

No. 1

Writ of Summons (0.6, r.1)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. OF 2020

BETWEEN:

Plaintiff

CAYMAN CONTEMPORARY CONSTRUCTION LTD.

and

TOBIN PRIOR

Defendant



WRIT OF SUMMONS

To the Defendant:

MR. TOBIN PRIOR, 118 CRYSTAL DRIVE, P.O.BOX 31686, GRAND CAYMAN, KY1-1207

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, PO Box 495 GT, George Town, Grand Cayman, the accompanying Acknowledgment of Service stating therein whether you intend to contest this action.

If you intend to defend the action, in whole or in part, you must set out **full particulars of your defence** in the space provided in the Acknowledgment of Service form.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 4th day of November 2020.

IMPORTANT

Directions for Acknowledgement of Service are given with the accompanying form.

STATEMENT OF CLAIM

AND THE PLAINTIFF claims:

1. The Plaintiff is Cayman Contemporary Construction Ltd, 48 Paradise Close, PO Box 10940, Grand Cayman, KY1-1007, a Cayman Islands ordinary resident company.
2. The Defendant is Mr. Tobin Prior at 118 Crystal Drive, PO Box 31686, Grand Cayman, KY1-1207.
3. The Defendant entered into a contract with the Plaintiff on **3 April 2018** (the “**Contract**”) to build an extension to the Defendant’s home (the “**Home Extension**”).
4. The Contract is for \$254,439 CI + change orders of \$ 1,711 CI = \$ 256,150 CI. Payments made to date are \$ 238,246.25 CI . The balance due on the contract is therefore \$ 17,903.75 CI. The defendant selected a roofing material that he later did not like, this added a cost of \$10,266.42 CI to the project. The Plaintiff is therefore claiming the following; balance due on contract \$ 17,903.75 CI, additional costs for roofing materials and having to hire another roofing contractor \$ 10,266.42 CI. The total claim is therefore \$ 28,170.17 CI.

The additional costs of \$10,266.42 CI for roofing works are broken down as follows; Roofing & Flashing \$ 8,837 (see schedule of values in contract **Exhibit A**). Original roofer Tyson Construction contract for \$5,670 CI (this was a savings of \$3,167 CI from the contract value for the Plaintiff). Payment made to Tyson Construction \$ 2,835 CI deposit made on 15/5/18 cheque #7245 (see attached copy of cheque **Exhibit B**), new roofer Smith’s Construction contract for \$ 11,304.20 CI (**See Exhibit C**), additional roofing materials order #3 ABC Supply Co \$2,626USD x 1.35 shipping & duty x.84= \$2,978 CI (**See Exhibit D**).

Minus the change order the Defendant agreed to for the change of roof color of \$1,180.78 (See **Exhibit E**). Total cost of the roof was \$15,936.42 CI minus schedule of values \$8,837 = \$ 7,099.42 CI + plus savings the plaintiff would have realized on the contract being the difference between the schedule of values \$8,837 and the contract price with Tyson Construction of \$5,670= \$ 3,167. This makes the total additional costs for the plaintiff which are attributable to the change of colour by the Defendant a total of \$ 10,266.42 CI.

5. The Defendant made partial payment to the Plaintiff pursuant to the Contract but he withheld \$16,500.00 CI (the “**Amount Due**”) in purported exercise of Article 3.2 of the Contract (See **Exhibit A**) which states:

“The Contractor shall commence construction at the signing of this contract and should achieve Substantial Completion of the entire work not later than the 11th of September 2018. Not subject to adjustments. After this date contractor will incur liquidated damages to the cost: \$250 per business day”.

6. The Plaintiff is not in breach of Article 3.2 of the Contract and is not the cause of delay under the Contract for these reasons:
 - a. each of the Plaintiff’s obligations was executed promptly upon receipt of the materials ordered and instructions;
 - b. materials to construct certain elements of the Home Extension could not be ordered by the Plaintiff until the Defendant made selections as to materials, but the Defendant delayed in making such selections, and also changed numerous selections multiple times, causing extensive delay.
 - c. There were a total of 14 days where rain either completely halted construction or hampered construction.
 - d. An instruction was given by the Defendant after the signing of the contract. This instruction was given by the Defendant to the site Foreman

Mr. Riaan De Jager. The instruction was 'all works onsite require site supervision'.

