

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No.

568/08

Between:-

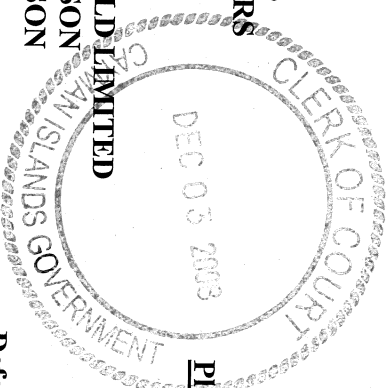
(1) PAUL MYERS
(2) CAROLYN MYERS

-and-

(1) ROBERTSON DESIGN BUILD LIMITED
(2) JAMES ROBERTSON
(3) SUSAN ROBERTSON

Plaintiffs

Defendants



WRIT OF SUMMONS

TO: ROBERTSON DESIGN BUILD LIMITED, JAMES ROBERTSON AND SUSAN ROBERTSON
of P.O. Box 31988 SM, Harbour Place, 103 South Church Street, Grand Cayman, Cayman Islands.

THIS WRIT OF SUMMONS has been issued against you by the above named Plaintiffs of 9 Coral Stone Club SMB, P.O. Box 30105, Grand Cayman KY1-1201 in respect of the claims set out on the next page.

Within 14 days after service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495, George Town, Grand Cayman, KY1-1106 the accompanying Acknowledgement of Service stating therein whether you intend to contest these proceedings.

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

Issued this 3rd day of December 2008.

NOTE this Writ may not be served later than 4 calendar months beginning with that date unless renewed by order of the Court

IMPORTANT

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

STATEMENT OF CLAIM

Parties

1. The Plaintiffs are members of the public who contracted with and deposited money on trust with the First Defendant in the circumstances set out below.
2. The First Defendant is a company incorporated in the Cayman Islands with registration number 154845 and its registered office at P.O. Box 31988 SM, Harbour Place, 103 South Church Street.
3. The Second and Third Defendants are directors and officers of the First Defendant. The Second Defendant was also a party to the relevant contract with the Plaintiffs as set out below.

Background

4. On 11 April 2007 the Plaintiffs entered into a contract (“the Agreement”) with the First and Second Defendants for the purchase of a condominium that was to be constructed on land located in Savannah Registration Section, Parcels 28D276, 28D277, 28D278, 28D279 and 28D280. The Agreement is attached as Annex A to this Statement of Case.
5. The Plaintiffs will rely at trial on the full terms and conditions of the Agreement. Without prejudice to the generality of this reliance, the Plaintiffs rely in particular upon the following terms and conditions of the Agreement:
 1. *The Vendor hereby agrees to sell and the Purchaser(s) hereby agrees to purchase the Residence for a price (the “Purchase Price”) of one million four hundred seventy two*

thousand seven hundred fifty United States Dollars (US\$1,472,750.00), of which the sum of one hundred thousand United States Dollars (US\$100,000.00) is paid on the date hereof as a partial down payment to the Vendor. A further down payment of one hundred twenty thousand nine hundred twelve United States Dollars and fifty cents (US\$120,912.50) shall be paid on or before May 1 2007. Combined, these two deposits are equal to 15% of the Purchase Price and referred to hereinafter as 'Down Payment'.

4. *In the event that construction of the Development has not commenced by 30 June, 2007 the Vendor or the Purchaser(s) may rescind this Agreement by giving notice to the other party provided that no notice may be given after construction of the Development has commenced. Upon the Agreement being so rescinded, the Purchaser(s) shall be entitled to a return of the Down Payment, together with all interest at 1% over US Prime, that may have accrued thereon, but not to any further compensation, costs or otherwise.*

16. *Time shall be of the essence of this Agreement and each and every part hereof.*
23. *This Agreement shall be governed and construed according to the laws of the Cayman Islands and the parties hereto submit to the jurisdiction of the courts of the Cayman Islands.*
24. *The Down Payment shall be used by the Vendor solely for the purposes of constructing the Development.*

29. *James Robertson is a party hereto in his capacity as a party to the JV.*

6. In accordance with their obligations under the Agreement, the Plaintiffs made a payment of US\$100,000 to the First Defendant on 11 April 2007, and made a further payment of US\$120,912.50 to the First Defendant on or about 1 May 2007 (collectively hereinafter "the Monies").
7. In accordance with clause 24 of the Agreement the First Defendant was a trustee of the Monies for the Plaintiffs and held the money on an express purpose (Quistclose) trust as described in that clause. The Plaintiffs remain the sole beneficial owners of the Monies.
8. Construction of 'the Development', as defined within the Agreement, did not commence by 30 June 2007 and has still not commenced at the present date.
9. On 10 September 2008 the Plaintiffs' Attorneys sent a letter to the First Defendant (for the attention of the Second Defendant) in the following terms:

Kindly note we are instructed by Paul and Carolyn Myers in connection with their pre-construction contract with you dated 11 April 2007, a copy of which we enclose for ease of reference.

