**[2015] JMSC Civ. 85**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2007 HCV 03924**

| | | |
|---|---|---|
| **BETWEEN** | **JAMES HOGAN** | **1ST CLAIMANT** |
| **AND** | **RENEE LATTIBUDAIRE** | **2ND CLAIMANT** |
| **AND** | **AL-TEC INC LIMITED** | **DEFENDANT** |

Mr Nigel Jones and Ms Kashina Moore instructed by Nigel Jones & Co., for the Claimants/Respondents.

Mrs G. Gibson-Henlin and Ms K. Ruddock instructed by Henlin, Gibson-Henlin for the Defendant/Applicant.

**Heard on: 15th September 2014; 7th and 22nd May 2015**

***Claimant's application for sale of land – Defendants application for judgment to be set aside – Whether judgment irregularly entered – Service of documents – Civil Procedure Rules – Rules 5.11(2), 8.16(1), 12.4, 13.3, 39.6 – Whether different order would have been made had Defendant attended assessment hearing***

**Coram: Morrison, J.**

[1] Long ago, Jenkins, L.J., in **Grimshaw v Dunbar** (1953) 1 ALL E.R. 350 at page 355, had this to say in respect of any verdict or judgment that was obtained against a party who did not appear at the trial and who is seeking to have the judgment or order set aside: "A party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an

order is made in his absence, common justice demands, so far as it can be given effect to, without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to court and present his case, no doubt on suitable terms as to cost".

[2] In the local decision of our own Court of Appeal, in **David Watson v Adolphus Roper** S.C.C.A. No. 42 of 2006, judgment delivered on November 18, 2005, The Honourable Mr Justice K. Harrison, in considering an application to set aside under Rule 36.9 of the Civil Procedure Rules (C.P.R.) determined that, "The predominant consideration therefore for the court, … after a trial in the absence of the applicant, is not whether there is a defence on the merits but the reason why the applicant absented himself from the trial. If the absence was deliberate and not due to accident or mistake, the court will be unlikely to allow a re-hearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation".

The above quotes reflect on the principle of law to be applied provided it is related to the the crux of the matter before the court. If it is not, then it is not applicable.

[3] By way of background, the parties to the claim at bar had entered into an Agreement for the Sale of Land which is referred to as South Sea Park, Westmoreland. It was a cash sale. It was a term of the contract that the Claimants would take the deposits as is set out therein in exchange for the full purchase price and the Duplicate Certificate of Title registered in the name of the purchaser. Further, it was an express term of the contract that the purchaser shall satisfy himself of the boundaries of the said land within twenty eight (28) days of the signing of the contract after which the Purchaser is taken to have accepted the boundaries as if the Vendor was not put on notice to make any rectification required.

[4] The Claimants having obtained a Surveyor's ID report, through their Attorneys-at-Law, wrote to the Defendant's Attorneys-at-Law, indicating that they required that the Certificate of Title be perfected in all respects and asked to know how the Defendant proposed to do so within ten (10) days. Subsequently, the Claimant's Attorneys-at-Law

advised their counterpart, through writing, that their clients were not prepared to accept the title with the defects.

[5] One day after the contractual completion date the Claimants' Attorneys-at-Law communicated in writing to the Defendant by way of a Notice to Complete which said notice gave to the latter seven (7) days within which to do so.

[6] In the end the Claimants' Attorneys-at-Law cancelled the Agreement for Sale having regard to the inability of the Defendant to give good title and generally to comply with a Notice making time of the essence. Consequently, the Defendant's Attorney-at-Law returned the deposit and the Claimant's half costs for preparing the Agreement for Sale.

[7] On the 13th July 2009, final judgement was entered at the Assessment of Damages hearing. It is of significance to note that neither the Defendant, through its representative, nor its Attorney-at-law were present. In the upshot the judgement of the Court as recorded reads: "Upon hearing Mr Nigel Jones, instructed by Nigel Jones & Company, Attorneys-at-laws, for and on behalf of the Claimants and with the Defendant not appearing or being represented:

IT IS HEREBY ORDERED AS FOLLOWS:

1. Special Damages in the sum of $1,987,470.00 at 3% per annum from June 29th, 2007 – 13th July 2009;

2. US $17,700 at 3% per annum from 29th June 2007 – 13th July 2009;

3. General Damages in the sum of $9,053,000.00 with interest at 3% from 13th November 2007 to 13th July 2009; and

4. Costs to the Claimants to be agreed or taxed".

[8] Next, I shall proceed to detail the chronology of events leading up to The Application for Court Orders for Sale of Land.

[9] **THE CHRONOLOGY OF EVENTS IN THE PROCEEDINGS**

1. On October 2, 2007, the Claimants commenced this suit in which they claimed damages for breach of contract.
2. On November 13, 2007, the Claimants filed a Request for Default Judgment ("The Request"), against the Defendant in Default of Acknowledgement of Service. The evidence in proof of service of the relevant documents in support of The Request was provided by a Mr Brenton Brown, Process Server.
3. Interlocutory judgement was signed on July 23, 2008.
4. The Court issued its Notice of Assessment of Damages for hearing on January 28, 2009.
5. On The Assessment For Damages Hearing coming before the Honourable Ms Justice Beckford on April 27, 2009, it was adjourned to July 13, 2009.
6. On July 13, 2009, at The Assessment for Damages Hearing final judgment was entered.
7. On December 12, 2012, the Claimants filed their Bill of Costs.
8. On November 22, 2012, the Claimants obtained a Provisional Charging Order.
9. On May 6, 2013, the Provisional Charging Order was made final.
10. On October 17, 2013, the Claimants filed their Notice of Application for Sale of Land.
11. On June 30, 2014, the Defendant files its Notice of Application For Court Orders.

[10] I shall here now go on to set out the Claim and the Particulars of Claim, if only to highlight the pleadings that the Defendant was expected to respond to upon their receipt.

[11] At this juncture I think that it is expedient that I set out the contents of the Claim Form in full. In doing so I draw attention to the observation that the claim is filed pursuant to Part 8 of the CPR which falls under the rubric, "How to Start Proceedings". It contains sub-head provisions such as, "Particulars of Claim to be issued and served

with Claim Forms" and, directives as to "Service of Claim Forms". Be it also noted that the claim was filed on October 2, 2007 in accordance with Rule 8.1(3) of the CPR.

[12] It reads: "The Claimants James Hogan and Renee Lattibudaire of 6 Dilsbury Avenue, Townhouse #3, Jacks Hill, Kingston 6 in the parish of Saint Andrew claim against the Defendant, Al-Tec Limited, 3 Washington Court, Kingston 8, Jamaica:

1. Damages in excess of JA$198,470.00 and US$17,700.00 (and continuing) being the fees and expenses incurred by the Claimants because of the Defendants breach of contract;

2. Damages amounting to JA$9,053,000.00 and continuing on account of the difference in value of the property at the time of judgment/award and the purchase price.

3. Interest at a commercial rate thereon;

4. Costs;

5. Such further and other relief as this Honourable Court may deem fit."

[13] There then follows an important aspect of the proceedings in the form of a "Notice to the Defendant", which contains thoroughgoing instructions and legal advice for his benefit. It reads:

**"NOTICE TO THE DEFENDANT**

This Claim Form must contain or have served with it either a Particulars of Claim or a copy of a court order entitling the Claimant to serve the Claim Form without a Particulars of Claim.

