



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
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CAUSE NO: 568 OF 2008

7 **BETWEEN:** (1) **PAUL MYERS**  
8 (2) **CAROLYN MYERS**

**PLAINTIFFS**

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11 **AND:** (1) **ROBERTSON DESIGN BUILD LIMITED**  
12 (2) **JAMES ROBERTSON**  
13 (3) **SUSAN ROBERTSON**

**DEFENDANTS**

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19 **Coram:** The Hon. Mr. Justice Foster, QC

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21 **Appearances:** Mr. Colm Flanagan of Nelson & Co. for the Plaintiffs and Mr.  
22 Nicholas Fox of Harneys for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

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24 **Heard:** 22<sup>nd</sup> February 2010  
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28 **RULING**  
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31 1. This an application by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to set aside a default judgment  
32 dated 25<sup>th</sup> March 2009 giving judgment for the Plaintiffs against the 2<sup>nd</sup> and 3<sup>rd</sup>  
33 Defendants jointly and severally for damages and interest to be assessed, together  
34 with costs. The Plaintiffs' claim arises out of an agreement ("the Purchase  
35 Agreement") dated 11<sup>th</sup> April 2007 between the Plaintiffs as purchasers and the  
36 First Defendant as vendor and developer for the purchase by the Plaintiffs of a  
37 condominium, garage and associated facilities in a development to be built at  
38 Pedro, Savannah, Grand Cayman for a total purchase price of US\$1,472,750. In

1 accordance with the Purchase Agreement the Plaintiffs made payments in April  
2 and May 2007 totalling US\$220,912.50 as down payments towards the purchase  
3 price (together “the Down Payment”). The Down Payment equalled 15% of the  
4 purchase price.

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6 2. The Purchase Agreement provided *inter alia* that in the event that construction of  
7 the development had not commenced by 30<sup>th</sup> June 2007 either party could rescind  
8 the Purchase Agreement by giving notice to the other and in that event the  
9 Plaintiffs, were entitled to return of the Down Payment together with interest.

10 The Purchase Agreement also provided by Clause 24 that:

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12 *“The down payment shall be used by the vendor solely for the purpose of*  
13 *constructing the development”.*

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16 3. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants failed to serve a defence to the Plaintiffs’s Writ and  
17 Statement of Claim timeously in accordance with the Grand Court Rules (GCR).  
18 Reasons for the delay are contained in the affidavit evidence which exhibit  
19 various email exchanges between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant’s then attorneys and  
20 then the 2<sup>nd</sup> Defendant personally on the one hand and the Plaintiffs’ attorneys on  
21 the other hand. I do not propose to go into the detail of these exchanges in this  
22 Ruling, suffice it to say that extensions of time were requested of the Plaintiffs’  
23 attorneys by or on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who were for some of the  
24 relevant time in the process of seeking to change their attorneys and consequently  
25 for a period they were for practical purposes party litigants. It seems to me that  
26 the Plaintiffs’ attorneys did not always take that sufficiently into account. It also

1 seems to me that while they were strictly entitled to apply for default judgment  
2 pursuant to the GCR, the Plaintiffs or their attorneys could have done more to  
3 bring to their attention to so apply and the consequences thereof to the attention of  
4 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants at the time. Furthermore, having obtained the default  
5 judgment there was then a significant delay of some 2 months on the part of the  
6 Plaintiffs attorneys in bringing the fact that a default judgment had been granted  
7 to the attention of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. However, there was then a delay of  
8 almost 3 months on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and/or their present  
9 attorneys in filing their application to set aside the default judgment, which first  
10 came before the Court in August 2009, at the same time as the Plaintiffs'  
11 application for assessment of damages pursuant to the default judgment.

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13 4. GCR O.13, r.9 provides that "*the Court may, on such terms as it thinks just, set*  
14 *aside or vary any judgment entered in pursuance of this Order*", [i.e. a default  
15 judgment]. The provisions of the former RSC in England are in precisely the  
16 same terms. It is accepted that these provisions give the Court a wide discretion  
17 to set aside or vary a default judgment in appropriate circumstances. A default  
18 judgment is clearly not a judgment on the merits of the case or made by consent  
19 of the parties but is a judgment granted purely in consequence of the breach of the  
20 procedural rules by the defendant and the provisions of GCR O.13, r.9 make it  
21 clear that the intention is to enable the Court to revoke what is an "expression of  
22 its coercive power" (see *Evans v Bartlam* [1937] AC 473).

