff to the Defendant;

3. In the further alternative, whether the Defendant through its agent acknowledged its indebtedness to the Plaintiff by letter dated the 1st December, 2015;

4. Whether the Plaintiff is liable to the Defendant for damages for professional negligence by the Plaintiff as alleged in the Defendant's Counterclaim.

Events at Trial / Plaintiff's Evidence

11. The manner in which the Plaintiff's evidence was presented formed the basis for the Defendant's no case submission and is therefore here set out.

12. At trial, the Plaintiff called but one witness, Ms. Vanessa Russell. Having been duly sworn, Ms. Russell stated her occupation as Office Manager at the Plaintiff law firm and confirmed that she had prepared bundles for use in this case from documents retrieved from the Plaintiff's files. Thereupon, learned counsel Mr. Moss directed Ms. Russell, one-by-one, to 19 documents contained in the Plaintiff's refiled Bundle of Documents and Supplemental Bundle of Documents, respectively filed on the 26th October, 2022. With respect to each individual document, learned counsel Mr. Moss asked the Court that the document be "*marked*". The Court acceded and the documents were accordingly marked "VR 1" through "VR 19" respectively.

13. Immediately after "VR 19" had been marked, Mr. Moss advised, "*We now tender the witness for cross-examination, my lady. We have no further questions*".

14. This Court thereupon asked learned counsel Moss whether the witness had prepared a witness statement and whether counsel intended to refer the witness to the same. An exchange ensued during which learned counsel Mr. Thompson objected to the witness being shown her Witness Statement. Mr. Thompson argued that Mr. Moss having tendered the witness for cross-examination, the witness' evidence-in-chief had been

completed, that she had made no reference whatsoever to the contents of the Witness Statement and that she should not be permitted to do so at that point.

15. Learned counsel Mr. Moss promptly sought leave to reopen his examination-in-chief to address Ms. Russell's Witness Statement. This Court granted leave on the basis that cross-examination had not yet commenced. Ms. Russell was then shown her Witness Statement filed on the 28th September, 2022. In response to learned counsel Mr. Moss' request, Ms. Russell turned to the relevant page of her Witness Statement and confirmed that her signature there appeared. Mr. Moss at once closed his evidence-in-chief for the second time stating, "*That concludes the examination-in-chief*."

16. Learned counsel Mr. Thompson then raised the issue that Ms. Russell's Witness Statement should not be viewed as part of her evidence-in-chief as she had not verified the Witness Statement on oath.

17. Learned counsel Moss disagreed and submitted that it was implicit from the provisions of ***Order 31A rule 18(2)(k)*** of the ***RSC*** that witness statements, once filed, are automatically evidence-in-chief. In further support of his contention, Mr. Moss cited the decision of Winder, J as he then was in ***Wallace I. Rolle and another v The Town Court Management Company*** **[2022] 1 BHS J. No. 5** and the decision of Charles, J. as she then was in ***In the matter of the Quieting Titles Act, 1959; And In the matter of the Petition of Eleuthera Land Company Limited*** **[2019] 1 BHS J. No. 36**. (Respectfully, neither decision discusses the procedure by which witness statements become evidence-in-chief.)

18. Mr. Thompson invited Mr. Moss more than once to again seek leave to re-open examination-in-chief to have the witness verify her Witness Statement on oath. Mr. Moss declined. Learned counsel Thompson then indicated that his cross-examination of Ms. Russell would be without prejudice and that the Defendant reserved its right to rely on the submission that Russell's Witness Statement did not form a part of her evidence-in-chief.

19. Under cross-examination, Ms. Russell testified that at the time when various correspondence in the bundle were written Ms. Russell was a secretary at the Plaintiff firm; that she had been promoted to Office Manager in 2015; that she would not have been present in the room when Mr. Moss interviewed his clients, and that she had no personal knowledge of the communications between Mr. Moss and his clients. Her knowledge came from documents pulled from the file. She admitted that she had no way of knowing whether the contents of the letters on file were correct or not; she testified that the documents on file were prepared by attorneys before being placed on the file.

20. Ms. Russell was directed to read into the record certain paragraphs of the Plaintiff's Statement of Facts filed on the 25th August, 2022. Ms. Russell read aloud the contents of paragraphs 5, 6, 10, 21, 22, 25, 27 and 28. (Those paragraphs were merely read and were not adopted by Ms. Russell as a part of her oral testimony.) During the course of that exercise, Ms. Russell testified that she accepted that the Plaintiff acted as the Defendant's attorney and that the Plaintiff had requested that the trial date in the Stubbs action be vacated on the basis that the Plaintiff had not been properly instructed.