If you do not complete the form of Acknowledgment of Service served on you with this Claim Form and deliver or send it to the registry (address below) so that it is received within FOURTEEN days of service of the Claim Form on you, the Claimant will be entitled to apply to have judgment entered against you. See Rules 9.2(5) and 9.3(1).

The form of Acknowledgment of Service may be completed by you or an Attorney-at-Law acting for you.

You should consider obtaining legal advice with regard to this claim.

This Claim Form has no validity if it is not served within six months of the date below unless it is accompanied by an order extending the same. See Rule 8.14(1)". (Emphasis mine).

[14] I have gone at length to reproduce the above so as to lay emphatic stress on the point that the Notice warns the Defendant of the consequences of his failure to file an Acknowledgment of Service.

[15] Again, what follows, because of its significance, is also repeated without subtraction: "The Claimant's address for service is that of their Attorneys-at-Law Nigel Jones & Co. at Suite #10, Oxford Place, 22G Old Hope Road, Kingston with telephone number 960-6358 and facsimile number 926-2312". Here, the Claimant is to give information or particulars about which he can avail himself if he intends to serve any document in response.

[16] I shall here advert to the Particulars of Claim which Rule 5.2 of the (CPR) speaks of. The Particulars of Claim, as mentioned above are required to be served with the Claim Form. Its importance is to bring to the Defendant's mind the central issues in dispute and thus the case he has to meet.

[17] Accordingly, I now set out the case that the Defendant had to meet. The Particulars of Claim reads:

> "The 1st and 2nd Claimants are Commercial Director and Homemaker, respectively and reside at 6 Dilsbury Avenue, Townhouse #3, Jacks Hill, Kingston 6 in the parish of Saint Andrew.
>
> 1. The Defendant is a Company duly incorporated under the Laws of Jamaica, which is engaged in the business of providing construction reports and was at all material times and remains the registered owner of all that parcel of land part of

Bruce Hill, Cove Pen, White House and Fustic Grove, now called South Sea Park, in the parish of Westmoreland, being the lot numbered Twenty Three on the plan of Bruce's Hill Cove Pen, White House and Fustic Grove now called South Sea Park aforesaid deposited in the Office of Titles on the 6th day of May 1985 of the shape and dimensions and butting as appears by the said plan thereof and being all of the land comprised in Certificate of Title entered at Volume 1190 Folio 426 of the Register Book of Titles

2. By an Agreement in writing ("the Agreement for Sale") dated the 4th day of May 2007 between the Claimants and the Defendant, it was agreed inter alia:

    (a) that the Defendant would sell the property to the Claimants for the sum of Five Hundred and Eighty Thousand United States Dollars (US$580,000.00) and

    (b) that the sale of the property to the Claimants would be completed on or before the expiration of forty five (45) from the date of the Agreement for Sale;

    (c) that the purchaser shall satisfy himself as to the accuracy of the boundaries of the land for sale, and as to the absence of any breach of Restrictive Covenant and to that end shall have done a Surveyors I.D. report within twenty eight (28) days of the signing thereof, after which the Purchaser is taken to have accepted the boundaries of the land as is, if the Vendor was not put to notice to make any rectification.

3. The Claimants have performed all obligations required of it by the Agreement for Sale prior to completion.

4. It is an implied term of the Agreement that the Defendant would transfer good title to the Claimant and that the Certificate of Title would be perfected in the event that there were defects.

5. In breach of the implied term the Defendant was not in a position to deliver good title because she could not and failed to address concerns raised by a report

dated May 23, 2007 of Andrew A. Bromfield, Commissioned Land Surveyor, which certified, inter alia:

(a) The boundaries **ARE NOT** in general agreement with the plan attached to the aforementioned Certificate of Title (see sketch plan below, Registered Distances and Unfenced Boundaries in Red).

(b) Restrictive Covenants nos. 1-5 as endorsed on the aforementioned Certificate of Title checked. All are in order except Covenant # 11 which is in breach;

(c) If the measurements in the aforementioned Certificate of Title are to stand then the building and the pool COULD BE affected; and

(d) "Remarks: A section of the land is encroaching on the land shown as Section C on deposited plan # 7413.

6. The defects in this Title highlighted by Andrew A. Bromfield were defects which the Defendant either knew of or could reasonably be expected to know of because:

(a) The Defendant was responsible for erecting the building, etc. on the property and would have had to obtain the necessary approvals to construct a pool in the manner constructed:

(b) The Defendant has admitted that many other inhabitants of the surrounding area have committed similar infringements; and

(c) The Defendant would have been knowledgeable of the extent of the property he had purchased in 2004.

7. On the date fixed by the Agreement for completion of the purchase, the Defendant did not have a good and marketable title to the property, in that, inter alia, a significant portion of the pool was constructed on neighbouring government land, which was in no way controlled by the Defendant.

8. Accordingly, the Defendant was unable to complete the sale of the property in accordance with the terms of the Agreement for Sale and the Claimants not being obligated to complete, terminated the contract on June 29, 2007 making time of essence and giving the Defendant Notice to Complete.

9. Alternatively, in breach of the terms of the Sales Agreement, the Defendant failed or refused to complete the sale of property to the Claimants despite the readiness of the Claimants to complete the purchase and despite the Defendant being served with several demands and a Notice to Complete dated June 19, 2007 making time of the essence and requesting that the Defendant complete the sale of the property.

10. As a result, the Claimants have suffered losses".

The particulars of Special Damages are also set out at length. I have done so as the award of damages by the Assessment Court became a fulcrum of attack by the Defendant:

[18] **PARTICULARS OF SPECIAL DAMAGES**

| | | **JA$** | **US$** |
|---|---|---|---|
| A | Informal Valuation Assessment | 7,500.00 | |
| B | Surveyor's Report | 20,970.00 | |
| C | Estimated Fee for Formal Valuation Report | 150,000.00 | |
| D | Attorney's fees in relation to the transaction | 20,000.00 | 8,700.00 |
| E | Rental expenses of Claimant since date of completion and @ US$3,000.00 per month and continuing | | 9,000.00 |
| F | Differences between purchase price of property and value of the property at the date of trial or sooner judgment | 9,053,000.00 | |

| | | | |
|---|---|---|---|
| | **TOTAL** | 9,251,470.00 | 17,700.00. |

[19] In proof that no acknowledgement of service was filed, the Claimants attached the affidavit of their Process Server, Mr Brenton Brown. It too is reproduced:

It is headed **AFFIDAVIT OF SERVICE OF BRENTON BROWN**

It reads:

**"I, BRENTON BROWN,** being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at 407 Westchester Drive, Portmore, in the parish of St. Catherine and I am a Process Server

2. That the Claim Form and Particulars of Claim filed herein were duly served by me on the Defendant at 3 Washington court, Kingston 8 in the parish of Saint Andrew on October 5, 2007 via Registered Mail posted at the King Street Post Office, Region No. 081931 at approximately 01:30 p.m. (attached hereto as "**BB1** is a copy of the Registered Mail Slip".