- e. the Contract is not written so as to permit the Defendant to be both the cause of the delay and the beneficiary of the liquidated damages clause with respect to the delay.
7. Article 3.2 of the contract states 'not subject to adjustments'. I would argue that this clause does not meet the legal standard of 'fair and equitable' and essentially discounts the inherent nature of reality in that there are circumstances outside the control of the parties to the contract. These 4 words 'not subject to adjustments' have never appeared in any contract we have entered into in the 16 years that our company has been in business. One of the circumstances outside the control of the Plaintiff in this instance was the weather. This project, being an addition to an existing house, required a majority of the work schedule, to be carried out in an environment which was open to the elements (no roof) during the rainy season.
8. There were three significant tasks in this project which took an inordinate amount of time to complete due to the Defendant's delay, being:
- a. plumbing fixtures and bathtub materials,
 - b. roofing materials, and
 - c. door hardware.

Plumbing Fixtures and Bathtub Materials

9. At the time the Contract was signed, the plumbing fixtures specifications were incomplete because the Defendant had not made final decisions as to the types of plumbing fixtures to use for the Home Extension. This, in turn, held up the ordering of supplies by the Plaintiff and the installation of the fixtures;
10. To keep the project moving forward, the Plaintiff (on 9 April 2018) began making enquiries by email to the architect and the supplier of goods with respect to the as-yet undetermined materials list. The Plaintiff hoped to spur on the decision-

making process with respect to the exact plumbing fixtures to be installed. Prompt procurement of materials is crucial in smaller projects because they carry shorter time frames for completion. See **Exhibit F**

11. The Plaintiff, the architect and the supplier worked together to produce a complete plumbing fixtures list on behalf of the Defendant. This was sent to the Defendant for review. The Defendant elected not to approve it, but finally agreed on a plumbing fixtures list by 10 May 2018. (See **Exhibit G**): plumbing fixtures submission which is dated May 9, 2018 and is from the supplier Ferguson International. The plumbing fixtures materials list was therefore only given to the Plaintiff 38 days after the signing of the contract.
12. See attached supporting information regarding the delayed plumbing fixtures materials list; email from Plaintiff to Architect 31 October “You may recall that from the day of signing the contract on April 3rd we spent 27 days working with Jose at Ferguson between the four of us; Architect, Client, Supplier and myself trying to come up with a completed plumbing fixture schedule. We placed the order probably the next morning after the plumbing fixtures were approved, that day being April 30th. After April 30th there were some additional items changed by the Defendant and it was May 9th before a final plumbing fixture submittal could be sent to the defendant for approval (See **Exhibit G**) as previously mentioned.
13. See attached email from Defendant to Plaintiff 26 April, 2018 this email from the Defendant clearly shows the Defendant approving certain plumbing fixture items. Item #5 of this email says ‘As I have stated previously the one depicted (from the spec) doesn’t match either the ‘Essence Range’ or the shower system, so no good’. This email from the Defendant shows that the plumbing fixture list was still incomplete therefore the order could not be placed. (See **Exhibit H**)
14. See attached email dated 30 April, 2018 from Gio the supplier of the plumbing fixtures from Ferguson International saying ‘Excellent to hear we are there! Updated quote attached’. (See **Exhibit I**)

15. See attached email dated April 9th from Gio at Ferguson International showing the lead time of some of the 'duravit plumbing fixtures' being 16 weeks on average. This is from the time of order to Miami, it takes another 10 days to 2 weeks to arrive on the jobsite. **(See Exhibit J)**
16. See attached email dated September 6th from Ferguson International saying 'partial material will be at your freight forwarder on September 12th, the Vero Air bathtub is still showing the week of September 24th. **(See Exhibit K)**
17. The custom-made bathtub & other plumbing fixtures finally arrived on the Island on October 22nd. This was almost 6 weeks later than the date given by the supplier, which was not the fault of the Plaintiff. See attached Bill of Lading for plumbing fixture & bathtub delivery to Island. **(See Exhibit L)**
18. Clearly, the contracted completion date of 11 September 2018 could not have been met by the Plaintiff (through no fault of its own).
19. The Plaintiff then projected a new completion date of 31 October 2018, which was based on communications from the materials suppliers in the USA.
20. In summary, the Defendant alleges the right to withhold monies from the Plaintiff for the reason of delay by the Plaintiff, but as explained above, none of the delays resulted from actions or inactions of the Plaintiff.

Roofing Material

21. Significant delays were also caused due to the procurement of roofing materials as instructed by the Defendant with respect to choice of colour. At contract signing there was no specification given for the roofing material colour therefore this had to be selected by the Defendant. After the new roofing material had been partially applied, the Defendant decided not to accept it, and instructed a different colour of roofing material to be purchased and applied. This delay was not the cause of the Plaintiff.

