

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law & Equity Division  
BETWEEN**

**2018  
CLE/gen/127**

**DAVID E. CUMMINGS**

**Plaintiff**

**AND**

**SUMNER POINT PROPERTIES LIMITED**

**Defendant**

**Before: The Hon. Madam Justice J. Denise Lewis-Johnson**

**Appearances: Travette Pyfrom for the Plaintiff  
Tanya Wright for the Defendant**

**Hearing Date: 30 November 2021**

**RULING**

**Civil - Practice - Summary Judgment - Plaintiff claiming Defendant not complying with court order - Preliminary requirements to hear an application for Summary Judgment – Defence and Counterclaim filed on behalf of the Defendant - Writ of Sequestration - Plaintiff applying for order for leave to enforce order against defendant - Whether to grant plaintiff leave to apply to enforce order – Notice not served on the parties**

By way of an Amended Specially Indorsed Writ of Summons filed 12 July 2020, the Plaintiff commenced an action against the Defendant for trespass and claimed damages in the sum of \$100,000.00, interests and costs.

An Amended Defence and Counterclaim were filed 23 July 2020 in which the Defendant avers that the Plaintiff is not the rightful owner of the property and several of its livestock were stolen by the Plaintiff.

On 13 May 2020 an Injunction Order was granted against the Defendant by which it was ordered that the Defendant be restrained until after the trial of this action from opening the gates of its property to prevent the Defendant's livestock from roaming freely and/or entering the Plaintiff's property and to complete the construction of the retaining fence on or before 25 May 2020.

property to prevent the Defendant's livestock from roaming freely and/or entering the Plaintiff's property and to complete the construction of the retaining fence on or before 25 May 2020.

The Plaintiff contends that the Defendant breached the Injunction Order and filed an application on 27 April 2021 for Summary Judgment. The Application was supported by the Affidavit of Virginia Bullard, legal assistant of the Plaintiff's Attorney, for damages for trespass and loss suffered by the Plaintiff.

On 27 October 2020 the Plaintiff filed an application for leave to issue a Writ of Sequestration against the Defendant for an order, *inter alia*, "that the Plaintiff be at liberty to issue a writ of sequestration to sequester all the real and personal property of the defendant for its contempt of court in committing breaches of the injunction of which the Defendant had due knowledge and notice of".

For both applications the Defendant raised numerous preliminary objections regarding the appropriate practice and procedure to be followed.

**HELD: (1) The Plaintiff's application for Summary Judgment is refused as the Defendant has presented a live and triable issue that must be considered by this Court. (2) The Plaintiff's Application for leave to issue a Writ of Sequestration is refused on the basis that the appropriate practice and procedure were not followed in accordance with the rules of this court.**

#### **Introduction**

There are two applications by the Plaintiff before the Court.

The first, filed 27 April 2020 is an application for Summary Judgment which reads:-

"... for an Order that judgment be entered against the Defendant pursuant to Order 14 of the Rules of the Supreme Court for damages for trespass and loss suffered by the Plaintiff and interest thereon to be assessed and costs to be taxed."

The second application filed 23 July 2020 is an application for leave to issue a Writ of Sequestration which reads:-

".... for an Order that the Plaintiff be at liberty to issue a writ of sequestration directed to the persons therein named to sequester all the real and personal property of the defendant Sumner Point Properties Limited for its contempt of court in committing breaches of the injunction of which the Defendant had due knowledge

and notice made by the order of the Honourable Justice Ruth Bowe Darville dated May 13, A.D., 2020, whereby it as order that:

“1. the Defendant Sumner Point Properties Limited, by its agents or servants, namely Robert Little Jr. and Gro Nilsson or otherwise be restrained and an Injunction is hereby granted restraining them until after the trial of this action or until further order from opening the gates of its properties thereby allowing the release of the subject animals or in any other manner taking steps which will result in the release of the Defendant’s livestock so as to permit them to roam freely and/or enter the Plaintiff’s property.

2. the Defendant, whether by its servants or agents shall on or before the 25<sup>th</sup> day of May, A.D., 2020 complete the construction of the retaining fence.”