The Certificate of Posting of A Registered Article, registration number 08913, bearing the date 5th October 2007, addressed to the attention of a Mr Crawford of Al-Tech Inc., Limited of 3 Washington Court, Kingston 8, was displayed as an annexure to the affidavit.

The next significant step in the proceedings was the Request for Default Judgment made by the Claimants on November 13, 2007. In it the Claimants asked, that in view of the fact, that the Defendant did not file an Acknowledgement of Service, that Default Judgment be entered against it. Here is how it was framed.

After remarking that the evidence of Service of the Claim Form was filed with the request, and which was attached, it says, "the Claimants certified that:-

(a) No Acknowledgement of Service has been served on us by the Defendant;

(b) The claim is for an unspecified sum of money and there should be judgment for the payment of an amount to be decided by the court; and

(c) The Claimant is a position to prove the amount of the damages".

[20] The next other significant step was the issuance and service by the Registry of the Notice of Assessment of Damages, dated October 5, 2009, which purports to show that the parties were made aware of what was going to take place in court. Let me now, particularly allude to its contents:

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"NOTICE OF ASSESSMENT OF DAMAGES

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO: 2007 HCV 03924

BETWEEN **JAMES HOGAN** CLAIMANT

**RENEE LATTIBUDAIRE**

AND **AL-TEC INC. LIMITED** DEFENDANT

TAKE NOTICE that the hearing of the Assessment of Damages is scheduled for hearing on Wednesday the 23rd day of January 2009 10:00 a.m.

Estimated Length of Hearing: ½ hr

NB. LISTING OF QUESTIONNAIRE IS TO BE FILED 14 DAYS FROM THE RECEIPT OF THIS NOTICE.

DATED THE 5th DAY OF December 2008

C. Turner

For REGISTRAR

TO: Nigel Jones & Co
Attorneys-at-Law
Unit # 2 Braemar Suites

AND TO: The Defendant
Al – Tech Inc. Limited

1D-1E Braemar Avenue
Kingston 10 ”

[21] Here, it will be observed that no address has been written in for the Defendant. I shall however, make the premature observation that if the Applicant is going to contest that fact then proof that it was not sent and, hence, not received would require some evidence. More on that later

[22] It was pursuant to the Assessment of Damages Hearing and other consequential intervening applications by the Respondents, which culminated in their filing of the Application for the Sale of Land, why this matter has not come to a head.

**THE APPLICATION FOR COURT ORDERS**

[23] The Applicant has sought to move this court, through the above headed application, filed on June 30, 2014 to grant to it certain orders against the fruits of the laboured purchase of the Respondents. They are that –

> “1. The interlocutory judgment in the default of Acknowledgment of Service dated the 23rd July 2008, be set aside.
>
> 2. The Final Judgment and all consequential orders entered on 13th July 2009, be set aside.
>
> 3. The Default Costs Certificate dated the 10th October 2013 whereby the Defendant was ordered to pay the costs in the sum of $864,852.90 be set aside.
>
> 4. The Provisional Charging Order granted on the 22nd November 2012 be discharged.
>
> 5. A Stay of Execution of the final judgment dated the 13th July 2009, and the order for costs dated the 10th October 2013 pending the hearing to set aside the judgments herein”.

[24] The stated grounds on which The Applicant seeks to obtain the said orders are:

a) Pursuant to rule 39.6 herein.

b) That the judgments were irregularly entered.

c) That the Defendant was not served with the documents in accordance with rule 8.16 of the CPR.

d) That the judgments were not served on the Defendant or a director of the Defendant in accordance with any rule or law as required.

e) That the Notice of the trial was not served on the Defendant, if notice of the proceedings was served on the Defendant and the Defendant was present at the trial a different judgement or order would have been made:

   i. The Defendant would have been granted an opportunity to set aside the Default judgment on the basis that it was wrongly entered.

   ii. The Notice of Trial was not served on the Defendant.

   iii. If the Defendant was present at the trial another order would have been made. The Claimants would only be awarded damages for investigation of the title. This is because there is no evidence that they are entitled to an award of damages other than in accordance with the principles in **Bain v. Fothergill.** This case was not cited to the learned judge at the assessment of damages.

   iv. There is no pleading that supports an award of damages on the basis of the ordinary contractual principles which is what was awarded in this case.

f) That to date it is unclear as to whether the final judgment has been served on the Defendant, its servants and or agents.

g) That a bundle of documents were delivered to the premises that is the subject matter of the order for sale and came to the attention of one director Crawford McLeish. It was in those circumstances that this Application in now being made.

h) That the stay is necessary to preserve the subject matter of the Applications and the Applicant's interest therein.

i) That if the stay is not granted the Applicant's will be rendered nugatory and it is likely to suffer irremediable prejudice.

j) That this application is urgent".

[25] I want it to be particularly noted what ground (d) says in the light of the affidavit of Mr. Garfield Whyte filed in support of the Application for Court Orders (The Application).

**SUBMISSIONS BY THE APPLICANT**

[26] In fine the Applicant disputes that there was any service on it of –

(a) The Court issued Notice of Assessment of Damages;

(b) The order made at the Assessment hearing, that is to say, the final judgment;

(c) The Claimants Bill of Costs;

(d) The Provisional Charging Order; and

(e) The Claimants' Default Costs Certificate.

[27] As such The Applicant submits that, first, the interlocutory judgment and all consequential orders be set aside. Second, that The Application was filed within the stipulated time. Third, The Applicant has given a good reason for failing to attend the hearing. Fourth, that it is likely that had it attended the hearing a different Order would have been made.

[28] In support of its submissions The Applicant recruited the undermentioned authorities in support

a) The Civil Procedures Rules, 2002.

b) **Astley v The Attorney General & The Board Of Management Of The Thompson Town High School**, JMCA 2012 CA 128 (Civil Appeal 57 Of 2012).

c) **Morgan-Taylor v Metropolitan Management Transport**, JM [2011] SC 136 (HCV 938 OF 2007)

d) **Dorothy Vendryes v Keane & Anor** [2011] JMCA CIV 15.

e) **Bain v Fothergill** (1870) L.R. 6 EXCH. 59.

f) **Keith Tennant v Alex's Import Limited** [2012] JMCA CIV 15.

g) **Alfred Chambers v Sarah Brown** [2010] JMCA CIV 51.

h) **J.T.M. Construction v Circle B Farms** CLAIM NO. 2007 HCV 05110, JUNE 2009, paragraphs 45-52,

i) **Cable & Wireless JAMAICA LIMITED (T/A LIME) v DIGICEL (JAMAICA) LIMITED**, SCCA 148/2009,

j) **Combi (Singapore) Pte Limited v Ramnath Sriram And Sun Limited**, FC 297/6273/C, judgment delivered on 23/7/1997.

**SUBMISSIONS BY THE RESPONDENTS**

[29] First, the Respondents argue that the judgment filed on November 13, 2007 was regularly obtained.

Second, that the issue of service cannot be resolved on affidavits.

Third, that the Defendant was aware of the Formal Order of November 27, 2012 and was served with the said order that it now seeks to have discharged at the very latest being the date April 23, 2013.

