IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO G 216 OF 2016

BETWEEN:

ROLANDO HYDES AND DAWN HYDES
TRADING AS GREEN VALLEY NURSERY

Plaintiffs

AND:

1. EMPIRE DEVELOPMENT COMPANY LIMITED

1st Defendant

2. LEWIS EBANKS

2nd Defendant

IN CHAMBERS

Appearances: **Mr. Phillip Ebanks, Attorney at Law on behalf of the Plaintiffs**
Mr. Lewis Ebanks, Director, for the 1st Defendant and in person

Before: **Hon. Justice Marlene I. Carter Actg.**

Date of Hearing: **17th November 2017**

HEADNOTE

Civil Division *– Agreement for provision of services – Liability of Defendants – Liability of Operator/Director of a Company – Piercing the Corporate veil*

JUDGMENT

1. The Plaintiffs are the owners of a plant and nursery business. The 1st Defendant is a real estate development company, and the 2nd Defendant is sued in his capacity as the sole director and shareholder of the 1st Defendant. It is accepted by the parties that the 2nd Defendant was at all material times the operator of the 1st Defendant.

2. The Plaintiffs allege that during the period 25th November 2014 and November 2015 that Green Thumb Nursery provided plants and nursery services to the Defendants at their request. The Plaintiffs state that they invoiced the Defendants for the work done. The Plaintiffs' claim arises from the alleged non-payment of invoices that were issued during this period, which the Plaintiffs claim resulted in an outstanding balance due to the Plaintiffs of CI$21,754.30.

3. The Writ of Summons filed herein sets out that the Plaintiffs wrote to the Defendants through their attorneys requesting payment of the outstanding sums. There was a course of correspondence between attorneys for the Plaintiff and the 2nd Defendant and a demand made for payment of the outstanding balance. However, it remains that the entire figure is still outstanding, and the Plaintiffs now seek, by this claim, payment of the debt, interest, and costs.

4. The Defendants filed a defence in this matter on the 15th of March 2017 in which they deny that the Plaintiffs were entitled to any of the relief claimed. The Defendants alleged that no plant and nursery services were provided to the 2nd Defendant as claimed and that substantial portions of the plant and nursery services that were provided by the Plaintiffs and for which invoices that form part of the instant claim were issued, were for the benefit of a company that was not added as a defendant in the proceedings.

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5. There were three witnesses at trial, for the Plaintiffs, Rolando Hydes and his wife Dawn Hydes, and Lewis Ebanks on behalf of both Defendants. It was agreed that the affidavits of the witnesses filed in support of their case would stand as the evidence-in-chief of the respective witnesses.

6. Oral closing submissions were made by attorney for the Plaintiffs and Mr. Lewis Ebanks for the defendants. Mr. Lewis Ebanks also asked the court to consider "*notes*"[1] on behalf of each defendant that had been submitted prior to the start of the trial as part of the closing submissions of the Defendants.

7. There are two main issues which arise for this court's consideration:

(1) Whether the 2nd Defendant was properly joined as a party on this claim, and

(2) Whether the defendants were liable to the Plaintiffs for the amount of the debt claimed, together with interest and costs.

[1] Notes for trial filed by the Defendants on the 15th November 2017

IS THE 2ND DEFENDANT PROPERLY JOINED AS A PARTY IN THESE PROCEEDINGS?

8. For the 2nd Defendant it was argued that the court should find that there was no legal claim or basis for a claim against him directly. The 2nd Defendant contends that he has no legal liability to the Plaintiffs by dint only of his being the sole director of the First Defendant, that there is no contract pleaded against him in his personal capacity. The 2nd Defendant therefore questioned the basis upon which he had been joined in the claim.

9. The 2nd Defendant's arguments were as follows:

(i) There is a wealth of case law to show that the corporate veil cannot and should not be lifted easily.