#### **Factual Background**

1. The Plaintiff contends that by virtue of a conveyance, dated 10 October 2001 recorded in Volume 8327 at pages 41 to 53 (“the conveyance”), he is the beneficial owner entitled to possession of three lots on the island of Rum Cay on which a home and outbuildings are erected. The conveyance contains covenants prohibiting the farming or rearing of animals save pets.
2. Sometime between September 2017 and February 2018 the Defendant’s livestock roamed on the subject property which the Plaintiff allege is not only a breach of the implied covenant not to permit any of the property to be used for farming purposes but also caused substantial damage to the Plaintiff’s gardens, hedges and landscape.
3. By letter dated 25 October 2017 and 18 January 2018 the Plaintiff wrote to the Defendant requesting that the livestock be corralled. The Plaintiff alleges that no steps were taken by the Defendant after the order to pen and or control the roaming livestock.
4. On 8 February 2018, the Plaintiff commenced this action by way of a Specially Endorsed Writ of Summons against the Defendant. On 30 June 2020, the Plaintiff filed an Amended statement of Claim seeking the following relief:
  - [1] Damages in the amount of One Hundred Thousand Dollars (\$100,000.00) for loss and damage suffered by the Plaintiff between September 2017 and 13<sup>th</sup> May 2020;
  - [2] An Order that the Defendant corral the livestock within 7 days alternatively that the Plaintiff be at liberty to dispose of livestock in any manner he sees fits;
  - [3] A permanent injunction restraining the Defendant from operating in any manner a livestock farm on the Plaintiff’s property;

[4] Further or alternatively damages, together with interest on those damages, under the Civil Procedure Award of Interest Act; and,

[5] Costs

5. In turn, the Defendant filed a Defence and Counterclaim on 13 April, 2018 which was amended on 23 July 2020.
6. Thereafter, on 13 May 2020, the Court granted an Injunction Order against the Defendant after the livestock continued to enter the Plaintiff's property.
7. After the Injunction Order was granted various email correspondences were sent via the parties' legal counsels concerning the erection of the fence. The interpretation of these correspondences led the Plaintiff to believe there was an admission of guilt on behalf of the Defendant.
8. The Plaintiff later filed a Summons for Summary Judgment on 27 April 2020 supported by the Affidavit of Virginia Bullard, the Plaintiff's legal assistant.
9. The Plaintiff alleges a breach of the Injunction and on 27 October 2020 filed an application for leave to issue a Writ of Sequestration against the Defendant for an order, *inter alia*, that the Plaintiff be at liberty to issue a writ of sequestration directed to the persons therein named to sequester all the real and personal property of the defendant for its contempt of court in committing breaches of the injunction of which the Defendant had due knowledge and notice of.
10. It is to be noted that the Injunction application was heard during the State of Emergency in The Commonwealth of The Bahamas and during the periods of lockdown. Thus, the Court allowed for relaxation of the required rules and procedures such as filing of documents and notarizations of Affidavits. In this case, the Injunction Order dated 13 May 2020 was made on an Affidavit that was unsigned, unsworn and unfiled.

#### **WRIT OF SEQUESTRATION**

11. The Court's Jurisdiction to grant leave to issue a Writ of Sequestration is contained in **Order 45 Rule 5 of the Rules of The Supreme Court** and provides as follows:-

**"5. (1) Where —**

**(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time, or, as the case may be, within that time as extended or abridged under Order 3, rule 4; or**

**(b) a person disobeys a judgment or order requiring him to abstain from doing an act;**

then, subject to the provisions of these Rules, the judgment or order may be enforced by one or more of the following means, that is to say —

- (i) with the leave of the Court, a writ of sequestration against the property of that person;
- (ii) where that person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body;
- (iii) subject to the provisions of the Debtors Act an order of committal against that person or, where that person is a body corporate, against any such officer. [Emphasis added]”

12. The preliminary point was taken by the Defendant that the necessary practice and procedure for seeking leave has not been followed and such pertinent defects should render the application null and void. The objections taken by the Defendant can be summarized as follows:

- a. The Plaintiff’s Notice of Motion does not identify any officer or director of the Defendant (which is a body corporate) against whose property it is sought to issue the writ of sequestration;
- b. Failure to include a penal notice and serve the order before expiration of time stated in the order;
- c. Failure of the Plaintiff to obtain an apostille of the Affidavits in Support;
- d. Failure to serve Notice of Motion and Affidavit personally on the Defendant or the persons named in the Order; and
- e. No Supporting Affidavit.

13. The Plaintiff contends that the Defendant’s objections to the application by Notice of Motion all relate to form rather than substance and although every relevant rule may have not been complied with for seeking leave, the Court has the discretion to cure any relevant defects. The Plaintiff asserts that the defects do not go to the root of the application to render it null and void.