[30] The Respondents attached reliance on the following authorities of –

a. **Coates v Xxtra Lee Supermarket Limited**, JM 2004, SC14.

b. **Capital & Credit Merchant Bank Limited v Lenbert Little-White & Anor**, [2012] JMCC, COMM. 14.

c. **Tulloch v Graham, Beason & Beason**, JM 2005, SC 90.

d. **Ricardo Lewis v Norma Dunn**, SUIT NO C.L. L O98/2001, judgment delivered on 22/6/2004.

e. **The Civil Procedure Rules, 2002**

**THE ISSUES**

[31] The issues spawned by The Application concern –

i. Service within Rule 8.16 of the CPR.
ii. Whether the Application was filed within 14 days of the Judgment or Order being served on the Applicant.
iii. Whether the Applicant has given a good reason for failing to attend the hearing.
iv. Whether it is likely that had the Defendant attended a different Order would have been made.
v. Whether the judgment was irregularly obtained
vi. Whether a stay of Execution of the Final Charging Order should be granted.

[32] I shall now deal with the respective issues. However, for the sake of convenience I shall deal with the Issue of Service as issue #i, issues # ii, iii and iv under the head 'The Application' as issue # 2 while that of v and vi will be dealt with separately.

**ISSUE #1**

[33] I wish to state at the very outset that there can be no doubt that the paramount consideration when once civil proceedings (within the meaning of the CPR) has been commenced by one litigant against another, is that, the former is obliged to bring to that other's attention the fact of that proceedings. I think it is important that I list the steps taken by the Respondents to notify the Applicant at the relevant stages of the proceedings and of the orders made by the court.

[34] I now set out the affidavits of service:

1) Affidavit of service of Brenton Brown dated the 12th day of November 2007 already adverted to.

2) Affidavit of service Devon Lawson dated the 18th day of June 2009.

3) Another Affidavit of service of Devon Lawson dated the 18th day of June 2009.

4) Affidavit of service of Devon Lawson dated the 29th day of June 2009.

5) Affidavit of Sheldon McDonald dated the 10th of April 2013.

6) Affidavit of Cedric Patten dated the 7th day of October 2013.

7) Affidavit of service of Andrew Scott dated the 12th day of June 2014.

8) Affidavit of service of Brenton Brown dated the 11th day of July 2014.

[35] **AFFIDAVIT OF SERVICE OF BRENTON BROWN**

**"I, BRENTON BROWN,** being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at 407 Westchester Drive, Portmore, in the parish of St. Catherine and I am a Process Server

2. That the Claim Form and Particulars of Claim filed herein were duly served by me on the Defendant at 3 Washington court, Kingston 8 in the parish of Saint Andrew on October 5, 2007 via Registered Mail posted at the King Street Post Office, Region No. 081931 at approximately 01:30 p.m. (attached hereto as "**BB1** is a copy of the Registered Mail Slip".

It was sworn to on 12th November 2007 showing registration No. 081931 and that it was posted to the address of 3 Washington Court, Kingston 8 to Al-Tech Inc. Limited.

[36] **AFFIDAVIT OF DEVON LAWSON**

**"I, DEVON LAWSON,** being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at 23 Boulevard Road, Kingston 11, in the parish of Saint Andrew and I am a Process Server.

2. I swear this Affidavit from facts and matters within my own personal knowledge and insofar as they are not within my knowledge, I state the source of the information and say that they are true to the best of my information and belief.

3. That the letter dated September 19, 2008 and the Interlocutory Judgment in Default of Acknowledgment of Service filed herein were duly served by me via registered mail on the Defendant at 2 Washington Court, Kingston 8 in the parish of St. Andrew via registered mail".

It was sworn to on the 18th day of June 2009. Note however that the documents were spoken of at paragraph 3 were served at 2 Washington Court, Kingston 8 and not 3 Washington Court, Kingston 8.

[37] **AFFIDAVIT OF SERVICE OF DEVON LAWSON**

**"I, DEVON LAWSON,** being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at 23 Boulevard Road, Kingston 11, in the parish of St. Andrew and I am a Process Server.

2. I swear this Affidavit from facts and matters within my own personal knowledge as insofar as they are not within my knowledge, I state the source of the information and say that they are true to the best of my information and belief.

3. That the Notice of Adjourned Hearing, Witness Statement of Renee Lattibudaire, Notice of Intention to Tender in Evidence Hearsay Statement made in a Document, filed herein were duly served by me on the Defendant at 2 Washington Court, Kingston 8 in the parish of St. Andrew

on June 11, 2009 via registered mail. Attached hereto as "**DL1**" is a copy of the Registered Mail Slip".

It was sworn to on the 15th June 2009. Note again that the particular documents referred to in paragraph 3 were served at 2 Washington Court.

[38] **AFFIDAVIT OF SERVICE OF DEVON LAWSON**

**"I, DEVON LAWSON,** being duly sworn make oath and say as follows:-

1. That I reside and have my true place of abode at 23 Boulevard Road, Kingston 11, in the parish of St. Andrew and I am a Process Server.

2. I swear this Affidavit from facts and matters within my own personal knowledge as insofar as they are not within my knowledge, I state the source of the information and say that they are true to the best of my information and belief.

3. That the Supplemental Witness Statement of Renee Lattibudaire, filed herein were duly served by me on the Defendant at its registered address at 2 Washington Court, Kingston 8 in the parish of St. Andrew on June 24, 2009 via registered mail. Attached hereto as "**DL1**" is a copy of the Registered Mail Slip".

It was sworn to on the 29th June 2009 and the bundle of exhibits, were displayed. The documents were yet again served at 2 Washington Court.

[39] **AFFIDAVIT OF SERVICE OF SHELDON MCDONALD**

1. That my address for the purpose of this Affidavit is care of Suite 11, Winchester Business Centre, 15 Hope Road, Kingston 10 in the parish of St. Andrew and I am a Bearer.

2. I swear this Affidavit from facts and matters within my own personal knowledge and insofar as they are not within my knowledge, I state the

source of the information and say that they are true to the best of my information and belief.

3. That the Notice of Application for Final Charging Order, filed December 6, 2012, Formal Order filed November 27, 2012, Affidavit in Support of Provisional Charging Order filed November 14, 2012 and a Further Affidavit of Renee Lattibudaire filed November 22, 2012 were served by me on Al-Tech Inc. Limited at 3 Washington Court, Kingston 8 on March 26, 2013 at approximately 2:25 p.m.

4. That I attended the given address, and noticed that the building was closed I then placed the documents, mentioned above, underneath the door. Attached hereto as "**SH-1**" is a copy of the cover letter dated March 22, 2013 which enclosed the court documents.

5. That the Notice of Application for Final Charging Order, filed December 6, 2012, Formal Order filed November 27, 2012, Affidavit in Support of Provisional Charging Order filed November 14, 2012 and a Further Affidavit of Renee Lattibudaire filed November 22, 2012 were served by me by way of Registered Maid on the 26th day of March 2013.

6. That I attended the General Post Office on that dated for the purpose of posting the documents and received a Certificate of Posting of a Registered Articled which is attached hereto as "**SM-2"."**

It was sworn to on the 10th April 2013 and the bundle of exhibits were displayed.

