IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/00203

B E T W E E N

MONTANA HOLDINGS LIMITED

Plaintiff

AND

The Matrix General Portfolio Limited Partnership
Acting by its general partner
MATRIX PORTFOLIO (GENERAL PARTNER) LIMITED

Defendant

Before:	The Honorable Mr. Justice Neil Brathwaite
Appearances:	Mrs. Tanya Wright for the Plaintiff
	Mr. Ramonne Gardiner and McFalloughn Bowleg Defendants
Hearing date(s):	1th February 2023 and 21th April 2023

RULING

BRATHWAITE, J

INTRODUCTION & BACKGROUND

[1.] This is an appeal of an Order made by Assistant Registrar Toote on 7th December 2021 by the Plaintiff. The brief facts of this matter are that the Plaintiff is a developer of a tract of land situate in Rum Cay, The Bahamas who has secured by way of debenture, a mortgage from the Bank of Scotland to fund the development of the Cay. After some time, the Defendant took over the debenture from the Bank of Scotland and appointed a receiver over the land to sell said property due to the Plaintiff's alleged failure to repay the loan.

[2.] The Plaintiff moved the Court in 2021 by way of Ex-Parte Summons filed 25th February 2021 and sought leave from the Learned Registrar to issue and serve the Writ of Summons filed 1th June 2021 out of the jurisdiction on the Defendant, and for leave to effect substituted service in England, United Kingdom. To this effect, said leave was granted to the Plaintiff.

[3.] The Defendant having been served with the Writ of Summons at their registered office applied to the Court by way of Ex- Parte Summons to enter a conditional appearance in the matter, and on a Summons filed 29th September 2021 to have the service of the Writ of Summons set aside. In its Summons, the Defendant states that the service of the Writ should be set aside on the basis that the Plaintiff commenced legal proceedings by way of Ex-Parte Summons and not an originating process, and for non-compliance with the RSC. The Defendant further stated that the Plaintiff failed to give full and frank disclosure to the court and that the Writ of Summons was an abuse of process, having regard to previous matters commenced by the Plaintiff against the Defendant concerning the same allegations.

[4.] The Learned Registrar ordered that the action be struck out as an abuse of the court's process with liberty to the Plaintiff to appeal, and ordered costs in favour of the Defendant. This appeal is a rehearing of the matter. Therefore, the matters which this Court must determine are whether the service of the Writ of Summons should be set aside for being in contravention of Order 11 Rule 3 (1) and for leave being obtained prior to the filing of the Writ, or whether this should be treated as an irregularity under Order 2 RSC. Secondly, whether the Plaintiff made full and frank disclosure to the court in seeking leave on the Ex-parte summons to serve the Writ outside of the jurisdiction. Thirdly, whether the multiplicity of actions by the Plaintiff against the Defendant amounts to an abuse of process. Fourthly, whether the circumstances of this matter warrant an anti-suit injunction against the Plaintiff and, whether the Defendant is entitled to indemnity costs.

PROCEDURAL HISTORY

Proceedings before the Learned Registrar

[5.] This matter was initiated by an ex-parte summons filed 25th February 2021 seeking leave from the Learned Registrar to issue a specially endorsed Writ of Summons out of the jurisdiction pursuant to Order 6 rule 7 RSC, leave to serve the said Writ out of the jurisdiction pursuant to Order 11 Rule 1 and for leave for substituted service of the Writ pursuant to Order 65 Rule 4. In the supporting affidavit of Michelle Curtis filed 25th February 2021, the deponent averred that the Intended Defendant acted as an intermediary on-lender between the Intended Plaintiff and the Bank of Scotland who agreed a property loan up to Twenty Two Million Seven Hundred and Fifty Dollars (22,750,00.00) for the development of Rum Cay. The deponent exhibited the facility letter for this agreement along with the debenture both dated 11th October 2005. The deponent avers that the Intended Defendant was in breach of the agreement and raised issues of the legality of the

appointment of a receiver by the Intended Defendant and the enforceability of the facility. The deponent stated that the Intended Plaintiff had a good cause of action and set out all that it intended to plead and prove before the court. Further, it was averred that the Intended Defendant is liable to the Intended Plaintiff for damage and for unlawfully creating an encumbrance on the property over which it has no lawful claim.

[6.] As it relates to substituted service, the deponent averred that a search of the Guernsey Companies Registry revealed that the Intended Defendant's registered office is Sarnia House, Le Truchot, St Peter Port, Guernsey, GY1 1GR and that the physical address has changed and is unknown to the Intended Plaintiff. It is, however, the Plaintiff's belief that the principals or agents of the Intended Defendant reside in Southern England, United Kingdom. As a result, the deponent avers that the Intended Plaintiff has been unable to effect service of the originating process on the Intended Defendant's physical address, and due to the COVID-19 Pandemic, it was impractical to effect service on the registered office other than by registered post. The deponent averred that an advertisement in the London Gazette and/or the London Times would be the best method for substituted service, with an alternative method by service on the Intended Defendant's attorneys at Lennox Paton.