21. During re-examination, Ms. Russell testified as to the procedure for opening files at the Plaintiff firm. She testified that the Plaintiff's files were opened once an engagement letter had been prepared and a retainer paid; that when she prepared her Witness Statement she relied on documents in the Plaintiff's files. Ms. Russell was directed to and identified various correspondence contained in the Plaintiff's Bundle, each prepared by one of three lawyers other than Mr. Gregory Moss while they were employed at the Plaintiff firm, namely Mr. Wendell Smith, Mrs. Lena Bonaby and Ms. Shavanthi Longe.

22. At the conclusion of Ms. Russell's re-examination, learned counsel Moss closed the case for the Plaintiff and the trial was adjourned until the following morning. On the morning of the second day of trial, learned counsel Mr. Thompson stated his intention to make a submission of no case to answer.

Defendant's Submission of No Case to Answer

23. Upon indicating that the Defendant elected to call no evidence with respect to the Plaintiff's claim, learned counsel Mr. Thompson submitted that the state of the evidence before the Court was such that there was no case for the Defendant to answer, that the Court should accordingly enter Judgment against the Plaintiff with respect to its claim and that the Defendant's Counterclaim should be tried separately. As authority, learned counsel relied on ***paragraphs 33-24*** and ***33-25*** of the ***13th Edition*** of ***Phipson on Evidence***.

24. Mr. Thompson contended that the test for determining whether there is a case to answer is to look at the evidence before the court to ascertain whether any reasonable jury could say from that evidence alone that the Defendant is liable, in this case, liable to pay the balance of fees claimed by the Plaintiff. He argued that based on the evidence there is no reason to find the Defendant liable.

25. With respect to Ms. Russell's Witness Statement, learned counsel Thompson relied on his submission cited previously herein that the witness had not verified her Witness Statement on oath and therefore the Witness Statement did not form a part of Ms. Russell's evidence. With respect to the Plaintiff's documents, Mr. Thompson submitted that in the absence of agreement between the parties, documents only become evidence when they have been admitted into evidence by the Court. Learned counsel Thompson stated that the foundation for entering documentary evidence had not been laid on behalf of the Plaintiff and its documents had not been admitted into evidence; consequently, submitted learned counsel, the only evidence before the court is the oral testimony of Ms. Russell.

26. Mr. Thompson submitted further that it was improper for the Plaintiff to call only its secretary [Office Manager] to give evidence in support of its claim since, in her capacity as secretary, her testimony was limited: she could only testify that documents were found among the Plaintiff's records; she could not testify or, more importantly, be cross-examined as to the truth of the statements contained in the documents.

27. Mr. Thompson argued that the failure of the Plaintiff to make Mr. Gregory Moss or any of the other attorneys who acted for T & N available for cross-examination, was improper. He argued that an attorney with some knowledge of the work for which fees are claimed ought to have been called as a witness to give evidence and be cross-examined. He further argued that an invoice cannot be the basis for a claim for legal fees; that a client's liability to pay fees does not arise from the creation of invoices by the attorney but from the service that was rendered. Mr. Thompson also contended that there was no evidence before the court that any service was rendered by the Plaintiff on behalf of the Defendant.

28. Learned Counsel Thompson supplemented his oral submissions with written Closing Submissions filed on the 9th December, 2022 in which he reiterated his submissions made orally including a submission that hearsay evidence is inadmissible. Mr. Thompson added that as the Plaintiff's claim is for the balance of fees, the Plaintiff must adduce evidence that the funds paid were insufficient to pay for the services performed.

Plaintiff's Submissions

29. In its written Closing Submissions filed on the 28th November, 2022, the Plaintiff repeated the oral submissions made on its behalf with respect to the means by which a witness statement becomes evidence-in-chief, that is, that upon filing, a witness statement automatically becomes the evidence-in-chief of the maker.

30. As to the documents on which the Plaintiff seeks to rely, in his oral submissions, learned counsel Moss argued that the documents identified by Ms. Russell and marked by the Court are evidence before the Court which it can consider in rendering its judgment.

