IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 04009

BETWEEN	**(1) ANTHONY THARPE**	**1st CLAIMANT**
	(2) Successors in the Interest of	**CLAIMANTS**
	(3) Business Ventures & Solutions Inc.	
	(4) All Damaged Parties; Judgment Creditors	
AND	**ALEXIS ROBINSON**	**1st DEFENDANT**
AND	**MYERS, FLETCHER & GORDON**	**2nd DEFENDANT**
AND	**JOHN GRAHAM**	**3rd DEFENDANT**
AND	**JOHN GRAHAM AND COMPANY**	**4th DEFENDANT**
AND	**SUZETTE SPENCE**	**5th DEFENDANT**
AND	**NICOLA DELAPENHA**	
AND	**ALL NAMED AND UNNAMED PARTIES**	
	WITH INTEREST COLD WELL BANKER	**DEFENDANTS**

IN CHAMBERS

The Respondent/1st Claimant appears in person

Messrs. Maurice Manning Q.C. and François McKnight instructed by Messrs. Nunes, Scholefield, DeLeon & Co. for the Applicants/1st and 2nd Defendants

Ms Peta-Gaye Manderson instructed by Messrs. John G. Graham & Company for the 3rd and 4th Defendants

Mr Wendell Wilkins instructed by Messrs. Robertson Smith Ledgister & Company for the 5th Defendant

Heard: April 25 and May 20, 2022

Civil procedure – Striking out – Application to strike out claimants' statement of case – Whether the claimants' statement of case ought properly to be struck out – The approach of the court in dealing with an application to strike out – Whether the 1st claimant has the requisite standing to bring the claim – Whether the claimants have sufficiently particularized the claim – Whether the claimants' statement of case as framed constitutes an abuse of the process of the court – Whether the claimants' statement of case is prolix, frivolous and vexatious and without merit – Whether the claimants' statement of case discloses any reasonable grounds for bringing the claim

Summary judgment – Whether in the alternative the court should grant summary judgment in favour of the defendants against the claimants – The approach of the court in dealing with an application for summary judgment – Whether the claimants' claim has any real prospect of success

Burden – Burden of proof – Standard – Standard of proof – Civil Procedure Rules, 2002, rules 8.7, 8.9(1), 15.2, 15.3(4) and 26.3(1)

A. NEMBHARD J

[1] The hearing of the Notice of Application for Court Orders to Strike out Claimants' Statement of Case and/or for Summary Judgment, which was filed on 24 July 2020, was first listed before this Court on 25 April 2022. At that time, the Respondent/Claimant, Mr Anthony Tharpe, who is a self-represented litigant, indicated to the Court that he filed certain documents via Federal Express ("FEDEX"). He enquired of the Court whether the Court was in receipt of those documents, whether on its physical or digital file.

[2] A careful examination of the Court's physical and digital files did not reveal the presence of any affidavit evidence or written submissions and authorities that had been filed by Mr Tharpe, in respect of the Notice of Application for Court Orders, which was filed on 24 July 2020. Mr Tharpe was unable to specifically identify the documents which he contends were filed via FEDEX. Nor was he able to communicate the specific content of the respective documents which he contends were filed on his behalf. Mr Tharpe was equally unable to indicate with whom in the Registry of the Supreme Court of Judicature of Jamaica these documents were filed or in which Division of the Supreme Court the documents were filed.

[3] That, notwithstanding, Mr Tharpe indicated to the Court that it could proceed with the hearing of the Notice of Application for Court Orders to Strike out Claimants' Statement of Case and/or for Summary Judgment, which was filed on 24 July 2020. Mr Tharpe indicated that he was duly served with the application, the supporting affidavit as well as the written submissions and authorities filed on behalf of the Applicants/1st and 2nd Defendants. He indicated, as the Court understood him, that he was in a position to respond to the application and to adequately address the issues raised therein. The Court cautioned Mr Tharpe that, if it were to proceed to hear the application, there would be no subsequent opportunity for the Court to have regard to the content of the documents of which

he spoke and further, that the Court was unable to make a judgment call as to whether proceeding in the absence of these documents would be in his best interest, as the Court was unaware of and unable to speak to the content of these documents. In the face of the caution that was administered by the Court, Mr Tharpe remained resolute that the Court should proceed with the hearing of the application.

[4] Up to the time of the delivery of the Judgment of the Court, in respect of the Notice of Application for Court Orders to Strike out Claimants' Statement of Case and/or for Summary Judgment, which was filed on 24 July 2020, no documents were presented to the Court as having been filed by Mr Tharpe. The Court's enquiry of the Civil Registry did not reveal that any documents had been filed by Mr Tharpe, in respect of the application.

INTRODUCTION

[5] This is an application to strike out the Claimants' Statement of Case. The application is made by the 1st and 2nd Defendants, Mrs Alexis Robinson and the Law Firm, Myers, Fletcher & Gordon, respectively. In the alternative, the Applicants/1st and 2nd Defendants seek Summary Judgment in their favour against the Claimants.

[6] The application is contained in a Notice of Application for Court Orders to Strike out Claimants' Statement of Case and/or Summary Judgment, which was filed on 24 July 2020. The Applicants/1st and 2nd Defendants, Alexis Robinson and Myers, Fletcher & Gordon (A Firm), respectively, seek the following Orders against the Respondents/Claimants, Anthony Tharpe, Successors In The Interest Of, Business Ventures & Solutions Inc., All Damaged Parties and Judgment Creditors: -

(i) That the Claimants' Claim Form and Particulars of Claim both filed on October 14, 2019, in relation to the 1st and 2nd Defendants, ALEXIS ROBINSON and MYERS, FLETCHER & GORDON (A

Firm) be struck out and judgment entered in favour of the 1st and 2nd Defendants, ALEXIS ROBINSON and MYERS, FLETCHER & GORDON (A Firm);

(ii) In the alternative, that Summary Judgment be entered in favour of the 1st and 2nd Defendants, ALEXIS ROBINSON and MYERS, FLETCHER & GORDON (A Firm) against the Claimants;

(iii) Costs to the 1st and 2nd Defendants, ALEXIS ROBINSON AND MYERS, FLETCHER & GORDON (A Firm), to be taxed, if not agreed;

(iv) A stay against the Claimants bringing any further proceedings against the Applicants pending the payment of said costs; and

(v) Such further or other relief as this Honourable Court deems fit.

The application is supported by the Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was also filed on 24 July 2020.

THE ISSUES

[7] The application raises the following issues for the Court's determination: -

(i) Whether the Claimants' Statement of Case ought properly to be struck out; or

(ii) In the alternative, whether the Court ought properly to enter Summary Judgment in favour of the Applicants/1st and 2nd Defendants against the Respondents/Claimants.