Prior proceedings before the Supreme Court

[7.] The deponent stated that prior to this action, the Intended Plaintiff had commenced three actions against the Intended Defendant and others in the Supreme Court namely: CLE/gen/00116/2009 (the 2009 action); CLE/gen/01436/2018 (the 2018 action) and CLE/gen/01660/2019 (the 2019 action). It was explained that each of these actions was ultimately dismissed by the court or withdrawn by the Intended Plaintiff against the Intended Defendant based on procedural missteps and not based on the merits of the actions. The deponent makes further mention of the stay of the 2018 action by Thompson, J (as he then was) until the Certificate of Taxation granted in the 2009 action was settled. The deponent stated that the Intended Plaintiff has complied and has settled in full each of the certified taxed costs plus interest in the 2009 and 2018 actions, therefore the stay restriction imposed by Thompson, J. is removed. The deponent avers that the 2019 action was not served on the 1st through 3rd Defendants in that matter, and was formally discontinued against each of them (this Defendant included) on 4th February 2021. Presently, the action only subsists against Andrew Davies (the appointed receiver), who is not a party to this action.

Orders made by the Learned Registrar

[8.] By Order of the Learned Registrar dated 20th May 2021, the Court was satisfied that:

> "One or more of the Order 11 r. 1 requirements applies to the intended action

The Statement of Claim attached to the said Affidavit discloses a reasonable cause of action

It is very probable that the Intended Defendant and its principals directors and or officers may be found in the United Kingdom

There is no concurrent remedy in the Jurisdiction in which the Intended Defendant will be served

AND THAT it is impracticable for the Intended Plaintiff to serve that Writ of Summons personally on the Intended Defendant or its principals officers and directors and that an Order for Substituted Service of the said Writ of Summons as herein directed would be effective steps to bring the Writ of Summons to the notice of the Intended Defendant.

IT IS HEREBY ORDERED THAT:

1. Pursuant to Order 6 r. 7 of the Rules of The Supreme Court leave is granted to the Intended Plaintiff to issue a specially endorsed Writ of Summons for service out of the Jurisdiction of the Commonwealth of The Bahamas and;

2. Pursuant to Order 11 r. 1 leave is granted to Intended Plaintiff to serve the specially endorsed Writ of Summons out of the Jurisdiction of the Commonwealth of The Bahamas and;

3. Pursuant to Order 65 r. 4 of the Rules of The Supreme Court that a copy of this Order and a copy of the Writ of Summons in this action by inserting and advertisement of such Order and Writ in Two (2) advertisements in the London Times, United Kingdom once per week for two consecutive weeks AND BY delivery of this Order and a copy of the Writ of Summons by registered post to the Registered office of the Intended Defendant at Sarnia House Le Truchot, St. Peter Port, Guernsey, GY1 1GR shall be good and sufficient service of the Writ and that the service shall be deemed to be effective on the last day of publication of the said advertisement or the date of receipt of the registered delivery whichever is the latter and that the time for acknowledgment of service be within 14 days from such date

4. That the Intended Plaintiff shall file and swear an Affidavit of Compliance with the terms of this Order

5. That there is no Order as to Costs"

[9.] This Order was set aside by a subsequent Order made by the Learned Registrar dated 7th December 2021 aforementioned, on application by the Defendant via Summons filed 29th September 2021 supported by the First and Second Affidavit of Robert Randall filed 8th September 2021 and 15th November 2021 respectively. It was ultimately ordered:

1. "That the action is hereby struck out as an abuse of process with liberty to the Plaintiff to appeal.

2. The Notice and Memorandum of Conditional Appearance filed on 29th September 2021 and Affidavit of Taniel Saunders and the First and Second Affidavits of Robert Randall are deemed to be valid and filed in accordance with the Rules of the Supreme Court.

3. The Plaintiff shall pay to the Defendant forthwith, the costs of and occasioned by the application."

THE PLAINTIFF'S CASE

[10.] The Plaintiff filed a Notice of Appeal on 14th April 2022 to appeal the decision of the Learned Registrar pursuant to Order 58 Rule 1 of the Rules of the Supreme Court, Ch. 53 ("RSC"). The Plaintiff stated that the decision of the Registrar should be set aside as:

1. "The Deputy Registrar ought not to have dismissed the Plaintiff's entire action when there was no application before the Court to strike out the action. The Defendant's application sought merely to set aside the service of the Writ of Summons on the Registered office of the Defendant and the Order granting leave to serve out of the Jurisdiction on the grounds set out in paragraphs 1 (a) – (i) and 2 (a)- (c) in its Summons.

2. The Deputy Registrar misdirected himself and was wrong in law to consider himself bound by **Yat Tung Investment Company Ltd. v Dao Heng Bank Ltd [1975] AC 581**, a case in which the abuse of the process was grounded in the principle of res judicata:

    a. After having expressly and empathetically declared earlier in the proceedings that res judicata DID NOT apply to the present proceedings.
    b. In light of the fact that each of the matters or actions in TAN were pending at the same time, some of which had been adjudicated upon. Whereas in this case all of the previous actions were either dismissed or withdrawn as against this Defendant and this Defendant [was] never served or properly before the Court in ALL of the said previous actions.

