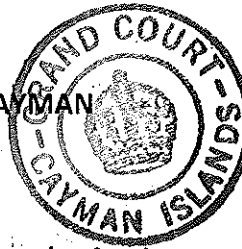


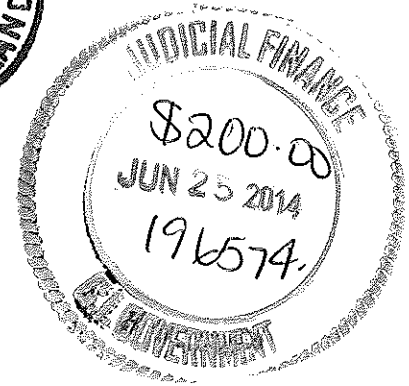
SCA 2/2014
IN THE GRAND COURT OF THE CAYMAN ISLANDS
ON APPEAL FROM THE SUMMARY COURT, GRAND CAYMAN
Grand Court Cause no: 104 2014
CASE NO: SC 179/2013



MICHAEL WITTER – Appellant/Defendant

v

COX LUMBER LTD – Respondent/Plaintiff



NOTICE OF APPEAL

TAKE NOTICE that I Micheal Witter, intend to appeal against the Order of the Summary Court made on 12 June 2014

The Grounds of Appeal are as follows:-

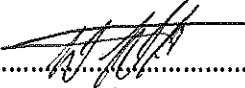
1. The Learned Judge erred in that she failed to properly consider the tests to be applied as set out in the various authorities including *Day v Royal Automobile Club Motoring Services Ltd 1 WLR P2150* ("*Day*") against the evidence placed before her in support of the application to set aside the Default judgment.
2. The Learned Judge erred in her judgment in that having considered the affidavit evidence, she respectfully erred in that she did not consider the draft Defence and the tests to be applied against it which was whether there was an arguable case for the defence. Further, at page 4, lines 1 to 5 of the Judgment, the Learned Judge states "...does the evidence give the court some degree of conviction." whereas the test should be "The "arguable" defence must carry some degree of conviction".
3. The Learned Judge erred in that she failed to consider whether there was an arguable case as set out in the Defence which the court was invited to review and placed too much weight on the facts of the delay in applying to set aside the judgment in Default rather than whether or not there was as set out in *Day* and others an arguable case for the defence. There are set out issues which conflict with the Plaintiff's case, amount to negligence on the part of the Plaintiff in failing to monitor who was purchasing goods of the Plaintiff's company account, a failure to make disclosure of the invoices prior to and after the signing of the Promissory Note and evidence of collusion and fraud against the Defendant contrary to the basic principle, in short, that he who seeks equity must come with clean hands.
4. That the Learned Judge erred in that she considered and tried issues of fact on evidence from the affidavits of one side verses the other when that was in fact a function of the

trial judge and not the judge hearing the set aside application in a case where the issues will turn on the assessment of the facts at trial.

5. The Learned Judge erred in that she has failed to understand the basic facts and what apparent findings of fact made by her, albeit inappropriately found, were not based on actual or any evidence. For instance, where on page 3, line 4 to 7 of the Judgment, the Learned Judge states the court does not accept the Defendant's lack of knowledge because he signed the Promissory Note and thus the Court found that the Defendant accepted that the company and thus the Defendant owed the funds is to fail to consider the evidence as to why such a Note was signed and the fact that the Defendant signed such a document on the understanding that the documents to support the claim, that is the invoices, would be provided to the Defendant. When such documents were not supplied to the Defendant no further payments were paid under the Promissory Note. Some invoices were provided on the day of the hearing of the set aside application.
6. The Learned Judge erred in her assessment of the reason for the delay that she placed no or insufficient weight on the reason and thus time it took for the Defendant to obtain disclosure of the documents and from the time of receipt of the HSBC documents which then clearly identified that other employees were moonlighting and signing documents to assist a developer to secure a loan to complete a development. It is the case for the Defendant that on learning of this contract, it formed the basis for the Defendant's belief that items were being purchased on credit without his knowledge and contrary to a written agreement with the Plaintiff as to the employees of the Defendant who could secure the purchase of material on credit as the Plaintiffs were in breach of their own agreement not to award credit to the Defendant unless to designated employees (contributory negligence)
7. The Learned Judge has erred in that she having considered the evidence wrongfully concluded and found and thus misunderstood what the Defendant would have known in August 2013 when the Plaintiff was filed verses what the Defendant learnt in April 2014 on receipt of the documentary evidence from HSBC and the specific facts set out by an employee explaining that other employees were moonlighting to support a Defence to the Plaintiff as the Defendant did not have a full understanding of the work being completed by his own employees outside the terms of their contract of employment with his company until such time and thus a reason being provided as to why material was being acquired on credit under the name of his company without his knowledge or authorisation for use for such other work. The Plaintiff relies on this latter witness to support its case when in fact that evidence contradicts an earlier statement made by him to the Defendant.
8. The Learned Judge has erred in that she has failed to understand that the Defendant is not saying he was not aware of the constructions of the home by or about December 2009. What the Defendant has never been shown in order to verify the claim and the same has not been seen by the court are all of the invoices as the Defendant has

repeatedly requested sight of the invoices and the invoices were not forthcoming. As stated above and which should have been apparent to the court is that the signing of the Promissory Note was conditional on sight of the invoices which had never taken place. There was no evidence before the court that any or all of the invoices to support the claim had been provided to the Defendant at the time before or after the signing of the Promissory Note.

DATED this 25 day of June 2014



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Appellant's signature

This Notice of Appeal has been lodged on behalf of the Defendant, Micheal Witter.