[8] In order to determine the issues raised, the following sub-issues must also be resolved: -

(i) Whether Mr Tharpe has the requisite locus standi to bring the Claim in the name of Business Ventures & Solutions Inc.;

(ii) Whether the Claimants have sufficiently particularized the Claim;

(iii) Whether the Claimants' Statement of Case is prolix, frivolous and vexatious;

(iv) Whether the Claimants' Statement of Case constitutes an abuse of the process of the court;

(v) Whether the Claimants' Statement of Case discloses any reasonable ground(s) for bringing the Claim; and

(vi) In the alternative, whether the Claimants have any real prospect of succeeding on the Claim.

BACKGROUND

The ownership of Business Ventures & Solutions Inc.

[9] The application is made against the background that Mr Tharpe was previously a Director of Business Ventures & Solutions Inc. ("BVS"), a company that was duly incorporated in the United States of America and in which he held a one hundred percent (100%) share of the legal interest. On 3 January 2006, BVS entered into an Agreement for Sale to purchase real property situate at 15 Queens Drive, Montego Bay, in the parish of Saint James, being the land comprised in Certificate of Title registered at Volume 665 Folio 10, Volume 665 Folio 11 and Volume 650 Folio 65, respectively, of the Register Book of Titles ("the Property").

[10] Pursuant to that Agreement for Sale, the vendor, Mr David Rubin, the then executor and trustee of the Estate and Trust of the late Alexander Mortimer

Burnham ("the Alexander Burnham Trust"), was the registered proprietor of the Property up to the time of his death on 2 February 1975. The parties agreed to a purchase price of Four Hundred and Seventy Thousand United States Dollars (USD$470,000.00). This amount was to be paid by way of a deposit in the sum of Forty-Seven Thousand United States Dollars (USD$47,000.00) and a further payment of Thirty-Seven Thousand United States Dollars (USD$37,000.00) upon signing. The balance of Three Hundred and Eighty-Six Thousand United States Dollars (USD$386,000.00), was to be paid on completion, ninety (90) days from the date of signing of the Agreement for Sale.

[11] On or about 6 April 2006, the titles to the Property were transferred to BVS, on the assurance of a purported undertaking, given on behalf of BVS, by a mortgage corporation in Florida. BVS and its then principal, Mr Tharpe, failed to pay the balance of the purchase price.

[12] This failure led, in part, to the initiation of litigation in Claim No. 2010 HCV 02692 which was brought by Capital One NA ("Capital One"), the successor administrator and trustee of the Alexander Burnham Trust. The claim was initiated against BVS, Mr Tharpe and Ms Jacqueline Buchanan. By virtue of that claim, Capital One sought, inter alia, the rescission of the Agreement of Sale and the reconveyance of the title to the Property to the Alexander Burnham Trust.

[13] On 29 February 2012, the court made an Order striking out BVS' Defence. Aggrieved by this decision, BVS filed an appeal.

[14] On 5 November 2012, the appeal was allowed. The Court of Appeal found that the standing of Capital One (at that time) to bring the claim, was in doubt as there was no evidence of its right or authority so to do.

[15] On 10 March 2015, a Grant of Administration with Will annexed *de bonis non* of all real and personal estate which by law devolves on and vests in the personal representative of the deceased David Rubin was granted to Ms Lorraine Gallagher, Trust Officer of Capital One, Trustee responsible for the administration of the Alexander Burnham Trust.

[16] Subsequently, on or about 22 February 2017, Mr Tharpe, who held a one hundred percent (100%) share of the legal interest in BVS, voluntarily placed himself into bankruptcy, by petitioning for relief under Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of Florida, West Palm Beach Division ("the Bankruptcy Proceedings"). The Bankruptcy Court appointed Mr Michael R. Bakst as the Chapter 7 Trustee in Mr Tharpe's bankruptcy. On 26 September 2017, Judge Paul G. Hyman, Jr approved motions for the sale of Mr Tharpe's estate, right, title and interest in BVS, free and clear of all liens, claims, interests and encumbrances, to the Alexander Burnham Trust, by and through Capital One, as trustee for the Burnham Trust.

[17] On or about 6 October 2017, the Bankruptcy Trustee for Mr Tharpe, by way of an Assignment Agreement, transferred all of Mr Tharpe's estate, right, title and interest in BVS to the Alexander Burnham Trust, by and through Capital One.

[18] On 9 January 2018, on a *Motion for Contempt and for Sanctions Against the Debtor (Anthony Tharpe) for Wilful Violations of the Court's Order*, the Bankruptcy Court compelled Mr Tharpe, inter alia, to immediately cease pursuing any claims against Capital One and the Burnham Trust that are the subject of the Settlement Agreement and the Settlement Order. Mr Tharpe was also compelled to cease taking any action on behalf of BVS, including, but not limited to, pursuing any claims on behalf of BVS.

MF&G's representation of BVS

[19] In or around late 2018, Myers, Fletcher & Gordon ("MF&G") was engaged to represent BVS, in respect of an action commenced in Claim No. 2010 HCV 02692, **Capital One, NA v Business Ventures & Solutions Inc & Ors**. MF&G was authorized to file a Notice of Change of Attorneys-at-Law, which was done on 10 December 2018. This was done on the authority and instructions of BVS, through its sole Director, Mr Steve Rapier, and Hancock Whitney Bank, the

trustee of the Alexander Burnham Trust, the sole shareholder of BVS, under the signature of Ms Gallagher.

[20] In 2019, MF&G, through its various Attorneys-at-Law, attended court on behalf of BVS. MF&G was instructed to file a Notice of Withdrawal[1] of a previously filed Notice of Application for Court Orders, which was filed on 21 March 2016 ("the 2016 Application").[2] Mr Tharpe sought leave to appeal BVS' withdrawal of the 2016 Application and filed multiple applications, each of which was refused by K. Anderson J, on 25 March 2019.[3]

[21] On 14 October 2019, the Claimants filed the Claim Form and Particulars of Claim, in the present instance, against Alexis Robinson, Myers, Fletcher & Gordon, John Graham, John Graham and Company, Suzette Spence, Nicola Delapenha and All Named and Unnamed Parties with interest Cold Well Banker.

[22] On 29 November 2019, a Defence was filed on behalf of the Applicants/1st and 2nd Defendants.

[23] On 24 July 2020, the Applicants/1st and 2nd Defendants filed their Notice of Application for Court Orders, by virtue of which they seek an Order that the Claimants' Statement of Case be struck out, or, in the alternative, that the Court enters Summary Judgment in their favour against the Respondents/Claimants.