3. The Deputy Registrar ought not to have acquiesced to the Defendant's request for a clarification of its costs order without giving the Plaintiff an opportunity to be heard on, inter alia, the issue of costs.

4. The Deputy Registrar failed to consider the contents of the affidavit of compliance before him and dismissed reference to it by stating erroneously and non-judiciously

that "... it is still neither here nor there because I still deem the matter an abuse of the process of the court."

5. The Deputy Registrar ought not to have unilaterally varied the terms of his Order as it relates to costs "on the papers" without giving the Plaintiff an opportunity to be heard thereon."

[11.] The Plaintiff relies on her submissions canvassed before the Learned Registrar. The Plaintiff submits that the Rules do not state that the Writ of Summons or other originating process must be filed prior to an application for leave to serve the Defendant out of the jurisdiction. The Plaintiff submits that there are Rules such as Order 29 and Order 68 that allow a party to move the Court on an ex-parte application when seeking an injunction or leave prior to filing any originating document and relies on **Moss v Moss (in her capacity as Administrix of the Estate of the late Willard Nazi Moss) [2015] 2 BHS J. No. 114** in this regard. Further, it is submitted that Order 5 Rule 1 makes it clear that the requirement that an action in civil proceedings is to be begun by an originating process is deliberately stated in non-mandatory language. The Plaintiff contends that Order 6 Rule 1 provides that no writ to be served out of the jurisdiction shall be issued without the leave of the court. It is contended that the issuing of a writ takes effect when it is duly sealed after presenting it to the Registry. Therefore, the Plaintiff is prohibited from issuing the Writ, by presenting it to the Registry, before it applies for leave. It is the Plaintiff's position that there is no irregularity in the commencement of these proceedings as the Rules permit the application for substituted service out of the jurisdiction to be made at the time that leave to issue the Writ is granted. Thus, the step taken in obtaining an order for substituted service prior to the filing of the Writ was proper, as the unfiled Writ should be attached to an application for leave.

[12.] As it relates to the endorsement of the Writ with the words "not for service outside of the jurisdiction", the Plaintiff contends that this endorsement is only necessary where one or more of the Defendants are located within the jurisdiction or where a Writ is issued against a Defendant(s) with a foreign address and is not intended to be served out of the jurisdiction. For instance, where the Defendant has attorneys within the jurisdiction that has instructions to accept service on its behalf.

[13.] The Plaintiff contends that although the Writ of Summons stated that it was issued under Order 6 Rule 7 as opposed to Order 6 Rule 6, the Court was not misled. The Plaintiff contends that its summons and affidavit referred to the words and language of Order 6 Rule 6 and not that of Rule 7, and the Court was aware of the justification under which it made its Order. In any event, the Plaintiff submits that the Court should be satisfied that the application for leave was made in good faith, that the order was entered in good faith, and there was no prejudice or injustice to the Defendant as the Court did in **Cornwall Estates Ltd. v Malonson [1984] BHS J. No. 8.**

[14.] The Plaintiff submits that it complied with the Registrar's Order on substituted service in which it advertised in The London Times the Notice of the Writ of Summons and the Court Order. Further, the advertisement contained instructions as to the time limit for entering an appearance and instructions to contact the attorney for the Plaintiff for documents relative to the proceedings. At the hearing on 1th February 2023, the Plaintiff's counsel contended that *"it was the expressed wording of the order of the Learned Registrar that the Plaintiff was [to] serve the Specially Endorsed Writ of Summons...by delivering of the order and a copy of the writ of summons via registered post."* In any event, the Plaintiff concedes that the service of the Writ of Summons as opposed to the Notice of Writ was not in compliance with the Rules, but submits that this noncompliance may be treated as an irregularity under Order 2 Rule 1.

[15.] The Plaintiff also submits that the Statement of Claim alleges that the Defendant breached the agreement between the parties by serving the demand in August 2015 and further breached the agreement in October 2018 by terminating the said Facility. The Plaintiff says that the earliest limitation period would begin in August 2015, and at the time of the application and issue of the Writ, the limitation period had not yet expired. The Plaintiff contends that it made full and frank disclosure to the Court and relies on the Affidavit of Tara Mackey.

[16.] Lastly, the Plaintiff submits that there is no abuse of process in bringing this present action as it raises a new cause of action never taken before in the previous proceedings against the Defendant. The Plaintiff further submits that the substantive issues in the previous matters were not adjudicated upon as each of the actions was dismissed. Therefore, the Plaintiff contends that the Privy Council decision of **Yat Tung Investment Co. v Dao Heng Bank**, upon which the Learned Registrar relied to dismiss the action is not applicable. Moreover, the Plaintiff contends that the entire action should have not been struck out as an abuse of process as that was not a relief sought in the Defendant's Summons.

