

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3
4 **Cause No: G 104/2015**
5

6 **BETWEEN:**

7 **MICHAEL WITTER**

8
9 **APPELLANT/DEFENDANT**

10
11 **AND:**

12 **COX LUMBER LIMITED**

13
14 **RESPONDENT/PLAINTIFF**

15
16
17 **Appearances:**

18 **Mr. Clyde Allen for the Appellant**

19 **Mr. Alex Davies of HSM for the Respondent**

20 **Before:**

21 **Mr. Justice Alastair Malcolm Q.C. (Actg.)**

22 **Heard:**

23 **23rd February 2016**

24
25
26 **JUDGMENT**

- 27 1. This is an application for leave to appeal and, if granted, an appeal against the
28 decision of Acting Magistrate Angelyn Hernandez on 12th June 2014 to refuse
29 an application to set aside a default judgment in this case.
- 30 2. The facts in this case are as follows.
- 31 3. The Appellant is the owner of a construction company called M&R
32 Construction and the Respondent, amongst other goods, supplies building
33 materials.
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1 4. Some years before 2009 the Respondent granted the Appellant a credit account.
2 According to the affidavit sworn by the Appellant, Mr. Witter, the three people
3 who were authorised to sign for goods on credit were Washbourne Lawrence,
4 Treverine Ebanks and himself. At no stage, he claims, was anybody else
5 authorised to sign for goods. That is disputed by the Respondent and, in an
6 affidavit, one of the Respondent's sales representatives, Michael Taylor, swears
7 that a number of the Appellant's employees had general authority from the
8 Appellant to sign for goods. Mr. Taylor avers that he had pressed the Appellant
9 to come in to Cox Lumber and update the authorised signatories.

10
11 5. Mr. Taylor also says that every invoice sent to charge account customers has
12 terms on the reverse which include:

13 *"Buyer agrees to notify seller within 10 days of receipt of monthly statement*
14 *of any discrepancy in billing. Failure to so notify Cox Lumber signifies*
15 *acceptance and responsibility for prompt payment".*
16

17 Mr. Taylor avers that no such notifications of discrepancies were received by
18 the Respondent.
19



1 6. Julie Hydes, a credit manager for the Respondent, in her affidavit, says that it
2 was in 2009 that the Appellant's company began defaulting on the payments
3 and no payment was made for two years. She says that the Respondent asked
4 the Appellant to come in and sign a Promissory Note. She says she told him
5 that unless he started periodic payments and signed the Promissory Note the
6 Respondent would commence proceedings.

7
8 7. It is agreed that the Appellant signed the Note on the 20th May 2011. The terms
9 of the note included:

10 a. The Appellant promised to pay CI\$9,015.29 (the principal amount) plus
11 interest at 18% per annum;

12
13 b. The Appellant was to pay CI\$300 on the 4th June 2011 and similar and like
14 payments on the 4th day of each successive month thereafter until the Note
15 is paid in full;

16
17 c. The principal amount of this Note represents an aggregate of amounts of
18 existing indebtedness that the (Appellant) freely admits are due and owing;

19
20 d. The occurrence of any of the following shall constitute an event of default
21 under this Note: The failure of the Appellant to make any payment when
22 due under this note (time being of the essence of this note).
23
24



1 8. A payment of CI\$1,300 was made in June 2011 and a further payment of
2 CI\$300 was made in July 2011. No further payments were made after the July
3 2011 payment.

4
5 9. The Respondent filed a suit in the Summary Court on the 29th July 2013. On the
6 18th October 2013 a Default Judgment was entered against the Appellant for
7 him to pay the Respondent:

8
9 a. CI\$8,691.42 – being the principal sum due;

10
11 b. CI\$8,408.76 – pre-judgment interest calculated from 1st January 2010 to
12 27th September 2013 at the rate of 18% per annum in accordance with the
13 terms of the credit agreement.

14
15 c. Post judgment interest from the 28th September 2013 at the rate of 18% per
16 annum in accordance with the terms of the credit agreement.

17
18 10. On 11th April 2014 the Appellant filed a Summons to set aside the default
19 judgment on the basis that he had a good defence to the claim.