**The Plaintiff’s Notice of Motion does not identify any officer or director of the Defendant (which is a body corporate) against whose property it is sought to issue the writ of sequestration.**

14. The Plaintiff states that it is permissible for the Writ of Sequestration to be issued against the corporate property of a body corporate and not against the personal property of its officers and or directors. The Plaintiff relies on the wording of Order 46/5/1 of the Supreme Court Practice 1967 which provides:-

**“Indeed sequestration is rarely used....except as against the property of a body corporate or a director or officer of that body.” [Emphasis added]**

15. Further, the Plaintiff submits that an action can only be taken against the director or officer of a body corporate personally for breach of an undertaking given on behalf of the body if it is established that the director or officer knew of the order and either actively assisted in the breach or willfully failed to take steps to ensure compliance.
16. It is noted by the Plaintiff that Mr. Lundy (former Counsel for the Defendant) was the Director of the company up until June 2021. The Plaintiff relied on various email correspondences from Billy Little dated 17 June 2020 and Mr. Lundy dated 17 June 2020 to garner the assumption that the company did not appoint a new director until 15 June 2021 when Michelle Curtis was appointed Director of the company.
17. Accordingly, when filing the application for leave in October 2020, the Plaintiff was under the presumption that the company was still without a new director.
18. The Plaintiff asserts that between May 2020 and October 2020 there is no evidence to suggest that the then Director (Mr. Lundy) had actively assisted in the breach or willfully failed to take steps to ensure compliance.
19. Therefore, the Plaintiff maintains that there is no basis in law upon which they could personally pursue a writ of sequestration against the personal assets of Mr. Lundy.
20. The Plaintiff relies on the case of **Re Garage Equipment Association Agreement (1964) LR 4 RP 491 at 504**. In that case, Megaw J stated:-

**“The court is prepared to accept that none of the officers of the company individually knew or realized that an undertaking given to the court was being broken or had been broken. But that does not detract from the fact that the company - and this motion is concerned with the company - was in contempt of court by these things being done when an undertaking had been given on behalf of the company and the company was aware of the existence of that undertaking.”**

21. The Plaintiff submits that its motion is against the company; not its directors. As appears from the decision of Megaw J such an application can properly be made without joining the directors or officers.
22. The Defendant states that the Plaintiff's assertion that a Writ of Sequestration can be issued against the property of a body corporate, without the need to pursue the personal property of the Directors or Officers is inaccurate. The Defendant submits that the true authority for Order 46

Rule 5 (1) which was relied on by the Plaintiff is **Worthington and Others v. AD-LIB Club Ltd. [1964 w. No. 2321]**, a 1965 authority decided on the old Rules of The Supreme Court. The previous Order 42, r.31 RSC reads as follows:

**"Any judgment or order against a corporation willfully disobeyed may, by leave of the court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property." [Emphasis added]**

23. The Defendant argues that the language of Order 42 on which Worthington was decided is pre-1965, and is quite different from Orders 45 and 46. **Order 42 of the Rules of the Supreme Court 1978** now deals with JUDGMENTS AND ORDERS and provides as follows"-

**"subject to the provision of the Debtors Act an order of committal against that person or, where that person is a body corporate against such officer." [Emphasis added]**

24. It was further submitted by the Defendant, that the Plaintiff failed to take reasonable steps to determine who the directors or officers of the Defendant Company were, and by whom any breach of the subject order was committed or facilitated. The Plaintiff's position is that there was no evidence to suggest that Mr. Lundy actively participated in any breach. If the only director the Plaintiff can attribute notice of the Order to has not committed a breach on his part, the Defendant submits that bringing this application against a Defendant without any proof against its officers, directors, servants or agents is an abuse of the process of the court.

#### **Decision**

25. When seeking a Writ of Sequestration leave must first be sought and granted, and following the grant of leave a hearing must take place giving the respondent an opportunity to be heard. Only on the basis of that hearing should the Court make a finding that there has or has not been compliance with an Order, and, if so found, grant the substantive remedy of committal or leave to issue a Writ of Sequestration as the case may be.
26. The Rules of The Supreme Court of The Bahamas are clear in the practice and procedure to be followed regarding a Writ of Sequestration. As such, in accordance with **Order 45 Rule 5 of the RSC**, I cannot support the Plaintiff's interpretation of to whom a Writ of Sequestration can be issued. I am of the opinion the Defendant's objection is warranted and that a director or officer of the body corporate should have been cited in the Notice of Motion.