(ii) The Plaintiffs have failed to set out any of the grounds or the evidential or other basis on which the sums claimed are pursued as against the 2nd Defendant. There is no basis set out to lift the corporate veil and particularly no allegation of fraud or dishonesty or serious misconduct of any kind is set out – there is not even any mention of lifting the corporate veil in the pleaded case;

(iii) The claim, in any event, fails to distinguish what sums are claimed against which Defendant which means that if the claims fail as against the 1st Defendant they should automatically fail against the 2nd Defendant;

(iv) In relation to the 2nd Defendant, the claims should be struck out in any case as having no basis in law and not being pleaded in any clear basis anyway.

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10. The capacity of the parties was addressed in this way in the pleadings. Paragraph 2 of the Writ of Summons was as follows:

> *"The 1st Defendant is a company incorporated in the Cayman Islands dealing in the development of real-estate properties. The 2nd Defendant, the sole director and shareholder of the 1st Defendant and was at material times the operator or the 1st Defendant. The business postal address of P O Box 1009, Grand Cayman, KY1-1001 was the billing address of the 1st and 2nd Defendants. The 1st and 2nd Defendants are collectively referred to herein as "the Defendants"."*

11. In response to these particulars, the defence stated at Paragraph 3:

> *"...it is admitted that the 2nd Defendant was at all material times the operator of the 1st Defendant insofar as the 2nd Defendant understands this to mean that he was acting in his capacity as sole-director of the 1st Defendant. It is denied that the 2nd Defendant is the sole-shareholder of the 1st Defendant."*

12. The Plaintiffs reply was as follows:

> *"The Plaintiff asserts that the 1st and 2nd Defendant is well aware of the Plaintiff's business having contracted with them to provide services which form the basis of this action."*

13. In his evidence-in-chief, Mr. Ebanks stated that:

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> *"Also, any plant and nursery services provided to the Snug Harbour Villas and Hilton Estates projects, to which the Plaintiffs is strictly put to proof of would have been requested in my capacity as director of Mirage and Empire respectively, and I reject any assertion by the Plaintiff that I am personally liable for the plants and nursery services provided to Mirage and Empire. I am, for the reasons set out in the above two paragraphs, of the opinion that I have been incorrectly added as a Defendant in my personal capacity to these proceedings and believe that my addition as a Defendant was done for the sole purpose of pressuring me personally."*

14. It is clear that the Plaintiffs recognised the role of the 2nd Defendant as it related to the 1st Defendant. An examination of the evidence of the Plaintiffs makes this quite apparent. In his evidence-in-chief Rolando Hydes gave evidence that:

> *"We were approached by Lewis Ebanks **acting on behalf of Empire Development** Company Limited ("**Empire**") to provide plants and gardening/landscaping services to him and Empire in connection with developments which Lewis was undertaking in the Islands."*[i]

15. Other aspects of his evidence are also relevant:

> *"From approximately 15 December 2008 to 16 November 2015, we supplied plants and gardening services to him and to Empire Development through him. **When Lewis corresponded with us he did so either through his name, signing emails and letters as such, or on headed notepaper or headed email correspondence headed with the name of Empire Development Company.** With that in mind the contract that we, as the Company, had to supply plant and gardening services, was with either Lewis Ebanks or Empire Development Company, of which he represented to us that he was the sole director of.*

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If Lewis Ebanks or Empire Development Company then used our plants or directed our services to properties or locations owned by other companies I am not aware of that occurring. I did not receive any correspondence from either Lewis Ebanks or Empire Development Company in which it was signed by either another party or another company or gave any indication that the plants and/or gardening services were being supplied to anyone other than Lewis Ebanks or Empire Development Company."

"Whenever plant or gardening services would be supplied, Dawn or I would be told to issue the invoices to Empire Development Company, Lewis Ebanks, P.O. Box 1009, Grand Cayman, KY1-1001."

