[2023] JMCC Comm 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2022CD00027

BETWEEN	**REXTON HOLDINGS LLC**	**CLAIMANT**
AND	**AMATERRA JAMAICA LTD**	**1st DEFENDANT**
AND	**AMATERRA JAMAICA H1 LTD**	**2nd DEFENDANT**
AND	**AMATERRA JAMAICA VR1 LTD**	**3rd DEFENDANT**
AND	**AMATERRA UTILITY LTD**	**4th DEFENDANT**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Mr. Jonathan Morgan instructed by DunnCox for the Claimant

Ashleigh Ximines instructed by Knight, Junor and Samuels Attorneys-at-Law for the Defendant

Heard: 22nd November 2022, 26th January and 21st April 2023

Civil Procedure – Application to vary Court Order – Application to set aside Default Judgment – Whether service by registered post proved – Whether service on one company is effective against other companies with same directorship – Whether Court's Jurisdiction ousted by Arbitration Clause

BROWN BECKFORD J

INTRODUCTION

[1] The Claimant /Respondent in these proceedings, **Rexton Holdings LLC**, obtained a Judgment in Default against all four **(4)** Defendant/Applicant Companies, **Amaterra Jamaica Limited, Amaterra Jamaica H1 Limited, Amaterra Jamaica VR1 Limited** and **Amaterra Utility Limited**, for failure to file an Acknowledgment of Service. The Defendants, who were purportedly served with the Claim Form and accompanying documents by registered mail, contend that the judgment was irregularly obtained as they had not in fact been served at the time the Default Judgment was obtained.

[2] The Defendants filed a joint Acknowledgment of Service, as required, disputing the Court's jurisdiction. They argued that the Court did not have, or should not exercise its jurisdiction to hear and determine the matter on the basis that the contract provided that disputes be settled by arbitration.

[3] Consequently, they made an Application to Set Aside the Default Judgment, which occasioned several affidavits being filed. The Claimant contends that certain affidavits in support of the Application to Set Aside the Default Judgment, breached an Order made by Batts J, which limited the contents of those affidavits.

[4] The disputation between the parties concern whether the impugned affidavits should be permitted to stand, whether the Default Judgment was regularly obtained and whether the Court has or should exercise jurisdiction to hear the substantive claim.

BACKGROUND

[5] In or around October 2017, the 1st Defendant engaged the Claimant in discussions to develop an *"800+ keys family-oriented all-inclusive resort"* on lands in Trelawny, Jamaica, owned by the 1st Defendant. Subsequently, the parties entered into contractual negotiations and the following Agreements were executed:

a. Letter of Intention dated 26th October 2017
b. Memorandum of Agreement dated 17th November 2017
c. Extension A to the Memorandum of Agreement dated 16th March 2018

d. The New Memorandum of Agreement dated 14th February 2019

[6] During the contractual period, the 2nd, 3rd and 4th Defendant companies were formed as holding companies, incorporated to hold real estate on behalf of the parties. On 15th May 2019, the parties executed the Framework Partnership Agreement and the Shareholders Agreement. Under these agreements, the Claimant would provide pre-equity financing and secure equity input for the development of the resort.

[7] Owing to a breakdown in the relationship between the parties, on 17th January 2022, the Claimant, by way of Claim Form and Particulars of Claim, commenced a claim for breach of contract on the ground that the Defendants failed to perform obligations owed to the Claimant under the Framework and Shareholders Agreements. The Claim Form and attendant documents were sent to the Defendant companies by registered post on 28th January 2022, and would be deemed served on the 18th February 2022**.** The Defendants having failed to file an Acknowledgment of Service within the prescribed period, the Claimant, on 11th March 2022, obtained a Judgment in Default of Acknowledgment of Service.

[8] On 25th May 2022, the Defendants filed a Notice of Application for Court Orders to Set Aside Default Judgment and for Stay of Proceedings. An Amended Notice of Application was filed on the 19th October 2022 **("1st Application")**. The Applicants sought the following Orders:

1. An order that the judgment entered against the 1st, 2nd, 3rd and 4th Defendants in default of their filing of an Acknowledgment of Service of Claim Form be set aside.
2. A declaration that pursuant to Clause 11 of the Framework Agreement executed by the parties and dated the 15th of May 2019, the Supreme Court of Judicature of Jamaica does not have or should not exercise the jurisdiction to try the claim.
3. An order that pursuant to section 11 of the Arbitration Act the dispute emanating from the Framework Agreement executed by the parties is to be referred to arbitration.

4. An order that there be a stay of proceedings pursuant to section 5 of the Arbitration Act, pending the submission of the matters in dispute herein to arbitration.
5. In the alternative to orders numbered 2, 3, and 4 herein, an order that:
   a. the Acknowledgment of Service of the Claim Form of the 1st, 2nd, 3rd, and 4th Defendants which was filed out of time be permitted to stand; and
   b. the 1st, 2nd, 3rd, and 4th Defendants be permitted to file a Defence within fourteen (14) days of the granting of the Orders made by this Honourable Court.
6. No order as to cost.
7. Such further and/or other relief as this Honourable Court deems just.

[9] The Defendants' original application was fixed for hearing on the 28th September 2022. The Defendants wrote to the Registrar of the Supreme Court, seeking an adjournment on the basis that although the Claimant's affidavit was served within the period stipulated by the **CPR**, the Defendants required more time to address the issues raised. On 28th September 2022, Batts J, who heard the application for an adjournment, made, inter alia, the following Order:

> *(3) The Defendant is permitted to prepare, file and serve an Affidavit in response to the Claimant's Affidavit, on the issues regarding the service of the Claim Form and the Particulars of Claim and the jurisdiction of the court only, on or before the 7th of October, 2022.*

Pursuant to the said Order, the Defendants filed the Affidavit of Keith Russell and the Affidavit of Beresford Downer in support of the Notice of Application for Court Orders filed 7th October 2022.

[10] On 19th October 2022, the Defendants filed a 2nd Notice of Application to permit the Affidavit of Keith Russell and the Affidavit of Berisford Downer, to stand **("2nd Application")**. The Defendants sought the following Orders:

1. The Affidavit of Keith Russell in support of the Notice of Application for Court Orders filed by the 1st, 2nd, 3rd, and 4th Defendants on the 7th of October 2022 be permitted to stand.

2. The Affidavit of Berisford Downer in support of the Notice of Application for Court Orders filed by the 1st, 2nd, 3rd, and 4th Defendants on the 7th of October 2022 be permitted to stand.
3. The Skeleton Submissions filed by the 1st, 2nd, 3rd, and 4th Defendants be permitted to stand.
4. Time for the filing and service of this Application be abridged.
5. Costs of the Application to be cost in the claim.
6. Such further and/or other relief as this Honourable Court deems just.

The Claimant objected to the Orders being sought in the 2nd application. Batts J recused himself from hearing this application.

[11] The Court agreed to deal with the 2nd Application first.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS/APPLICANTS

2nd APPLICATION: THE AFFIDAVITS BE PERMITTED TO STAND

[12] Counsel for the Defendants, Ms. Ashleigh Ximines, contended that the affidavits of Keith Russell and Berisford Downer should be permitted to stand on the basis that the affidavits contain material information, and (in the case of Mr. Russell) exhibit a draft defence which shows that the Claimant's representations were false. Said representations are listed as follows:

(i) Denied the existence of the partnership between the parties;
(ii) Delayed the execution of development tasks;
(iii) Relocated funds supplied by the Claimant in an unauthorized manner;
(iv) Unilaterally entered into hotel management agreements;
(v) Failed to timely, or at all, complete due diligence obligations;
(vi) Failed to incorporate the 2nd, 3rd and 4th Defendants as holding companies and to transfer land titles for the proposed development sites of the resort and associated facilities to those holding companies during the contract term. Steps taken in 2020,

after the 1st Défendant advised the Claimant that there was *"no current partnership"* between the parties.

(vii) Failed to incorporate three mirror corporations SPV's in St. Lucia as soon as possible, and to transfer 100% of the shareholding of the corresponding to the 2nd – 4th Défendant companies to the St. Lucian SPVs, at a pre-arranged consideration price.