**Failure to include a penal notice and serve order before expiration of time stated in the order**

27. The Defendant contends that **Order 45, Rule 7 of the RSC** requires that the Order be served on the Defendant before the expiration of the time stated in the order requiring it to do the act in question. **Order 45, Rule 7** provides as follows:-

**7. (1) In this rule references to an order shall be construed as including references to a judgment.**

**(2) Subject to Order 24, rule 16(3), Order 26, rule 6(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless —**

**(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and**

**(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.**

**(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(ii) or (iii) unless —**

**(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought; and**

**(b) in the case of an order requiring the body corporate to do an act, a copy has been so served before the expiration of the time within which the body was required to do the act.**

**(4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served —**

**(a) in the case of service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the Order, he is liable to process of execution to compel him to obey it; and**

**(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.” [Emphasis added.]**

28. The Defendant argues that the expiration date should have been included within in the Penal Notice to be read in the following terms:- *“That if the body corporate neglects to obey the order within the time so specified or, that if the body corporate disobeys the order, HE is liable to process of execution to compel the body to obey it.”*



29. The plaintiff accepts irregularities in service and the penal notice. However, the Plaintiff submits that as Philip Lundy (the then director of the company) was in court at the time the order was made, his presence was enough to satisfy service pursuant to **SCP Order 45/6/7**; which reads:

**(1) "An order ... may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either:-**

**(a) By being present when the order was made; or**

**(b) By being notified of the terms of the order, whether by telephone, telegram or otherwise."** [Emphasis added]

30. Accordingly, the case for the Plaintiff is that as Mr. Lundy was in court when the Order was made it is no defence to the enforcement of the Order that a copy of the perfected Order had not been served on the company and or its director. As such, at all material times the company knew of the terms of the Order as Phillip Lundy went on record to say that he appeared in the matter in his capacity as Director of the Defendant and made this position clear to the court. He later entered a conditional appearance on behalf of the Defendant.

31. The Plaintiff further submits that the argument is unsustainable as **Order 45 Rule 7 of the SCP** provides that the court may dispense with service of a copy of the order under this rule if it thinks it just to do so. Accordingly, as the Court can dispense with service, the argument that a failure to serve renders the proceedings void is baseless.

#### **Decision**

32. Procedural irregularities may not be fatal and often times they can be cured at the discretion of the court. In this case, the Plaintiff acknowledged that it failed to endorse the Order with a Penal Notice and failed to serve the Order before expiration of time stated in the Order. In the case of **Sheila Narine v. The Representative of the Estate of the Late Terry Fernander 2016/CLE/gen/0607** the Honourable Madame Justice Indra Charles stated:

**[30] Modern case law seem to suggest that the omission of the penal notice in an order is not fatal to enforcement by committal once the person who is sought to be committed was well aware of the consequences of disobedience: Sofroniou v Szgetti [1991] FCR 332.**

**[31] The Court may dispense with a penal notice under the power to dispense with service: Jolly v Circuit Judge of Staines County Court [2000] 2 FLR 69 but the onus is on the Applicant to demonstrate that no injustice would be done by waiving the defect of the presentation of the penal notice.**

33. As such, I am of the opinion that the fact that the Order was not endorsed with the proper Penal Notice does not render it invalid. I note that Mr. Lundy was present when the Order was made. He was present as Counsel for and Director of the Defendant. Resultantly, the Defendant was aware of the terms of the Order and no grave injustice would be done by waiving the defect of service of the Order before expiration of time stated in the order.

**Failure of the Plaintiff to obtain an apostille of the Affidavits in Support**

34. The Defendant objects to the failure of the Plaintiff to obtain an apostille of the Affidavit of David Cummings (re: application for sequestration) filed 27 October 2020 and the Supplemental Affidavit of David Cummings (re: application for sequestration) filed 11 December 2020.

35. The Defendant submits that the Affidavits of David Cummings cannot be used in support of this application as they have not been duly sworn and apostilled as:

- a. The Affidavit of David Cummings (re: application for sequestration) filed 27 October 2020 which purports to have been Sworn at Nassau, Bahamas on 6th day of October 2020 bears no notary signature or seal,
- b. The signature of the Affiant claims that the affidavit was sworn to in Nassau, The Bahamas, while the certificate page was signed in New York;
- c. The signature of one Michele Questel, purported Notary Public of the State of New York is not apostilled; and
- d. The Supplemental Affidavit of David Cummings (re: application for sequestration) filed 11 December 2020 has the same defects.

36. The Plaintiff asserts that the proceedings for the Injunction application took place in the height of the COVID-19 pandemic. Accordingly, the Court accepted that the rules of court had to give way and allowed for some flexibility in order for the streams of justice to continue to flow and for this purpose insistence upon the strict application of the rules was unreasonable.

37. As such, the Affidavits relied on in support of the application for the injunction and the Affidavit relied on to oppose were unsworn and unfiled. During this time, both parties (on the hearing of the injunction application) emailed the Affidavits to the learned judge who relied on the versions of the unsworn and unfiled Affidavit when granting the injunction.