"On or about the 6th November 2015, ***I met with Lewis Ebanks to discuss the outstanding debt and other matters related to other monies that he owed Dawn and I through his Company, Empire Development.*** *We met in Camana Bay. During the conversation he accepted he owed us the amount outstanding above and he said he would pay shortly."*

16. For the Plaintiffs it was asserted that the Defendants named in the action were both proper parties to the contract based upon the evidence. Counsel for the Plaintiffs submitted that the Court should look to the normal business relationship between the parties and to the way in which the business was conducted between them. He asked the Court to find that the authorities submitted by Mr. Ebanks were not relevant and that there was never a denial by Mr. Ebanks that he was not liable for the payments prior to the commencement of the instant action.

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THE LAW

17. It is trite law that a company is a separate legal entity as distinct from its members so that it is separate at law from its shareholders and directors. Where the liability of the members is limited, they cannot be held liable for the company's debts.[2] A director is not personally liable for contracts which may bind the company for whom he acts as agent. The circumstances in which a director can be held personally responsible for a company's debts and liabilities are limited and generally arises in instances where the director has acted improperly and not in the best interests of the company.

18. ***Prest v Petrodel Resources Limited and others***[3] is often cited as the main authority on piercing of the corporate veil. In ***Prest*** Lord Sumption stated as follows:

> *"Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In* ***Salomon v A Salomon and Co Ltd*** *[1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company."*
>
> *"The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law. ...In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. ...I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. The difficulty is to identify what is a relevant wrongdoing."*

19. After identifying two distinct principles the Learned Judge went on to define these:

> *"The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or*

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[2] Salomon v Salomon & Company [1897] AC 22

[3] [2013] UKSC 34

> *perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant."*

The Learned Judge continued went on:

> *"...The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement."*

20. In ***Dave Persad v Anirudh Singh***[4] the Privy Council was faced with a question of whether the appellant was liable to the claimant for sums due under a lease which the claimant had granted to a company, Chicken Hawaii (Trinidad) Ltd. ("CHTL"). The facts of that case are that the claimant negotiated with the appellant for the lease of certain premises. The lease was prepared by the appellant and it named the lessor as the claimant and the Lessee as CHTL. The court accepted that there had been no mention of CHTL during the negotiations and the inclusion of the company as lessee was neither questioned nor challenged by Mr. Singh at the time of execution. Two years later Mr. Singh issued proceedings for possession and arrears of rent as well as damages for breach of contract. CHTL and the appellant were named as defendants. Judgment was given against both defendants in the High Court and the Court of Appeal.

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[4] (Trinidad & Tobago) [2017] UKPC 32

21. The Privy Council noted that the lower courts had justified their conclusions as to the liability of both defendants on the basis that CHTL was only formed after discussions as to the level of rent for the leased premises, that the appellant did not draw the identity of CHTL or even its existence to Mr. Singh's attention before the lease was sent to be executed and that the appellant took possession of the leased premises personally from the start. However, their Lordships did not agree that piercing the corporate veil was justified in those circumstances. The Board referred to the decisions of the Supreme Court in ***VTB Capital Plc v Nutritek International Corpn***[5] and in ***Prest***. Lord Neuberger agreed with the explanation advanced by Lord Sumption in ***Prest*** that piercing the corporate veil can be justified only where:

> *"...a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control"*

22. While reiterating that the piercing of the veil is only justified in very rare circumstances, the Court found on the facts that Mr. Singh:

> *"...cannot get near establishing any evasive or frustrating action on the part of Mr. Persad."*

23. Further the court referred to ***Salomon v A Salomon and Co. Ltd***[6] and reiterated:

[5] [2012] 2 Lloyd's Rep. 313

[6] [1897] AC 22

> *"That case also exposes the fallacy of the notion that the court can pierce the veil where the purpose of an individual interposing a company into a transaction was to enable the individual who owned or controlled the company to avoid personal liability. One of the reasons that an individual ... will take advantage of limited liability is to avoid personal liability if things go wrong. ...If such a factor justified piercing the veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice."*[7]

THE COURT'S CONCLUSIONS

24. This Court finds that the circumstances of this case do not lend themselves to a finding of any attempt at concealment or evasion on the part of the 2nd Defendant so as to invite the court to pierce the corporate veil. They do not arise on the evidence. Instead this is a case in which the Plaintiffs, because of the manner in which they invoiced the 1st Defendant for the work done, has unwittingly joined the 2nd Defendant to the action seemingly without fully appreciating the effect of the 1st Defendant being a separate legal entity from the 2nd Defendant, its director and operator. There was no proper appreciation that their having entered into an agreement with the 1st Defendant for the provision of gardening services, that they could not thereby impute liability to the 2nd Defendant, who, as the director of 1st Defendant, was acting only as its agent, solely on that basis.