1 5. In my view, although expressed from time to time in slightly different language,  
2 the test, as set out both the English and Cayman Islands cases, to be applied in an  
3 application like this is reasonably clear. It has been expressed both negatively and  
4 positively; negatively in that the Court should only refuse to set aside a default  
5 judgment if the defendant has “no real prospect of success” in his proposed  
6 defence to the action; positively in that the Court should only set aside a default  
7 judgment if the defendant can show that he has real prospect of success in his  
8 proposed defence. In the Cayman Islands case of Default Judgment [1990] 2 CI  
9 Law Bulletin, Collett C.J. stated that the most important element in considering an  
10 application to set aside is whether the defendant has shown a “triable issue of law  
11 or fact” and the proposed defence must be “fairly arguable”. That approach was  
12 also followed by Smellie J. (as he then was) in Fiduciary Management Services  
13 Ltd. v Intermediate Securities Limited [1992–1993] CILR 1 in which he  
14 determined that there was a triable issue and that it would therefore be unjust to  
15 let the matter go by default.

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17 6. The Plaintiffs claim that construction of the development had not commenced by  
18 30<sup>th</sup> June 2007 in accordance with paragraph 4 of the Purchase Agreement, that  
19 the First Defendant has failed to return to them the Down Payment with interest  
20 and that the First Defendant is therefore in breach of contract. They claim too that  
21 the 2<sup>nd</sup> Defendant is also a party to the Purchase Agreement and accordingly in  
22 breach of contract himself. Alternatively, the Plaintiffs claim that the 2<sup>nd</sup> and 3<sup>rd</sup>

1 Defendants, as the sole directors of the First Defendant, induced or caused the  
2 breach of contract by the First Defendant.

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4 7. The Plaintiffs also claim that by virtue of Clause 24 of the Purchase Agreement  
5 the First Defendant was a trustee for the Plaintiffs in respect of the Down  
6 Payment and that the First Defendant holds the Down Payment monies on a  
7 Quistclose trust. They contend that the Plaintiffs remain the sole beneficial  
8 owners of the Down Payment monies. They allege that the First Defendant did  
9 not use the Down Payment monies solely for the purpose of constructing the  
10 development as required and that the First Defendant is therefore in breach of  
11 trust. The Plaintiffs further claim that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, as sole directors  
12 of the First Defendant (and in the case of the 2<sup>nd</sup> Defendant as a party to the  
13 Purchase Agreement), were aware of the terms of the Quistclose trust and that  
14 they accordingly knowingly assisted the First Defendant in its breach of trust.  
15 Finally, the Plaintiffs claim that they are entitled in the circumstances to pierce the  
16 corporate veil of the First Defendant and to compensation by the 2<sup>nd</sup> and 3<sup>rd</sup>  
17 Defendants personally in respect of the Down Payment monies, which they  
18 contend have been misappropriated by one or other or all of the Defendants.

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21 8. Together with their affidavits in support of their application to set aside the  
22 default judgment, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have exhibited a draft defence to the  
23 Plaintiffs' statement of claim. For the hearing before me Counsel for the parties  
24 each submitted a lengthy principal skeleton argument and also a lengthy

1 supplementary skeleton argument, all of which I have now read twice. The  
2 hearing before me took a whole day.

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4 9. In the end of the day the issue between Counsel was whether the 2<sup>nd</sup> and 3<sup>rd</sup>  
5 Defendants' draft defence and their affidavits filed in support of their set aside  
6 application disclose no real prospects of success in defending the action on their  
7 part, or no real likelihood that the proposed defence will succeed or that there is or  
8 is not a triable issue of law or fact on which the proposed defence is founded.  
9 Counsel for the Plaintiffs argued also that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants affidavit  
10 evidence did not support the facts which they plead in their proposed defence,  
11 which accordingly does not meet the requisite degree of conviction.

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13 10. In the course of argument each Counsel went into considerable detail in analyzing  
14 and, in the case of Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, seeking to undermine  
15 and, in the case of Counsel for the Plaintiffs, seeking to support, the various  
16 grounds, which I have outlined, on which the Plaintiffs' claims are based and the  
17 pleading of those grounds in their statement of claim.