[24] By virtue of their application, the Applicants/1st and 2nd Defendants contend that the Claimants lack the requisite locus standi to bring the Claim in the name of BVS and that the Claimants have failed to provide any factual basis to ground the Claim. The Applicants/1st and 2nd Defendants further contend that the Claimants have no real prospect of succeeding on the Claim against them, in circumstances where they acted in the capacity of Attorneys-at-Law for a corporate client, through its duly appointed Director and shareholder.

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[1] See – Exhibit **"AR-10"** of the Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020

[2] See – Exhibit **"AR-9"** of the Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020

[3] See – Exhibit **"AR-11"** of the Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020

[25] The submissions advanced on behalf of the Applicants/1st and 2nd Defendants were adopted by Learned Counsel Ms Peta-Gaye Manderson and Mr Wendell Wilkins for and on behalf of the 3rd and 4th Defendants and the 5th Defendant, respectively. The Court is being asked to grant the Orders sought, by way of the application, in favour of the 3rd, 4th and 5th Defendants.

[26] A careful examination of the Court's records in respect of the instant matter does not reveal an indication that Ms Nicola Delapenha or All Named and Unnamed Parties with Interest Cold Well Banker were ever served in respect of this matter. Nor has Mr Tharpe been able to assist the Court with any evidence to prove that they have in fact been duly served.

THE LAW

Striking out

[27] Rule 26.3(1) of the Civil Procedure Rules, 2002 ("the CPR") provides that a court may strike out the whole or part of a statement of case. The rule provides as follows: -

> *"26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*
>
> *(a) That there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
> *(b) That the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
> *(c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
> *(d) That the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."*

[28] The traditional approach to striking out is that striking out is appropriate only in plain and obvious cases and that those cases which require prolonged and serious argument are unsuitable for striking out.[4]

[29] In **Dotting v Clifford & The Spanish Town Funeral Home Ltd**,[5] McDonald Bishop J (as she then was) stated as follows: -

> *"In considering this application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases. The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substance or where it is clear that the statement of case is contradicted by all the documents or material on which it is based (Three Rivers District Council v Bank of England (No. 3) [2003] 2 A.C. 1).It may also be said, on the guidance of the relevant authorities, that in determining the issue as to whether the claim should be struck out one may seek to ascertain, among other things, whether the claimant's pleadings have given sufficient notice to the defendant of the case she wishes to present and whether the facts pleaded are capable of satisfying the requirements of the tort alleged. The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be essentially, the same as that in granting summary judgment, that is: the claim against the defendant is one that is not fit for trial at all".*

[30] The Board of the Judicial Committee of the Privy Council affirmed this approach in the authority of **Peerless Limited v Gambling Regulatory Authority and others**.[6] At paragraph 24, Sir Paul Girvan had the following to say: -

> *"The power to terminate proceedings without any hearing on the merits is one which should be exercised with considerable caution and in a proportionate way. In its armoury of powers the court has other less draconian ways of marking its*

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[4] See – **Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd** [1986] AC 368, HL, per Lord Templeman and confirmed in **Three Rivers District Council v Bank of England (No 3)** [2001] 2 All ER 513, HL and **S & T Distributors Ltd v CIBC Jamaica Ltd et al** SCCA No. 112/2004, unreported, judgment delivered on 31 July 2007. This position was reiterated in the case of **Herbert A. Hamilton v Minister of National Security and Attorney General of Jamaica** [2015] JMSC Civ 39.

[5] Claim No. 2006 HCV 0338, unreported, judgment delivered on 19 March 2007, per McDonald Bishop J (as she then was), at paragraph 10

[6] [2015] UKPC 29

disapproval of the conduct of a party and its legal advisers. It can, for example, make a wasted costs order against the legal advisers, it may disallow costs or it may award the costs of the proceedings for the leave application to the respondent even if leave is granted."

[31] An application to strike out a statement of case should be brought by way of a notice of application for court orders[7] and, where certain facts need to be proved, should be supported by evidence on affidavit.

[32] Additionally, the court has the power to treat an application to strike out as one for summary judgment. This enables the court to dispose of insubstantial claims or issues that do not merit a full investigation at trial.[8]

Summary judgment

[33] Comparatively, summary judgment is the mechanism by which the court, on an application, is able to identify and filter out those cases that do not have a real prospect of success. It is a discretionary remedy that is utilized by the court to decide on a claim or on a particular issue that is raised in the claim, without a trial. This mechanism is governed by Part 15 or the CPR and allows the court to dispose of cases promptly and expeditiously and without the need for a trial.

[34] The court may grant summary judgment in respect of the claim or in respect of a particular issue where it is of the view that either of the two (2) grounds specified in rule 15.2 of the CPR is met. These grounds are set out below: -

"15.2 The Court may give summary judgment… if it considers that -

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue."

[7] In accordance with the provisions of Part 11 of the CPR

[8] See – **Taylor v Midland Bank Trust Co Ltd** [1999] All ER (D) 831

The burden and standard of proof

[35] The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential.[9] The standard of proof in civil cases is satisfied on a balance of probabilities.

[36] In **Miller v Minister of Pensions**,[10] Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, said: -

> *"That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged but if the probabilities are equal it is not."*

[37] In **Celador Productions Limited v Melville Boone and Others**,[11] the then Vice Chancellor enunciated the following principles: -

> *"a) it is for the applicant for summary judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be;*
>
> *b) a 'real' prospect of success is one which is more than fanciful or merely arguable;*
>
> *c) if it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies then his prospects of success are not real; but*
>
> *d) the court is not entitled on an application for summary judgment to conduct a trial on documents without disclosure or cross-examination."*

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[9] See – **Murphy on evidence**, 9th edition, at page 71, paragraph 4.5
[10] [1947] 2 All ER 372, at pages 373-374
[11] [2004] EWHC 2362 (CH), at paragraph 7

Real prospect of success

[38] The dicta of Lord Woolf in the oft-cited case of **Swain v Hillman**[12] is instructive. At paragraph 7, Lord Woolf is quoted as follows: -

> *"7. The word 'real' distinguishes fanciful prospects of success… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

[39] Further, at paragraph 20, Lord Woolf stated: -

> *"20. …the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."* [13]

[40] In **Three Rivers District Council v Bank of England (No 3)**,[14] Lord Hutton opined: -

> *"The important words are 'no real prospect of succeeding'. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give Summary Judgment. It is a 'discretionary' power; that is, one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is no 'real prospect' he may decide the case accordingly."*

[41] The criterion that the judge has to apply is not one of probability but the absence of reality.