38. The Plaintiff indicated that in these very proceedings the court permitted the use of Affidavits unfiled and unsworn. Objections were not taken by either Counsel as it was understood that strict compliance with the rules of procedure and form was impossible due to the global pandemic.

39. In any event the Plaintiff cites **Order 41 Rule 4 of the SCP Rules 1979** provides that:-

**“An affidavit which is defective may, with the leave of the of the court be used in evidence notwithstanding any irregularity in the form thereof.” [Emphasis added]**

40. The explanatory notes to **Order 41 Rule 4** further states:

**“If the irregularity can be cured without undue hardship or is not a matter of substance or affects its actual content then it should be put right.” [Emphasis added]**

41. It is the Plaintiff’s submission that the irregularity is not of substance nor does it affect the content of the Affidavit.

42. Notwithstanding such, the Defendant submitted that the failure to authenticate not one but both the affidavits of David E Cummings is only one of many fatal defects in the Affidavits.

43. Reliance was placed on the case of **David E Cummings v Tamarind Tree Holdings Co Ltd. V. Sumner Point Properties Limited et al SCCivApp. No. 142 of 2018** a case in which present counsel for the Plaintiff raised this very argument. His Lordships emphatically stated:-

**“We were not impressed with the respondents’ position. The Rules are clear in relation to foreign affidavits being produced from abroad. The seal or signature of the official administering the oath must be proved by a certificate given by someone with authority to give such a certificate. This is oftentimes referred to as an apostille. In the absence of such a certificate the Judge ought not to have allowed John Faraday’s affidavit to be admitted in the trial.”**

#### **Decision**

44. It is my opinion that this defect goes to the root of the Application.

45. In regards to foreign documents, **Order 41 Rule 11 Rules of The Supreme Court** provides that:-

**11. A document purporting to have affixed or impressed thereon or subscribed thereto the seal or signature of a court, judge, notary public or person having authority to administer oaths in a part of the Common wealth outside The Bahamas in testimony of an affidavit being taken before it or him shall be admitted in evidence without proof of the seal or signature being the seal or signature of that court, judge, notary public or person:**

**Provided that no such document signed, sealed, executed or sworn outside The Bahamas or other part of the Commonwealth shall be admitted in evidence unless the seal or signature is proved by a certificate of the person having authority to give such certificate, which shall be conclusive in all respects, if it states that the person signing the certificate has such authority. [Emphasis added]**

46. During the COVID-19 Pandemic, the Court did its best to maneuver through unprecedented times by instituting certain procedures allowing attorneys to comply with the rules of the court safely and effectively. Although allowances were made in 2020 to provide attorneys with flexibility, as at October 2020, I understand why unsworn Affidavits were being brought before the court by Counsel seeking to adduce it into evidence. The signing by an Affiant and notary in two different countries and the failure to apostille same may have been acceptable if the hearing was during October 2020.
47. The Court of Appeal in **David E Cummings v Tamarind Tree Holdings Co Ltd. V. Sumner Point Properties Limited et al SCCivApp. No. 142 of 2018** said such an Affidavit ought not to be allowed. Additionally, while flexibility was allowed, at the end of the State of Emergency Counsel had thirty days to file documents and comply with the rules and procedure. At the date of this hearing the Affidavits remain unfiled and un-apostilled.

**Failure to serve Notice of Motion and Affidavit personally on the Defendant or the persons named in the Order as required by the rules**

48. The Defendant argues that the Directors ought to have been served with the Notice of Motion and the Affidavits in support. Neither the Order, Notice of Motion nor any Affidavit in support was served on the Company, a director, officer, servant or agent of the Defendant, nor were they served personally on the persons named in the Order - Mr. Robert Little Jr., and Ms. Gro Nelson.
49. The Defendant submits that personal service is not affected on a body corporate by “service on its attorney” as the Plaintiff’s Notice of Motion appears to suggest. It is submitted that **Order 45 Rule 5 of the RSC** is clear that in the case of sequestration, service must be on the officer of the company against whose property it is sought to issue the writ of sequestration.
50. The Plaintiff does not dispute that personal service is the preferred method of service under Order 45 of the RSC. However, Order 46 of the RSC provides that the Notice of Motion together with the Affidavit “*must*” not “*shall*” be personally served on the person against whose property it is sought to issue the writ.
51. In any event, the Plaintiff further relies on **Order 46 Rule 5 (3) of the SCP** which provides:-

**“Without prejudice to its powers under Order 64 rule 4, the Court may dispense with service of the notice of motion under this rule if it thinks it just to do so.” [Emphasis added]**