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19 11. It is well established that an application of this nature is not intended to be and  
20 should not be in effect a trial of the issues. I do not think it necessary for me to go  
21 into all of the arguments at this stage. Suffice it to say that there is a clear dispute  
22 in particular as to the interpretation of the Purchase Agreement in several  
23 respects, particularly as to whether the 2<sup>nd</sup> Defendant is a party to the Purchase  
24 Agreement for these purposes, what is meant by the term "construction" in the  
25 context, whether construction, however defined, had or had not started by the due

1 date and whether the Down Payment had or had not been utilized solely for the  
2 purpose of construction. There is also considerable argument about what  
3 constitutes a Quistclose trust and whether the Down Payment is held by the First  
4 Defendant on such a trust for the benefit of the Plaintiffs. There are also  
5 contested issues concerning the alleged personal liability of the 2<sup>nd</sup> and 3<sup>rd</sup>  
6 Defendants as directors of the First Defendant, amongst other issues. In my view,  
7 unless satisfied that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants case in respect of these issues  
8 clearly has no real prospect of success, choosing between the parties' respective  
9 arguments in relation to those issues is the function of a trial judge. None of these  
10 issues are straightforward or are easily resolved in the circumstances of this case  
11 and to my mind they are eminently triable.

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13 12. Having heard the extensive arguments of both Counsel and having considered  
14 again their principal and supplementary skeleton arguments I am satisfied that the  
15 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have demonstrated a sufficiently persuasive arguable case  
16 which has a sufficient degree of conviction that it cannot be said that their  
17 proposed defence has no real prospect of success or is not triable. Without in any  
18 way seeking to reach a concluded view on any of the arguments, I did find the  
19 submissions of Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sufficiently convincing that  
20 in my assessment of the justice of the case the default judgment should be set  
21 aside and the matter should go to trial.

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23 13. However, as I have already pointed out GCR O.13, r.9 does empower the Court,  
24 in its discretion, to set aside such a judgment on such terms as it thinks fit. While

1 I do not consider the delay in bringing on the application to set aside the default  
2 judgment is entirely attributable to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, nonetheless I am  
3 concerned that there appears to me to have been a degree of failure on their part to  
4 co-operate in bringing the Plaintiffs' claims to trial as expeditiously as they  
5 should and an inclination by them to seek to avoid the matter for as long as  
6 possible. Whether this is entirely due to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants personally  
7 themselves or due to the conduct of their previous and present attorneys is hard to  
8 assess and is perhaps not relevant. I do not consider this delay in itself to be a  
9 sufficient reason to change my view that in all the circumstances the matter  
10 should go to trial and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should be entitled to defend the  
11 action. However, in my opinion this should only be on the basis that the matter is  
12 now brought to trial as soon as possible but also on the condition that the 2<sup>nd</sup> and  
13 3<sup>rd</sup> Defendants should make a significant payment into Court, which bears some  
14 relation to the sum sued for; this to be a pre-condition of the default judgment  
15 being set aside.

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17 14. In all the circumstances therefore and in the exercise of my discretion I order that,  
18 subject to my comment below, the default judgment dated 25<sup>th</sup> March 2009  
19 should be set aside and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should have leave to file and  
20 serve and their draft defence. However, this shall be on condition that no later  
21 than Friday 26<sup>th</sup> March 2010 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall pay into Court the  
22 total sum of US\$110,450, being approximately one half of the Down Payment in  
23 issue, and notice of such payment in shall be served expeditiously on the

1 Plaintiffs' attorneys. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' proposed defence as exhibited  
2 to the 2<sup>nd</sup> Defendants' affidavit shall be filed and served within 3 working days  
3 after such payment into Court and the Plaintiffs shall file and serve any Reply to  
4 the Defence within 14 days after service if it. Counsel for the parties should apply  
5 as soon as possible for further appropriate directions in order to bring this matter  
6 on for trial expeditiously. There shall anyway be general liberty to apply. The 2<sup>nd</sup>  
7 and 3<sup>rd</sup> Defendants shall pay the Plaintiffs' costs of and incidental to the  
8 application to set aside the default judgment in any event, such costs to be taxed if  
9 not agreed.

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14 Dated 23<sup>rd</sup> February 2010  
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Hon. Justice Angus Foster QC  
Judge of the Grand Court