22. Given that it is difficult if not impossible to match the colour of roofing material on an older home (7 to 10 year old existing home) to the colour of roofing material on a new extension of such home, (due to the sun causing the existing material to fade) it was agreed between the Plaintiff, the Defendant, the architect, and the roofing subtrader, Tyson Construction Company Ltd. (“**Tyson**”) that the costs of the second colour of roofing material would be split evenly amongst all four parties (except that Tyson ultimately reneged on the arrangement), despite that the colour selection was made by the Defendant, and the subsequent decision not to accept that colour was also made by the Defendant. It was a goodwill gesture on the part of the Plaintiff and the architect to split the costs of the change of colour selected by the Defendant. **(See Exhibit E)**

23. The second order of roofing material was purchased from ABC Supply Company immediately and was released by Hyde Shipping on approximately 16 October 2018. The plaintiff had to act quickly to get the correct colour roofing material and since the original roofing contractor ‘Tyson Construction’ quit due to the roof colour problem the Plaintiff had to order the material themselves. The 2nd order of roofing material arrived on the project site approximately 22 October 2018. **(See Exhibit M)**

24. The Plaintiff then hired Smith Construction to finish the roofing work at a price of CI \$11,304.00 **(See Exhibit C)**. Tyson Construction, the original roofing contractor quite the job because they didn’t want to pay extra for the colour change made by the Defendant. This caused the Plaintiff to lose money on the deposit made to Tyson Construction and created additional costs for having to hire another company Smith Construction to finish the roof.

25. After installing the second order of roofing material there was still approximately 200 square feet of roof area left to be covered due to the original roofing subtrade’s miscalculations. The 3rd order of roofing materials cost US \$2,626 plus shipping and duty for a total of CI \$2,978. **(See Exhibit D)**

26. In summary, the original selection of the roof colour by the Defendant and the subsequent change to that color also by the Defendant caused time delays, which were not the fault of the Plaintiff.

Door Hardware

27. The first order of door hardware selected by the Defendant was released by Hyde Shipping on 16 October 2018 and arrived on the project site approximately 4 days later. (See **Exhibit N**)
28. The second order of door hardware was released by Hyde Shipping on 20 November 2018 and arrived on the project site approximately 4 days later. (See **Exhibit O**)
29. The second order of door hardware was necessary because the first specification of door hardware (chosen by the Defendant or his architect) would not work with the internal metal frame that was lodged within the door itself. This caused additional delays which are not attributable to the Plaintiff. The Defendant agreed to pay for the second order of door hardware. (See **Exhibit P**)
30. By this time, the amended completion date of 31 October 2018 had also passed, without being met, through no fault or delay of the Plaintiff.

Weather

31. There were a total of 14 days during the project where rain either halted the project or hampered the works on site. The attached rainfall chart shows April 4 rainfall days, May 7 rainfall days, June 7 rainfall days, July 7 rainfall days, August 8 rainfall days, September 9 rainfall days for a total of 42 rainfall days (See **Exhibit Q**) Since the project is outside weather plays a significant factor in the progress of the work. Since weather is not within the control of the Plaintiff weather must be considered with respect to any progress related assessment. Please remember that time delays negatively impact the profitability of the Plaintiff as less work is completed over more time.

Defendant Instruction for Supervision

32. The defendant gave an instruction onsite after the contract was signed to the site Foreman Mr. Riaan De Jager. The instruction was 'all works onsite require site supervision'. The problem with this request is that this project was a 'small works' project in that it was a small addition to an existing house. The nature of this type of project is that many little items must be taken care of in a very specific order which requires the delivery of many specific materials and the trades labour requirement is very small. These facts require a very coordinated approach to organizing the delivery of the materials and then after the materials have been delivered organizing the labour for the work. When the Defendant gave this instruction to the site Foreman it changed how the project could be performed as now all works would require not only the trades labour which required many short duration visits to site to complete the works but also now required supervision for each short frequent visit to the jobsite. This instruction added cost and time to the project, as a supervisor in any company is not as readily available as a line employee. The works involved were not complicated which would have necessitated the need for a supervisor. The Plaintiff did not ask for compensation for the added cost of this instruction.

Roof Not Complete

33. Even though the roof was not complete and dried in due to the wrong color selection by the Defendant, the Plaintiff did everything it could to complete the project. An example of this is that the Plaintiff installed the ceiling underneath the roof even though we knew that the roof was not dried

in completely. We did this in order to move along the interior works and therefore progress the entire project. This decision to install the ceiling even though we knew the roof wasn't 100% dried in caused Cayman Contemporary Construction to have to replace / repair some of the ceiling as it got wet. We did not charge the Defendant for this. It is important to point out that the longer a project takes to complete the more it costs the builder therefore the incentive for the builder is inherently built into the time it takes to complete the project as the contract is a fixed price contract therefore profitability for the builder decreases the longer the project takes to complete.