[40] **AFFIDAVIT OF SERVICE CEDRIC PATTEN**

**"I, CEDRIC PATTEN,** being duly sworn make oath and say as follows:-

1. That my address for the purpose of this Affidavit is care of Resident Magistrate Court, Great George's Street, Savannah-La-Mar in the parish of Westmoreland and I am an Assistant Bailiff.

2. I swear this Affidavit from facts and matters within my own personal knowledge and insofar as they are not within my knowledge, I state the source of the information and say that they are true to the best of my information and belief.

3. That the Notice of Application for Final Charging Order filed December 6, 2012, Formal Order filed November 27, 2012, Affidavit in Support of Provisional Charging Order filed November 14, 2012, a Further Affidavit of Renee Lattibudaire filed November 22, 2012, Claimants Bill of Costs dated December 12, 2012 and a Notice to the Defendant dated December 12, 2012 were served by me on Mr Crawford McLeish, the director of the Defendant, Al-Tech Inc. Limited at Lot 23, South Sea Park, Westmoreland on April 23, 2013 at approximately 4:30 p.m. The documents were accepted by Mr Crawford McLeish.

4. That Mr Crawford McLeish was note previously known to me, but identified himself as the Director of the Defendant, and he accepted service of the documents referred to in paragraph 3 above".

It was sworn to on 7th October 2013. There according to paragraph 3 the pertinent documents were served personally on Mr Crawford McLeish, Director of the Defendant at Lot 23 South Sea Park, Westmoreland on April 23, 2013. It is to be observed that Mr Cedric Patten is Assistant Bailiff of the Resident Magistrate's Court, Westmoreland.

[41] **AFFIDAVIT OF SERVICE OF ANDREW SCOTT**

**"I, ANDREW SCOTT,** being duly sworn make oath and say as follows:-

1. That my address for the purpose of the Affidavit is care of Suite 11, Winchester Business Centre, 15 Hope Road, Kingston 10 in the parish of St. Andrew and I am a Process Server.

2. I swear this Affidavit from facts and matters within my own personal knowledge and insofar as they are not within my knowledge, I state the

source of the information and say that they are true to the best of my information and belief.

3. That the Notice of Application for Order for Sale of Land, filed October 17, 2013, an Affidavit in Support of Order for Sale of Land, filed October 17, 2013, an Affidavit of Kashina K. Moore in Support of Application for Sale of Land, filed May 16, 2014 and a Default Cost Certificate, filed October 10, 2013 were served by me on Mr Crawford McLeish the Director for the Defendant at Lot 23, South Sea Park in the parish of Westmoreland on May 3, 2014 at approximately 2:21 p.m. The documents were accepted by Mr Crawford McLeish the Director for the Defendant.

4. Mr Crawford McLeish was not previously known to me, but identified himself by name, and he accepted service of the documents referred in paragraph 3 above".

It was sworn to on 12th June 2014. Again, it is worth noting that Mr Scott alleges that he served Mr Crawford McLeish at the very Lot 23, South Sea Park in the parish of Westmoreland.

**FURTHER AFFIDAVIT OF SERVICE OF BRENTON BROWN**

[42] This affidavit is made ostensibly in respect of the deficiency of the November 12, 2007

Affidavit of Mr Brenton Brown. It reads:

**"I, BRENTON BROWN,** being duly sworn make oath and say as follows:

1. That I reside and have my true place of abode at 407 Westchester Drive, Portmore, in the parish of St. Catherine and I am a Process Server.

2. On or about November 12, 2007 and Affidavit of Service was filed in this matter in which I indicated that the Claim Form and Particulars filed herein were duly served by me on the Defendant at 3 Washington Court, Kingston 8 in the parish of Saint Andrew on October 5, 2007 via

Registered Mail posted a the King Street Post Office, Region No. 081932 at approximately 1:30 p.m. My reference to the Claim Form in that Affidavit included reference to all the attachments filed with it which includes Notice to the Defendant, Prescribed Notes to the Defendant and Acknowledgment of Service Form and Defence".

It was sworn to on 11th July 2014.

[43] It will no doubt be noted that of the eight (8) affidavits, three (3) purport to have been served at 3 Washington Court, Kingston 8, St Andrew; three (3) at #2 Washington Court, Kingston 8, St Andrew; two (2) purport to have been served on a Mr Crawford McLeish, the Director of the Defendant, at Lot 23, South Sea Park, Westmoreland. "The documents" according to the affidavit of Cedric Patten and Andrew Scott were accepted by Mr Crawford McLeish. It is to be observed that Mr Crawford McLeish has not given any affidavit in response to deflect the allegations that he was personally served.

En passant Mr Crawford has not given an affidavit in support of The Application in the face of strong allegations that he was put on notice of the relevant court proceedings. It is more than passingly curious that all that is said about him is that he is ill. Even if he is in extremis certainly an affidavit could have been taken to refute the strong assertions made concerning the case the Defendant had to meet.

**THE LAW**

[44] I hope that I am not perceived as doing an injustice to the parties by not referring to all their cited authorities. By not doing so I bestow the honour to points well made and illustrated but find their reduplication unnecessary.

The CPR sets out its procedure that is to be followed by way of service of its court processes.

Part 8 of the CPR contains guidance as to the procedure to be followed in respect of starting proceedings and the allied adjunct of service of claim forms. In particular Rule 8.13 states that after the claim form has been issued it may be served on the Defendant in conformity with Part 5, which deals with service of the claim form.

[45] Rule 5.1(1)-(2) says that the general rule is that a claim form must be served personally on each Defendant and that the Defendant must be served with a copy of the claim form. Rule 5.2 states that the general rule is that the Claimants Particulars of Claim must be served with the claim form.

[46] Rule 5.3 speaks to the method of personal service while Rule 5.4 speaks to the permitted place of service.

[47] "Proof of personal service is addressed by Rule 5.5: personal service of the claim form is proved by an affidavit sworn by the server stating –

a) The date and time of service;

b) The precise place and address at which it was served;

c) The precise manner by which the person on whom the claim form was served was identified; and

d) Precisely how the claim form was served".

[48] Rule 5.7 deals with service on a Limited Company. It reads "Service on a Limited Company may be effected –

a) By sending the claim form by telex, fax, prepaid registered post, courier delivery or cable addressed to the registered office of the company;

b) By leaving the claim form at the registered office of the company;

c) By serving the claim form personally on any director, officer, receiver-manager or liquidator of the company;

d) By serving the claim form personally on an officer or manager of the company which has a real connection with the claim; or

e) In any other way allowed by an enactment".

[49] Here I will interpose in saying that the Companies Act of Jamaica allows for the service of court documents or certain personages of the Company and which is also referred at rule 5.7 of the C..R. see Section 357.

[50] In speaking about "Proof of Postal Service", Rule 5.11(1) mandates that service by registered post is proved by an Affidavit of Service by the person responsible for posting the Claim Form to the person to be served while, Rule 5.11(2) says that the affidavit must exhibit a copy of the claim form and state the date and time of posting and the address to which it was sent.