[7] Per Lord Neuberger at Paragraph 20

25. The Plaintiffs averred that "*the 2nd Defendant is sued in his capacity as the sole director and shareholder of the 1st Defendant. The 2nd Defendant was at all material times the operator of the 1st Defendant.*" The 2nd Defendant is not liable, without more, for the debts of the 1st Defendants in any of those roles. The Plaintiffs have led no evidence that the 2nd Defendant should be held personally liable for the debts of the Company and I find that he is not so liable. The 2nd Defendant has been improperly joined in these proceedings and I dismiss the claim against him.

ARE THE DEFENDANTS LIABLE AS CLAIMED?

26. In light of my findings on the first issue, I will go on to consider the liability of the 1st Defendant only.

27. For the avoidance of doubt the 2nd Defendant is referred to as Mr. Ebanks for the balance of this judgment.

28. I will consider the actions, evidence and submissions from Mr. Ebanks solely as agent of the 1st Defendant.

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THE EVIDENCE OF ROLANDO HYDES

29. Mr. Hydes is a director of the Green Valley Nursery together with his wife. Mr. Hydes in his evidence described the relationship between himself and Mr. Ebanks. He stated that they had gone to school together from primary school. That they were childhood friends and that Mr. Ebanks had been the best man at his wedding and was the godfather to one of his grandchildren. Mr. Hydes described that his company extended credit to the 1st Defendant and Mr. Ebanks and that Mr. Ebanks always paid on a monthly basis. He stated that the 1st Defendant and Mr. Ebanks never disputed the invoices that his company would issue for works done, neither had he made any claim that invoices were wrongly issued. Specifically, with regard to the amounts which form the basis of the Plaintiffs' claim, Mr. Hydes stated:

> *"When I raised the sum total of the outstanding monies he never disputed they were incorrect. He never disputed that wrong plants were delivered or anything to do with the orders at any point before litigation progressed."*

30. In his evidence in chief he further stated:

> *"We were approached by Lewis Ebanks acting for Empire Development Company Limited ("**Empire**") to provide plants and gardening/landscaping services to him and him and Empire in connection with developments which Lewis was undertaking in the Islands."*

> *"I did not receive any correspondence from either Lewis Ebanks or Empire Development Company in which it was signed by either another party or another company or gave any indication that the plants and/or gardening services were being supplied to anyone other than Lewis Ebanks or Empire Development Company."*

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"Whenever plant or gardening services would be supplied, Dawn or I would be told to issue the invoice to Empire Development Company, Lewis Ebanks, P.O. Box 1009, Grand Cayman, KY1-1001."

31. Mr. Hydes further stated that after a demand for payment of the alleged debt was made, that Mr. Ebanks wrote to him stating that he expected to have the debt settled in November or December 2015. Also, that he met with Mr. Ebanks on the 6th November 2015 to discuss the outstanding debt. He states that during the conversation, Mr. Ebanks accepted that he owed the amount outstanding and said the he would pay shortly. Mr. Hydes detailed other attempts made to recover the monies and also that Mr. Ebanks would always assert that he would shortly make the payments on the outstanding debt.

32. Under cross-examination by Mr. Ebanks the Plaintiff maintained that the amounts were never disputed although he did concede that it was his wife the 2nd Plaintiff who did the invoicing for the Green Valley Nursery.

33. Mrs. Hydes also gave evidence in chief, which did not differ from that given by her husband. In cross-examination Mr. Ebanks questioned her about a discrepancy on an invoice which involved another company, namely Mirage Development Ltd. Mrs. Hydes admitted that there had been a discrepancy in the invoicing for Mirage Development on one occasion. However, Mrs. Hydes stated clearly in re-examination that the two invoices which related to Mirage Development were no part of the instant claim.