20
21 11. The Appellant's Draft defence filed with the Summons asserted the following:

22
23 a. The Appellant had not acquired the goods and materials from the
24 Respondent;

25
26 b. The goods and materials were obtained without the Appellant's authority
27 and contrary to the credit agreement between the Appellant and the
Respondent;

1 c. The goods and materials had been obtained and used by Christopher Brown
2 in the course of a building contract between Christopher Brown and Fame
3 Verona and Carlos Sandoval;

4
5 d. Christopher Brown was not an approved signatory and the goods and
6 materials had been obtained without the Appellant's knowledge or consent;

7
8 e. On the 10th December 2009 the Appellant entered into an agreement to
9 complete the contract that Christopher Brown had not fulfilled.

10
11 12. In relation to the Promissory Note, the draft defence asserted that the Appellant
12 agreed to sign the note subject to being provided with documents to support the
13 items purchased for use on the property, but no such documents were provided
14 by the Respondent.

15
16 13. The summons to set aside was supported by an affidavit sworn by the Appellant
17 on the 11th April 2014 and two documents. The first is dated 10th December
18 2009 and is said to be evidence of the Appellant and M & R Construction
19 taking over the contract that Christopher Brown had failed to complete. The
20 second is an undated typed letter addressed to the Appellant's Attorney. The
21 first paragraph of the letter states:





1 *"I Christopher Brown ask (sic) Barrington Parker to get some material*
2 *from Cox Lumber for a project that I was working on. The materials were*
3 *credited on the account of M & R Construction Ltd without the knowledge*
4 *of Michael Witter"*.

5
6 The letter ends:

7 *"I gave monies to Mr Barrington Parker a co-worker of the same company*
8 *to pay the bill at Cox Lumber, due to the fact that he was the one that*
9 *credited the material from Cox"*.

10
11 The name Christopher Brown is typed at the end and there is a signature which
12 could be C Brown.

13
14 14. Prior to the hearing of the Summons on the 11th June 2014 the Respondent
15 served affidavits which included one sworn by Christopher Brown on the 10th
16 June 2014 in which he swears that the Appellant was fully aware of the project
17 to construct the house for Farne Verona and Carlos Sandoval and that the
18 Appellant authorized him to sign documents on behalf of the company.
19 Christopher Brown further asserts that he was authorized by the Appellant to
20 purchase materials and charge them to the Company's account generally and,
21 specifically, in relation to the construction of the house. Finally, Christopher
22 Brown says that the he paid the amount due for the materials and goods
23 obtained from the Respondent to the Appellant.

24

1 15. Mr Allen on behalf of the Appellant raises two matters in relation to the service
2 of this and the other affidavits by the Respondent. The first is that the affidavits
3 did not reach the Appellant until the day of the hearing. The second is that,
4 despite the Respondent having the letter purporting to come from Christopher
5 Brown since 11th April, nowhere in his affidavit does Christopher Brown deal
6 with it. He neither denies sending it nor explains its contents. In relation to the
7 former I have some sympathy for the Appellant but it is the latter that is of
8 more importance for this appeal.

9
10 16. The Appellant raises three main grounds of Appeal:

11
12 a. The learned Acting Magistrate erred, in that, she failed to properly consider
13 the tests to be applied.

14
15 b. The learned Acting Magistrate placed too much emphasis on the delay in
16 applying to set aside the judgment rather than whether there was an
17 arguable case for the defence.

18
19 c. There was a triable issue on the face of the documents, namely the letter
20 purporting to come from Mr. Brown as against the contents of Mr. Brown's
21 affidavit with which the learned Acting Magistrate did not deal in her
22 judgment.

23
24 17. There is sufficient substance in those grounds for me to grant leave to appeal.
25



1 18. The test I have to consider is that contained in *Alpine Bulk Transport Co Inc v*
2 *Saudi Eagle Shipping Co Inc*¹ in which Sir Roger Ormrod having reviewed
3 *Evans v Bartlam*² said at p. 223

4
5 *“In our opinion therefore to arrive at a reasoned assessment of the justice*
6 *of the case the Court must form a provisional view of the probable outcome*
7 *if the judgment were to be set aside and the defence developed. The*
8 *arguable defence must carry some degree of conviction.”*
9

10
11 19. It must not be forgotten that this is an action on the Promissory Note and the
12 primary defence put forward is that it was conditional on the provision of
13 documents supporting the alleged debt. The circumstances in which the debt
14 occurred are only relevant in as much they are evidence to support the cases of
15 the Appellant and Respondent as whether it was conditional or not.