[51] As to the "Service of other Documents" and who is to serve documents other than a claim form, Part 6 of the CPR holds sway. According to Rule 6.1(1), "Any judgment or order which requires service must be served by the party obtaining that judgment or order unless the court orders otherwise". Then follows Rule 6.1(2) which says that any other document must be served by a party unless a rule otherwise provides or the court orders otherwise.

[52] In relation to the "Method of Service", it is of note that, any means of service, in accordance with Part 5 is allowed, "Where these Rules require a document other than a claim form to be served on any person …" prepaid post or courier delivery to any address for service in accordance with rule 6.3(1). Other methods of service are allowed suffice it to say, the ones mentioned are apropos to the case at hand.

[53] Rule 6.3(1) demands that the documents be delivered, posted or sent by courier delivery to a party at any address for service within the jurisdiction given by the that party while Rule 6.6 deals with the deemed date of service. It reads that "a document which is served within jurisdiction in accordance with these Rules shall be deemed to be served on the day shown" (in a table) which indicates a period of 21 days after posting for service by post and 21 days after the date indicated on the Post Office receipt for Registered Post.

[54] Again, Part 42 of the C.P.R. is another important part of the service regime. It speaks to the requirement for Judgments and Orders of the Court to be served. Rule 42.5(2) reads: Subject to Paragraph (5), every judgment or order must be drawn up

and filed at the Registry by the party on whose claim or application the order made, unless –

a) the court directs another party to draft and file it;

b) another party with the permission of the court agrees to draft and file it;

c) the court dispenses with the need to draw the judgment or order; or

d) ...

Now, rule 42.6(1) says, "Unless the court otherwise directs the party filing a draft judgment or order in accordance with rule 42.5 must serve the judgment or order is made"... As to the service of the Provisional charging order it is made quite plain what a judgment creditor is to do: where the court makes a provisional charging order the judgment creditor must serve on the judgment debtor in accordance with Part 5, the order and a copy of the affidavit in support of the order: See Rule 48.7.

As far as these affidavit of Brenton Brown is concerned its only deficiency subsequently made right by his second affidavit, was its failure to mention the other relevant documents as being served at the time of the serving of the Claim form particulars of claim.

In respect of all three (3) affidavits of Devon Lawson all are procedurally errant in being "served" at an incorrect address.

Concerning the affidavits of Sheldon McDonald and Cedric Patten it is my view that both are procedurally correct in keeping with rule 48.7 read in tandem with rule 5.13.

Even if I am wrong here, it seems to me that any such procedural error can be corrected as per rule 26.9. In any event the affidavit or Ms Rene Lattibudaire in support of the application for the charging order amply fulfils the dictates of Rule 48.3(2) in all its requirements and in keeping with the directive of Rule 48.5(1)

Accordingly, I am to say that these procedural errors are amenable to Rule 26.9: See **Coate v Xxtra Lee,** *supra.*

**ISSUE #2**

[55] The Applicant relies on Rule 39.6(1) of the CPR in advancing the submission that the judgment which was obtained at the assessment hearing should be set aside.

[56] I now invite attention to what Part 39 of the CPR speaks to. It speaks to "Trials". In particular Rule 39.6(1) allows, "A party who was not present at a trial at which judgement was given or an order made in its absence", to apply to have such a judgment or order set aside.

[57] However, according to sub-clause (2), such an application must be made within fourteen (14) days after the date on which the judgment or order was served on the Applicant. Further, mandates sub-clause (3)(a) and (b), "The application to set aside must be supported by evidence on affidavit showing a good reason for failing to attend the hearing and that it is likely that had the Applicant attended some other judgment or order might have been given or made.

[58] As has been already noted elsewhere, Rule 5.1 deals with the normal method of service of the claim form while rule 5.2 mandates that the Particulars of Claim are to be served with the Claim Form. Rule 5.4 deals with the permitted place of service while Rule 5.7 directs how service on a limited company is to be effected. Be it noted that whatever the allowable means employed, service must be effected at the registered office of the Defendant.

[59] It will also suffice to remind, that Rule 5.11 speaks to the matter of proof of postal service. As to service, affidavit evidence is required from the process server, not only in respect of the date and time of posting, but also, the address to which the pertinent documents were sent.

[60] The above are the lead-in rules to an application whether made under Rule 39.6 or under Rule 12.4 in conjunction with Rule 13.2(1).

[61] Part 12 of CPR addresses Default Judgments. Rule 12.1(1) set out the two circumstances by or under which a Claimant may obtain judgment without trial. One is

that the Defendant has failed to file an acknowledgement of service. Rule 12.4 lays out the conditions that are applicable in that regard –

a) The Claimant proves services of the Claim Form and particulars of claim on that Defendant;
b) The period for filing an acknowledgement of service under Rule 9.3 has expired;
c) That Defendant has not filed –
    i. An acknowledgement of service; or
    ii. A defence to the claim or any part of it;
d) Where the only claim is for a specified sum of money apart from costs and interest, that Defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;
e) …
f) … the Claimant has permission to enter judgment.

[62] A claim for specified sum of money is addressed by Rule 12.8 and is allowed in certain specific circumstances.

Reads Rule 12.8(1): "The fact that the Claimant also claims costs and interest at a specified rate does not prevent a claim from being a claim for a specified sum of money. Here it is worthwhile to observe that a "claim for a specified sum of money" means, inter alia –

a) A claim for a sum of money that is ascertainable or capable of being ascertained as a matter of arithmetic and is recoverable under a contract.
b) …

[63] It is also to be noted that under Rule 12.3 the Defendant's rights following the entry of a Default Judgment is set out; Unless the Defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a Defendant against who a default judgement has been entered may be heard are –

a) Costs;

b) The time of payment of any judgment debt;
c) Enforcement of the judgment; and
d) An application under Rule 12.10(2).

[64] It will be seen that Part 12 of the CPR must be read alongside Part 16. Rule 16.2(1) says, "An Application for a default judgement to be entered under Rule 12.10(1)(b), must state –

a) Whether or not the Claimant is in a position to prove the amount of the damages; and, if so
b) The Claimant's estimate of the time required to deal with the assessment.

Further, the rule continues, "Unless the application states that the Claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the Claimant not less than 14 days' notice of the date, time and place fixed for the hearing.

3) A Claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

4) The registry must then fix:

a) The date for the hearing of the assessment;
b) A date by which standard disclosure and inspection must take place;
c) A date by which witness statements must be filed and exchanged; and
d) A date by which a listing questionnaire must be filed.

[65] Let me return to the Application in its reliance on Part 39 proceedings. It is, as I have noted elsewhere, supported by the affidavit of Mr Garfield Whyte. The Applicant's contention is that under the relevant rule it is a condition precedent for the entry of a default judgment that proper services of all relevant documents be proved. That is, of course, correct.

[66] In support of its contention that the judgment be set aside and that the Application was filed within time, the Defendant has sought to rely on the procedural

errors or default on the part of the Claimants. Insofar as it relates to the service of the judgement on the Defendant it is alleged that, first, there is no evidence of service of the final judgement as there is no affidavit of service. Second, if there is any such affidavit of service, it is likely that the document was returned to the Claimants, uncollected. Third, that there must be given for the Claimants' serving of documents on the Defendant at the property, the subject matter of the claim, and not at the Defendant's registered address. Fourth, that the Claimants have not filed an affidavit of service to refute the Defendant's contention that the final judgment was not served. Viewed as such, the Defendant has asked this court to say this is evidence from which it may be inferred that the judgment was not served on the Defendant.