(viii) Failed to offer the Claimant TLDI 18.75% of the shareholding in the St. Lucian SPVs at nominal share value and failed to give seats on the SPVs' boards of directors.

[13] She further contended that the foregoing defence contains points of law which would destroy the Claimant's cause of action. Consequently, the affidavit would show that the Defendants have a real prospect of success. **(For the avoidance of repetition see authorities in support of this submission referenced at paragraph 15 of this judgment.)** Lastly, it was Counsel's submission that should these affidavits not be permitted to stand, the Defendants would be severely prejudiced as they would be prevented from adequately defending the claim.

1ST APPLICATION: TO SET ASIDE DEFAULT JUDGMENT

[14] It was Counsel's contention that the Default Judgment was irregularly obtained. She submitted that the presumption that the documents were served twenty-one **(21)** days after the date indicated on the Certificate of Posting was rebuttable. She pointed out that the evidence indicates that the relevant documents were not placed in the postal box owned by Mr. Keith Russell, a Director of the 1st to 4th Defendants. To this end, it was also submitted that both the Notice of Arrival of Registered Mail slip and the documents were received on 12th April 2022 and, as such, was the date of service. She relied on **Rule 5.19 (1) of the CPR**, **S. 52 of the Interpretation Act of Jamaica**, **R v County of London Quarter Sessions Appeals Committee Ex parte Rossi** (1956) QB 682, **Linton Watson v Gilon Sewell** [2013] JMCA Civ 10 and **Giscombe v Howe** [2021] JMCA Civ 47. Specifically as it related to the 2nd to 4th Defendants, Counsel submitted that the Claim

Form and Particulars of Claim were not duly served as they were not properly addressed to the Defendants.

[15] Counsel also argued, in the alternative, that the criteria for setting aside a Default Judgment is not cumulative, as the Court's focus is to assess whether the applicant has a real prospect of successfully defending the claim. Reliance was placed on **Rule 13.3 of the CPR**, **Blackstone's Civil Practice 2004 paragraph 20.14**, **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** (unreported), Supreme Court, Jamaica, Claim No. 2008HCV05707 delivered 4 April 2011 and **Merlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1.

[16] Counsel contended that the Defendants have a reasonable prospect of successfully defending the claim as the Claimant's representations are false. To this end, she relied on **Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc** [1982] 2 Lloyd's Rep 22, **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy (Supra**), **Swain v Hillman** [2001] 1 ALL ER 91 and **Russell Holdings Limited v L & W Enterprises Inc and Ads Global Limited** [2016] JMCA Civ 39. She submitted that the Affidavit of Mr. Keith Russell contains evidence which shows that the Defendants could not have breached the agreement, as the Claimant had failed to provide the consideration the agreement was predicated on, namely the equity and debt financing.

[17] It was further submitted that the Defendants acted as soon as was reasonably practicable as they filed their application for the Default Judgment to be set aside within one **(1)** month and three **(3)** days of the judgment being entered against them. She submitted that the delay, although essential to the determination of the application, is not a deciding factor if the Defendants can show that there was a real prospect of defending the claim. This she buttressed by relying on the cases of **Standard Bank v Agrinvest International** [2010] EWCA Civ 1400 and **Meeks v Meeks** [2020] JMCA Civ 20.

[18] Counsel also submitted that there was a good reason for the delay as the Defendants only became aware of the claim when the documents were received from the

post office on 12th April 2022. Consequently, the Defendants were unable to act within the stipulated timeline.

[19] In the alternative, Counsel submitted that Defendants were not properly served by Registered Mail as the Claim Form and accompanying documents were not addressed to the correct address of the 1st Defendant and not at all to 2nd - 4th Defendants. She rejected the submission by Mr. Morgan that all the companies were effectively served through Mr. Russell as the single directing mind of all four (**4**) companies. She further submitted that the 1st Defendant was not the parent company of the other Defendants having no shares in, or control over the other Defendants.

CHALLENGE TO THE COURT'S JURISDICTION

[20] It was submitted that the Court does not have jurisdiction to hear the substantive claim as there was an Arbitration Clause in the Framework Agreement. Reliance was placed on **S. 11(1) of the Arbitration Act**. Ms Ximines submitted that pursuant to **Rule 9.6 of the CPR**, the Defendants filed an Acknowledgment of Service with a supporting affidavit and applied for a declaratory Order within the period for filing a defence.

[21] She further submitted that the portion of the Arbitration Clause which was incapable of being performed did not make the entire Arbitration Clause null and void. Consequently, she submitted, the unenforceable portion could be severed. She also argued that the administration by the International Court of Arbitration **("ICA")** is not an essential feature of the clause and, as such, the Arbitration could be governed by the **Arbitration Act** of Jamaica. She relied on **S. 13 of the Arbitration Act**. Counsel further argued that the Court is empowered to assist in constituting a proper panel to administer the Arbitration proceedings. In support of this submission, she relied on **S. 9** and **S. 14(2) of the Arbitration Act**.

[22] Lastly, Counsel submitted that the Defendants did not repudiate the Arbitration Clause as the Claimant contends. It was submitted that the Defendants' former Attorney stated that the 1st Defendants were advised not to participate. Further, there is no

evidence before the Court that any action was taken by the 1st - 4th to Defendants to show that they were unwilling to have the matter arbitrated.

SUBMISSIONS ON BEHALF OF THE CLAIMANT/RESPONDENT

2nd APPLICATION: THE AFFIDAVITS BE PERMITTED TO STAND

[23] Counsel for the Claimant, Mr. Jonathan Morgan, contended that for the Court to vary an Order, a party must show that there had been some material change of circumstances since the Order was made, or there was evidence that the Judge was misled into making the Order that he did. He submitted that the Defendants have provided no evidence to satisfy either of the forgoing criteria, as such, the Defendants' 2nd Application ought to be refused. He relied on **Rule 26.1(7) of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)** and **Gloria Chung et al. v Michael Chung et al** [2018] JMSC Civ 44.

1ST APPLICATION: TO SET ASIDE DEFAULT JUDGMENT

[24] Mr. Morgan rejected the submission that the Claim Form and Particulars of Claim were not served until 12th April 2022. He submitted that pursuant to **Rule 6.6 of the CPR,** the foregoing documents were served on 18th February 2022. He further contended that in accordance with **A.C.E. Betting Co Ltd v Horseracing Promotions Ltd & Summit Betting Co Ltd v Horseracing Promotions Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 70 & 71/1990, delivered 17 December 1990, **Linton Watson v Gilon Sewell** [2013] JMCA Civ 10, **Fletcher (Andrew) v Devine Destiny Co Ltd** [2021] JMCA Civ 42 and **Giscombe v Howe** [2021] JMCA Civ 47, once it was proved that the relevant documents were sent to the intended recipient's last known address, then service was deemed to have been effected. Further, it was submitted that the presumption of service could be rebutted, however, the Defendants' absence of evidence that the documents were addressed incorrectly, or of an issue at the post office, then the Defendants' evidence amounts to a mere denial that they received the relevant documents by February 18th 2022. It was submitted that the two partial illegible date

stamps on the registered slip did not indicate that the documents were served on 12th April 2022.

[25] It was also submitted by Counsel that the Defendants did not have a real prospect of successfully defending the claim. He argued that the Defendants had failed to exhibit a proposed draft defence and the affidavit in support of the NOA to set aside the judgment contained no evidence to support that there was a real prospect of successfully defending the claim. He relied on **Bar John Industrial Supplies Limited v Honey Bee Fruit Juice Limited** [2011] JMCA Civ 7.

[26] It was argued that the letter accompanying the pleadings which clearly expressed that service was being effected on the group of companies under Amaterra's control constituted valid service. Counsel submits that the Defendant Companies are limbs of Amaterra Jamaica Ltd. and have a single-corporate mind, as such, all four **(4)** companies should be treated as a single legal entity for the purpose of service. This argument was bolstered by **DHN Food Distributors Ltd v Tower Hamlets London Borough** [1976] 1 WLR 852.