[42] In the result, the respondent to an application for summary judgment is required to demonstrate that there is some 'real prospect' of success which is not falsified, fanciful or imaginary, in order to defeat the application.[15]

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[12][2001] 1 All ER 91

[13] Part 24 of the United Kingdom Civil Procedure Rules reads similarly to Part 15 of the CPR

[14] [2001] UKHL 16

ANALYSIS AND FINDINGS

[43] The power of the court to strike out a party's statement of case is permissive, not mandatory. It confers the court with a discretion which is to be exercised in the light of all the circumstances. This discretion is to be exercised by applying two fundamental, though complementary principles. Firstly, that the parties to an action should not lightly 'be driven from the seat of judgment'. What that means is that the court will exercise its discretionary power with the greatest care and circumspection and only in cases where it is apparent, plain and obvious that a claim cannot succeed.

[44] The second principle is that a stay of proceedings or even a dismissal of proceedings may often be required for justice to be done. This is in an effort to prevent the parties from being harassed and put to expense by frivolous, vexatious or hopeless litigation.[16]

[45] In the present instance, the Applicants/1st and 2nd Defendants contend that the Claimants' Statement of Case is frivolous, vexatious and hopeless, primarily because the issues raised therein have already been judicially determined by a court of competent jurisdiction.

Whether the Claimants' Statement of Case ought properly to be struck out

(i) Whether Mr Tharpe has the requisite locus standi to bring the Claim in the name of Business Ventures & Solutions Inc.

Submissions advanced on behalf of the Applicants/1st and 2nd Defendants

[46] Mr Manning QC submits that, by virtue of the Orders made by Judge Paul G. Hyman, Jnr, in the Bankruptcy Proceedings, in the United States Bankruptcy Court for the Southern District of Florida, West Palm Beach Division, Mr Tharpe has no legal standing or locus standi to bring this Claim. This was the position in 2018, when the firm of MF&G was first retained.

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[15] See – **International Finance Corp v Utexafrica Sprl** [2001] C.L.C. 1361 and **ED&F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472

[16] See – Halsbury's Laws of England (4th edn, 2003), volume 37, paragraph 430

[47] It is further submitted that, from the Claimants' own averments, the following observations can be made in respect of the ownership and control of BVS: -

(i) Mr Tharpe was the principal of BVS in respect of which he held the entire legal interest;[17]

(ii) Mr Tharpe's property rights and interest in BVS have been assigned or transferred to other parties in the winding up proceedings in the United States of America;[18]

(iii) Mr Tharpe filed a Voluntary Chapter 7 Bankruptcy Petition in relation to his interest in BVS;[19]

(iv) A fraudulent proof of claim alleging that Mr Tharpe was indebted to the Alexander Burnham Estate in the sum of Six Hundred Thousand United States Dollars (USD$600,000.00) was filed by Capital One and other co-conspirators;[20] and

(v) That Mr Tharpe remains the legal Director and decision-maker of BVS even though his right and interest in same were fully divested to other parties and that he has a right under the laws of the United States of America to represent BVS, which includes the making of any and all binding decisions.[21]

[48] Conversely, the Applicants/1st and 2nd Defendants contend that Mr Tharpe's interest and estate in BVS were judicially determined in the Bankruptcy Proceedings.[22] Furthermore, motions for the sale of Mr Tharpe's estate, right, title and interest in BVS, free and clear of all liens, claims, interest and encumbrances, were sold to the Alexander Burnham Trust, by and through

[17] See – Paragraphs 1 and 32 of the Particulars of Claim, which was filed on 14 October 2019
[18] See – Paragraphs 7-10 of the Particulars of Claim, which was filed on 14 October 2019
[19] See – Paragraphs 23 and 24 of the Particulars of Claim, which was filed on 14 October 2019
[20] See – Paragraphs 26-30 of the Particulars of Claim, which was filed on 14 October 2019
[21] See – Paragraph 34 of the Particulars of Claim, which was filed on 14 October 2019
[22] See – Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020, at paragraphs 12, 13, 15 and 16

Capital One.[23] This means, it is submitted, that, at the time that MF&G became involved in the matter, Mr Tharpe had no further legal or beneficial interest in BVS, whether as shareholder, Director or otherwise.

[49] The Applicants/1st and 2nd Defendants further contend that Mr Tharpe purports to bring the Claim in his personal capacity as well as in a representative capacity, on behalf of BVS. BVS, it is submitted, is an incorporated entity which possesses a separate legal personality. Mr Manning QC asserts that it is trite law 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. To ground this submission, Mr Manning QC referred the Court to the authorities of **International Hotels (Jamaica) Ltd v Proprietors Strata Plan No. 461**[24] and **Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd (RBC) and Ors and Delroy Howell v Royal Bank of Canada and Ors**.[25]

[50] In **Ocean Chimo Ltd**, the court was asked to consider an application for summary judgment which was made by the 3rd, 4th, 5th and 6th defendants. The application for summary judgment emanated from an arrangement between Ocean Chimo Ltd and RBC Royal Bank (Jamaica) Limited and RBC Royal Bank (Trinidad and Tobago) Limited, for a syndicated loan to be made to Ocean Chimo Ltd. The loan was secured by a mortgage as well as a debenture over the property and fixed assets of Ocean Chimo Ltd, then Hilton Kingston hotel. The loan was also secured by the assignment of the Fire and Allied Perils Insurance over the buildings and assets of the hotel. Additionally, the loan was secured by Mr Delroy Howell, the Chief Executive Officer and Chairman of Ocean Chimo Ltd.

[51] In both claims, the claimants argued, among other things, conspiracy, fraud and loss of reputation. In the second claim, brought by Mr Howell, in respect of his

[23] See – Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020, at paragraph 12
[24] [2013] JMCA Civ 45, at paragraph 63, per Morrison JA (as he then was)
[25] [2015] JMCC Comm. 22

personal guarantee which was given in respect of the loans advanced to Ocean Chimo Ltd., Mr Howell argued that there was a conspiracy among the defendants and the management of the hotel, resulting in an agreement between the lenders and the hotel to have the lenders appoint a receiver/manager and to cause that receiver/manager to sell the hotel and so deprive him of his rights to the assets of Ocean Chimo Ltd.

[52] At paragraphs [239] and [240], Edwards J (as she then was) had the following to say: -

> *"The gravamen of Mr. Howell's claim is that because of the actions of the defendant he has suffered loss of valuable property (that is the hotel). However[,] Mr. Howell has no locus standi to bring such a claim in his personal capacity or as guarantor. A shareholder cannot bring an action to recover losses suffered by a company. Only a company can do so. See* ***Johnson v Gore Wood & Co 2001 1 All ER 481 and Stein v Blake et al*** *[1998] 1 All ER 724.*
>
> *Mr. Howell personally guaranteed the loan to Ocean Chimo but has not suffered any loss under the guarantee since the call was made to him to pay up under the guarantee and he ignored it. No payments were made and therefore no loss was suffered. This cause of action must also fail in the face of the absence of evidence to substantiate any pleaded losses."*

Submissions advanced on behalf of the Respondents/Claimants

[53] For his part, Mr Tharpe maintains that he has been recognized by the Supreme Court of Judicature of Jamaica as the representative of BVS and further, that no judgment of a foreign court can properly be enforced in Jamaica, in light of the principle of 'sovereignty'. The gravamen of his submissions, as the Court understands them, is that the submissions advanced by Mr Manning QC, in respect of the application to strike out, touch and concern matters that have been settled by the Supreme Court of Judicature of Jamaica. As a consequence, the doctrine of res judicata applies.