It is noted that construction has not commenced within the specified date and this letter is to give you formal notice that our clients have rescinded the Agreement. Pursuant to paragraph 4 of the Agreement, our clients now require repayment in full of their Down Payment, i.e. US\$220,912.50, together with all interest at 1% over U.S. Prime accrued thereon.

The repayment of the Down Payment and interest should be made by bank draft, payable either to Mr and Mrs Myers or this firm and should be delivered or made available for collection (on notice) within 7 days of the date of this letter. In default,

appropriate legal action may be commenced forthwith and without further notice to you.

10. In the premises, the Plaintiffs thereby rightfully and properly rescinded the Agreement in accordance with clause 4 thereof.
11. Notwithstanding the rescission of the Agreement, the First and/or Second Defendant have refused to make repayment of the Monies to the Plaintiffs, or to give any good reason to the Plaintiffs as to why such payment is not forthcoming, or to clarify to the Plaintiffs the present location of the Monies. In fact, in a telephone conversation with the First Plaintiff on 18 September 2008, the Second Defendant stated that the Monies had been spent, although no explanation of precisely how the Monies had been spent was provided.

Contractual claims

12. In breach of clause 4 of the Agreement, the First and/or Second Defendant have failed to make repayment of the Monies to the Plaintiffs. The Plaintiffs hereby seek damages for breach of contract against the First and/or Second Defendant equivalent to the sum that is due to be repaid to the Plaintiffs under clause 4, i.e. the sum of US\$220,912.50 plus interest as described in the Agreement (i.e. 1% above US Prime).
13. Further or alternatively the Plaintiffs are entitled at common law to repayment of the Monies by virtue of rescission of the contract. Rescission entitles the Plaintiffs at common law to return of the Monies, plus interest at a rate to be determined by the court.

Claim in tort against Second and Third Defendants

14. Further or alternatively, if, as indicated by the Second Defendant on 18 September 2008, the

Monies have been applied by the First Defendant in breach of contract, that breach of contract will have been induced and caused by the acts of the Second and/or Third Defendants.

15. The Second and Third Defendants are the sole directors and officers of the First Defendant. The Second and Third Defendants were aware of the terms of the Agreement and in particular clause 24 thereof which provided that the Monies were not to be applied for any purpose other than for the construction of the Development.

16. Any misapplication of the Monies by the First Defendant could only have taken place at the instigation of and via the acts of the Second and/or Third Defendant, who could only have acted in that manner in the knowledge that the application of the Monies for any purpose other than the construction of the Development was a breach of contract by the First Defendant and/or the Second Defendant.

17. In those circumstances the Plaintiffs would have a claim against the Second and/or Third Defendant for the tort of inducing a breach of contract. The Plaintiffs will claim damages for this tort in the sum of the Monies plus interest on the Monies as the court deems just.

18. The Plaintiffs will plead further in relation to this cause of action upon receipt of the Defence and/or proper and full disclosure of documents by the Defendants. The reason the Plaintiffs are not able to plead further at this stage is the refusal of the Defendants to explain clearly and precisely what has happened to the Monies.

Breach of trust/fiduciary duty claims

19. Further or alternatively, clause 24 of the Agreement made clear that the First Defendant was to hold the Monies for the specific and sole purpose of constructing the Development. The

Monies were not permitted to be used for any other purpose.

20. In the premises the Monies were paid to the First Defendant pursuant to a Quistclose trust (i.e. a trust as described by the House of Lords in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567). The First Defendant was accordingly a trustee of the Monies with power to apply the Monies only for purpose of constructing the Development.
21. The construction of the Development did not commence as contractually agreed and, with the rightful rescission of the Agreement by the Plaintiffs, the purpose of the Quistclose trust has now failed and the Plaintiffs are entitled to immediate return of the Monies (plus any interest generated by the Monies whilst held by the First Defendant). The First Defendant's failure to return the Monies is a breach of trust. The Plaintiffs hereby claim return of the Monies plus interest.
22. The Second and Third Defendants, as officers of the First Defendant (and, in the case of the Second Defendant, as a party to the Agreement) were aware of the terms of the trust upon which the Monies were held and, in their position as officers of the First Defendant, owed a duty of trust and confidence to the Plaintiffs to ensure that the Monies were not wrongly applied, or applied for a purpose which benefited themselves but not the Plaintiffs.
23. If, as indicated by the Second Defendant on 18 September 2008, the Defendants or any of them have applied the Monies in breach of trust and/or fiduciary duty, the Plaintiffs hereby claim all relevant proprietary remedies to recover the Monies. The Plaintiffs will seek to follow or trace the Monies as appropriate and will assert beneficial entitlement over any asset or assets purchased by the Defendants or any of them with the Monies.