CHALLENGE TO THE COURT'S JURISDICTION

[27] Counsel Mr. Morgan opposed the Defendants 'contention that the Court does not have, or ought not to exercise jurisdiction to hear this matter. He submitted that the Defendants failed to file their application to challenge the Court's jurisdiction within the time prescribed by **Rule 9.6(3) of the CPR**. On this basis, he contended that the Court ought to strictly apply the consequences of failing to comply with the said rule, and as such, the challenge to the Court's jurisdiction ought to fail. He relied on **Jamaica Association of Composers v Jamaica C.V. Ltd** [2021] JMSC Civ 161.

[28] It was further submitted by Counsel, that the Defendants by their letter dated 5th July 2021, evinced a clear intention to repudiate the Arbitration Agreement and so, lost their entitlement to be bound by the Arbitration Clause. It was submitted that the Defendants cannot revive a repudiated arbitration to now seek to have the dispute

determined by arbitrators. Reliance was placed on **S. 10(1) of the Arbitration Act**, **Downing v Al Tameer Establishment and another** [2002] EWCA Civ 721 and **Sabal PH v G.M. Associates Ltd.** [2020] JMCA Civ 43.

[29] On the issue of jurisdiction, it was lastly submitted that the Arbitration Clause is incapable of being performed as the Arbitration Agreement was administered by the ICA but governed by London Court of International Arbitration Rules **("LCIA")**, as, Counsel submitted, the ICA could not administer Arbitration proceedings under the LCIA rules as its jurisdiction was confined to ICA Rules. It was further submitted that the ICA could only administer the Arbitration if the parties mutually consented to modifying the Agreement to proceed with the ICA rules, however, the Defendants had already repudiated the Arbitration Agreement.

ISSUES

The applications and submissions raise the following issues for the Court's determination:

1) Whether Court has the power to vary an Order of a Court of equal jurisdiction?
2) Whether the Defendants were validly served by registered mail?
3) Whether proof of actual service displaces the deemed date of service?
4) Whether the Court's jurisdiction is ousted by the Arbitration Clause?

DISCUSSION

APPLICATION TO VARY COURT ORDERS

[30] The Defendants' Notice of Application seeks, in effect, to have the Order of Batts J varied to the extent that the affidavits of Keith Russell and Berisford Downer were not restrained to the issue of service and jurisdiction, but also included the Defendants' proposed defence to the claim.

[31] **Rule 26.1(2) of the CPR** includes, among the judges' case management powers, the power to vary or revoke an Order. This power is not constrained to the judge making the Order. In the case of **Lori Morgan v Prime Sports Jamaica Limited (Coral Cliff Entertainment)** [2016] JMSC Civ.103, Sinclair-Haynes J (as she then was) had varied an Order made by Hibbert J, and it was contended she did not have the power to do so. It was argued that the Learned Judge did not have the discretion to set aside the Order of a judge of concurrent jurisdiction where there was no evidence of fraud, misrepresentation or material non-disclosure.[1] Similarly, Counsel for the Claimant contends here that there was no material change in circumstances, or other legal ground to support the application for a variation.

[32] P. Williams JA confirmed in a terse statement that Sinclair-Haynes J did have the power to vary the Order of Hibbert J.[2] P Williams JA also made clear that the guiding principle when considering whether to vary or revoke an Order, is whether in the interest of justice, it is appropriate to do so. This requires the Court to have regard to the overriding objective of dealing with cases justly.

[33] The Affidavit of Tessa Simpson, filed 19th October 2022, contends that the restriction on the contents of the affidavit would severely prejudice the Defendants who had a real prospect of successfully defending the claim, and, would be required by **Rule 13.4(3) of the CPR** to provide an Affidavit of Merit exhibiting a draft defence. She suggested that the Claimant on the other hand, having had sight and notice of the contents of the affidavit, could be afforded time to respond.

[34] The Claimant, in its objection, contends that there are portions of the Affidavit of Keith Russell that are false and misleading. The suggested offending portion reads:[3]

> *In or about April 2022, I personally visited the Post Office and requested a copy of the Notice of Arrival of Registered Mail slip and to enquire why Mr.*

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[1] **[**2016] JMSC Civ.103, para 21
[2] Ibid, para 15
[3] The Affidavit of Berisford Downer filed on 7th October 2022, para 27

> *Berisford received the mail so late. I was subsequently informed by Ms. Gayle Tharpe, a postal mistress of the Falmouth Post Office and do verily believe that the documents were placed in the general delivery area instead of my postal box, and was stacked with documents and letters for another gentleman also named Keith Russell, who lives in Falmouth, Trelawny. As a consequence, when the Mr. Downer visited the post office each week to collect mails, these documents or notice thereof were not given to him or found in the postal box*

This statement, it was submitted, is contradicted by the email of Ms. Danielle Watson, who indicates:

> *However, I confirm that the statement "that the documents were placed in the general delivery area instead of my postal box, and was stacked with documents and letters for another gentleman also named Keith Russell, who lives in Falmouth, Trelawny" is in fact false as at no point was the mail placed in the other Mr. Russell's PO box nor did he collect the mail from the general registered mail.*

Despite agreeing with the possibility that the pejorative statements in the question posed could be true, Ms. Watson's statement does not in any way deal with what Mr. Russell was told. Mr. Russell's statement that he was given the information by Ms. Gayle Thorpe, a Postal Mistress of the Falmouth Post Office, was therefore not contradicted. Ms. Watson's email simply outlines what was the factual position. The Court cannot on the basis of this answer, attribute any falsehood to Mr. Russell. In fact, a careful reading of Ms. Watson's email shows Mr. Russell to be correct. The documents were placed in general delivery instead of his Post Office Box, **(See discussion below as to occupation of P.O. Box 49)** and his bearer was given the Notice of Arrival Slip from among the general mail. (The *"he"* in Ms. Watson's statement is unclear; if it refers to the other Keith Russell, then the suggestion is that his mail would be placed in PO Box 49 and not general delivery. This would not be true as he was not the occupier of Box 49.)

[35] The Claimant also contends that it would be severely prejudiced by allowing the affidavits to stand as it has had no opportunity to respond to show why the defence in fact has no merit.

[36] In **Richard Burgher v Earl Martin** [2021] JMCA Civ 35 ("**Burgher**"), Harris JA was considering the dispute between the parties as to whether the appellant's statement of

case should have been struck out for failing to comply with the Orders of the Court. She agreed that applicable legal principles and cases were those considered by the judge at first instance. She said of the Learned Judge's exposition:[4]

> *She considered firstly the oft-cited authority on striking out,* ***Biguzzi****, which established the well-known and accepted principle that the striking out of a party's statement of case should not be the first recourse when deciding on an appropriate sanction to impose for non-compliance. Instead, such a measure should be reserved for the most egregious breaches. The learned judge then referred to the case of* ***Charmaine Bowen*** *and applied the principle stated by Brooks JA (as he then was) that a fundamental role of the court is to settle disputes through the adjudication of matters based on the merits of the case. The learned judge in the present case also observed, based on that dictum, that courts ought to be slow to strike out a party's case on grounds of non-compliance (unless egregious) and technicalities*

[37] She concluded that:[5]

> *It is well settled that while rule 26.3(1)(a) of the CPR gives the court power to strike out a party's statement of case, where there has been a failure to comply with a rule, practice direction or an order or direction given by the court in the proceedings, there is a plethora of authorities emanating from our jurisdiction that underscore the principle that striking out should be used only as a last resort and in the most exceptional cases. As such, the particular circumstances of each case must be considered.*

I am guided by this decision.

[38] Neither party indicates that there was any particular reason for the limitation imposed by Batts J. The Application before Batts J was an Application to Set Aside the Default Judgment on the ground, inter alia, that the Defendants have a realistic prospect of successfully defending the Claim. The request for an adjournment was to respond to the Affidavit of Samantha Grant in Response to the Affidavit of Tessa Simpson and in Opposition to the Defendant's Notice of Application for Court Orders filed 16th September 2022, an affidavit which it was said *"…raised pertinent issues regarding the service of the*

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[4] [2021] JMCA Civ 35, para 27
[5] Ibid, para 30

Claim Form and Particulars and the jurisdiction of the Court…". This seems to be the basis of the Order made by Batts J.