52. It is submitted on behalf of the Plaintiff that while the rule does not explain the circumstances under which it “may be just” to dispense with service, it is submitted that on that facts of the case justice requires the court to consider the matter as a whole.
53. The Plaintiff asserts that the email correspondences between the defendant (by its newly appointed attorneys) to Counsel for the Plaintiff is an admission by the Defendant that the company was aware of the terms of the order and aware that it had acted and continued to act in breach of the 13 May 2020 court order.
54. It is claimed on behalf of the Plaintiff that if the court has power to dispense with service of documents, then the failure to serve in strict compliance with the rule does not render the proceedings invalid.
55. Furthermore, the Plaintiff argues that rendering proceedings invalid due to a failure to serve in strict compliance is directly in conflict with the fundamental principle of procedure as stated in **Order 2 Rule 1 of the RSC** which provides:-
- “where ... any stage in the course of or in connection with any proceedings, there has been by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document or judgment or order therein.**
56. The Plaintiff contends that the above provisions apply across the board; to any proceedings, and any step taken in the proceedings.
57. Reliance was placed on the case of **Texan Management Limited v Pacific Electric Wire & Cable Company & Anor [2009] UKPC 46**, where the Privy Council heard an appeal from the British Virgin Islands involving an allegation that the Appellant could not pursue their application due to a failure by the Appellant to file and serve an Affidavit with its application which was required under the rules.
58. Lord Collins upheld the appeal and restated the principle that *“procedure is a servant and not a master”* and explained at paragraph 74 that:-

**“ ... except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right ...”**

59. On the authority of **Order 2 Rule 1 of the RSC** and/or the Privy Council’s decision in *Texan Management*, the Plaintiff argues that the court can make an order to correct the relevant errors. The Plaintiff also highlights that neither Order 45 nor Order 46 specify the result of a failure to comply strictly with the procedural steps.

**Decision**

60. I am of the opinion that the relevant parties should have been served. I accept that procedure is a ‘servant and not a master’. However, the Court is not prepared to waive this irregularity due to the gravity and nature of sequestration. There is no evidence of attempts by the Plaintiff to effect service, and if there were challenges in serving the relevant parties, the court accepts the Defendant’s argument that substituted service was not sort. A search of the Companies Registry would reveal the Officers and Directors of the Defendant, there is no evidence this was done, allowing the Plaintiff to determine who should have been served. An application of sequestration without service is fatal and will not be cured by this court.

**No Supporting Affidavit**

61. The Plaintiff gives notice of an intention to rely on the Affidavit of Craig Gaitor. The Defendant asserts that neither the Defendant nor its counsel was served with such an Affidavit.

62. Counsel for the Plaintiff also produces a Witness Statement of Craig Gaitor filed 3 June 2020. The Defendant argues “that a witness statement is a statement of the facts upon which a party will seek to rely at the trial of the matter and is not a sworn statement. Therefore, the witness statement is incompetent to support the application for leave which must be supported by an Affidavit.”

**Decision**

63. The application before this Court is for an Order granting the Plaintiff leave to issue a Writ of Sequestration to sequester all the real and personal property of the Defendant for its alleged contempt of Court in committing alleged breaches of the Injunction granted 13 May 2020.

64. I am not prepared to accept an unsworn Witness Statement of Craig Gaitor which has not been served upon the relevant parties in support of the application. Again, I am troubled by the many irregularities of the Plaintiff in bringing its application before the Court. While understandable that during the Pandemic flexibility was granted in an effort for cases to progress naturally, the

Plaintiff at no point took steps to cure the defects. As of this 2021 hearing no effort has been made to correct the irregularities.

65. While the Court has jurisdiction to cure defects in proceedings, the amount of defects to be cured would be unfair to the Defendant. For reasons stated above on particular defects and given the serious nature of the application, the number and gravity of the defects, in all the circumstances the court dismisses the application for Sequestration

### **SUMMARY JUDGMENT**

66. The governing provisions for an application for summary judgment are set out in **Order 14 of the RSC. Order 14 Rule 1 of the RSC** provides as follows:

**“Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.”**[Emphasis added]

67. **Order 14 Rule 2 (1)** states:

**“An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent’s belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.”** [Emphasis added]

68. **Order 14 Rule 3** provides:

**“(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.**

69. In **Roberts v Plant [1895] 1 QB 597** it was stated that the purpose of Order 14 is to enable a Plaintiff to obtain judgment without trial, if he can prove his claim clearly and if the defendant is unable to set up a bona fide defense, or raise an issue against the claim which ought to be tried.