31. Relying on both ***Order 27 rule 4*** of the ***RSC*** and the Singapore Court of Appeal decision of ***Jet Holding Ltd and Others v Cooper Cameron (Singapore) Pte Ltd and another; and other appeals*** **[2007] 2 LRC 593, 623**, Plaintiff counsel submits that the

authenticity of the documents listed in the Plaintiff's Lists of Documents and produced in the Plaintiff's Bundles of Documents is deemed to have been admitted by the Defendant. He further submits that the copies of documents listed in the Plaintiff's Lists of Documents and produced in the Plaintiff's Bundles of Documents have all been proved by secondary evidence within the meaning of ***sections 41***, ***42*** and ***43*** of the ***Evidence Act***; that there is no need to call the person(s) who produced or created documents; that the absence of the maker or original source of the documents only goes to the weight which the court can give to documents adduced; and lastly, that all of the documents which are listed in the Plaintiff's Lists of Documents and produced in the Plaintiff's Bundles "*should be accepted by the Court for their full force and effect…*".

32. On the question of the procedural consequence of the no case submission on the Defendant's Counterclaim, learned Counsel Moss submitted that the Defendant having elected not to call evidence, the Counterclaim fails because there is no evidence in support of it; that there is no second trial after the determination of the submission.

Issues to be determined on Submission of No Case to Answer

33. Submissions of no case to answer in civil proceedings are rare. In the ***15th Edition*** of ***Phipson on Evidence*** (published in the year 2000) the Editors observed that the submission of no case to answer in civil cases where the judge sits without a jury "***is increasingly becoming obsolete***".

34. But the practice remains that a submission of no case to answer may be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the Court should hold that the burden has not been discharged (***Yuill v Yuill*** **[1945] P.15**). In cases tried by a judge alone, the practice is that a defendant who wishes to make a submission of no case to answer must elect to call no evidence. (***Alexander v Rayson*** **[1936] 1 KB 169**; ***Young v Rank*** **[1950] 2 KB 510**). Where the defendant makes the election, the submission is decided on the basis of whether the plaintiff's

case has been established by the evidence on the balance of probabilities. (***Miller v Cawley*** **[2002] EWCA Civ 1100**).

35. The Defendant herein having submitted that the Plaintiff has not satisfied the evidential burden of proving its case and the Defendant having elected, as required, to call no evidence with respect to the Plaintiff's claim, the court must determine whether the Plaintiff has met the burden of proving its case on a balance of probabilities. In the present case, in order to make that determination, the court must first decide what evidence has been properly adduced in support of the Plaintiff's claim upon which the Court can base its decision.

The Law

36. The starting point for appreciating the manner in which facts may be proved at trial is ***section 76(1)*** of the ***Supreme Court Act***. It reads:

> ***76. (1) Subject to the provisions of this section, the Rules Committee may make rules of court for the purpose of giving effect to this Act and for regulating and prescribing the practice and procedure of the Court in all matters whether civil or criminal and whether within its original or appellate jurisdiction and in particular, but without prejudice to the generality of the foregoing — (f) for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given in any proceedings or on any application in connection with or at any stage of any proceedings;***

37. Prior to the implementation of ***Order 31A*** of the ***RSC*** in 2004, the rules of court did not permit the use of witness statements. Pre-2004, the rule relevant to the oral or written nature of the evidence of witnesses at the trial of writ actions was found in ***Order 38 rule 1*** of the ***RSC***. The provisions of ***Order 38 rule 1*** mandate that the evidence of witnesses at the trial of actions begun by writ be given orally and in open court. It states:

> ***1. Subject to the provisions of these rules and to the Civil Evidence Act 1968 of England, (in so far as the latter is applicable) and any other enactment relating to evidence, any fact required to be proved at the trial of any action begun by writ by***

the evidence of witnesses shall be proved by the examination of witnesses orally and in open court.

The rules relating to Witness Statements

38. Subsequently, in 2004, with its implementation of ***Order 31A*** of the ***RSC***, the Rules Committee sought expressly to empower the Court to actively manage cases with a view to increasing efficiency. By ***Order 31A*** the Court was empowered, inter alia, to direct the use of witness statements at trial. In that regard, ***Order 31A rule 18(2)(k)*** and ***(p)*** of the ***RSC*** provides:

18. (2) Except where these Rules provide otherwise, the Court may —
…
(k) require the maker of an affidavit or witness statement to attend for cross-examination;
…
(p) direct that any evidence be given in written form;

39. It is clear that by these provisions the intention of the Rules Committee was to empower the Court to permit witness statements to be used as evidence-in-chief at trial. If this were not so and if ***Order 31A rule 18(2)(k)*** were to be considered in isolation, as suggested by learned counsel Moss, the power to determine whether examination-in-chief should be conducted orally or by witness statement would not belong to the Court but to the parties in each action. In other words, in the absence of ***Order 31A rule 18(2)(p)***, a party might, by virtue of ***Order 31A rule 18(2)(k)***, without any input from the Court, have the discretion to elect whether the evidence-in-chief of a witness would be given orally or in writing.

