



Solutions Inc (“BVS”), a company duly incorporated under the laws of New York, United States of America with its registered office at Capitol Services Inc., 1218 Central Ave, Suite 100, Albany, New York, 12205, USA. Mr Tharpe’s claim is for title by way of adverse possession as well as a specified sum of One Hundred Billion United States Dollars (USD\$100,000,000,000.00) for damages. The registered land, known as 15 Queens Drive, Montego Bay, St. James is comprised in Certificates of Title registered at Volume 665 Folio 10, Volume 665 Folio 11 and Volume 650 Folio 65 of the Register Book of Titles (“The Property”). BVS is the registered proprietor of the subject property.

- [2] The Claim Form and Particulars of Claim were served on July 3, 2018 on Mr. Anthony Tharpe (who is one and the same person as Dennis Tharpe) having received the pleadings as a Director and Registered Agent of BVS.
- [3] Approximately seventeen days after filing the Claim Form and Particulars of Claim on July 20, 2018, Mr Tharpe, on even date, filed two sets of incorrect and wrongly headed documents purporting to enter default judgment against BVS for failure to file a defence. As a result of a search conducted at the Supreme Court by attorneys-at-law acting on behalf of BVS, BVS became aware of the said documents and thereafter filed a Notice of Application for Extension of Time to file Defence with Supporting Affidavit on March 5, 2021.
- [4] The matter came for hearing on November 17, 2021 before Master S. Reid (Ag.) who ordered as follows:
  - 1. *The matter is adjourned to February 22, 2022 at 2:30pm for 1 hour before a Judge in Chambers.*
  - 2. *The Claimant is to prepare, file and serve his Affidavit in reply on or before December 15, 2021.*
  - 3. *In the event that any other Affidavits are to be filed, said Affidavits must be filed on or before February 11, 2022.*

4. *Costs are to be costs in the Claim*
5. *The Applicant's attorneys-at-law are to prepare, file and serve the Formal Order herein*

**[5]** BVS having realised that Default Judgment was not entered on November 29, 2021 filed an Amended Notice of Application for Court Orders seeking the following Orders:

1. *The Claim Form filed on July 3, 2018 is invalid.*
2. *The Claimant's Statements of Case are struck out.*
3. *The costs of this application and the claim are to be paid by the Claimant to the Defendant and are to be taxed if not agreed.*
4. *Alternatively, if default judgment has not been entered in this claim, it is hereby set aside.*
5. *Further and/or alternatively, the Defendant is granted an extension of time to file and serve its defence and must do so within 14 days of the date of order.*
6. *That costs of this application are to be paid by the Claimant to the Defendant and are to be taxed if not agreed.*

**[6]** At the adjourned hearing on February 22, 2022, the Honourable Mrs. Justice Thompson-James made the following orders:

1. *The Defendant's Amended Notice of Application for Court Orders dated and filed November 29, 2021 is adjourned to May 19, 2022 at 10:00a.m. for 1½ hours.*
2. *The parties are to file and serve written submissions and a List of Authorities to be relied on at the hearing on or before May 5, 2022.*

3. *The Applicant/Defendant's Attorneys-at-law are to prepare a complete judge's bundle in relation to the hearing on May 19, 2022 and to serve a copy thereof on the Respondent/Claimant on or before May 11, 2022.*
4. *By consent, service of the document in relation to paragraphs 2 and 3 is permitted to be by way of email at the Respondent/Claimant's email address pheniase@msn.com.*
5. *Costs are to be costs in the application.*
6. *The Applicant/Defendant's attorneys-at-law are to prepare, file and serve the orders herein.*

## **SUBMISSIONS**

### **THE DEFENDANT'S/APPLICANT'S SUBMISSIONS**

- [7] The Applicant submits that the claim before the Court was not served pursuant to rule 8.14(1) of the Civil Procedure Rules ("CPR") as amended and that by virtue of rule 26.3(1) (a) of the CPR, the Court is empowered to strike out a party's statement of case for failure to comply with a rule. The Applicant further claims that the Claim Form, which was filed on July 3, 2018 would have been invalid on or about January 4, 2019 on the basis that the Claimant failed to serve and or apply for a further extension of the time within which the Claim Form is to be served during the lifetime of the Claim Form. Reliance was placed on the authority of **Annette McLean v Princess Edmondson and ors. [2021] JMCA Civ 41**.
- [8] The Applicant further argues that the purported Claim Form served by the Process Server, Mr Oniel Cunningham, on Anthony Tharpe (the Claimant) as outlined in his Affidavit filed on July 20, 2018 is improper, because Mr Tharpe claimed to be an authorised agent and Director of BVS. BVS argues that the Claimant is not an authorised officer of the company as set out in rule 5.7(c) and (d) of the CPR, as he was removed as a director of the Company in October,

2017 pursuant to a Court Order of the Southern District of Florida, USA, Bankruptcy Court as a consequence of Mr. Tharpe filing for bankruptcy.