70. If a judge is satisfied not only that there is no defence but there is no fairly arguable point to be raised on behalf of the defendant it is the duty of the Court to give judgment for the plaintiff: **Anglo-Italian Bank v. Wells, 38 LT p 201**. A determination will be made by examining the merits of the defence filed.
71. The test which is applicable is well known and was most recently applied by Charles J in the case of **Higgs Construction Company v Patrick Devon Roberts and Shenique Esther Rena Roberts 2017/CLE/gen/00801 (unreported)** where Madam Justice Indra Charles observed as follows:

**“[26] Under O. 14 r 5, the test to be applied by the Court is whether there is any “triable issue or question” or whether “for some other reason there ought to be a trial”. If a plaintiff’s application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.**

**[27] It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court’s active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.”**  
**[emphasis added]**

72. By the Plaintiff’s Summons filed 27 April 2021, it sought summary judgment against the defendant for damages for trespass and loss suffered by the Plaintiff.

#### **The Plaintiff’s Arguments**

73. The Plaintiff asserts that the Defendant is in direct violation of the 13 May 2020 Injunction Order.
74. The Plaintiff cites the judgment of the court of Appeal in **David Cummings et al v Sumner Point Properties Limited et al Sciv App no. 142 of 2018 at paragraph 52** where the Court confirmed the tort of trespass as **“...any unjustifiable intrusion by one person upon the land in the possession of another ...”** Accordingly, the Plaintiff takes the position that trespass is “an injury to possession and not ownership or title.”



75. To substantiate its position that the Defendant is in breach of the Order, the Plaintiff referred to a communication made on 23 June 2020 where Counsel for the Plaintiff wrote the newly appointed attorneys for the Defendant advising that the livestock were roaming freely in breach of the Order of the court.
76. By letter dated 19 August 2020 Counsel for the Defendant wrote stating that *'it has become extremely challenging to comply with the Order of the court ...'*
77. It is the Plaintiff's contention that both counsels for the Defendant have admitted the ownership of the livestock and the continued trespass by its livestock onto land in the possession of the Plaintiff.
78. The Plaintiff relies on **Order 27 Rule 3 of the RSC** which provides:-

**3. Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by motion, or summons. [emphasis added]**

79. The Plaintiff submits that on the pleadings and affidavits before the court, final judgment ought to be granted on the claim in trespass with costs to the Plaintiff.

#### **Preliminary objections by the Defendants**

##### **Affidavit of Virginia Bullard**

80. In support of its application the Plaintiff relies on the Affidavit of Virginia Bullard filed 28 April 2021. Virginia Bullard is a legal assistant employed with Pyfrom Farrington Chambers, attorneys of record for the Plaintiff.
81. In this capacity the Defendant argues that she is not competent to make a statement of fact that the correspondence between her employer and another attorney constitutes an admission of allegations contained in the pleadings. She is also incompetent to state her belief that "there is no defence to this action save as to the amount of damages". Ms. Bullard purports to make both statements, as legal assistant in the firm of Pyfrom Farrington, the Attorney for the Plaintiff. She also does not state the source and basis of the belief she purports to hold.

82. The Defendant relies on the case of **Belgravia International Bank & Trust Company Limited (by itself and in its capacity as Trustee of the Trusts Listed In Appendix A of the Statement of Claim) and others v. CIBC Trust Company (Bahamas) Limited (in its capacity as Trustee of the Trusts Listed In Appendix A of the Statement of Claim) - [2012] 1 BHS J. No. 84** where Adderley J. stated:-

**While on the question of affidavits the plaintiffs objected to the affidavits of fact sworn on behalf of the defendant by Sophia Rolle an Associate at the law firm Lennox Paton. Mr Simms (for the Defendant) expressed the view that the rule relates to the case in which an individual attorney acting in the case, not another member of his firm, swears the affidavit, but no authority was given to support this view.**

**In the absence of authority it seems to me that unless there is a demonstrated firewall between attorneys in a firm it must be bad practice for any attorney in a firm to swear affidavits containing material facts on behalf of a client who, as in this case, is being represented by another attorney in the same firm, where the client has officers available to swear such affidavits.**

**Such practice flies in the face of the Practice Direction No 1 issued by Gonsalves-Sabola, CJ dated 20 March 1995 and various authorities dealing with the undesirability of such a practice on the principle that an attorney should not be both counsel and witness in the same case because of the embarrassment it might cause the court. It seems to me that depending on the circumstances the sanction could be that the offending affidavit not be admitted, that there be a requirement that it be re-sworn by the proper person, and that the costs thrown away occasioned by the re-swearing be borne by the attorney. I have not taken that action in this case but counsel should take note. [Emphasis added]**