Accordingly, the Defendant argues that it is within the fourteen (14) days time limit imposed by Rule 39.6 of the CPR for the filing of an application to set aside a judgment obtained at a trial. Further, to date the judgment has not been served and no proof has been tendered in respect thereof and since the judgment was presumably returned then the Defendant was within time.

[67] The Application is supported by a 24-paragraph affidavit from one Mr Garfield Whyte, attorney-at-law, "having conduct of the conveyancing aspect of the matter on behalf of the Defendant subsequent to the cancellation of a Sale Agreement dated the 4th day of May 2007 and which is the subject matter of this claim". His main plaint is that "the judgments in this matter were irregularly entered and otherwise to the extent that final judgment was entered, if it or its representative was present a different order would have been made". According to this deponent, the following documents were either not served on or received by the Defendant as required by the rules a condition precedent for proper service and the entry of default judgment:

a) Claim Form,
b) Particulars of Claim,
c) A Form of Acknowledgment of Service,
d) A Form of Defence,
e) The Prescribed Notes for Defendants (Form 1a)".

[68] I pause here to venture upon a remark: Surely Mr. Whyte's saying that he is authorized to give his affidavit on behalf of the Defendant is not borne out by any such authority. Nevertheless, he continues.

[69] As far as this deponent is concerned "the Defendant only became aware of the matter in or about April 2013 when all the papers up to that point were delivered the address of the subject matter of the Agreement for Sale and the Application for Sale of Land being Lot 23, South Sea Park, Westmoreland". (Emphasis mine).

[70] He then avers that the interlocutory judgment and for damages to be assessed was not served on the Defendant; so too in respect of the Notice of the Assessment of Damages; so too in respect of the court-ordered Notice of Adjourned Hearing on the 27th April 2009; so too in respect of the final judgment.

[71] He confidently asserts at paragraph 17 that, if the judgment had been served on the Defendant or its representative and had the Defendant been represented at the hearing a different order would have been made.

[72] The Applicant has in keeping with the requirements of Rule 39.6 maintained that, first, they have a good reason for failing to attend. Second, that it is likely that had they attended a different order would have been made. Third, that the application was filed within 14 days of the judgment or order being served on them. Fourth, that the judgment was entered irregularly. The reasons as are set out by the Applicant are truly representative of the requirements under rule 39.6.

Let me now move to deal with the Applicant's contentions singly:

[73] **HAS GOOD REASON BEEN SHOWN BY THE APPLICANT FOR NOT ATTENDING THE ASSESSMENT OF DAMGES HEARING**?

[74] Let me begin by saying that it is my view that in light of the fact that judgment was entered in default by the Applicant's failure to file an Acknowledgement of Service, then the only matters at the Assessment Hearing on which the Defendant could be heard on are as to costs, time of payment of any judgment debt, enforcement of the judgement and application under Rule 12.10(2): See Rule 12.13. This is I think is the

vital point in departure from the Applicant's use of the regime under the Rule 39.6 for setting aside a judgment. In this I accept the Respondent's contention.

On the assumption that I am wrong, I now go on to deal with other aspects of the adopted procedure under rule 39.6

[75] One formidable hurdle which the Applicant would have to surmount is that it was not served. This it cannot prove by a mere denial through affidavit evidence: See **Chin v Chin**, Privy Council Appeal No. 61 of 2009.

[76] Since there is a contested issue as to service it can only be resolved through viva voce evidence where the affiants would be subject to cross-examination.

[77] In any event, I find that the application was not made within the prescribed time. It is Mr Garfield Whyte's evidence that the Defendant only became aware about the matter in or about April 2013 yet The Application was filed on the 30th of June 2014. Why? The answer in search of an explanation is the final judgment was not served on it and that it only became aware of the matter through the papers which were delivered to the address of the subject-matter land.

[78] I find myself unable to accept such a convenient explanation. The simple truth is there is a serious gulf of time between April 2013 and June 2014.

[79] To return to the matter that the Defendant was within the time limit, the Defendant supports that contention by relying on the first instance judgment of Lawrence-Beswick J who quoted from the judgment of Denning LJ in the case of **Regina v County Of London Quarter Sessions Appeals Committee Ex parte Rossi** [1956] 1Q.B. 682 at 694. "… [W]hen service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post any judgment or order by default obtained on the fate of that assumption is perfectly regular … <u>But if the letter is returned undelivered and nonetheless, notwithstanding its return, a judgment or order by default, should afterwards be obtained, it is irregular and will be set aside ex debitio justitiae".</u>

[80] I will here point to the emphasised portion of the above excerpt in saying that, in the case at bar, there is no evidence that the Claim Form and Particulars of Claim, from the November 12, 2007 affidavit of Brenton Brown, that the referenced documents were not served on the Defendant nor is there any room to say, by way of inference that the documents were returned as undelivered.

[81] I will say here that the deemed date of service (Rule 5.19) creates an irrebuttable presumption of service on the day set out at Rule 6.6. I am to say that the same observation will obtain, in respect of Mr Brenton Brown's 2nd Affidavit of July 11, 2014 where he explains that his reference to the Claim Form in his 1st affidavit "included reference to all the attachments with it which includes Notice to the Defendant, Prescribed Notes to the Defendant and Acknowledgement of Service Form and Defence". As already been pointed out Mr Jones in its submissions which I adopt as being correct observed that the Companies Act of Jamaica, at Section 387, makes it clear that service by Registered Post is an acceptable means of service on a company. Once a company is served by leaving the relevant document at, or, by sending it by registered post to the registered office of the company then such a company is properly served. He relies on this proposition on the cited authority of **Coates v Xxtra Lee Supermarket Limited**, *supra*. In that case Brooks J (as he then was) had to contend with an application to set aside a final judgment. The questions which fell for the termination was whether the application was made as soon as reasonably practicable; whether the Defendant provided a good explanation for failing to file an Acknowledgement of Service; and, whether the Defendant had a real prospect of defending the claim. Mr Justice Brooks said: "**Xxtra** sought to argue that Miss Coates had not been served with the Claim Form and other relevant documents, because, on her case, there were sent by registered post addressed to **Xxtra** at '105 Red Hills Road, Kingston 19'. The Honourable Judge went on to say that **Xxtra** states that its registered office as per the records of the office of the Registrar of Companies is '105 Red Hills Road, Kingston 10' … the Honourable Judge, through a combination of judicial notice and the Defendants own correspondence concluded that service had been effected. He concluded that the absence of a copy of the Claim Form as exhibit to the affidavit of service, did not invalidate the judgment. He referred to Rule 26.9(2) of the CPR which

says that an error of procedure or failure to comply with a rule practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

[82] However, in **Dorothy Vendryes v Keane & Anor**., *supra*, Harris JA speaking with particular reference to Rule 8.16(1) made a very poignant pronouncement.