Delays Caused By Defendant or Materials Supplier

34. As identified there were many delays outside of the control of the Plaintiff all of which contributed to the time it took to complete the project. As noted the longer a project takes the more it costs the builder to complete. Cayman Contemporary Construction has not asked for additional compensation from the Defendant for this additional time it took for the works to be completed.

Final Payment on Contract

As noted in item #4 above there is an outstanding balance on the contract of \$17,903.75 which is made up of \$16,500 held for liquidated damages which leaves \$ 1,403.75 CI. The Defendant recently said that he was withholding this final payment of \$1,403.75 because his Washing machine wasn't working. See attached service call invoice from Appliance Doctor's from 9 November, 2018 when we asked to have this item repaired. As far as we knew the washing machine was properly repaired as Appliance Doctor's are in our opinion the 'gold

standard' in appliance repair in Cayman. We were told by the Defendant more than a year after this service call that the washing machine never worked properly. If we were notified of this at the time we could have had the washing machine replaced as it had a one year warranty. I explained this to the Defendant at the time he alerted me to this problem. (See **Exhibit R**)

Conclusion

35. The Plaintiff achieved substantial completion within two days after the delivery of the third order of roofing material, being 26 November 2018. (See **Exhibit S**) (email from Smith Construction).
36. Throughout the project, work was delayed by the Defendant as detailed above. The contractual completion date of this project was therefore unilaterally amended by the actions of the Defendant in his repeated rejections of plumbing fixtures, roofing materials & door hardware which he himself selected. The delays which the Defendant claims were the fault of the Plaintiff were in fact the fault of the Defendant himself.
37. The change by the Defendant in his selection of roof color added to the cost of the project for the Plaintiff. The 14 days of weather delays added to the time to complete the project. The instruction by the Defendant after contract signing which required site supervision also added to the time to complete the project. The Plaintiff did all that it could to mitigate the time delays and move the project forward as time delays inherently cost the Plaintiff.
38. The Plaintiff respectfully submits that the **Amount Due** ought rightfully to be paid to the Plaintiff by the Defendant, and the Defendant has no right to withhold such amount.

39. Further, the Plaintiff seeks interest pursuant to Section 34 of The Judicature Law on all sums found to be due to the Plaintiff from the Defendant at a rate of 7¼% per annum.
40. Additional Exhibits 'P' regarding plumbing fixtures
41. AND the Plaintiff Claims:
42. The sum of CI \$28,170.17.
43. Interest pursuant to section 34 of the Judicature Law or other Law as deemed appropriate.
44. Costs to be assessed. _____

If, within the time for returning the Acknowledgment of Service, the Defendant pays the total amount claimed of \$ 28,170.17 CI (including interest and costs) further proceedings will be stayed. The money must be paid to the Plaintiff.

 4/11/20

Signature of Plaintiff

This Writ of Summons was issued by Cayman Contemporary Construction Ltd, PO Box 10940, Grand Cayman, KY1-1007, Cayman Islands

No. 8

Acknowledgement of Service of Writ of Summons (0.12, r.3)

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE OF WRIT OF SUMMONS

1. The accompanying form of Acknowledgment of Service should be completed by an attorney acting on behalf of the Defendant or by the Defendant if acting in person.

After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495, Georgetown, Grand Cayman.

2. A Defendant who states in his Acknowledgement of Service that he intends to contest the proceedings must also serve a defence on the Attorney for the Plaintiff (or on the Plaintiff acting in person).

If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served with 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter judgment against him without further notice.

3. A Stay of Execution against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay, execution will be stayed for 14 days after his Acknowledgement, but he must, with that time, issue a Summons for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

See over for notes for guidance

Please complete overleaf

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.
2. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.
3. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words “sued as (the name stated on the Writ of Summons)”
4. Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description “Partner in the firm of (.....)” after his name.
5. Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description “trading as (.....)” after his name.
6. Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorized to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.
7. Where the Defenant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian ad litem.
8. A Defendant acting in person may obtain help in completing the form at the Courts Office.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. OF 2020

BETWEEN:

CAYMAN CONTEMPORARY CONSTRUCTION LTD

Plaintiff

and

MR. TOBIN PRIOR

Defendant

**ACKNOWLEDGMENT OF SERVICE
OF WRIT OF SUMMONS**

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

Important. Read the accompany directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1. State the full name of the Defendant by whom or on whose behalf the service of the Writ is being acknowledged.

2. State whether the Defendant intends to contest the action.

Yes

No

3. If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (tick box)

Yes

No

Service of the Writ is acknowledged accordingly.

Defendant's Signature

Dated this ____ day of _____, 2020

Please complete overleaf

Notes on address for service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of limited company, "residence" means its registered or principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.