24. The Plaintiffs will plead further in relation to these causes of action upon receipt of the Defence and/or proper and full disclosure of documents by the Defendants. The reason the Plaintiffs are not able to plead further at this stage is the refusal of the Defendants to explain clearly and precisely what has happened to the Monies.

Piercing the corporate veil

25. Yet further or alternatively, if the Second and/or Third Defendant has misappropriated the Monies, the court is entitled to pierce the corporate veil and order them to personally recompense the Plaintiffs for the Monies that have been misappropriated. Such a course of action is justified where officers of a company have acted with deliberate impropriety, and/or where it would be contrary to the interests of justice to refuse the plaintiffs a remedy against the officers directly, and/or where the corporate structure is no more than a façade or sham concealing the true position.

26. The Plaintiffs will plead further in relation to these causes of action upon receipt of the Defence and/or proper and full disclosure of documents by the Defendants. The reason the Plaintiffs are not able to plead further at this stage is the refusal of the Defendants to explain clearly and precisely what has happened to the Monies.

No waiver of right to pursue criminal prosecution

27. All of the above remedies are claimed without prejudice to the Plaintiffs' rights to pursue a criminal prosecution against the Second and/or Third Defendants once the full facts emerge which justify that course of action, i.e. should it emerge that the Second and/or Third Defendants have wrongfully appropriated the Monies for their own purposes.

AND THE PLAINTIFFS CLAIM:-

Against the First Defendant:

1. Damages for breach of contract in the sum of US\$220,912.50 plus contractual interest at 1% above US Prime from 1 May 2007 to date; alternatively
2. Compensation for breach of trust in the sum of US\$220,912.50 plus interest from 1 May 2007 at such rate as the court thinks just and equitable.
3. All relevant equitable proprietary remedies to recover the Monies, including but not limited to following the Monies or tracing them into any assets purchased therewith.
4. Interest pursuant to s.34 of the Judicature Law (2004 Revision);
5. All necessary consequential orders, accounts and inquiries;
6. Costs;
7. Further or other relief.

Against the Second Defendant

1. Damages for breach of contract in the sum of US\$220,912.50 plus contractual interest at 1% above US Prime from 1 May 2007 to date; alternatively
2. Damages for the tort of procuring a breach of contract, in the sum of US\$220,912.50 plus interest from 1 May 2007 at such rate as the court thinks just and equitable; alternatively

3. Compensation for breach of fiduciary duty in the sum of US\$220,912.50 plus interest from 1 May 2007 at such rate as the court thinks just and equitable.
4. All relevant equitable proprietary remedies to recover the Monies, including but not limited to following the Monies or tracing them into any assets purchased therewith.
5. Interest pursuant to s.34 of the Judicature Law (2004 Revision);
6. All necessary consequential orders, accounts and inquiries;
7. Costs;
8. Further or other relief

Against the Third Defendant

1. Damages for the tort of procuring a breach of contract, in the sum of US\$220,912.50 plus interest from 1 May 2007 at such rate as the court thinks just and equitable, alternatively
2. Compensation for breach of fiduciary duty in the sum of US\$220,912.50 plus interest from 1 May 2007 at such rate as the court thinks just and equitable.
3. All relevant equitable proprietary remedies to recover the Monies, including but not limited to following the Monies or tracing them into any assets purchased therewith.
4. Interest pursuant to s.34 of the Judicature Law (2004 Revision);
5. All necessary consequential orders, accounts and inquiries;

6. Costs;

7. Further or other relief

Dated the 30 day of December 2008


NELSON & COMPANY
Attorneys-at-law for the Plaintiffs

TO: The Clerk of the Courts

AND TO: The Defendants

This Writ and Statement of Claim was issued by Nelson & Company, Attorneys-At-Law for the Plaintiffs, whose address for service is P.O. Box 2075, 31 The Strand, 46 Canal Point Drive, Grand Cayman, KY1-1105, Cayman Islands

In the Grand Court of the Cayman Islands

Cause No. _____

Between:-

(1) PAUL MYERS
(2) CAROLYN MYERS

Plaintiffs

-and-

(1) ROBERTSON DESIGN BUILD LIMITED
(2) JAMES ROBERTSON
(3) SUSAN ROBERTSON

Defendants

**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 accompanying 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 intend to contest the proceedings (tick appropriate box)
 Yes No

3. If the claim against the Defendants 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

Signed

Attorney for

Address for service:

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 a 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.

Nelson & Company
Attorneys at Law
PO Box 2075
31 The Strand
46 Canal Point Drive
Grand Cayman KY1-1105
CAYMAN ISLANDS
Attn: Roger Nelson

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

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 495G, George Town, Grand Cayman.
2. A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings *must also serve a defence* on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

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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 within 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 Acknowledgment, but he must, within 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

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 authorised 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 Defendant 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.