[39] However, the Affidavit of Ms. Grant also asserted, among other things, that *"the Defendant's Affidavit also fails to adduce sufficient evidence to support an application to Set Aside Default Judgment"*. An Affidavit of Merit exhibiting the draft defence is the vehicle to produce such evidence to the Court. It could only have been an oversight or error by Counsel to not seek to have the issue of a meritorious defence included in the affidavit.

[40] As in **Burgher**, this is not a case where the Defendants' behaviour has been contumelious or there is a pattern of non-compliance with Orders of the Court. This was an oversight or error on the part of Counsel at a relatively early stage of the proceedings. There is no reason why the Claimant could not have been given time to respond to the Affidavit of Keith Russell. In fact, instead of seeking such an Order, which could have been done at an earlier stage in these proceedings, minimizing any prejudice, the Claimant has been persistent in its objection to the Defendants' application. Striking out the Affidavit of Keith Russell, or offending portions of it, would leave the Defendants unable to present material to the Court to consider whether they had a meritorious defence in order to warrant the exercise of the Court's discretion in the Defendants' favour. This draconian step would wreak disproportionate havoc to the Defendants' case. In this case, and at this stage, limiting the affidavit to the issue of service and jurisdiction, would in effect exclude information material to the Claim. This is not warranted. I would allow the Defendants' application.

[41] In any event, for the decisions taken below, this issue is no longer material.

WHETHER THE DEFAULT JUDGMENT WAS REGULARLY OBTAINED?

[42] Pursuant to **Rule 12.1 of the CPR**, a claimant may obtain default judgment where the defendant has failed to file an acknowledgment of service giving notice to defend or failed to file a defence. In the instant case, the Claimant obtained Default Judgment on

the basis that the Defendants failed to file an Acknowledgment of Service in the time prescribed by the **CPR**. **Rule 12.4 of the CPR** prescribes the conditions to be satisfied for a judgment for failure to file an Acknowledgment of Service. It reads:

> *12.4 The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgment of service, if -*
>
> *(a) the claimant proves service of the claim form and particulars of claim on that defendant;*
>
> *(b) the period for filing an acknowledgment of service under rule 9.3 has expired;*
>
> *(c) that defendant has not filed -*
>
> *(i) an acknowledgment 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) that defendant has not satisfied in full the claim on which the claimant seeks judgment; and*
>
> *(f) (where necessary) the claimant has permission to enter judgment.*

[43] The Defendants contend that the Default Judgment obtained against them was irregularly obtained on two prongs. Firstly, the conditions in **Rule 12.4(a) of the CPR** were not satisfied as the deemed date of service was rebutted. Secondly, the Defendants were not served at their registered office.

[44] The Affidavit of Service by Registered Post filed 14th March 2022 indicates, by the exhibited Certificate of Posting, that on 28th January 2022, the originating documents were registered to be served on the Defendants via registered post. Pursuant to **Rule 6.6(1) of the CPR** the deemed date of service by registered post is twenty-one (**21**) days after the date of the Certificate of Posting. Therefore, in this instance, service would be deemed to have been effected on 18th February 2022. Consequently, pursuant to **Rule**

9.3(1) of the CPR, the fourteen **(14)** day period for filing the Acknowledgment of Service would have expired on 4th March 2022. The Defendants did not file an acknowledgment within this timeline, and the Claimant therefore obtained Default Judgment on 11th March 2022. At this juncture it is necessary to separate the issue as it concerns the 1st Defendant from the 2nd to 4th Defendants.

[45] Mr. Keith Russell, Director of the 1st Defendant, contends that having been made aware of the Default Judgment entered against the Defendants, he caused checks to be made through his Bearer, Mr. Beresford Downer, at the Falmouth Post Office. Mr. Downer received the Notice of Arrival of Registered Mail slip, addressed to Keith Russell, on the 12th April 2022, and, on the same date collected the posted documents. This then was the actual date of service. On this basis, the Defendants filed a joint Acknowledgment of Service on 22nd April 2022, which they contend is within the prescribed period for filing the Acknowledgment of Service.

[46] In determining the issue of when the 1st Defendant was served, the Court must consider the question, what constitutes proper service by registered post. In answering this question, I consider that **Rule 5.19(1) of the CPR** is the natural starting point. It states:

> *A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served unless the contrary is shown, on the day shown in the table in rule 6.6* ***[service via registered post - 21 days after the date of the Certificate of Posting].***

Also of important note is **S. 52 of the Interpretation Act** which reads:

> *52.-(1) Where any Act authorizes or requires any document to be served by post, whether the expression "serve", "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*

[47] Therefore, once it can be proved that the relevant documents were addressed correctly and completely, there is a presumption that service was effected. However, such a presumption can be rebutted by evidence to the contrary. The burden of proof is placed

on the Defendant to show that service was not effected or not effected at that time. This was the case in **Regina v County of London Quarter Sessions Appeals Committee. Ex Parte Rossi**. [1956] 1 Q.B. 682 **("Ex Parte Rossi")** which has been followed in this jurisdiction.

[48] In **Ex Parte Rossi**, the Notice of Appeal was sent to the appellant's last known address but was not delivered to him. An Order was made in the appellant's absence and he applied for a Certiorari to quash the Order on the basis that the notice was not given to him. The application was refused and the appellant appealed. The Court of Appeal held that the Order of Certiorari should be granted on the ground that the appellant did not receive the notice as it was returned through the post. The dicta of Denning LJ has been applied in this jurisdiction as discussed below :[6]

> *To sum up, when 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 and any judgment or order by default obtained on the faith of that assumption is perfectly regular. It will not as a rule be set aside except on payment of costs and showing of merits: see T. O. Supplies (London) Ltd. v. Jerry Creighton Ltd.9 But if the letter is returned undelivered and nevertheless, notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be set aside ex debito justitiae. The order of quarter sessions here was irregular because there was no proper service and it should be set aside.*

[49] The decision of Forte JA in **A.C.E. Betting Co Ltd v Horseracing Promotions Ltd & Summit Betting Co Ltd v Horseracing Promotions Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 70 & 71/1990, delivered 17 December 1990 **("Ace Betting")** is most often cited as setting out the approach to be followed in this jurisdiction. In **Ace Betting** the appeals of two companies, A.C.E. Betting Co and Summit Betting Co were heard jointly. For the purpose of the present discussion, I will only recount the facts of **Ace Betting** addressing the issue of service. In relation to A.C.E. Betting Co, service of the Writ of Summons was effected by Registered Mail on 17th May

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[6] [1956] 1 Q.B. 682, pg 694

1990, however, no appearance was made and consequently a Judgment in Default of appearance was entered on 11th June 1990. The Appellant made an application to have the judgment set aside and relied on the affidavit of the secretary of the company which revealed that the writ was received on the 14th June 1990. Following this an appearance was entered on the 15th June 1990. The learned judge concluded that service was properly effected on the appellant. Forte JA, as he then was, said:[7]

> *I am therefore of the opinion that the learned judge was correct in finding that the writ was regularly served there having been no intimation at the time of judgment that the writ had not been effectively served through Registered Mail. In the event, I would conclude that the writ having been regularly served, the appellant is not entitled to have the judgment set aside ex debito justitiae, and therefore would be compelled to show it has merit.*

[50] In relation to Summit Betting Co, service of the Writ of Summons was effected by Registered Mail. Before the Judge at first instance, it was argued that the Registered Slip referred to the address of the appellant company as *"Northside Street"* instead of *"Northside Drive"*, which was the correct address of the Appellant company. The Learned Judge held that service of the writ was irregular. However, having found that an appearance was entered on the 15th June 1990, the irregularity in the service of the writ had been waived. At the Court of Appeal, the addressed envelope containing the writ, which had been sent by Registered Mail to the appellant but was returned to the Respondent's Attorneys-at-Law marked *"unclaimed"*, was examined and it was discovered that the letter had been addressed correctly. The Court of Appeal found that had this evidence been available to the Learned Judge, then he would not have concluded that service of the writ was irregular. Forte JA found that the Default Judgment was therefore regularly obtained, same as in the case of A.C.E Betting Co.