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34. Mr. Ebanks' witness statement was accepted as his evidence-in-chief on behalf of the Defendant. In his evidence-in-chief, Mr. Ebanks asserted that both Empire Development Ltd and Mirage Development Ltd were the relevant companies associated with the instant matter. He asserted:

> *"Time was not of the essence in any alleged contractual agreement between the parties. Empire, Mirage and me personally were the Plaintiff's largest clients and continued to critically support their nursery for many years. Though the years an understanding between the parties developed whereby costs for plants and nursery services, which are usually completed at the end stage of a real estate development, will occasionally be paid once the net sales proceeds are received after closing on the properties. This is further supported by a failure on any of the invoices appended to the Plaintiff's Statement of Claim (the "**invoices**") to reflect a due date for payment.*
>
> *The Plaintiff has failed to properly particularize the invoices. There is an intermingling of alleged plant and nursery services provided for the Hilton Estates project, The Snug Harbour Villas Project and to my personal house as well as my mother's house (the latter two which are located in the district of Spotts on the islands of Grand Cayman). Additionally, when added up, the total amount owing according to the invoices differs from the amount claimed by the Plaintiff in its Statement of Claim, thus creating uncertainty as to what is in fact being claimed by the Plaintiff and which invoices it is relying upon in support of its claim.*
>
> *Also, I am of the opinion that, because the Plaintiff's failed to keep a separation between the Hilton Estates and the Snug Harbour Villas projects, and my and my mother's personal houses on its invoices, only rendering invoices to Empire for the all alleged plants and services provided, the Plaintiff has in fact conjoined multiple causes of action to artificially inflate the total amount claimed, thereby causing this matter to fall outside of the scope triable by the Summary Court.*

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> *Because of the intermingling of various causes of action combined with the understanding between the parties to these proceedings that payment is stayed until the completion of the real estate developments, I am also of the opinion that the Plaintiff's potential claims have not yet crystallized and that these proceedings are premature.".*

35. Additionally, on behalf of the 1st Defendant the Court was invited to dismiss the Plaintiffs' claim as they had failed to provide "*an accurate amount for their claim, or by whom the amounts were owed and under which agreement or project.*"[8] The notes for trial on behalf on the 1st Defendant therefore states that the amount of the claim brought by the Plaintiffs included invoices that relate to deliveries to Snug Harbour for the Mirage Development Ltd Project and not to Hilton Estates for the Empire Development Ltd project, the verbal agreement being for deliveries to Hilton Estates.

36. The 1st Defendant submits that the total of these non-associated invoices was in the amount of CI$6,826.72. The 1st Defendant further contends that the Plaintiffs would have known that the non-associated invoices were for work done for an entity entirely separate from the Defendants.

37. Mr. Ebanks was cross-examined by counsel for the Plaintiffs. He agreed that there was a personal element to his dealings with Green Valley because of his relationship with the Hydes. In reply to counsel Mr. Ebanks denied that the Plaintiffs could have been relying on any assurances for payment made by him of the amounts now due on the instant claim.

[8] As set out in the 1st Defendant's "Note for Trial on Behalf of the First Defendant"

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Mr. Ebanks was shown a letter by counsel in which he had made certain statements regarding payment of the outstanding invoices.

38. He admitted that he intended to make good on the outstanding monies but added that the paragraph following the penultimate paragraph meant that he was not speaking directly to the amounts being claimed, as at the juncture where he wrote the letter he was not sure that the amounts being claimed were correct.