83. It is submitted by the Defendant that no distinction ought to be made between an affidavit sworn by counsel acting in a case and her legal assistant, employee servant or agent acting in such capacity, in this case legal assistant. Accordingly, the said affidavit is deficient as it fails to comply with the provisions of Order 14.
84. According to the Affidavit of Virginia Bullard the Defendant has admitted that the livestock is owned by the Defendant and have roamed onto the Plaintiff's property. In support of this position the Plaintiff relies on correspondence attached to the said affidavit and marked VTB-1.
85. At the said Exhibit VTB-1 the email dated 30 April 2020 makes various allegations. The Defendant argues that none of the said allegations have been admitted by or on behalf of the

Defendant. Although an Order was made directing the Defendant to contain its animals, which was to solve the problem of the animals roaming outside of a contained area. Nowhere in the said correspondence is there an admission that the Defendant's livestock have roamed onto the Plaintiff's property.

86. Reference is also made at VTB-1 to the Defendant 'making slow but steady progress in keeping the animals away from the Plaintiff's property'. The Defendant contends that nowhere in the said correspondence is there an admission that the Defendant's livestock have roamed onto the Plaintiff's property. The denial of this fact is expressly pleaded in the Amended Defence at paragraph 13.
87. It is submitted by the Defendant that any update or confirmation regarding the containment of the animals is in pursuance of the Court's Order to do so and in no way constitutes an admission that animals were on the Plaintiff's property.

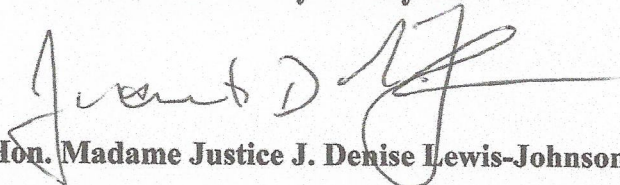
#### **Triable issues**

88. The Defendant submits that the Plaintiff's application for summary judgment cannot succeed as there are triable issues which requires the Court's determination. It is the Defendant's belief that there is a live issue as to the true boundary of the Plaintiff's property. Such issue will have to be determined in order for the Plaintiff to establish his claim and defend the Defendant's counterclaim.
89. The Defendant denied paragraph 1 of the Plaintiff's Statement of Claim where the Plaintiff claims to be the owner and entitled to possession of three lots on which he constructed his home and outbuildings. Resultantly, the Defendant asserts that for the Plaintiff's claim to succeed the Plaintiff must satisfy the court that he has some right to title or interest to the areas of land upon which he alleges the animals entered.
90. The Defendant puts forth the following triable issues mentioned within its Counterclaim:
- a. Unlawful trespass by the Plaintiff, his servants or agents;
  - b. Removal of livestock which is the property of the Defendant; and
  - c. Damages.
91. The Defendant relies on **Jacobs v Booth's Distillery Co (1901) 85 LT 262** which states that Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court or to make him liable in such case to be put on terms. Thus in an action on bills of exchange where the defendant set up the plea that they were given as part of a series of Stock Exchange transactions and asked for an account, it was held to be a clear defence, and entitled the defendant to leave to defend.

**Decision and Conclusion**

92. The test to be applied is as articulated by Charles J in **Higgs Construction Company v Patrick Devon Roberts and Shenique Esther Rena Roberts** and is whether there is a “triable issue or question” or whether “for some other reason there ought to be a trial”
93. In considering whether there are triable issues the Court considered:
- a. Whether the Plaintiff has a legal title or is in possession of the property where the alleged trespass took place; and
  - b. Whether the Defendant has raised a Defence such that has led the court to believe there are triable issues to be heard and determine requiring a trial;
  - c. Whether livestock belonging to the Defendant roamed on the Plaintiff’s property.
94. It is noteworthy that the injunction granted and Order made were not tantamount to a determination of the issue of liability on the part of the defendant, thus the action raised in the Writ of Summons remains to be determined at trial.
95. Having heard both parties on the application, I am of the opinion that the preliminary objections raised by Counsel for the Defendant have merit and by their defence filed there are triable issues.
96. Having determined there are triable issues the court will go no further so as to avoid conducting what might amount to a mini trial, which ought to be avoided. The nature of trespass is a triable issue.
97. I refuse the application for summary judgment on behalf of the Plaintiff.
98. Cost to the Defendant to be taxed if not agreed.

**Dated this 31<sup>st</sup> day of May 2022**

  
**The Hon. Madame Justice J. Denise Lewis-Johnson**