[51] The prevailing position was recently confirmed by the Court of Appeal in **Fletcher (Andrew) v Devine Destiny Co Ltd** [2021] JMCA Civ 42 **("Fletcher")**. In **Fletcher**, the originating documents were sent by registered mail 6th January 2009. The letter to the

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[7] **(unreported), Court of Appeal, Jamaica Appeal No. 70&71/90, judgment delivered 17 December 1990, pg 13**

respondent was sent to the correct address of its registered office. The respondent in failing to acknowledge service or file a defence, the Appellant, on 8th July 2009, requested Judgment in default of an Acknowledgment of Service and Defence. At the time of the request for judgment, the Appellant was not aware that the Respondent had not collected the letter and on 15th April 2009, the post office had sent the letter to the Return Letter Branch on the basis that the letter did not have a return address. The letter was never returned to the Appellant's attorneys-at-law. The Learned Master Mott Tulloch -Reid (as she then was) set aside the Default Judgment. Foster-Pusey JA found that the Learned Master erred in setting aside the judgment in default, as the judgment was regularly obtained and the respondent would have had to show that it had a reasonable prospect of successfully defending the claim in order for the judgment to be set aside. Foster-Pusey JA reaffirmed and emphasized the dicta of Forte JA that:[8]

> ***Consequently, not having received any intimation that the writ remained "unclaimed" prior to the entering of the judgment, and no appearance having been entered, the Judgment in Default was regularly entered and therefore cannot be set aside ex debito justitiae. The appellants would therefore have to show merit i.e. that there is a triable issue."*** *(Emphasis supplied).*

The question of whether the Registered Slip was properly addressed was not determinative in either **Ace Betting** (in relation to A.C.E Betting Co, the address was correct and in relation to Summit Betting Co, it was later agreed that the address was correct) or **Fletcher** (no issue being taken that the document was correctly addressed).

[52] The Court of Appeal however had the opportunity to address this issue in **Annette Giscombe v Halvard Howe and Anor** [2021] JMCA Civ 47 **("Giscombe")**. Dunbar Green JA (Ag), as she then was, carried out an admirable review of the law, including examining the cases referred to above. The extracts below set out the legal position presently.[9]

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[8] [2021] JMCA Civ 42, para 57
[9] [2021] JMCA Civ 47, paras 85-87

> *There was no direct evidence before this court as to how service by registered post is effected but it can be deduced from the letter by the postal authority that it involves these steps. After the article is received by the post office, a notice (that is, the registered slip) is sent to the intended recipient. It is the registered slip which alerts the recipient to the existence of a registered article at the post office for collection. The recipient is then expected to collect the article from the post office. Once it is proved that the registered slip was properly addressed, stamped, the fee paid and it was sent to the correct address, in the ordinary course of post, service is deemed to have been effected at a particular date. However, - as was established by rule 5.19, the legal fiction of "deemed service" as it concerns the claim form, is rebuttable.*
>
> *…[T]he threshold for deemed service by registered post was not the receipt of the claim form and particulars of claim … or their delivery … personally. Rather, it should be shown that by sending the mail by registered post, he would have likely ascertained the contents of the claim form. That is the plain meaning of rule 5.14 of the CPR. The rule does not say that it is not good service if the party to be served does not receive the documents. …[T]he intended recipient of the notice of a registered mail is obligated to claim the mail once he receives the notice. However, rule 5.14 must also be read with rule 5.19(1), which means that deemed service of the claim form can be rebutted where there is evidence to the contrary.*
>
> *Ultimately, whether a claim form is served is not a matter of pure law. It is also a matter of evidence.*

Dunbar Green JA (Ag) made it strikingly clear that a bare denial of receipt of the registered mail was not sufficient to disprove service where there had been no evidence from the postal service to state that it had been returned or unclaimed. She highlighted that the defendant, who bears the burden of disproving service, ought to support his contention by an Affidavit of the Post Master or his/her representative.

[53] The Affidavit of Beresford Downer filed 7th October 2022 asserts that he is the bearer for Mr. Keith Russell and is authorized to collect documents from the Post Office on his behalf. Despite making monthly checks, he received no mail for the months of February and March up until the 12th April 2022. On that date, he received a Notice of Arrival of Registered Mail and also on that same date, the documents in this claim. He was required to, and did affix his name to the registered slip and the Post Mistress Ms. R. Bruce also signed and stamped same. The registered slip is exhibited bearing his name, a date stamp of even date, and signature of which *'Bruce'* is identifiable.

[54] The Third Affidavit of Samantha Grant filed 19th October 2022 has, exhibited to it, responses to Counsel Mr. Morgan's questions, as prepared by Ms. Watson, on instructions from Mrs. Diane Thompson Clarke, Senior Legal Officer (Ag) of the Post and Telecommunications Department. The questions were posed based on an Access to Information request.

[55] The answers posit that:

i. The Notice of Arrival only bore the name Keith Russell and not the name and address of the 1st Defendant.

ii. It was placed at General Delivery and not delivered to the Company or placed in any Post Office box.

iii. The name is shared by another Keith Russell who is the occupier of Box 49.

iv. They are unclear of the date Mr. Downer was given the Notice.

[56] Ms. Watson in her email indicated that there is another Keith Russell who is the occupier of P.O. Box 49. To the contrary, the Affidavit of Urgency of Tessa Thompson filed 22nd November 2022, exhibiting the company documents, indicates P.O. Box 49, Falmouth as the postal address of the company. A letter of authorisation given to Mr. Downer, over the hand of this Mr. Keith Russell, described him as the Owner/Manager of Silver Sands Jamaica Limited and an address of P.O. Box 49 Falmouth was used. The letter of authorisation of 12th July 2021 from Mr. Russell to Mr. Downer, gives Mr. Russell's address as P.O. Box 49, Falmouth. Therefore, the statement that there was a second Keith Russell having P.O. Box 49 would seem to be incorrect.

[57] Though Ms. Watson was drawn into speculation by the question posed that the bearer may not have collected the articles when he received the Notice of Arrival, the evidence of Mr. Downer that he received the slip and collected the articles on the 12th April 2022, in all the circumstances, is very convincing and I accept his evidence. However, there was no evidence from the 1st Defendant, who bears the burden of proof, that any of this was known to the Claimant at the time the Default Judgment was entered. On the authority of **Ace Betting** and subsequent cases, this would not avail the

Defendants if the Registrar had no intimation of these events. That being the case, the Judgment in Default would have been regularly obtained. It is on the second prong that the 1st Defendant may see some success.

[58] **Rule 5.7 of the CPR** which provides for service on a company states:

> ***Service on limited Company***
>
> *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;*

S. 387 of the Companies Act 2005 as amended on the 1st of January 2014 prescribes that *"[a] document may be served on a company by leaving it at or sending it by post to the registered office of the company."*

[59] It is necessary in interpreting these provisions to revisit the dicta of Dunbar-Green JA (Ag) in **Giscombe**. At paragraph 67 she states that *"[T]he document to be posted must be properly addressed. This means that the intended recipient's address should be* ***correct and complete****"* [Emphasis mine]. In relation to Summit Betting Co, the Judge at first instance had deemed service to be irregular on the basis that the address was incorrect. On appeal it was agreed, after production of the addressed envelope containing the writ, that the address was correct. Forte JA said that *"Had this evidence been available to the Learned Judge it is fair to say that he would not have come to the conclusion that the service of the writ was irregular."* It can be inferred from this statement that had the address been incorrect, service would have been irregular.