39. Mr. Ebanks admitted that he never indicated to the Plaintiffs that the invoices under consideration in this case were incorrect or needed to be clarified as he states that "*That would have been done upon readiness for payment as it always was.*" Interestingly, when pushed on the cross-examination, he went on to explain that with regard to "*readiness for payment*" that: "*it would be improper for me to speculate or to guess when that would have been.*"

THE COURT'S CONCLUSION

40. The outstanding invoices are not in dispute, except to the extent that the 1st Defendant alleges that some of the outstanding invoices are in respect of deliveries relating to Mirage Development Ltd and therefore that any such invoices included in the amount claimed by the Plaintiff, are not properly part of the instant claim. This Court has viewed all of the invoices which form the basis of the Plaintiffs' claim. They are all billed in the name of Empire Development Ltd and Lewis Ebanks. The invoices evidence sufficient particularity to enable the Defendant to understand the specifics of the claim and as well to enable this Court to determine whether the amounts claimed by the Plaintiffs represent what was billed for the services that the Plaintiffs contend that they rendered to the 1st Defendant.

41. Mirage Development Ltd does not appear on any of the invoices. There are notations that suggest that some of the services took place at Snug Harbour,[9] however the fact that the 1st Defendant never disputed that the services provided at that location were not provided for the benefit of Empire Development, is detrimental to his defence at trial. The Plaintiffs freely admit that they also provided services to Mirage Development. I believe their evidence that the services provided as evidenced by the invoices attached to their claim were provided to Empire Development at the locations indicated therein. I reject the arguments advanced on behalf of the 1st Defendant that there were any "*non-associated invoices*" included in the Plaintiffs' claim.

42. The 1st Defendant's next point of contention is focused on the history of being able to dispute matters on the invoices. That has not been questioned or denied by the Plaintiffs. It is clear on the evidence that the Defendant has never, in relation to the invoices which form the subject matter of the claim, indicated to the Plaintiffs that they wished to dispute the invoices in part or at all or that this was the reason for non-payment. I accept the evidence of the Plaintiff on this point.

43. I accept the Plaintiffs' evidence that the arrangement was for a monthly payment of invoices and for a line of credit being extended thereafter. Mr. Ebanks simply states that the payments would be made upon closings and his being able to retain a net profit.

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[9] See Invoices # 666, 668, 664 and 589

44. There is no doubt in this Court's mind that the 1st Defendant is liable to pay the outstanding sum. Whether or not there were discrepancies on the invoices does not remove the legal obligation to pay any valid invoices for services rendered, once account has been taken of such discrepancies. The 1st Defendant could not point to any discrepancies on the invoices in this case. Mr. Ebanks did not suggest to either of the Plaintiffs any particular discrepancies and I find that there are no discrepancies for my consideration.

45. I also believe the Plaintiffs that the 1st Defendant has never questioned the invoices for the services provided that form the basis of the claim in this case, before the claim was filed. Mr. Ebanks' position before this point was to simply state that he was not in a position to pay them at the time that the Plaintiffs made their demand for payment, and that the Plaintiffs should have realised from previous dealings that he would have paid them, and therefore there was no need to bring the present action. That reasoning may work well for the 1st Defendant, but it does not for the Plaintiffs who are entitled to payment for their services.

46. It appears to this Court that it is the time for payment that the 1st Defendant disputes. In his witness statement which was introduced as his evidence-in-chief in this matter, Mr. Ebanks expressed that: "*time was not of the essence in any alleged contractual agreement between the parties.*"[10] All of the evidence points to this not being the case. The evidence of demands for payment, the meetings of the parties to discuss these and the assurances given all contradict Mr. Ebanks on this point.

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[10] See paragraph 9 of the Witness Statement of Lewis Ebanks

THE COURT'S ORDER

(1) The 1st Defendant is liable to the Plaintiffs in the sum of $21,754.30.

(2) The Plaintiffs are entitled to their costs on the standard basis to be taxed if not agreed.

(3) The Plaintiffs are entitled to interest from the date of filing of the writ of summons until the amount to which they are entitled at a. above has been paid in full.

(4) The claim against the 2nd Defendant is dismissed.

(5) The Plaintiffs shall pay the 2nd Defendant's costs to be taxed if not agreed.

Dated this the 6th April 2018

Carter J (Actg.)
Acting Judge of the Grand Court

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