40. But for the provisions of ***Order 31A rule 18(2)(p)***, Mr. Moss may have been correct in his submission, particularly since ***Order 31A rule 31*** of the ***RSC*** mandates that where the rules of ***Order 31A*** conflict with the rules of any other Order the rules contained in ***Order 31A*** shall prevail.

41. However, ***Order 31A rule 18(2)(k)*** of the ***RSC*** does not exist in isolation. In my view, it must be read in conjunction with ***Order 31A rule 18(2)(p)*** and ***Order 38 rule 1*** of the ***RSC*** along with ***sections 126*** and ***129*** of the ***Evidence Act***.

42. The provisions of ***sections 126*** and ***129*** of the ***Evidence Act*** require that all evidence be given on oath or solemn affirmation. Those sections appear under the rubric "***Judicial Procedure***". They state:

> ***126. Subject to section 129 and to any other law to the contrary, all evidence shall be given on oath.***
>
> ***…***
>
> ***129. If any person who is called as a witness or to whom an oath is tendered for the purpose of an affidavit objects to be sworn stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, he shall be permitted to make his solemn affirmation instead of taking an oath.***

43. The combined effect of the provisions of ***Order 38 rule 1*** and ***Order 31A rule 18(2)(k)*** and ***(p)*** of the ***RSC*** when read in conjunction with ***sections 126*** and ***129*** of the ***Evidence Act*** is that the evidence of witnesses at the trial of actions begun by writ must be given on oath (or solemn affirmation), viva voce or orally in open court except where the Court directs that it be given in written form.

44. It is apposite to note that in the UK, in 1986, years prior to the introduction of their Civil Procedure Rules, the use of witness statements was introduced by virtue of ***Order 38 rule 2A*** of the UK ***Rules of the Supreme Court***. While we do not have corresponding provisions, the explanatory notes in ***Volume 1*** of the ***1999 edition*** of the ***Supreme Court Practice*** concerning the use of witness statements are instructive. The notes found at ***38/2A/11*** in that Volume state:

> ***"Notwithstanding the pre-trial exchange of the other statements of the witnesses between the parties, …, the trial itself remains an oral, public trial. The written statement of a witness is not in itself evidence of the case. The trial Judge may, on such terms as he thinks fit, direct that the statement of the witness should stand as the evidence in chief of that witness or part of such evidence…. Whether the statement of the witness is directed to stand as his evidence in chief or his testimony is elicited orally at the trial, he will be subject to oral cross-examination by the opposite party…. In the absence of such a direction, the party calling the***

witness must elicit his evidence by his oral examination-in-chief in the ordinary way under O.38, r.1."

45. For the reasons stated previously, it is clear to this Court that in order for a witness statement to become evidence-in-chief, two things must happen. For one, as indicated by learned counsel Mr. Thompson, the witness must verify the witness statement on oath. Secondly, the court must direct that the witness statement is to stand as evidence-in-chief.

46. Ordinarily, in practice, a witness takes the stand, identifies her witness statement, swears to the veracity of its contents and indicates a wish that the witness statement stand as her evidence-in-chief, at which point the trial judge usually directs that the witness statement so stands.

47. In the instant case, no such direction was given at trial. Neither was such a direction given at the Case Management Conference or at any other time. The only direction made concerning witness statements was given by Hanna-Adderley, J at the Case Management Conference held on the 2nd December, 2021. By clause 8 of the CMC Directions Order Her Ladyship ordered, "***That there be mutual exchange of witness statements on or before the 25th day of February, 2022"***. To be sure, no mention was made of witness statements standing as evidence-in-chief.

48. As to the requirement that the witness verify the witness statement on oath, Ms. Russell did not. As indicated earlier, Ms. Russell simply identified her signature in her Witness Statement before being tendered for cross-examination for the second time.

49. In the circumstances, I find that the Witness Statement of Ms. Russell does not form a part of her evidence-in-chief and Ms. Russell's evidence is limited to her oral testimony at trial.