[60] In this case, the Company's Registered Address, Actual Business Location and Mailing Address are the same: Irving Tower Estate, Martha Brae, Falmouth Post Office, P.O. Box 49, Trelawny, Jamaica. The Certificate of Posting was addressed to Amaterra Jamaica Company Limited, Irving Tower Estate, Martha Brae, Falmouth, Trelawny, However, a critical part of the address is missing, that is P.O. Box 49. The postal address

was therefore incomplete. This does not appear to be an error made by the Post Office as the letter of 25th January 2022 accompanying the documents, was similarly addressed.

[61] It is even more egregious when one examines the Registered Arrival Slip. It was simply and solely addressed to Keith Russell. The name of the 1st Defendant is not stated in any portion of the address given.

[62] Given the incomplete address, there could be no deemed service of the registered documents. The 1st Defendant is entitled to have the Default Judgment set aside as of right.

[63] The 1st Defendant had filed an Acknowledgment of Service in which it is indicated that it received the Claim Form and accompanying documents on the 12th April 2022. **Rule 5.1(9)(2) of the CPR** provides that:

> *(2) Where an acknowledgment of service is filed, whether or not the claim form has been duly served, the claimant may treat –*
>
> *(a) the date of filing the acknowledgment of service; or*
>
> *(b) (if earlier) the date shown on the acknowledgment of service for receipt of the claim form,*
>
> *as the date of service.*

The 1st Defendant is then to be treated as having been duly served on the 12th April 2022. The 1st Defendant cannot be taken to be waived the irregularity of service having indicated at several paragraphs of the Acknowledgment of Service its intention to dispute the Court's jurisdiction **(see B & J Equipment Rental v Nanco (Joseph)** [2013] JMCA Civ 2, para 9**)**.

SERVICE ON THE 2nd to 4th DEFENDANTS

[64] It is not disputed that the Claim Form and accompanying documents sent by registered post were not addressed or sent to the 2nd to 4th Defendants at their registered office in keeping with **CPR Rule 5.7 (a)**. The Claimant contends that service was effected via registered post on all the Defendants by virtue of service on Mr. Keith Russell, the

principal of all the Defendant companies. The Defendant Companies, with Mr. Russell, being the single directing mind in all companies which were created for a singular purpose, were to be treated as one entity. The Defendants denied this and contended that the 1st Defendant, was not the parent company of the 2nd, 3rd and 4th Defendants and owned no shares in them nor had any control over them. Thus, the question arises, whether service can be effected on the 2nd to 4th Defendants through the 1st Defendant

[65] It is trite law that a subsidiary company is a distinct legal entity from the parent company. The same applies to companies in a group. This was the posture of the English Court of Appeal in the oft-cited case of **Adams v Cape Industries plc** [1990] Ch. 433 **("Adams")**, a case in which the question for determination was whether a company was domiciled in the jurisdiction by the presence of its subsidiary. The English Court of Appeal stated the law quite clearly. The court said:[10]

> *There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:" The Albazero [1977] A.C. 774, 807 per Roskill L.J.*

It went further to note:[11]

> *[T]he court is not free to disregard the principle of Salomon v A. Salomon & Co. Ltd. [1897] A.C. 22 merely because it considers that justice so requires. Our law, for better or worse, recognises that the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.*

[66] The court further stated that there is no presumption that the subsidiary is the agent of the parent company or that is it the alter ego of the parent company. The corporate veil of a subsidiary company can only be pierced where the company was formed with the

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[10] [1990] Ch. 433, pg 532 para D
[11] Ibid. pg 536 para G

intention of carrying out some wrongdoing as was stated in **Prest v Petrodel Resources Limited and others** [2013] UKSC 34 ("**Prest**").

[67] In **Prest**, the question on appeal was whether the court had the power to order the transfer of several properties owned by companies that were wholly owned or controlled by a husband to his wife as matrimonial property. Lord Sumption noted that *"[t]heir separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them."*. **Prest** was considered by the Court of Appeal in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461** [2013] JMCA Civ 45. Morrison JA (as he then was) stated:[12]

> *It is therefore clear that a company generally falls to be treated as an independent person, separate and distinct from its shareholders, capable of holding land and other property, entering into contracts and incurring debts and other liabilities in its own name.* ***In the context of groups of companies, each company is also a distinct entity and a subsidiary does not fall to be regarded as an agent of the parent by reason only of the fact that the parent is its controlling shareholder. In this regard, it is generally irrelevant that the parent and the subsidiaries share or have common directors or other officers****. [Emphasis mine]*

With respect to piercing the corporate veil Morrison JA, in considering **Prest**, opined:[13]

> *Although the court confirmed that there is a limited category of cases in which it might be appropriate to pierce the corporate veil, it squarely located the jurisdiction to do so within the context of cases of abuse of a company's separate legal personality "for the purpose of some relevant wrongdoing" – per Lord Sumption at para [27].*

[68] There has been no evidence presented, and none was suggested, from which the Court could make a finding of abuse by any of the Defendants of their separate legal personalities, which would cause this Court to lift the corporate veil of the Defendant companies. As such, service on one company could not be considered service on all.

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[12] [2013] JMCA Civ 45, para 63
[13] Ibid. para 65

[69] I would decline to hold that **DHN Food Distributors Ltd v Tower Hamlets London Borough** [1976] 1 WLR 852 **("DHN Food Distributors")**, relied on by the Claimant, sets out a general principle that companies in a group with a common interest and having the same directorship should be regarded as a single entity. In fact, Goff LJ made it clear that he was relying on the facts of the particular case (described by Shaw L.J. as *"of an exceptional and unusual character"*) and that the nature of the question involved was highly relevant. This was a situation where to treat the companies as separate was likely to result in a denial of justice. This case also predates the cases abovementioned. In fact, there was an opposing decision to **DHN Food Distributors** in the House of Lords in the case of **Woolfson v Strathclyde Regional Council** 1978 SLT 159, HC. This was a case on all fours with **DHN Food Distributors** on its facts.

[70] The House of Lords indicated that the decision in **DHN Food Distributors** was incorrect. Inter alios, Lord Keith speculated as to whether the Court of Appeal in **DHN Food Distributors** had improperly applied the guiding principle, that is whether it is appropriate to pierce the corporate veil only where special circumstances exist. This in effect would indicate that the veil is a mere façade concealing the true situation. In my view **Adams** and **Prest** establish definitively that **DHN Food Distributors** was quite an outlier.

[71] The Claimant's Attorney also submitted that Mr. Russell was the single directing mind of all four companies and service on him could constitute service on all the companies. According to the Affidavit of Service by Registered Post filed 14th March 2022, the originating documents posted on 28th January 2022 were accompanied by a letter, dated 25th January 2022,[14] which was addressed as follows:

> *January 25, 2022.*
> *Amaterra Jamaica (Co) Ltd*
> *Irving Tower Estate*
> *Martha Brae, Falmouth Trelawny*

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[14] Exhibit JW-1

Jamaica W.I.

Attention: Mr. Keith E. Russell
Dear Sirs:

Re: Rexton Holdings LLC v The Amaterra Group

Reference is made to the captioned matter.

Please find attached for your attention, a copy of the Claim Form and Particulars of Claim, both filed on January 17, 2022.

This copy represents a formal service on the following:

Amaterra Jamaica Ltd — *1st Defendant*
Amaterra Jamaica H1 Ltd — *2nd Defendant*
Amaterra Jamaica VR1 Ltd — *3rd Defendant*
Amaterra Utility Ltd — *4th Defendant*

Kindly acknowledge receipt of the above items by signing and returning to me the enclosed copy of this letter.

Yours faithfully,
DunnCox

This clearly suggests that said documents were being formally served on the 1st, 2nd, 3rd and 4th Defendants through Mr. Russell.

[72] Rule 5.7 of the CPR which provides for service on a company states:

> ***Service on limited Company***
>
> *Service on a limited company may be effected –*
>
> *(b) by sending the claim form by telex, FAX, prepaid registered post, courier delivery or cable addressed to the registered office of the company;*
>
> *(c) by leaving the claim form at the registered office of the company;*
>
> *(d) by serving the claim form personally on any director, officer, receiver, receiver-manager, or liquidator of the company;*
>
> *(e) by serving the claim form personally on a officer or manager of the company at any place of business of the company which has a real connection with the claim; or*
>
> *(f) in any other way allowed by the enactment.*

[73] Where service is being effected through a Director, personal service is required. In the present case, service was attempted through registered post, therefore, service was not properly effected on Mr, Russell as Director of the 1st Defendant company. From this it follows then that the 2nd to 4th Defendants were also not served.