THE DEFENDANT'S CASE

[17.] The Defendant's Summons sought to set aside the service of the Writ pursuant to Order 12 Rule 7 RSC and Section 21 of the Supreme Court Act on the grounds that:

a. "the Plaintiff irregularly commenced proceedings by filing an Ex-Parte Summons and obtained an Order thereon, prior to issuing any originating process under the Rules of the Supreme Court;
b. The Plaintiff obtained an Order for leave to serve the Defendant out of the jurisdiction prior to commencing valid proceedings under the Rules of the Supreme Court;
c. The original Writ of Summons filed on 1st June 2021 to commence proceedings, was not marked 'not for service out of the Jurisdiction' as it should have been;

d. The Writ of Summons was issued pursuant to the incorrect rule of the Rules of the Supreme Court as appearing on the Writ of Summons;
e. The Defendant was not served with a Notice of Writ or Concurrent Writ of Summons as mandated by the Rules of the Supreme Court rather, it was served with the Writ of Summons itself;
f. The Writ of Summons was not served with the Ex-Parte Summons, Affidavit or Skeleton Submissions in support of the application for leave to serve out of the jurisdiction,
g. The Writ of Summons was not served with an Order indicating the time limit that the Defendant had to enter an appearance;
h. The Plaintiff failed to provide a note of the Ex-Parte hearing before Assistant Registrar Renaldo Toote; and
i. Leave to serve the Defendant via substituted service was granted pursuant to the incorrect rule of the Rules of the Supreme Court;

2. Without prejudice to the Defendant's position that the application for leave to serve out of the jurisdiction was made and determined before any legal proceedings were properly constituted and are therefore invalid, the Order should in any event be set aside on the basis that:

   a. The Plaintiff's claim as set out in the purported Writ of Summons is limitation barred pursuant to the Limitation Act;
   b. The Plaintiff failed to give full and frank disclosure to the Court; and
   c. The Writ of Summons was an abuse of process having regard to CLE/gen/00116 of 2009, CLE/gen/1436 of 2018 and CLE/gen/1660 of 2019, all of which actions were commenced by the Plaintiff and concerned the same allegations.

3. The Plaintiff and their agents be restrained from bringing any further actions against the Defendant or any associates or agents of the Defendant without leave of the Court; and

4. The Plaintiff pay to the Defendant the costs of and occasioned by the application on an indemnity basis."

[18.] The Defendant submits that the Plaintiff commenced irregular proceedings by filing the Ex-Parte Summons as opposed to a Writ of Summons, and failed to have the Writ marked "not for service within the jurisdiction". The Plaintiff relies on **Iglesias v Carib Resorts Inc. and others [2016] 1 BHS J. No. 63** in which Isaacs Sr. J. (as he then was) dismissed the Plaintiff's application to serve the Third Defendant out of the jurisdiction as the Plaintiff had not applied to issue a concurrent writ, and the ordinary Writ was not sealed with a notification that it is "not for service out of the jurisdiction". It is the Defendant's submission that the Writ should have been endorsed with the words "not for service within the Jurisdiction", and that having failed to sodo and commence

proceedings by the Writ, these proceedings and all subsequent actions to serve the Defendant out of the jurisdiction are nullities. In any event, the Defendant submits that it was served with the Writ of Summons on its registered office and not the Notice of the Writ or a concurrent Writ.

[19.] The Defendant highlights that the Plaintiff's Writ of Summons was issued pursuant to Order 6 Rule 7 of the Rules, which deals with the duration and renewal of a Writ, and not pursuant to Order 6 Rule 6 which it ought to have been issued under. Further, the Plaintiff obtained an order for substituted service under Order 65 Rule 4 of the Rules, which ought to have been Order 61 Rule 4 which deals with substituted service. The Defendant contends that the Plaintiff ought to have made an application to correct these irregularities and failed to do so.

[20.] The Defendant submits that the Plaintiff was under a duty of full and frank disclosure as the Order filed 1th June 2021 was on an ex-parte basis. The Defendant asserts that the Plaintiff has not mentioned to the Court in the Affidavit of Michelle Curtis that it has not met any of its performance obligations under the debenture, has not repaid any of the sums advanced by the Defendant, or even failed to mention the action that was brought by Montana UK Ltd. (despite the Plaintiff claims that there is no relationship with the said company). Yet the Montana UK Ltd. action was commenced 7 days before the Plaintiff's application for withdrawal of the 2018 action occurred, and the company was also seeking an injunction restraining the sale of the property in Rum Cay. The Defendant further submits that the Plaintiff failed to raise possible defences including res judicata and abuse of process or why such defence did not apply and even failed to advise the Court that the application for leave was made prior to the filing of a Writ of Summons and there was no jurisdiction to do so.

[21.] The Defendant contends that the Plaintiff failed to serve a copy of the Ex-Parte Summons, the Affidavit of Michelle Curtis in support, a note of the hearing, or the Order filed 1th June 2021, when it served the Defendant at its registered office. The Defendant contends that the Plaintiff is obligated to serve the Defendant with all documents relied upon at the application for leave to serve outside the jurisdiction.

[22.] The Defendant submits that the instant action is an abuse of process and a plea of res judicata arises, in that the Plaintiff had an opportunity to raise the issue of breach of the 2008 Agreement which allegedly occurred in October 2018 in the 2018 action in which the Writ of Summons was filed 7 December 2018, and in the 2019 action in which the Writ was filed 27 November 2019. The Defendant relies on **Ricardo F. Pratt v Ginn-La West End Limited and another [2020] 1 BHS J. No. 42** and **Yat Tung Investment Company Ltd.** (supra) as in both instances the Court admonished parties pursuing the same subject of litigation in respect of some matter which might have been brought forward as part of the subject in contest, but was not raised because of negligence or inadvertence or accident. Moreover, the Defendant submits that the present action is an abuse of process and is vexatious given the multiplicity of proceedings with similar causes

of actions relative to the property in Rum Cay, and relies on **Continental Finance Trading Co. SA v Gollmer [1992] BHS J. No. 94**.