Documentary Evidence

50. As to any documentary evidence, in light of the submissions of both counsel, it is necessary to state that while hearsay evidence is admissible in civil proceedings, there

are rules which govern the manner in which hearsay evidence, both oral and documentary, is admitted. Those rules are found in the ***Evidence Act***; the rules that relate solely to civil proceedings are found in ***sections 58*** through ***65*** of that ***Act***.

51. Generally speaking, where parties are able to agree the admission into evidence of documents, strict rules of evidence are waived as regards the agreed documents. In the absence of agreement, however, it is incumbent upon the party seeking to tender documents as evidence to lay the necessary groundwork in accordance with the relevant provisions of the ***Evidence Act*** before seeking and obtaining the leave of the Court to have its documents entered.

52. In the instant case, the parties have not agreed the admission of any documents into evidence. As such, the Plaintiff needed to satisfy the requirements of the ***Evidence Act*** before seeking the Court's leave to have its documents entered.

53. With the greatest respect to learned counsel Moss, the "marking" of documents by the Court does not equate to the admission of documents in evidence for the court's consideration. Neither does the inclusion of documents described in Lists of Documents in a party's Trial Bundles render those documents exhibits which the court can take into consideration in making its decision.

54. In the present case, learned counsel Mr. Moss never attempted to tender any documents into evidence and never sought the Court's direction that any of the Plaintiff's documents be exhibited as evidence. The issue never arose. As such, no documents were entered into evidence on behalf of the Plaintiff.

55. As it stands, I find that the only evidence properly before this Court on which it can and must base its decision is the oral testimony of Ms. Russell. I also find that that evidence is insufficient to satisfy the Plaintiff's evidential burden of proving its case on a balance of probabilities.

56. However, contrary to the submission of learned Counsel Mr. Thompson, the deficiency does not lie in the lack of evidence relating to the legal services provided by the Plaintiff. It was not necessary for the Plaintiff to lead evidence in that regard since the

Defendant at paragraph 7 of its Defence admitted that the Plaintiff undertook significant legal work on behalf of the Defendant in the Stubbs and Devco actions as particularised at paragraph 7 of the Statement of Claim.

57. This notwithstanding, there remains a dearth of evidence on the disputed issues of whether the work performed by the Plaintiff, in particular by the filing of the second action, was necessary; and of the necessary work performed, the reasonable value to be placed on that work.

58. I therefore find that there is no evidence before the court as to the necessity of the work performed by the Plaintiff, the value of the work performed or of the time spent on the various items of necessary work. Without any of this evidence, the court is in no position to first determine what work done was necessary and of the necessary work, to assess or quantify its reasonable value. This is needed in order to make a determination whether the reasonable value of the necessary work exceeds the amount already paid by the Defendant and if so, by how much.

59. Lastly, I find that there is no evidence before the Court to prove the Plaintiff's allegation that the Defendant through its agent acknowledged the Defendant's indebtedness to the Plaintiff by letter dated the 1st December, 2015.

60. In summary, having considered the evidence before the Court, and having found insufficient evidence to support the Plaintiff's claim on a balance of probabilities, it is my decision that the Defendant's no case submission succeeds and the Plaintiff's claim is accordingly dismissed.

61. I might add however, that as an advocate with some years' experience at the private bar, I can empathise in principle with any attorney who has conducted extensive legal work on behalf of a client only to be rebuffed upon remittance of an invoice, by a seemingly ungrateful beneficiary of that work. Nonetheless, without any evidential basis upon which a judgment in the Plaintiff's favour can be made I am bound to decide this matter in the Defendant's favour.

Defendant's Counterclaim

62. In the course of making his no case submission, learned counsel Mr. Thompson invited the court to direct that the Defendant's Counterclaim be tried separately. At the time, I declined Mr. Thompson's invitation. Having now had an opportunity to properly consider the practice and authorities, I accept that that decision was incorrect in law. The Defendant's election has no bearing on issues unrelated to the submission. And so, the Defendant having elected to call no evidence with respect to the Plaintiff's claim, and the Defendant having submitted at the close of the Plaintiff's case that there was no case to answer, the Court ought to have directed that the Counterclaim be tried separately. Accordingly, I hereby set aside my decision with respect to the Counterclaim and do now order that the Defendant's Counterclaim be tried separately.

Conclusion

63. In the result, the Defendant, having succeeded on its no case submission, is entitled to its costs of the application and of the Plaintiff's action, the same to be taxed if not agreed.

64. As indicated in the antepenultimate paragraph hereof, the Defendant's Counterclaim is to be tried separately.

Dated this 9th day of February, A.D. 2023

Ntshonda Tynes
Justice (Ag.)