[74] Consequently, I find that the 2nd, 3rd and 4th Defendants are also entitled to have the Default Judgment set aside as of right. Having also filed an Acknowledgment of Service, acknowledging receipt of the Claim Form and accompanying documents, they were duly served on the 12th April, 2022.

SUPERVISORY JURISDICTION OF THE COURT

[75] The Defendants filed an Acknowledgment of Service pursuant to **Rule 9.6 of the CPR** disputing the Court's jurisdiction. It was indicated that the Acknowledgment of Service was being filed for the sole purpose of making an application to set aside the service of the Claim Form and Particulars of Claim. Consequently, the Defendants filed the 1st application seeking the Orders 2,3 and 4 set out at paragraph 6.

[76] The learned authors of Russell on Arbitration, 19th Edition stated:[15]

> *Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement , commences an action to have the dispute determined by the court, the prima facie leaning of the court is to stay the action and leave the plaintiff to the tribunal which he has agreed.....Once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay.*

[15] Russell on Arbitration, 19th Edition, pg 190

The authors also noted that in matters of this nature, it was well established that it is entirely within the Court's discretion to stay proceedings.[16] This commentary is in keeping with **S. 5 of the Arbitration Act** which provides:

> *If any party to a submission, or any person claiming through or under him, commences any legal proceedings against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings and a Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.*

[77] From the authorities cited, it is made clear that the burden is placed on the party moving for a stay to satisfy the Court that (i) the applicant is ready and willing to do all things necessary for the proper conduct of the arbitration and (ii) there is sufficient reason to show why effect should not be given to the arbitration agreement. This burden may be satisfied by the party moving for a stay asserting his willingness to engage arbitral proceedings. I find particular support in this position in the case **of Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ. 19 **("Leighton Chin-Hing")**, where Phillips JA said:[17]

> *…the assertion of an applicant who seeks to have proceedings stayed that it is willing and ready to arbitrate is sufficient evidence upon which a court may find that it is indeed willing and ready unless there is evidence to the contrary. There need not be any further facts in support of that assertion although such facts would strengthen its position.*

[78] In **Leighton Chin-Hing** the dispute concerned a lease which provided that disputes or questions in relation to certain matters were to be settled by arbitration. The appellant had sent an email seeking to invoke the arbitration clause, however, the

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[16] Ibid, pg 154
[17] [2013] JMCA Civ. 19, para 21

respondent did not respond to said request. The appellant commenced proceedings against the respondent and, subsequently, the respondent filed an application for the matter to be stayed pending arbitration. The respondent contended that they had not expressed an unwillingness to have the dispute resolved by arbitration and that they were ready and willing to participate in arbitration proceedings. The Court found that though there was no evidence that there was a response to the email in which arbitration was suggested, *"silence or inaction on the part of the respondent to a suggestion to arbitrate is insufficient to ground a finding of unwillingness."*

[79] **Leighton Chin-Hing** is distinguishable from the case of **Sharma v Adit et al,** (unreported) High Court, Trinidad and Tobago, Claim No. CV 2012 – 04258 **delivered 8 February 2013 ("Sharma")**, a Trinidadian case in which the claimant had instituted legal proceedings, and the defendants had filed an application for a stay of proceedings for six **(6)** months in order to have the matter resolved by arbitration proceedings. The Trinidadian High Court found that the claimant was not ready and willing to participate in arbitration proceedings. The Court was of the view that the lack of response to the claimant's pre-action letter seeking to invoke the arbitration clause in tandem with the defendant's action of instituting summary proceedings almost four weeks after the pre-action letter was sufficient for the Court to refuse to exercise its discretion to stay proceedings. Though the decision of **Sharma** is not binding on this jurisdiction, I find it useful in illustrating that determining what is ready and willing conduct is dependent on the circumstances of each case.

[80] In the case at bar, the Defendants contend that they are ready and willing to participate in arbitration proceedings and there is sufficient reason to illustrate why the matter should be referred to arbitration.[18] Accordingly, the Defendants seek to challenge the Court's jurisdiction pursuant to **Rule 9.6 of the CPR**. However, the Claimant contends that the Defendants were not willing to participate in arbitration proceedings, and, had in

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[18] Affidavit of Tessa Simpson dated May 25th 2022, para 11

fact evidenced a clear intention to repudiate the arbitration clause by their letter dated 5th July 2021.

[81] In **Sabal PH v G.M. Associates Ltd.** [2020] JMCA Civ 43 **("Sabel")**, Morrison P, in reviewing what qualifies as the repudiation of an arbitration, cites the following extract from **Russell on Arbitration** 20th Edition:[19]

> ***Express or implied repudiation.*** *A party may repudiate the arbitration agreement and if the other party accepts that repudiation the arbitration agreement will come to an end. The repudiation may be express or may be inferred from the conduct of a party who acts in a way that is inconsistent with the continued operation of the arbitration clause and evinces an intention not to be bound by it. However, a failure to comply with the general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings is not a repudiation of the arbitration agreement. The repudiation may be by anticipatory breach of the arbitration agreement. Acceptance of the repudiation may be demonstrated by the commencement of proceedings in court.*
>
> ***Repudiation by commencing proceedings****. A party may repudiate the arbitration agreement by commencement of proceedings in court in breach of its terms, but such breach will only be repudiatory if done in circumstances that show the party in question no longer intends to be bound by the agreement to arbitrate. Such an intention can only be inferred from conduct which is clear and unequivocal. If there was some reason for the breach, such as confusion as to the correct course, the court will not infer that the party bringing the proceedings intended to renounce the obligation to arbitrate."*

[82] In **Downing v Al Tameer Establishment and another** [2002] 2 All ER (Comm) 545 **("Downing")** a case before the English Court of Appeal, the claimant entered into contract with the defendant which provided for disputes to be settled by way of arbitration. The defendants failed to fulfil their obligations under the agreement and as such the claimants sought to invoke the arbitration clause. The defendants responded to the claimants by way of letter and denied that there was ever an agreement between the parties. Further, in response to the claimant's threat of instituting proceedings, the

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[19] [2020] JMCA Civ 43, para 66

defendants communicated that the claim will be defended and a counterclaim would be pursued. The Claimant commenced proceedings. Potter LJ held:[20]

> *The question of whether or not a party had lost the right to arbitrate under a secondary contract such as an arbitration agreement was to be approached by the application of the traditional principles of the law of contract, and in particular the doctrine of repudiation, whereby if one party demonstrated an intention no longer to be bound by the contract it was open to the other party to accept such demonstration as repudiation and thereby to bring the contract to an end. In the instant case, the judge had been right to hold that the defendant's letter of 22 June 1995 amounted to a repudiatory breach of the agreement to arbitrate. That letter had been written against the background of a scrupulous effort by the claimant to set up arbitration proceedings in accordance with cl 13 of the agreement which had been met by a denial that any contractual relationship existed between the parties. That stance had been maintained by the defendant's statement that the claimant's proposed proceedings would be defended and a counterclaim pursued, rather than any suggestion being made that the proceedings were inappropriate by reason of the arbitration clause. It followed that, prior to the issue and service of proceedings, the defendant was plainly evincing an intention not to be bound by the agreement to arbitrate. However, the judge had been wrong to conclude that the issue and service of proceedings did not amount to a clear and unequivocal indication that the claimant had accepted the defendant's repudiation of the arbitration agreement. Contrary to the view of the judge, the position of a party issuing proceedings following a repudiatory breach of an arbitration agreement was different from that of a party issuing proceedings simply to test the water.* ***The question of whether or not the issue and service of proceedings was an unequivocal acceptance of the repudiation depended upon the previous communications of the parties and whether or not, on an objective construction of the state of play when the proceedings were commenced, the fact of the issue and service of the proceedings amounted to an unequivocal communication to the defendant that its earlier repudiatory conduct had been accepted, in the sense that it was clear that the issue of such proceedings (i) was a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation thereunder and (ii) reflected a consequent decision on the claimant's part to abandon the remedy of arbitration in favour of court proceedings.*** *On the facts of the instant case, those conditions were satisfied at the time the application for a stay had been heard and, in consequence, the arbitration agreement had been inoperative for the purposes of s 9(4) of the Act. Accordingly, the appeal would be allowed.* [Emphasis mine]