- [9] The Applicant further submits that the Claimant, having failed to properly serve the Defendant with the pleadings, sought to obtain Default Judgment against BVS for failing to file a Defence. This could not be successful as the conditions of Part 12.5 (a) (c) and (d) of the CPR had not been complied with. Although the Claimant omitted to request entry of Default Judgment in default of Acknowledgment of Service, it would have been necessary to comply with rule 12.4 (a) of the CPR. Most importantly, the Applicant maintains that even if Mr. Tharpe could establish that BVS was properly served (which he could not), the request for Default Judgment was premature since the pleadings were served 17 days after service on BVS. CPR Rule 10.3 stipulates that the period for filing a defence is 42 days after service of the Claim Form on the Defendant.
- [10] The Applicant further submits that the subject matter of the claim being land, should have been commenced by way of a Fixed Date Claim Form ("FDCF") instead of a Claim Form in accordance with CPR rule 8.1(4) (b).
- [11] BVS Attorneys therefore maintain that BVS is yet to be served with the Claim Form and Particulars of Claim which are now invalid and cannot be resuscitated and as such, the claim ought to be struck out on that basis.
- [12] In the alternative, the Defendant maintains that if a Default Judgment was irregularly entered due to procedural errors, it ought to be set aside pursuant to rule 13.2 (1) of the CPR.
- [13] Similarly, if service of the pleadings on the Defendant is not satisfied, a Default Judgment so entered is to be set aside as of right - see the case of **Frank I Lee Distributors Ltd v Mullings & Company (A Firm) and Mullings and Company (A firm) v Frank I Lee Distributors Ltd** [2016] JMCA Civ. 9.

[14] The Applicant submits that BVS will be prejudiced if the applications are not granted, and is therefore seeking an order to strike out the claim on the basis that it is invalid or alternately grant an extension of time for BVS to file a Defence.

### **THE CLAIMANT'S/RESPONDENT'S SUBMISSIONS**

[15] It is noted that the Claimant failed to comply with order #2 of the Hon. Mrs. Justice Thompson- James made on February 22, 2022 which states:

*“The parties are to file and serve written submissions and a list of authorities to be relied on at the hearing on or before May 5, 2022.”*

[16] The following was taken at the hearing on May 19, 2022

The Claimant submits that he is the legal representative of BVS and that this position was recognized by the Supreme Court of Jamaica pursuant to a ruling made by Justice G. Brown in another matter on May 16, 2018. He argues that the attorneys currently acting on behalf of BVS have no authority to act as they were not retained by him the legal representative for the Company. The Claimant further argues that he and BVS are one and the same person and that it is by virtue of this that he accepted service of the Claim Form on behalf of BVS and considers this to be good service on BVS. He further submits that BVS having failed to file a defence in response to the claim warranted a Default Judgment entered against BVS.

[17] Mr. Tharpe submits that the only matter before the Court for its consideration is the issue of the Default Judgment that was filed against BVS and that BVS attorneys' application ought to be dismissed with costs awarded to him.

### **THE LAW**

[18] The following rules of the CPR are relevant to the matter at bar:

- i. Where the Defendant is a limited company, service is effected in terms of Rule 5.7 which states:

*Service on a limited company may be effected -*

- a) *by sending the Claim Form by telex, fax, prepaid registered post, courier delivery or cable addressed to the registered office of the company.*
- b) *by leaving the Claim Form at the registered office of the Company*
- c) *by serving the Claim Form personally on any director, officer, receiver-manager or liquidator of the company*
- d) *by serving the Claim Form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or in any way allowed by an enactment.*

- ii. Rule 7.5 speaks to permission to serve a Claim Form out of the Jurisdiction
- iii. Rule 8.1(4) (b) states that form 2 must be used in claims for possession of land
- iv. Rule 8.14 (1) states:

*The general rule is that a Claim Form must be served within 6 months after the date when the Claim was issued or the Claim Form ceases to be valid.*

- v. Rule 8.15 (1) states:

*The Claimant may apply for an Order extending the period within which the Claim Form may be served.*

- vi. Rule 8.15 (2) states:

*The period by which the time for serving the Claim Form is extended may not be longer than six months on any application*

vii. Rule 8.15(3) states:

*An application under paragraph (1)*

(a) *must be made within the period –*

(i) *for serving the Claim Form specified by rule 8.14; or*

(ii) *of any subsequent extension permitted by the Court.*

viii. Rule 10.3(1) states:

*The general rule is that the period for filing a Defence is the period of 42 days after the date of serving the Claim Form.*

ix. Rule 12.4 states:

*The registry at the request of the Claimant must enter judgment against a Defendant for Failure to File an Acknowledgment of Service, if:*

*the Claimant proves service of the Claim Form and Particulars of Claim on that Defendant*

(a) *the period for filing an Acknowledge of Service under rule 9.3 has expired*

(b) *that Defendant has not filed:*

(i) *an Acknowledgment of Service; or*

(ii) *a defence to the claim or any part of it*

x. Rule 12.5 states:

*The registry must enter judgment at the request of the Claimant against a Defendant for failure to defend if –*

(a) *the Claimant proves service of the Claim Form and Particulars of Claim on that Defendant; or*

(b) *An Acknowledgment of Service has been filed by the Defendant against whom judgment is sought; and*



*(c) The period for filing a Defence and any extension agreed by the parties or ordered by the court has expired*

xi. Rule 12.7 states:

*A Claimant applies for Default Judgment by filing a request in Form 8.*

xii. Rule 26.3(1) states:

*The court may strike out a statement of case or part of a statement of case if it appears to the court that:*

*(a) 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) 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.*

## **ISSUES**

**[19]** The issues for my consideration that arise from the Defendant's Amended Notice of Application for Court Orders dated and filed on November 29, 2021 are as follows:

1. Whether the Claimant was an authorised agent, director and/or officer of BVS capable of accepting service on behalf of BVS in accordance with rule 5.7 of the CPR;
2. Whether the Claim Form is valid and, if so, whether the application to enter default judgment could stand

## **ANALYSIS AND DISCUSSION**

### **ISSUE #1: *Whether the Claimant was an authorised agent, director and/or officer of BVS capable of accepting service on behalf of BVS in accordance with rule 5.7 of the CPR?***

**[20]** It is trite law that if a party is not authorised to accept service of court documents on behalf of the defendant that, such service if effected, is deemed ineffective/improper.

**[21]** In the case at bar, the Claimant, Dennis Tharpe, engaged the service of process server, Mr Oneil Cunningham, on July 3, 2018 to serve Mr. Anthony Tharpe (one and the same person as Dennis Tharpe) with Claim Form and Particulars of Claim. According to paragraphs 3, 4, 5 and 7 of Mr. Cunningham's Affidavit of Service of Claim Form filed on July 20, 2018, the following took place:

3. *That a sealed copy of the Claim Form filed with the Registrar of the Supreme Court of Jamaica was delivered to Anthony Tharpe, a Director for Business Ventures and Solutions Inc, and who is also a corporate individual in his corporate capacity as legal registered agent for accepting service of process and defending against any claims on behalf of Business Ventures and Solution Inc was delivered/served on him on the 3<sup>rd</sup> day of July 2018.*
4. *That the Claim Form along with the Particulars of Claim was served; hand delivered directly, to the legal Registered Agent of Business Ventures and Solutions Inc at 15 Queens Drive Montego Bay at 1:00p.m. in the afternoon on the 3<sup>rd</sup> day of July, 2018.*
5. *That the Claim Form and Particulars of Claim were delivered and served directly to the Director and Registered Agent of Business Ventures and Solutions Inc by me the Agent for the Claimant.*
7. *That service was effected in such a manner that the Registered Agent Anthony Tharpe could easily ascertain the nature of the documents served.*

[22] The burden of proof is on the Claimant to prove that the Defendant, BVS was properly served in accordance with Rule 5.7 of the CPR which outlines how service on a limited company may be effected.

**Section 387 of the Companies Act of Jamaica, 2006**, is also in conformity with Rule 5.7 of the CPR and states:

*A document may be served on a company by leaving it at or by post to the registered office of the company.*

[23] In response to Mr. Tharpe's allegation of service being effected on BVS, the applicant has submitted a copy of the Court Order made by the Southern District of Florida Bankruptcy Court on the 26<sup>th</sup> of September 2017. A copy of the said order was exhibited to the Affidavit of Steve Rapier, the sole director of BVS, authorised to make this Affidavit which was filed on March 5, 2021.

[24] As such, it is necessary to refer to paragraph 6, 7 and 10 of the Affidavit of Steve Rapier as it provides cogent evidence that Anthony Tharpe was not authorised to represent BVS.

[25] At paragraph 6, Mr Rapier disclosed that Anthony Tharpe has not been a Director of BVS or authorised to represent it in any way since October 6, 2017.