[54] Mr Tharpe contends that, on 16 May 2018, a Case Management Conference Hearing was held in the Supreme Court of Judicature of Jamaica, in respect of another matter, at which hearing the court recognized him [Mr Tharpe] as being the representative of BVS. Mr Tharpe further contends that, at that Case Management Conference Hearing, the court ruled that the Judgment of Judge Paul G. Hyman, Jnr, in the Bankruptcy Proceedings, cannot be enforced in Jamaica. In the result, the application to strike out seeks to have this Court review those matters, which should have been done by way of an appeal.

[55] Mr Tharpe asserts that the Applicant/1st Defendant, Mrs Alexis Robinson appeared in court without having filed a Notice of Change of Attorney and that, after having heard all these arguments about a US Trustee and a US Court, G. Brown J fixed the matter for a hearing of the Assessment of Damages. Mr Tharpe asserts that when Mrs Robinson appeared and indicated that she was withdrawing the claim for Assessment of Damages, she actually committed fraud. Mr Tharpe asserts that BVS indicated to Mrs Robinson, prior to that, that she [Mrs Robinson] was not retained. Mr Tharpe asserts that there are three (3) distinct cases, 2010 and 2016 HCV 0064. Mr Tharpe asserts that it is important to refer to the judgment of Beswick J, in which she threw out the case for the Applicants/1st and 2nd Defendants and incorporated the ruling of the Appeal Court. Foreign Law is irrelevant to these matters. Mr Tharpe asserts that the post judgment clarification of Beswick J, which was handed down on the 23 November 2016, states clearly that foreign law has no relevance to these matters. No foreign court order can be enforced in the Jamaican jurisdiction because of ‘sovereignty’. In the result, Mr Tharpe asserts, this argument has to be struck as res judicata as the Court of Appeal has already ruled on these matters.

Findings

[56] It is correct to say that judgments of the courts in one jurisdiction do not, without more, automatically become recognized and enforceable in another jurisdiction. It is equally correct that there is no statutory framework which allows for the

reciprocal enforcement of foreign judgments between the state of Florida in the United States of America and Jamaica. In the present instance, however, this Court is of the view that the recognition and enforcement of foreign judgments have no immediate bearing.

[57] The Court accepts the submissions of Mr Manning QC in this regard. The Court accepts the submission that Mr Tharpe has not established that he suffered any loss, in his personal capacity, in the instant Claim. The Court accepts further that Mr Tharpe has no interest in BVS, as is confirmed by the Written Consent of the Board of Directors of Business Ventures Solutions and the Restated Certificate of Incorporation of Business Ventures Solutions (under Section 807 of the New York Business Corporation Law), dated 2 May 2019.[26] The Court finds it curious that, from the Claimants' own assertions, although Mr Tharpe's rights and interest in BVS have been assigned or transferred to other parties in the winding up proceedings in the United States of America, Mr Tharpe remains as a Director of BVS, possessing the right to make any and all decisions in respect of it. Nor does Mr Tharpe purport to indicate to whom his rights and interest have been assigned or transferred. Nor does he produce any document(s) to support his bald assertions in this regard. If Mr Tharpe were to seek to challenge the validity of the Share Certificates,[27] the Supreme Court of Judicature of Jamaica would not be the proper forum for doing so, as this is a transaction which took place in the United States of America.

[58] In the result, the Court finds that Mr Tharpe cannot, whether in his personal capacity or on behalf of BVS, proceed in respect of the instant Claim and that he lacks the requisite locus standi to bring the Claim in the name of or on behalf of BVS.

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[26] See – Exhibit **"AR-6"** of the Affidavit of Alexis Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020

[27] These Share Certificates were also exhibited as part of exhibit **"AR-6"** of the Affidavit of Alexis Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020

(ii) Whether the Claimants have sufficiently particularized the Claim

Submissions advanced on behalf of the Applicants/1st and 2nd Defendants

[59] Mr Manning QC submits that the Claimants have alleged that the named and unnamed Defendants fraudulently procured an Order authorizing the sale of BVS' interest in the Property and that the Defendants collectively conspired to defraud the Claimants of same.

[60] Mr Manning QC maintains that rule 8.9 of the CPR mandates that the facts upon which a claimant relies must be particularized and that consequently, to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. In the instant case, the Claimants allege fraud, conspiracy, larceny (styled as theft), constitutional infringement and economic loss as their causes of action and have pleaded the sum of Two (2) Trillion United States Dollars (USD$2,000,000,000.00), by way of Damages. This, Mr Manning QC maintains, has not been substantiated, either in part, or, at all.

[61] It is further submitted that fraud must be precisely alleged and strictly proved. This, Mr Manning QC asserts, has been the principle that can be extrapolated from the case of **Davy v Garrett**[28] and the more recent case of **Donovan Crawford and Others v Financial Institution Limited PC**.[29] He reminds the Court that the Jamaican Court of Appeal has endorsed this principle in the cases of **Sunshine Dorothy Thomas and Winsome Blossom Thompson (Executrices of the Estate of Leonard Adolphus own, deceased) and Owen Brown v Beverly Davis**,[30] as well as in the cases of **Barbican Heights Ltd v**

[28] [1878] 7 Ch. D. 473, at paragraph 489, per Thesiger LJ
[29] [2005] UKPC 40
[30] [2015] JMCA Civ 22

Seafood and Ting International Ltd.[31] and **Hartley Corporation Guarantee Investment Company Ltd v Estate Rudolph Daley and Others**.[32]

[62] Additionally, Mr Manning QC makes the point that it is an established principle that the court should not be asked to infer fraud or fraudulent intention from general allegations.[33]

[63] Further, Mr Manning QC asserts that the Claimants' allegation of fraud is insufficient to cause the Claim to proceed to trial and that the Claimants have no real prospect of success for the following reasons: -

(a) That the allegations of fraud largely point to the actions of Capital One, the Alexander Burnham Trust and other actors located outside of the jurisdiction and which notably, are not named parties to the instant Claim;

(b) That Mrs Robinson and MF&G became involved in the instant matter after the sale of Mr Tharpe's interest in BVS was concluded and in the capacity of Attorneys-at-Law, for a corporate client, through its duly appointed Director and shareholder;

(c) That Mr Tharpe indicated that Capital One and the Alexander Burnham Trust fraudulently procured an Order to sell BVS' interest but has not particularised that allegation by putting forth any fact(s) in support of these allegations, either as against those entities or the Applicants/1st and 2nd Defendants; and

(d) That Mr Tharpe has ignored the outcome and effect of the Bankruptcy Proceedings and the Court Order[34] which led to the sale of BVS to the Alexander Burnham Trust.[35]

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[31] [2019] JMCA Civ 1

[32] Although the Civil Procedure Rules, 2002 do not expressly require that fraud be expressly pleaded, a claimant is required to state the facts or conduct on which he relies to support the allegation of fraud.