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[20] [2002] 2 All ER (Comm), pg 545-546

[83] The dicta of Porter J was followed by Morrison P in **Sabel**. In that case the respondent communicated that it intended to pursue arbitration. However, following this, no action was taken by either party, and as a result the fourteen **(14)** day deadline to appoint an arbitrator as agreed between the parties had elapsed. Subsequently, the respondent commenced an action against the appellant. Morrison P found that in the circumstances the conduct of the respondent evinced a clear intention to repudiate the arbitration agreement. The Learned Judge further found that the appellant unequivocally accepted such repudiation by filing a defence and counterclaim to the action. Hence, the respondent was taken to have abandoned arbitration proceedings in favour of court proceedings.

[84] In the case at bar, Clause 11 of the (Amaterra) Framework Agreement, dated 15th May 2019, is a Dispute Resolution clause which mandates that disputes arising from the agreement should be settled by way of arbitration proceedings. It reads as follows:

> ***Dispute resolution***
>
> *The Parties expressly waive their right to any form of legal recourse and agree to submit any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA (LONDON COURT OF INTERNATIONAL ARBITRATION) Rules, which Rules are deemed to be incorporated by reference into this clause.*
>
> *(i) The number of arbitrators shall be minimum of two.*
>
> *(ii) The ICA will administer arbitration proceedings in Jamaica.*
>
> *(iii) The language to be used in the arbitral proceedings shall be English.*
>
> *(iv) The governing law of the contract shall be the substantive laws of Jamaica.*

[85] By letter dated 7th June 2021, the Claimant wrote to Mr. Keith Russell to demand that the Claimant be compensated for breach of contract, failure to do so would result in the Claimant instituting arbitration proceedings against the Defendants. The Defendants responded by letter dated 5th July 2021 to refute the allegations of the Claimant. Pursuant to the 1st Affidavit of Samantha Grant filed 16th September 2022, two **(2)** paragraphs of

the foregoing letter were referenced as evidence of the Defendant's intention to repudiate the arbitration agreement. They read as follows:

> *The documentation following the MOA (including the Framework Agreement and the Shareholders Agreement) were all predicated on the Rexton material role and function under the MOA to find a financier (loan and/or equity) which it has failed to do. Accordingly, those documents can have no legal effect as the factual precondition for their legal validity does not exist.*
>
> *Based on the foregoing, we have advised our client that it cannot accede to your request to embark upon arbitral proceedings under the Framework Agreement which did not come into effect for the reasons stated above. Nevertheless, our clients wish a non-contentious resolution to the termination of the relationship with your client and is prepared to meet on condition that the caveat is withdrawn immediately.*

[86] The letters referenced above, though not exhibited to any affidavits, were filed under seal out of an abundance of caution that some aspects of the letters may contain without prejudice material. I considered it necessary to review them properly in order to consider this issue. Having considered both letters in full, particularly the letter dated 5th July 2021, the context of which is crucial to uncovering the intention of the portions of the letter cited above, it is my understanding that the Defendants had altogether denied the existence of a contractual relationship between the parties. The Defendants' position was attributed to the Claimant's alleged failure to provide credible financing options. This, as the Defendants contend, was the obligation on which the entire agreement was predicated. It was for those reasons that the Defendants could not *"accede"*, as they put it, to the Claimant's request to embark upon arbitral proceedings. In essence, the Defendants refused to submit to arbitration proceedings on the basis that there was no valid agreement between the parties at the time of the request.

[87] The contention of the 1st Defendant that it *"was advised not to participate"* is distinct from what was conveyed in the letter of 5th July 2021 which states: *"we have advised our client that it cannot accede to your request"*. *"Not to participate"* conveys a discretion which was not exercised to participate, *"cannot accede to your request"* conveys that there is a bar to participation, the latter is more befitting to the circumstances considering the context of the letter of 5th July 2021. I find that the evidence indicates that the

Defendants were not ready and willing to participate in arbitration proceedings. They had instead expressly repudiated the arbitration clause and the Claimant accepted said repudiation by commencing proceedings. The case at bar is therefore distinguishable from the circumstances in **Leighton Chin-Hing**. Consequently, the Claimant was left with no option but to commence proceedings in Court.

[88] The facts of the present case are mirrored to the case of **Downing**, where Potter LJ had found that the previous communications of the parties could serve as an indication as to whether *"the issue and service of proceedings was an unequivocal acceptance of repudiation".* In the current circumstances, I find that it is.

[89] On this basis I refuse the application to stay proceedings. In the light of this conclusion, it is not necessary to deal with the ground concerning the severability of portions of the arbitration clause.

CONCLUSION

[90] Though the evidence shows that the actual date of service on the 1st Defendant was 12th April 2022, there is no evidence that the Claimant was notified at the time the default judgment was entered that the documents remained uncollected to rebut the deemed date of service. However, the documents were posted to an incomplete address for the 1st Defendant. Consequently, the Default Judgment obtained on 11th March 2022 was irregularly obtained and must be set aside. The documents were not posted to the registered address of the 2nd to 4th Defendants. The Defendants being separate legal entities, the 2nd to 4th Defendants could not be served by virtue of service on the 1st Defendant, nor was service by Registered Post properly effected on Mr. Keith Russell as a director of each Defendant.

[91] The Acknowledgment of Service filed by the Defendants indicated that they received the Claim Form and accompanying documents on 12th April 2022. The Claimant is entitled to treat the Defendants as having been served on that date.

[92] As the Court has no need to consider whether to exercise its discretion to set aside the Default Judgment, there is no need to consider the merit of the Defendants' defence. No prejudice is therefore occasioned to the Claimant by permitting the affidavits of Mr. Russell and Mr. Downer to stand.

[93] The Court has the jurisdiction to hear this matter as the Defendants evinced an intention not to be bound by the Arbitration Clause. The Court therefore declines to stay the proceedings in favour of arbitral proceedings.

ORDERS

On Notice of Application for Court Orders filed 19th October 2022

1. The Order of Batts J is varied and it is ordered as follows:

    (a) The Affidavit of Keith Russell is permitted to stand.
    (b) The Affidavit of Berisford Downer is permitted to stand.
    (c) The Skeleton Submissions filed by the 1st, 2nd, 3rd, and 4th Defendants are permitted to stand.
2. Time for the filing and service of this Application is abridged.
3. Costs of the Application to be cost in the claim.
4. Leave to appeal refused.

On Amended Notice of Application for Court Orders filed 19th October 2022

1. Default Judgment entered on March 11, 2022 is set aside.

2. A declaration that pursuant to Clause 11 of the Framework Agreement executed by the parties and dated the 15th of May 2019, the Supreme Court of Judicature of Jamaica does not have or should not exercise the jurisdiction to try the claim is refused.

3. An order that pursuant to **S.11 of the Arbitration Act** the dispute emanating from the Framework Agreement executed by the parties is to be referred to arbitration is refused.
4. An order that there be a stay of proceedings pursuant to **S.5 of the Arbitration Act**, pending the submission of the matters in dispute herein to arbitration is refused.
5. Acknowledgment of Service being filed in time is to stand.
6. The 1st, 2nd, 3rd and 4th Defendants are permitted to file a defence within fourteen **(14)** days of this Order.
7. Case Management Conference is fixed for April 25th 2023 at 10:00am for 1 hour.
8. Claimant to have half costs to be taxed if not sooner agreed.
9. Leave to appeal granted.
10. Applicant's Attorneys-at-Law to prepare, file and serve formal Order.

_____

Brown Beckford J

Puisne Judge