[26] Paragraph 7 disclosed that on February 22, 2017 Anthony Tharpe filed for Bankruptcy and on September 26, 2017, the United States Bankruptcy Court issued orders approving the transfer of Mr. Tharpe's 100% interest in BVS to the Burnham Trust, a third party.

[27] Paragraph 10 of Mr Rapier's Affidavit further disclosed that Mr Anthony Tharpe is not authorised to represent BVS in these or any proceedings whatsoever since he is no longer a director, shareholder or principal officer of BVS and has no interest in the company. Unfortunately, Mr. Tharpe erroneously continued to hold himself as the principal and legal registered agent of BVS, despite Court Orders which state otherwise.

- [28] Mr. Tharpe submitted that he is the legal representative of BVS and that this position was recognized by the Supreme Court of Jamaica pursuant to a ruling made by Justice G. Brown in another matter on May 16, 2018. However, he has presented no evidence in support of this.
- [29] Mr Tharpe, in his submissions, maintained that he and Anthony Tharpe is one and the same person and in that regard, it is highly impossible for the Claimant to serve BVS by serving himself with the pleadings.
- [30] Based on the foregoing, I am of the view that Mr. Tharpe is incapable of accepting service on behalf of BVS. He failed to utilize the proper method of service on a limited liability company as provided in rule 5.7 (c) and (d) of the CPR.
- [31] I am guided by the authority of **James Hogan v Renee Lattibudaire and AI – Tec Inc Limited [2015] JMSC Civ** where at paragraph 85, the Honourable Mr Justice Bertram Morrison submitted that:

*“... at the very outset that there can be no doubt that the paramount consideration when once civil proceedings (within the meaning of the CPR) has been commenced by one litigant against another, is that, the former is obliged to bring to the other’s attention the fact of that proceeding.”*

- [32] On the issue of service, it is necessary to mention at this juncture that Mr. Tharpe should have sought permission under Part 7.5 (1) (a) – (c) of the CPR to serve BVS out of the jurisdiction. It is noted that BVS is a company incorporated under the laws of New York, USA. As such, the correct procedure would have been for the Claimant to make a without notice application supported by affidavit evidence on the ground that he has a realistic prospect of success and to supply the place within which BVS may be found.

[33] I therefore find that BVS has not been properly served and or notified of the claim brought against it. I do not accept that Mr. Tharpe was the appropriate agent to be served with the pleadings on behalf of BVS. I am equally satisfied that Mr. Tharpe did not have the legal authority to accept service on behalf of BVS. Most importantly, the method of service to be employed on a limited liability company as outlined in rules 7 of the CPR has not been satisfied by Mr. Tharpe.

**ISSUE #2: *Whether the Claim Form is valid and if so whether the application to enter Default Judgment could stand.***

[34] According to Rule 8.14(1) of the CPR, the general rule is that a Claim Form must be served within 6 months after the date the claim was issued or the Claim Form ceases to be valid.

[35] In the context of the case at bar, the Claimant, Mr. Dennis Tharpe, filed and served the Claim Form and Particulars of Claim on Mr. Anthony Tharpe (who is the Claimant himself). It is contended that Mr. Tharpe is not an authorised agent of the Defendant, BVS, as he was removed as a Director on October 6, 2017. The Claimant therefore failed to serve BVS in accordance with Rule 5.7 (c) of the CPR (*ibid. p. 6*)

[36] Mr. Tharpe still had an obligation to serve the documents on BVS. Under the misguided view that BVS was properly served, he proceeded to make an application for Default Judgment to be entered against BVS for failing to defend the claim as opposed to failure to file an Acknowledgement of Service (see CPR Rule 12.4).

[37] The time period within which to serve the Claim Form which was filed on July 3, 2018 would have expired on January 3, 2019. It would therefore have been necessary for the Claim Form to be valid in order for it to be served after January 3, 2019.