[33] See – **Wallingford v The Directors of Mutual Society** [1880] 5 AC 685 at 697, per Lord Selbourne, where he stated "With regard to fraud…general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it is that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded…"

[64] Consequently, Mr Manning QC maintains that the allegations of fraud do not warrant a fuller or more in-depth investigation, as there are no triable issues or issues of credibility to be resolved. Additionally, the Claimants have failed to particularize or to substantiate any of the other causes of action on which they seek to rely.

Findings

The nature and import of pleadings

[65] The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties. Pleadings serve the two-fold purpose of informing each party of the case of the opposing party and, at the same time, informing the court of the issues between the parties that will govern the interlocutory proceedings between them and which the court will have to determine at the trial.[36]

[66] Pleadings are therefore required to demarcate the parameters of the case that is being advanced by each party to an action and are critical to identify not only the issues joined between the parties but the extent of the dispute between them.

[67] Lord Woolf MR, in **McPhilemy v Times Newspapers Ltd and others**,[37] provides a comprehensive analysis of the nature and importance of pleadings. He states as follows: -

> *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for*

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[34] See – Exhibit **"AR-3"** of the Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020

[35] See – Exhibit **"AR-6"** of the Affidavit of Alexis L. Robinson in Support of Notice of Application for Court Orders, which was filed on 24 July 2020

[36] See – **Bullen and Leake and Jacob's Precedents of Pleadings**, 12th edition, at page 3

[37] [1999] 3 All ER 775, at pages 792 j - 793 b

particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader." [38]

The duty of a claimant to set out his case

[68] The obligation of a litigant to set out his case has been encapsulated in and streamlined by the CPR.

[69] Rule 8.9 of the CPR outlines the duty of a claimant to set out his case. The relevant provisions of the rule are set out below: -

> *"8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.*
>
> *(4) Where the claim seeks recovery of any property, the claimant's estimate of the value of that property must be stated.*
>
> *(5) The particulars of claim must include a certificate of truth in accordance with rule 3.12."*

[70] Rule 8.9(1) of the CPR requires a claimant to include in his claim form or particulars of claim, a statement of all the facts on which he intends to rely. 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 unqualified duty to

[38] See also – **Gasoline Retailers of Jamaica Limited v Jamaica Gasoline Retailers Association** [2015] JMCA Civ 23, at paragraph [48], per Morrison JA (as he then was) and **Desmond Kinlock v Denny McFarlane & Others** [2019] JMSC Civ 20, at paragraphs [27] and [28], per Palmer J

adhere to its conformity. Failure to comply with the rule as mandated offends the rule.

[71] In the instant Claim, the Claimants have pleaded a number of causes of action, including but not limited to, fraud and conspiracy to defraud. Fraud, as a cause of action, has to be precisely alleged and strictly proved. The court cannot deduce fraud on the basis of general or unsubstantiated assertions. The question of the presence (or absence) of fraud is one of fact to be determined by the court, having regard to all the circumstances.

[72] A person who agrees with one or more persons, by dishonesty, to either deprive a person of something which is his or to which he would be or might be entitled; or to injure some proprietary right of a person, is guilty of conspiracy to defraud at common law.[39] Once there is an agreement to commit an unlawful act, whether express or implied, the offence is made out. The onus of proving that there was an intent on the part of the conspirators to defraud, lies on the person alleging it.[40]

[73] The Claimants allege that the actions of the Applicants/1st and 2nd Defendants were orchestrated events both leading up to and subsequent to the Hearing of the Assessment of Damages, which was fixed for 29 and 30 January 2019. This conduct, the Claimants allege, constitutes a conspiracy on the part of Capital One and its agents, both here in Jamaica and in the United States of America, to defraud the Claimants and Judgment Creditors of Damages in the sum of in excess of Two Trillion United States Dollars (USD$2,000,000,000,000.00).[41]

[74] The Claimants allege further, that, in September 2019, the Defendants placed the Property for sale on the open market. The Claimants contend that there is a continued conspiracy among the named Defendants, to defraud them and that

[39] See – Halsbury's Laws of England (4th edn, 2003), Volume 11(1), at paragraph 61
[40] See – Halsbury's Laws of England (4th edn, 2003), Volume 31, page 552, at paragraph 869
[41] See – Paragraph 50 of the Particulars of Claim, which was filed on 14 October 2019

this is in breach of the Orders of the Supreme Court of Judicature of Jamaica as well as the Court of Appeal of Jamaica.[42]

[75] Regrettably, the Claimants have not sought to particularize these allegations in their pleadings. The Claimants' Statement of Case, as it currently stands, consists of 'bare' assertions, in respect of the alleged conduct on the part of the Defendants. The allegations made are perfectly general and vague allegations of fraud where no single material fact has been presented which would enable a court to understand what it is that is being alleged to be fraudulent.

[76] In the result, the Court is constrained to find that the Claimants have failed to meet the requirements of rule 8.9 of the CPR. The Court also finds that the pleadings, as they currently stand, have not been particularized so as to demarcate the parameters of the case that is being advanced.

(iii) Whether the Claimants' Statement of Case is prolix, frivolous and vexatious

(iv) Whether the Claimants' Statement of Case constitutes an abuse of the process of the court

Submissions advanced on behalf of the Applicants/1st and 2nd Defendants

[77] Mr Manning QC posits that the categories of abuse of process are many and are not closed. He asserts that some of the examples are vexatious proceedings; attempts to re-litigate decided issues; collateral attacks on earlier decisions; pointless and wasteful litigation; bringing a claim in the absence of knowledge of any basis for the claim and an inability to formulate a claim; improper collateral purpose; delay and where the statement of case fails to reveal to the defendant the case he can expect to meet at trial.