[23.] The Defendant seeks an anti-suit injunction to restrain the Plaintiff from commencing any further proceedings without obtaining leave of the Court. It is submitted that the Supreme Court has the power to grant such Order under its inherent jurisdiction if a Plaintiff continuously threatens or initiates frivolous and vexatious litigation. The Defendant relies on **Fujifilm Kyowa Kirin Biologics Co Ltd. v AbbVie Biotechnology Ltd and another [2017] Bus LR 333** in which the Court determined that it had the power to grant a domestic anti-suit injunction under section 37(1) of the Senior Courts Act 1981. This provision is identical to section 21 of the Bahamian Supreme Court Act which states that the Court may grant an injunction, final or interlocutory where it is just and convenient to do so. In Fujifilm, the Court cited **Hospira UK Ltd. v Eli Lilly & Co. [2008] EWHC 1862 (Pat)** in which Floyd J concluded that the Court has the power to grant a domestic anti-suit injunction against a Defendant over whom it has in personam jurisdiction on the ground that the proceedings which the Defendant threatens to bring are vexatious or oppressive or an abuse of process. The Defendant relies on the First and Second Affidavits of Robert Randall for the entirety of its case.

[24.] The Defendant also seeks indemnity costs in the matter fit for two counsels. The Defendant relies on **Taihu International Cruise Company Limited v Diamond Cruise International Co. Limited [2020] 1 BHS J. No. 45** in which indemnity costs are said to be granted in the court's discretion and in exceptional cases where the conduct of a party can be considered egregious. The Defendant submits that the multiplicity of actions by the Plaintiff dealing with the same or similar subject matter is unreasonable and that it is evident that the claim is unsustainable and doomed to fail given that the breach of the agreement in 2018 could have been raised in the 2018 or 2019 action. The Defendant asserts that this Order should be made to compensate the Defendant for the costs of the action, as it would not fully recover all fees expended on taxation.

LAW AND ANALYSIS

[25.] The Plaintiff appeals the Order made by the Learned Registrar to strike out the matter as an abuse of process, on the Defendant's application to have the service of the Writ set aside. As this is an appeal from the Learned Registrar, Order 58 of the Rules is the operative rule and provides as follows:

> "1. (1) An appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice.

(3) Unless the Court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.

(4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought."

Originating Process

[26.] Order 5 Rule 1 of the Rules provide specifically:

"1. Subject to the provisions of any Act and of these Rules, civil proceedings in the Supreme Court may be begun by writ, originating summons, originating motion or petition."

[27.] Although the language contained within Rule 1 is permissive, the following provisions specifically categorizes the matters which must be started by one of the four originating processes. The Plaintiff claims a breach of agreement in the instant matter which is subject to Rule 2, and must be begun by Writ. The Plaintiff claims that the matter was commenced by way of Ex-Parte Summons as it had to first seek leave to issue the Writ. Further, it is contended that the issuance of the Writ was a process simultaneously done with filing the Writ once the document was lodged in the Registry. The Plaintiff contends that once the Writ is returned from the Registry, it is already issued. Thus, a Plaintiff must first approach the Court on an Ex-Parte Summons to seek leave before filing the initial Writ. This cannot be the case. To begin any matter in the Supreme Court, one of the four originating processes must be filed where appropriate, subject to those peculiar matters in which the Rules or other enactment provide otherwise.

Leave to issue Writ

[28.] Order 6 Rule 6(1), (2) and (3) provide:

"6. (1) No writ which, or notice of which, is to be served out of the jurisdiction shall be issued without the leave of the court…

(2) A writ must be issued out of the Registry.

(3) Issue of a writ takes place upon its being sealed by an officer of the Registry."

[29.] I take the position that leave must be obtained by the Court to issue a Writ or notice of a Writ to be served out of the jurisdiction which can only be done by presenting it to the Registry to be filed

and subsequently stamped and sealed by the Registrar. Prescod J. (Acting)(as he then was) in **Cornwall Estates Ltd. v Malonson [1984] BHS J. No. 8** stated:

> "11. In other words, where it is intended to serve a writ or notice thereof outside the jurisdiction, leave of the Court must be obtained before issue. Where the address of the defendant as stated in the writ is outside the jurisdiction it is reasonable to assume that service outside the jurisdiction was intended. This is not, however, conclusive evidence of an intention to serve the writ, or notice thereof abroad as the Rules permit the issue of a writ against a defendant with a foreign address in certain cases where it is not intended to serve abroad. In such a case the writ should be stamped on issue with the seal; "Not for service outside the jurisdiction."