- [38] To achieve this, Mr. Tharpe would have had to comply with rule 8.15 (1) of the CPR and apply for an Order extending the period within which the Claim Form may be served.
- [39] Mr. Tharpe having failed to have the life of the Claim Form extended for a further period of 6 months before it ceased to be valid, meant that the Claim Form was now invalid and could no longer be served. The case of **Annett McLean v Princess Edmonson and others [2021] JMCA Civ 91** is relevant on this point where Dunbar Green JA affirmed [at paragraph 15] the learned Master's words that "*Once the Claim Form has expired and there is no pending application to extend it in compliance with rule 8.15(3), it cannot be resuscitated or resurrected.*"
- [40] It is important to note that no more than two extensions of 6 months each of the Claim Form are permitted in accordance with rule 8.15(6) of the CPR. Mr. Tharpe having failed to serve the Claim Form on BVS and to extend the life of the Claim Form means that the Claim Form is no longer valid and Mr. Tharpe is precluded from moving this matter any further.
- [41] I now return to the issue of whether the application to enter Default Judgment filed by Mr. Tharpe against BVS could stand. Mr. Tharpe has failed to prove service of the Claim Form and Particulars of Claim on BVS in accordance with CPR Rule 12.5 (a).
- [42] Mr. Tharpe, on July 20, 2018, prematurely filed an application to enter Default Judgment 17 days after the alleged service of the documents on BVS. This application runs counter to Rule 10.3 (1) of the CPR which provides that the period for filing a defence is 42 days after the date of service of the Claim Form, and not 17 days.
- [43] Mr. Tharpe also failed to utilize the proper form in making the request for default judgment having filed an Affidavit of Urgency instead of a request in form 8 as provided in rule 12.7 of the CPR. In addition to the Affidavit of Urgency the

Claimant filed another incorrect document on July 20, 2018 requesting entry of Default Judgment and headed as follows:

*“Notice of filing request to the Registrar for entry of Default Judgment for Defendant’s failure to file an Acknowledgment of Service or Defence against the Claim served on the Defendant on the 3<sup>rd</sup> day of July alternatively to set the matter for the Court to enter Default Judgment at the earliest date possible pursuant to Part 12”.*

**[44]** As such, I am of the view that the application to enter Default Judgment in Default of Defence against BVS could not be entertained for the following reasons:

- i. Mr. Tharpe has yet to prove to the court that BVS was served with the Claim Form and Particulars of Claim. Mr. Tharpe having served himself with the pleadings does not amount to service on BVS since he is not an authorised person within the context of rule 5.7 (c) and (d) of the CPR.

Proof of service is a necessary prerequisite for entry of Default Judgment whether in default of Acknowledgment of Service of Defence, hence the conditions order rules 12.4 and 12.5 of the CPR cannot, and were not satisfied.

- ii. Not being served meant that BVS was unaware of the action filed against it for some 2½ years. This meant that time for filing a Defence had not begun to run.
- iii. The Claim Form being filed on July 3, 2018 ceased to be valid after January 3, 2019 as it was never served on BVS. Mr. Tharpe also failed to have the life of the Claim Form extended during the period it was valid (see rule 8.15(3) (a))

of the CPR). Hence, there was no process to initiate and or continue proceedings against BVS.

**[45]** Therefore, Mr. Tharpe has failed to comply with rule 8.14(1) of the CPR. Consequently, I must conclude that he has failed to serve BVS with the initiating documents and or to take any and all reasonable steps to ensure that BVS was the proper party to be served – rule 5.7 (c) and (d) of the CPR.

**[46]** In addition, and most importantly, the fact that Mr. Tharpe failed and or omitted to serve BVS whilst the claim form was valid, he is now precluded from having the Claim Form restored as it is deemed invalid as no steps were taken by Mr. Tharpe to further extend its life and have it served on BVS while it was valid.

**[47]** Mr. Tharpe consistently failed to comply with the relevant procedural rules as indicated above. Notably, the Applicant is of the view that the claim ought to have been initiated by a Fixed Date Claim Form in accordance with rule 8.1(4) of the CPR which provides that a Form 2 (the Fixed Date Claim Form) must be used in claims of possession of land, since the claim is for title of registered land by way of Adverse Possession. I must agree with the view of the Applicant.

**[48]** Based on the above it is only fitting that this claim be struck out pursuant to rule 26.3(1)(a) of the CPR which states:

*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.*

**[49]** The Claimant has consistently made applications that are fraught with procedural irregularities and contravene the various rules of the CPR.



[50] The Applicant has urged the Court to Strike Out the Claimant's statement of case pursuant to Rule 26.3 (1) (b) which gives the court the power to strike out a Statement of Case which is an abuse of the Court's process. In **Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at 536**, Lord Diplock opined that "*..this is a power which any court of justice possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules would never the less be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.*" I concur with that decision.

[51] Having considered the aforementioned discussion, I believe that the proper course is to strike out the Claimant's case as BVS would be prejudiced if that course of action is not taken.

[52] I therefore make the following Orders:

1. The Claim filed on July 3, 2018 is invalid.
2. The Claimant's Statements of Case are struck out.
3. Costs to the Applicant/Defendant to be agreed or taxed.
4. Leave to appeal is refused.
5. The Applicant/Defendant's Attorneys-at-Law shall prepare, file and serve this order.