[78] In seeking to illustrate his point, in relation to frivolous and vexatious proceedings, Mr Manning QC relies on the cases of **Ashmore v British Coal**

[42] See – Paragraphs 51- 58 of the Particulars of Claim, which was filed on 14 October 2019

Corporation,[43] (specifically the dicta of Stuart-Smith LJ), **McDonald's Corporation v Steel**[44] and the recent case of **Prince Radu of Hohenzollern v Houston**.[45]

[79] Mr Manning QC maintains that the court's processes should only be engaged in the pursuit of a particular subject matter or cause and that a court has a duty to prevent any misuse of its processes. He maintains that the processes of the court should not be used for a purpose or in a manner that is significantly different from its ordinary or proper use. This would be tantamount to an abuse of process.

[80] In concluding his submissions, Mr Manning QC contends that the causes of action, in the instant Claim, are unlikely to succeed, should the matter proceed to trial, for the following reasons: -

a. Mr Tharpe's Claim is a bold but futile attempt to re-litigate the issues decided in the Bankruptcy Proceedings, which were concluded in 2017. Mr Tharpe was assigned a Bankruptcy Trustee who transferred all his estate, rights, title and interest in BVS to the Alexander Burnham Trust by way of an Assignment Agreement;[46]

b. In January 2018, Capital One and the Alexander Burnham Trust sought and were granted Orders[47] on a Motion for Contempt and for Sanctions Against Mr Tharpe for Wilful Violations of the Court's Order. This compelled Mr Tharpe to cease pursuing any claims against those parties as well as to cease taking action on behalf of BVS. Mr Manning QC is asking this Court to draw the appropriate inference from this conduct, that, the Claimants, through this Claim, have launched a collateral attack on the earlier decisions of the

[43] [1990] 2 QB 338
[44] [1995] 3 All ER 615
[45] [2009] EWHC 398
[46] See – Exhibit **"AR-4"** of the Affidavit of Alexis L. Robinson, which was filed on 24 July 2020
[47] See – Exhibit **"AR-5"** of the Affidavit of Alexis L. Robinson, which was filed on 24 July 2020

Bankruptcy Proceedings in the United States of America and of the Supreme Court of Judicature of Jamaica in Claim No. 2010 HCV 02692;

c. The Claim, in its current form, constitutes pointless and wasteful litigation;

d. There has been significant delay by Mr Tharpe and the other unnamed Claimants in seeking a remedy for the allegations made herein; and

e. The Claimants' Statement of Case, though prolix, fails to reveal the case that the Applicants/1st and 2nd Defendants should meet at trial and has in fact caused the Applicants/1st and 2nd Defendants to incur expense to defend same.

Findings

Abuse of process

[81] The court has an inherent power to safeguard against abuse of its processes. This power has been described as 'an inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.'[48]

[82] This power is reflected in the provisions of rule 26.3(1)(b) of the CPR which permits the court to strike out a statement of case or part of a statement of case if it appears that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.

[48] See – **Hunter v Chief Constable of West Midlands and another** [1981] 3 All ER 727, at page 729, paragraphs e-f

The doctrine of collateral attack

[83] A collateral attack is a species of abuse of process.[49] A collateral attack has been described as an attack on a previous final decision of a court of competent jurisdiction.

[84] In the seminal authority of **Hunter v Chief Constable of West Midlands and another**,[50] Lord Diplock examined the doctrine of collateral attack and opined that a collateral attack on the final decision of a court of competent jurisdiction may take varied forms. At page 733, he provided a detailed analysis of the doctrine of collateral attack. He is quoted as follows: -

> *"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."*

[85] The circumstances of the **Hunter case** are instructive. There, the claimant, Hunter, alleged that, at his trial for murder, his confession had been obtained as a result of his having been assaulted by police officers. The confession (which was the main evidence against the claimant) was found admissible by the court on a voire dire.

[86] The police officers were later charged with the offence of assaulting the claimant but were acquitted. The claimant appealed against his conviction (in which no challenge was made to the admissibility of the confession) and his appeal was dismissed. Subsequently, the claimant initiated a claim against the defendants for damages for assault on the basis that there was fresh evidence to support his allegation of assault. The court of appeal struck out his statement of case on the

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[49] **Arthur J S Hall & Co (a firm) v Simons; Barratt v Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm)** [2002] 1 AC 615 at page 743, paragraph B

[50] (supra)

basis that he was precluded by the doctrine of issue estoppel from raising the issue of assault in the civil proceedings, as it had already been decided against him in the criminal trial. The claimant appealed that decision to the House of Lords. The House of Lords concluded that the civil claim was an abuse of the process of the court, as it was, in essence, a collateral attack on the decision of the court at first instance in the criminal case that concluded that the confession was admissible.[51]

[87] The authorities clearly establish that a collateral attack on a previous decision of a court of competent jurisdiction does not automatically constitute an abuse of process. In **Secretary of State for Trade and Industry v Bairstow Re Queen's Moat House plc**,[52] Sir Andrew Morritt V-C. highlighted the circumstances in which mounting a collateral attack on a previous decision of the court would give rise to an abuse of process. At paragraph 38 j-b, he stated as follows: -

> *"(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court… (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."*

[88] Additionally, in **Arthur J S Hall & Co (a firm) v Simons; Barratt v Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm)**,[53] Lord Bingham of Cornhill succinctly outlined the factors that a court must consider when

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[51] See also – **The Minister of Housing v New Falmouth Resorts Ltd** [2016] JMCA Civ 20. F. Williams JA (as he then was) cited with approval the dicta of Lord Diplock.
[52] [2004] 4 All ER 325
[53] (supra), at page 643, paragraph 38G

determining whether a collateral attack on a previous decision constitutes an abuse of process. These factors include the nature and effect of the earlier decision; the nature and basis of the claim made in the later proceedings; and any grounds relied on by the party to justify the collateral attack (if it is determined by the court to be a collateral attack).

[89] In the present instance, the Court is mindful of the duty to balance a claimant's right to bring a genuine and legitimate claim against that of a defendant to be protected from being harassed by a multiplicity of proceedings where one would have sufficed.[54]

[90] The Claimants' Claim primarily concerns an action brought against the Defendants, whom they allege are all part of an alleged conspiracy to defraud them of the Property and of their property rights.[55] This, they contend, was discovered when the Property was placed on the open market for sale by the Defendants.[56]

[91] Mrs Robinson contends that BVS entered into an Agreement for Sale to purchase the Property from Mr David Rubin, in January 2006. It is her evidence that Mr Rubin was the then executor and trustee of the Estate and Trust of the late Alexander Mortimer Burnham, who was the registered proprietor of the Property, up to the time of his death.[57]

[92] As Mrs Robinson understands it, Mr Tharpe was the principal of BVS and the titles to the Property were transferred to BVS in April of 2006. This was done on the assurance of a purported undertaking, given on behalf of BVS, by a Florida mortgage corporation. The balance of the purchase price was not paid and the conflict between the parties led to litigation, which culminated in the action brought in Claim No. 2010 HCV 02692. The claim sought, inter alia, the rescission of the Agreement for Sale of the Property and the reconveyance of the