[83] It will no doubt be recalled what Rule 8.16(1) dictates: That on service of the Claim Form all the other documents referred to in that rule are to be served.

[84] This is how her Ladyship Harris JA reasoned: "the language of the rule is plain and precise. The word "must" as used in the context of the rule is absolute. It places on a Claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule, and clearly amounts to an irregularity which demands that, in keeping with the dictates of Rule 13.2, the judgment must be set aside".

[85] The issue in the **Vendryes** case concerned the Respondents failure to serve the prescribed notes for the Defendants, The form of acknowledgement of service and the form of defence as prescribed by rule 8.16(1).

[86] It is one of the very issue that is germane to the case at hand. It seems to me that the **Xxtra** case is distinguishable from the instant case. One of the arguments posed in the **Xxtra** case is virtually undistinguishable that since its registered office is 105 Red Hills Road, Kingston 10 and that since the provisions of rule 5.7 dealing with service on a Limited Liability company was not complied with as the documents were sent to 105 Red Hills Road, Kingston 19, then the documents were not sent to the address of its registered office.

[87] It was against that background that Justice Brooks J found the submission to be without merit. Based on receipts issued by **Xxtra** to the Claimant, which stated its address to be 105 Red Hills Road, Kingston 19 and, based on documents produced from the Postal Services which showed that the correct zoning for 105 Red Hills Road is Kingston 19, the Honourable Judge concluded "that it is clear that an error was made at

the Registrar of Companies. It is untenable for the Defendant to submit that it must be served by post at an address which is at best inaccurate".

[88] In the instant case the fact is that the Applicant was served with the Claim Form and Particulars of Claim according to the affidavit of Brenton Brown dated the 27th day of November 2012. It was after The Application was filed that the Claimants' Process Server tried to remedy the perceived defect or error or omission, contained in his first affidavit by his filing of his second affidavit, that it emerged that he was now saying he had filed all relevant documents as per Rule 8.16(1).

There is no distinguishing characteristic between the **Xxtra** case and the instant one. In spite of the above, be it noted the Request for Default Judgment to be entered would have had to rely on the first affidavit of service of Mr Brenton Brown for its proper grounding and upon which, ostensibly the Registrar of the Supreme Court was satisfied why judgment was entered. It also follows that all consequential orders were based on it. The question which begs to be answered is can the unilateral act of the Claimants by seeking to advance an explanation for the defect or error or omission in the first affidavit give to it retrospective validity? I should think so in spite of its being characterized as "self-serving'. The truth is, it is also amenable to rule 26.9: "This rule applies only where the consequences of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order. (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders. (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right. (4) The court may make such an order on or without an application by a party."

[89] As have been already alluded to, according to Rule 12.4, the Registry must enter judgment, at the request of the Claimant against a Defendant who has failed to file an Acknowledgment of Service where the Claimant proves service of the Claim Form and Particulars of Claim on that Defendant and, where the period for filing and acknowledgement of service has expired.

[90]] It seems to me that primarily what the registry is to be concerned about is the proof of the service of the Claim Form and the Particulars of Claim on the Defendant, whereas according to the **Vendryes** case it is mandatory that the Defendant be served with not only the Claim Form and Particulars of Claim, but also, a Form of Acknowledgement of Service, a Form of Defence and the Prescribed Notes for the Defendants.

[91]] In the **Capital And Credit Merchant Bank Limited** case, supra, one of the issues which engaged the attention of Mangatal J was whether the judgment entered in default of service and defence was properly entered due to the lack of proof of service of the Claim Form and Particulars of Claim, or at all, on the Respondents.

[92] At paragraph 25 of her judgment this is what Her Ladyship had to say: "I should state that, quite separate and apart from the requirements of Counsel … I advise Counsel that on the authority of the Privy Council's decision in **Chin v Chin** … cross examination of a number of the affiants was necessary in order for me to decide the critical issue of whether Mr Little-White was personally served at his office on the relevant date and time". Her Ladyship continues, "this is because these are issues upon which there has been a conflict with which I will have to grapple with, and which cannot be resolved without the evidence, or at least a significant part of the evidence of Mr Ashmead on the one hand, or Mr Little-White or Ms Richards, being rejected.

[93] Accepting that to be a true statement of the principle, I am to say that any contest as to issue concerning service, generally, of the relevant documents, cannot be resolved on the basis of affidavit evidence of disputative affiants without their being cross examined.

[94] Hence I rule that the Application to set aside is refused.

On the question of the issue whether a different order would have been made had the Defendant or its representative been present at the Assessment Hearing, I will only say, provided the right procedural challenge had been adopted. In any event, supposing that I am wrong in that regard, I return to the judgment of K. Harrison JA in the case of

**David Watson v Adolphus Roper**, *supra,* where significant pronouncements were made by his Lordship concerning the time for making the application under Rule 39.6, the reasons for the appellants non-attendance at trial and the appellants chances of success at the trial. His Lordship observed that "Rule39.6 gives the absent party the opportunity of explaining why he did not attend and that he has a reasonable prospect of success. It also gives the party in whose favour the judgment was given the chance of not having to prove his case all over again, with all the attendant expense that this will involve and, if a Court is satisfied that there is in truth no reasonable prospect that the judgment would be reversed".

[95] His Lordship observed that, "The conditions in Rule 39.6 are similar to those enunciated in the case of **Shocked v Goldschmidt** [1998] 1 ALL ER 372 but under the CPR they are cumulative. There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied: **Barclays Bank plc v Ellis** (2000) The Times, 24 October 2000".

[96] In dealing with the question of time for making the application His Lordship said that the rule provides that it be done within a period of 14 days after service of the judgment or order. He further observed that the application must be made with some degree of promptness: **Regency Rolls Ltd v Carnal** (2000) LTL 16/10/2000.

[97] In the instant case from the affidavit of Devon Lawson, sworn to on the 18th of June 2009, the interlocutory judgment in default of Acknowledgement of Service was served by him via registered mail at 2 Washington Court, Kingston 8, St Andrew. Obviously, this is a procedural error having regard to the fact that previous service of court processes were effected at #3 Washington Court, Kingston 8. I am mindful that the court through Rule 29.6 has the power correct procedural errors. However, I take into consideration the fact that the Defendant was aware from as far back as April 2013 of the case at bar yet were content to be inactive until June 2014. I am to say therefore, even under the regime of Rule 39.6 that the time for making the application had overrun the generous liberality of the rule.

[98] I am to say, adopting as my guide, the law is laid down in the **Watson** case that the reason for the Applicant's non- non attendance at the trial was not a good one. Had the Applicant prosecuted with diligence and dispatch the notice that a process had been in train, I well perceive that it could have been said that it was within the time limit. For this, because all the conditions spoken of in Rule 39.6 are cumulative and have not been met, I would refuse the Application because the requirements under rule 39.6 are cumulative. They must cohere.

[99] It stands to reason that it is unnecessary to grapple with the issues raised by (v) and (vi) as was promised by me earlier to be dealt with separately. They will not be pursued at this time in view of my decision above.

[100] Having regard to the above, as I have said before the Notice of Application for Court Orders, is refused. Costs are to go to the successful party and are to be agreed, if not, then such costs are to be taxed.