[30.] Order 11 Rule 3 provides that leave granted for service out of the jurisdiction is for the service of the notice of the Writ and not the Writ itself. It seems to me that the correct process would be for the Plaintiff to first commence the action by filing the Writ with the endorsement "not for service out of the jurisdiction" and then on even date or shortly thereafter file a summons for leave to issue a concurrent Writ pursuant to Order 6 Rule 6 and leave to serve the said Notice of the Writ out of the jurisdiction.

[31.] Order 6 Rule 5 makes it clear that a Writ for service within the jurisdiction may be issued as a concurrent Writ with one which, or notice of which, is to be served out of the jurisdiction. It provides:

> "5. (1) One or more concurrent writs may, at the request of the plaintiff, be issued at the time when the original writ is issued or at any time thereafter before the original writ ceases to be valid.
>
> (2) Without prejudice to the generality of paragraph (1), a writ for service within the jurisdiction may be issued as a concurrent writ with one which, or notice of which, is to be served out of the jurisdiction and a writ which, or notice of which, is to be served out of the jurisdiction may be issued as a concurrent writ without one for service within the jurisdiction.
>
> (3) A concurrent writ is a true copy of the original writ with such differences only (if any) as are necessary having regard to the purpose for which the writ is issued."

[32.] It follows then that the Plaintiff should have applied for leave to issue the concurrent writ out of the Jurisdiction and to serve the Notice of the Writ out of the jurisdiction. This however was not the case as the Plaintiff applied for leave to issue the Specially Endorsed Writ of Summons out of the jurisdiction pursuant to Order 6 Rule 7. In this regard, leave should not and could not be granted. In any event, the Plaintiff made an application for leave to issue under the incorrect

provision of the Rules. The appropriate rule to issue a Writ out of the jurisdiction is Order 6 Rule 7.

[33.] Whilst I do find on the Affidavit of Michelle Curtis filed 25th February 2021 that this might have been an appropriate matter to issue a concurrent writ out of the jurisdiction, given that the Defendant is a foreign company, I do not find that the Plaintiff complied with the Rules. The matter was incorrectly initiated before the Court, the Plaintiff obtained leave to issue the Writ before filing the Writ, and sought and obtained leave to issue the Writ of Summons itself. I find these actions to constitute fundamental irregularities incapable of curing.

Leave to serve Writ out of the Jurisdiction and Substituted Service

[34.] Order 11 of the Rules of the Supreme Court governs service of process out of the jurisdiction and states:

> "1. (1) Subject to rule 3 and provided that the writ does not contain any such claim as is mentioned in Order 67, rule 2(1), service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say —
>
> (a) if the whole subject-matter of the action begun by the writ is land situate within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to land so situate;
>
> (b) if an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action begun by the writ;
>
> (c) if in the action begun by the writ relief is sought against a person domiciled or ordinarily resident within the jurisdiction;
>
> (d) if the action begun by the writ is for the administration of the estate of a person who died domiciled within the jurisdiction or if the action begun by the writ is for any relief or remedy which might be obtained in any such action as aforesaid;
>
> (e) if the action begun by the writ is for the execution, as to property situate within the jurisdiction, of the trusts of a written instrument, being trusts that ought to be executed according to Bahamian law and of which the person to be served with the writ is a trustee or if the action begun by the writ is for any relief or remedy which might be obtained in any such action as aforesaid;
>
> (f) if the action begun by the writ is brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages

or obtain other relief in respect of the breach of a contract, being (in either case) a contract which —

(i) was made within the jurisdiction; or
(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or

(iii) is by its terms, or by implication, governed by Bahamian law;

(g) if the action begun by the writ is brought against a defendant in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;
(h) if the action begun by the writ is founded on a tort committed within the jurisdiction;

(i) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(j) if in the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;

(k) if the action begun by the writ is either by a mortgagee of property situate within the jurisdiction (other than land) and seeks the sale of the property; the foreclosure of the mortgage or delivery by the mortgagor of possession of the property but not an order for payment of any moneys due under the mortgage or by a mortgagor of property so situate (other than land) and seeks redemption of the mortgage, reconveyance of the property or delivery by the mortgagee of possession of the property but not a personal judgment;

(l) if the action is a probate action within the meaning of Order 68."

[35.] In **RTL v ALD and others [2015] 1 BHS J. No. 82**, Winder J stated at paragraph 55:

"Order 11 rule 1(2) provides that service is permissible outside of the jurisdiction where an Act gives jurisdiction to the Court, notwithstanding that a defendant or any of the defendants may be abroad, or that the claim relates to matters that happened outside of the jurisdiction."

[36.] As service out of the jurisdiction is an extra-territorial occurrence, there may also be repercussions. Therefor each party seeking leave to serve out of the jurisdiction must comply with the Rules of the Supreme Court. In **Camera Care Ltd v Victor Hasselblad [1986] 1 F.T.L.R 348** it was stated by the Court:

> "However, service of process out of the jurisdiction is an unusual assertion by this Court of an extra-territorial jurisdiction which could have international repercussions, and so is carefully controlled by the Rules of Court. It is consequently very important to ensure compliance with the rules. So, irregularities should be cured only in exceptional cases. I do not think that this is a case in which it would be a proper exercise of the discretion for the Court to put right the egregious mistakes of the plaintiff's solicitors so as to bring a foreign party before this Court and, incidentally but not insignificantly, deprive him of a limitation defence."