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[54] See – **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1, at page 29, paragraph a
[55] See – Paragraphs 56-59 of the Particulars of Claim, which was filed on 14 October 2019
[56] See – Paragraph 24 of the Claim Form, which was filed on 14 October 2019
[57] See – Paragraphs 7-8 of the Affidavit of Alexis Robinson, which was filed on 24 July 2020

titles to the Property to the Alexander Burnham Trust. At that time, Mr Tharpe was the principal of BVS.[58] Lawrence-Beswick J found that, despite the orders of the court, BVS had produced no evidence that the proceedings and submissions which had been presented on its behalf, by Mr Tharpe, had been made with the authority of BVS. Lawrence-Beswick J found further that Mr Tharpe had disobeyed the court's Order of 10 July 2013, by virtue of which he had been ordered to file and serve affidavit evidence to prove that he is authorized to conduct proceedings on behalf of BVS. Mr Tharpe disobeyed a similar Order which was made on 10 September 2013. In those circumstances, the court held that there was no authorization presented for Mr Tharpe to speak on behalf of BVS or to pursue any action on its behalf. As a consequence, the court held that it could not properly enter judgment against Capital One on the counterclaim, purportedly filed by BVS, as the proof of the consent or approval of BVS to file and prosecute same remained unfiled.

[93] In the present instance, Mr Tharpe asserts that he is the owner of the Property, having come into possession of it through the mechanism of adverse possession.[59] He claims that he has and had assigned all of his property rights and interest as the successor developer of the Property, to BVS. He also claims that BVS was legally and administratively dissolved by both the state of Florida and the state of New York, in the United States of America and was legally estopped from transacting any business, except for the winding-up process which he effected.[60]

[94] The Bankruptcy Proceedings that Mr Tharpe commenced resulted in the sale of BVS to the Alexander Burnham Trust. The subsequent actions of Capital One, the Trustee for the Alexander Burnham Trust and the other named Defendants, in reliance on the outcome of those proceedings and Orders, appear to form the background to the Claim.

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[58] See – Paragraph 9 of the Affidavit of Alexis Robinson, which was filed on 24 July 2020
[59] See – Paragraphs 1-4 of the Particulars of Claim, which was filed on 14 October 2019
[60] See – Paragraphs 7-8 of the Particulars of Claim, which was filed on 14 October 2019

[95] The issue of Mr Tharpe's rights to the Property has already been raised, litigated and determined by two (2) courts of competent jurisdiction. The titles to the Property have already been re-conveyed to the Alexander Burnham Trust, by an Order of the Supreme Court of Judicature of Jamaica.

[96] In those circumstances, this Court is of the view that the Claimants' Claim and Particulars of Claim, each filed on 14 October 2019, represent an attempt to repackage issues that have already been determined. The Court finds that the Claimants' Statement of Case is frivolous and vexatious and an abuse of the court's process. The Court also finds that the Claimants' Statement of Case is a collateral attack on the decisions made in the Bankruptcy Proceedings as well as on those made in Claim No. 2010 02692. It is significant to note that, the position, as it relates to BVS and Mr Tharpe, as reflected in the observations made by Lawrence-Beswick J, in Claim No. 2010 HCV 02692, has not changed. There is no evidence that has been placed before this Court that suggests that the instant Claim has been brought by the authority of BVS or with its consent.

(v) Whether the Claimants' Statement of Case discloses any reasonable ground(s) for bringing the Claim

[97] Where a pleading discloses no reasonable cause of action or defence, it will be ordered struck out or amended, if it is capable of being amended. If it is the statement of case which is struck out, the court may order the action to be stayed or dismissed. No evidence, including affidavit evidence, is admissible on an application on this ground, and, since it is only the pleading itself which is examined, the court is required to assume that the facts pleaded are true and undisputed. However, the summary procedure under this provision will only be applied to cases which are plain and obvious; where the case is clear beyond doubt; where the cause of action or defence is, on the face of it, obviously unsustainable, or where the case is unarguable.[61]

[61] Halsbury's Laws of England (4th edn, 2003) vol 37, para 432

[98] On the other hand, where the court is satisfied that no reasonable cause of action is disclosed by the statement of claim or any particulars served under it and that it is not capable of being cured by amendment, it will strike out the pleading and dismiss the action.

[99] For all the reasons that have been stated above, by way of this Analysis, this Court is of the view that the Claimants' Statement of Case does not disclose any reasonable ground(s) for bringing the Claim.

[100] In concluding, this Court is of the view that the Claimants' Statement of Case ought properly to be struck out as against the Applicants/1st and 2nd Defendants. Additionally, having carefully examined the Claimants' pleadings, this Court is equally of the view that the complaints that have been made in respect of the Claimants' Statement of Case, are equally applicable to the 3rd, 4th and 5th Defendants. As a consequence, this Court is of the view that the Claimants' Statement of Case ought properly to be struck out as against the 3rd, 4th and 5th Defendants and in its entirety.

In the alternative, whether the Court ought properly to enter Summary Judgment in favour of the Applicants/1st and 2nd Defendants against the Respondents/Claimants

(vi) Whether the Claimants have any real prospect of succeeding on the Claim

[101] In light of the Court's findings above, there is no necessity for the Court to make any pronouncements in respect of the relief that is sought in the alternative. In any event, rule 15.3(4) of the CPR makes it clear that proceedings for redress under the Constitution of Jamaica cannot form the subject matter of summary judgment.[62]

[62] See – Claim Form, which was filed on 14 October 2019

DISPOSITION

[102] It is hereby ordered as follows: -

(1) The Claimants' Claim Form and Particulars of Claim, each filed on 14 October 2019, are struck out;

(2) The costs of the Notice of Application for Court Orders, which was filed on 24 July 2020, are awarded to the Applicants/1st and 2nd Defendants, against the Claimants and are to be taxed if not sooner agreed;

(3) The costs of the Claim, which was filed on 14 October 2019, are awarded to the 1st, 2nd, 3rd, 4th and 5th Defendants against the Claimants and are to be taxed if not sooner agreed;

(4) The Claimants are precluded from initiating any new claims in the Supreme Court of Judicature of Jamaica against the 1st, 2nd, 3rd, 4th and 5th Defendants in the Claim numbered SU 2019 CV 04009 and in respect of the allegations made therein, unless the costs that have been awarded at paragraphs (2) and (3) of these Orders have been paid;

(5) The Claimants/Respondents are refused Leave to Appeal;

(6) Messrs. Nunes, Scholefield, DeLeon and Co. are to prepare, file and serve these Orders.