16
17 20. What is the evidence that the Appellant signed the Promissory Note
18 conditionally?

19
20 21. It comes solely from the affidavit sworn by the Appellant. The Appellant never
21 raised the issue in writing at the time of signing or at any stage thereafter until
22 the action had been started, judgment entered and enforcement proceedings had
23 commenced.



1 Lloyds Report [1986] Vol2 221
2 [1937] AC 473

1 22. Mr. Allen, counsel for the Appellant, is correct when he submits that delay, *per*
2 *se*, cannot be a reason for not setting aside a judgment when there is an
3 arguable defence. However, the fact that the defence was not raised until very
4 late in the proceedings is a factor I am entitled to consider when deciding if the
5 defence carries “some degree of conviction”.

6
7 23. Before I do take the delay into account I must consider any explanation for the
8 delay. Mr Allen submits that the Appellant did not seek any legal advice until
9 the enforcement proceedings had commenced, and that the Appellant is a
10 builder and paperwork is not his forte.

11
12 24. The Appellant asserts that he signed the Promissory Note on condition that he
13 was provided with the supporting paperwork. It was a term of the Note that he
14 should pay CI\$300 on the 4th June 2011 and similar payments on the 4th day of
15 each month thereafter. Despite not receiving any paperwork the Appellant paid
16 CI\$1,300 in June and a further CI\$300 in July. That is over 5 months’ worth of
17 payments paid *without* chasing the Respondent for the missing paperwork. In
18 his affidavit the Appellant does not explain those payments.

19
20 25. The Respondent’s case is contained in the Affidavit of their Credit Manager,
21 Julie Hydes, who swears that:

22
23 *“prior to signing the promissory note I showed him all the invoices that*
24 *amounted to the sum owed on the note, in the amount of CI\$9,015.29.”*
25



1 26. As to the background, the Appellant's case is contained in his affidavit,
2 supported he says by the two documents I have referred to above. The
3 document dated the 10th December 2009 has nothing in it to indicate that the
4 house building project was a frolic of Christopher Brown which the Appellant
5 was taking over on that date. It states that it is a contract between Fame Verona
6 and Carlos Sandoval on the one part, and M & R Construction on the other,
7 concerning the payment of the balance of US\$16,597.13 on completion by 16th
8 December 2009. The only explanation for the contract is contained in the final
9 paragraph which says:

10 *"This is due to complications and timeframes set by M & R Construction*
11 *given to the client and the bank which has not been met on their part over*
12 *the last few months. This is the final contract."*

13 27. The only support for the assertion that this was Christopher Brown's project of
14 which the Appellant was not aware is the undated letter addressed to Mr. Allen
15 purporting to come from M.r Brown. It is a letter that can only have come into
16 existence after Mr. Allen was instructed in 2014. There is, neither evidence of
17 its provenance, nor any explanation in the Appellant's affidavit.
18

19 28. The Respondent's case is supported by affidavits which assert that the
20 Appellant knew Mr. Brown was signing for goods and materials for this house
21 building project and agreed to it being done.
22



1 29. In my judgment it is inconceivable that the Appellant did not question the
2 monthly invoices when they came in, especially as he states in his affidavit:

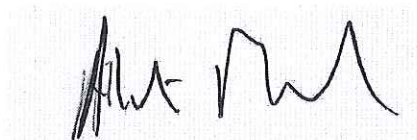
3 *“M & R would only purchase goods on credit if it had been awarded a*
4 *contract to develop a property and the funds were to be paid by way of*
5 *draw-down at some later stage, otherwise I would never acquire such goods*
6 *as we would not have the funds and thus could not pay for them”*

7
8 30. Further it is inconceivable if he was only signing the Promissory Note
9 conditionally, and that he would pay CI\$1,600 without receiving the
10 documentation or, at the very least, without chasing the Respondent for the
11 documentation.

12
13 31. For those reasons, in my judgment, the defence put forward by the Appellant
14 does not, in Sir Roger Ormrod’s words *“carry some degree of conviction.”*

15
16 32. It follows therefore that this appeal is dismissed.

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18
19 **Dated this the 3rd June 2016**

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22 **Mr. Justice Alastair Malcolm Q.C. (Actg.)**
23 **Acting Judge of the Grand Court**