[37.] As aforementioned, Order 11 Rule 3 states that *"leave granted under rule 1 or 2 shall be leave for service out of the jurisdiction of notice of the writ and **not** the writ"*. (Emphasis mine). The Plaintiff sought and obtained leave to serve the specially endorsed Writ out of the Jurisdiction pursuant to Order 11 Rule 1 and for substituted service pursuant to Order 65 Rule 4. Again, Order 65 Rule 4 is not the correct rule for substituted service, the appropriate rule is Order 61 Rule 4. As per the Affidavit of Compliance deposed by the Plaintiff's attorney herself, filed on 27th August 2021, it was averred that a Notice of the Learned Registrar's Order and the filing of the action was published in the London Times on 9th July 2021, 23rd July 2021, 2nd August 2021 and 9th August 2021 and that an original of the said Order and the Writ of Summons were delivered to the Registered Office of the Defendant.

[38.] Further, the Notice published in the London Times did not provide a date for the Defendant to enter an appearance pursuant to Order 11 Rule 4 (3). The Notice however provided that *"you must within 14 days from the publication of the advertisement inclusive of the day of such publication acknowledge service of the said Writ of Summons by completing a prescribed form of acknowledgment of service ... otherwise Judgment may be entered against you."* Once more, these are fundamental errors on behalf of the Plaintiff which have to my mind surpassed being cured as irregularities.

[39.] There are numerous mistakes and inadvertences which when compiled can amount to an abuse of the court's process. The Plaintiff relies heavily on the decision of Evans J in **Moss v Moss** (supra) in which Evans J exercised his discretion to cure the irregularities pursuant to Order 2 Rule 1 and allowed the Order for service out of the jurisdiction to stand. In that case, the irregularities were similar to that of this instant matter, in that the Plaintiff served the Writ of Summons on the Defendant, the Plaintiff failed to issue a concurrent writ and the Plaintiff obtained leave to serve the writ out of the jurisdiction on the incorrect ground. I am however not bound by this decision,

which in my view would have been more applicable if the Plaintiff had not had several opportunities to pursue a correct course of litigation. I would therefore decline to cure any irregularities, and set aside the service of the Writ on the Defendant's registered office and substituted service, not least as a result of the several aborted actions taken by the Plaintiff to have these issues properly adjudicated.

Full and Frank Disclosure

[40.] The Defendant contends that the Plaintiff has not made full and frank disclosure to the court on the ex-parte hearing. The Defendant further asserts that the Plaintiff had a duty to fully disclose to the court the nature of the proceedings and possible defences. In the Affidavit of Michelle Curtis in support of the Ex-parte summons, the Plaintiff explained the nature of the relationship between itself and the Defendant and exhibited the facility letter and the debenture setting out the terms of the agreement between the Bank of Scotland and the Defendant.

[41.] However, as the Defendant rightly points out, there is no indication that the Plaintiff disclosed to the Court any possible defences which the Defendant may have to the claims whilst asserting that it has a good cause of action. However, I find that the Plaintiff, although not said in exact terms as the Defendant alleges, disclosed that it is alleged that it has not met any of its obligations under the debenture or repaid any sums advanced, as the deponent states in paragraph 5 of the Affidavit that *"On 29th October 2018, the Intended Defendant appointed a Receiver over the Intended Plaintiff's assets under the said Debenture based on the purported breach of Schedule 8 of the said Facility."*

[42.] The Defendant further raised that the Plaintiff failed to disclose the defence of res judicata or abuse of process owing to a multiplicity of actions. The Plaintiff explained to the court that prior to this action, it had commenced three other actions against the Defendant which were either dismissed by the court or withdrawn by the Plaintiff. I however accept the Defendant's submission that the Plaintiff has made no mention of the action brought by Montana UK Ltd. Nevertheless, given that the Plaintiff has asserted non-affiliation with said company, I cannot see that this would amount to a material non-disclosure.

[43.] As it relates to the failure of the Plaintiff to serve a note of the hearing before the Learned Registrar and to serve a copy of the Ex-parte summons and Affidavit of Michelle Curtis in support or the Order filed 1th June 2021 when the Defendant was served at his registered office, there is nothing in Order 11 requiring the Plaintiff to serve these aforementioned documents along with the Notice of Writ. Furthermore, the Defendant in its submissions stated that copies of the documents were eventually provided. This I find does not amount to material non-disclosure by the Plaintiff.

[44.] In **Essex Global Capital, LLC v Purchasing Solutions International, Inc.[2019] 1 BHS J. No. 60**, Charles J (as she then was) held:

> "(1) In order to enable the Court to decide an application under RSC, Ord 11, r 1 (f) (iii), it was necessary for the party making the application to supply all the material facts within his knowledge. The Court would then, without trying to determine the merits of the action, consider all the relevant documents, even though that might involve some investigation, and make an order accordingly. In the present action, the Court finds that the Plaintiff has done so.
>
> (2) When considering an application for leave to allow service of proceedings out of the jurisdiction under Ord 11, r.1(1) the court, before exercising its discretion to grant leave, had to consider (i) whether there was a good arguable case that the court had jurisdiction under one of the paragraphs of r.1(1), and (ii) whether there was a serious issue to be tried so as to enable exercise of the discretion to grant leave under r 4(2). In particular, the test of the strength of the case on the merits which a plaintiff had to establish for the grant of leave to serve proceedings out of the jurisdiction was merely whether the evidence disclosed that there was a serious issue to be tried, not whether he had a good arguable case: Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1993] 4 All E.R. 456 at page 457.
> (3)The Court has a discretion to discharge an ex parte order granted at a hearing for failure on the part of the applicant/plaintiff to give full and frank disclosure but this is not the inevitable consequence of every non-disclosure. The Court will have regard to all the circumstances of the case and will assess the gravity of the alleged breach, the degree and extent of culpability with regard to the non-disclosure, the importance and significance of the facts not disclosed to the outcome of the application, any excuse or explanation offered, the severity and duration of any prejudice caused to the respondent/defendant and whether the non-disclosure can be and, if so, has been, remedied. In my opinion, the Plaintiff has sufficiently disclose all relevant material to the Court and it is now time for the Defendant to file and serve his Defence."

[45.] In this vein, I have read and considered the Affidavit and find that the Plaintiff has made a full and frank disclosure by disclosing all relevant material to the Court. I do not find the non-disclosures purported by the Defendant to be prejudicial or such that warrants setting aside the service on this ground solely.

Abuse of Process

[46.] The Defendant specifically sought to have the Order of the Learned Registrar granting service out of the jurisdiction set aside as the action amounts to an abuse of process and a plea of res judicata arises. I reject the Defendant's submission that res judicata arises as in all of the previous matters, the Plaintiff's case was not heard on the merits but rather dismissed or withdrawn early on in the

proceedings. There can be no basis for res judicata in this regard. The rule in **Johnson v Gore Wood [2002] 2 AC 1** states:

> "'The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ... While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[47.] Nevertheless, I accept the Defendant's submissions that there has been a multiplicity of proceedings by the Plaintiff against the Defendant in regard to the same subject matter. As the Defendant rightfully states, the Plaintiff claims a breach of the agreement occurred in 2018, yet this was not raised in the 2018 or 2019 action which were both commenced by Writ of Summonses following the alleged breach.

[48.] In any event, there must be some finality to litigation and the Plaintiff ought to have put its entire case correctly and completely before the Court. It is unfair to the Defendant to be face the prospect of litigation over and repeatedly, on four different occasions, only for the actions to be dismissed or withdrawn at the hand of the Plaintiff for technical or procedural deficiencies. This present matter is no different. Although the Plaintiff asserts that not all of the matters were properly served on the Defendant, who was therefore not in legal jeopardy, it is vexatious to be the subject of proceedings carried on in this fashion. It is unfair to the Defendant who has incurred costs and expended funds seeking representation to successfully challenge these actions on technical

grounds. This has resulted in the Plaintiff being ordered to pay costs to the Defendants in the 2009 and 2018 actions. This is an appropriate action to deem an abuse of the process.

Anti- suit injunction

[49.] The Defendant seeks an anti-suit injunction against the Plaintiff to restrain the Plaintiff from commencing any further proceedings without prior leave of the Court. Following the decision of the Court in **Fujifilm Kyowa Kirin Biologics Co Ltd.** (supra) I am satisfied that I have the power under section 21 of the Supreme Court Act which is identical to section 37(1) of the Senior Courts Act 1981 to grant an anti-suit injunction in this matter.

[50.] Section 21 provides:

> "21. (1) The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the Court think fit."

[51.] I find it just and convenient to do so to prevent the Plaintiff from abusing the Court's process as it would be required to obtain the leave of the Court before commencing another action against the Defendant. This is not an attempt to drive the Plaintiff from the judgment seat or a conclusion that the Plaintiff's claims are vexatious. I do not find this to be the case. The Plaintiff would be able to commence an action against the Defendant, but must prove to the Court that they have complied with all preliminary matters and that the claim is properly before the Court.

Indemnity costs

[52.] The issue of indemnity costs was comprehensively considered in **Taihu International Cruise Co. Limited v Diamond Cruise International C. Limited** [2020] 1 BHS J No. 45 by His Lordship Moree CJ (as he then was).

[53.] The discussion need not be repeated, but having regard to the principles enunciated in that decision, I do not find the conduct of the Plaintiff so egregious or disgraceful or deserving of moral condemnation as to attract an award of costs on an indemnity basis. I therefore decline to make such an order.

CONCLUSION

[54.] It is hereby ordered that:

1. The Order of the Learned Registrar made 7th December 2021 setting aside the service of the Writ out of the Jurisdiction stands.
2. This action is hereby struck out as an abuse of the court's process. The Plaintiff and/or its agents are hereby prohibited from commencing fresh proceedings against the Defendant with respect to the same subject matter without leave of the Court.
3. The Plaintiff shall pay to the Defendants the costs occasioned by this application, to be assessed by the Court if not agreed.

Dated this 3rd day of October A.D., 2024

Neil Brathwaite
Justice