IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FAMILY DIVISION

CLAIM NO. E432 of 1998

IN THE MATTER of premises known as 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew being Lot numbered 8 on the plan of Nos. 1 and 3 Friendship Park in the parish of Saint Andrew and registered at Volume 982 and Folio 230 of the Register Book of Titles.

AND

IN THE MATTER of 1997 Toyota Cressida motorcar Licence No. 4490 BB, Toyota Coaster Licence No. PP 0727 and 1992 Toyota Hiace mimibus Licence No. PP 175T

AND

IN THE MATTER of all the items of furniture, crockery, linen, appliances and household effects in the house of Lot 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew

BETWEEN	**SEPHLENE ANNE JOHNSON**	**PETITIONER/ APPLICANT**
AND	**CLARENCE GEORGE JOHNSON**	**RESPONDENT**

IN CHAMBERS

Mrs. Dorothy Lightbourne instructed by Lightbourne & Hamilton for the Applicant

Mrs. Casie Jean Graham Davis instructed by Casie Jean Graham Davis and Associates for the Respondent

HEARD: 21st January 2016 and 7th February 2019

CIVIL PROCEDURE – NOTICE OF APPLICATION OF COURT ORDERS – WHETHER JUDGE OF CONCURRENT JURISDICTION CAN VARY AN EARLIER COURT ORDER MADE BY THAT SAME COURT, IF SO, IN WHAT CIRCUMSTANCES - CONSENT ORDER- WHETHER CLAIM IS 'RES JUDICATA'

ANDERSON K., J.

BACKGROUND

[1] The Applicant Sephlene Anne Johnson and the Respondent Clarence George Johnson are the registered proprietors of their matrimonial home, a property located at 1F Friendship Park Avenue, Kingston 3 in the parish of St. Andrew which is registered at Volume 982 and Folio 230 of the Register Book of Titles.

[2] Upon summons under the Married Women's Property Act Sephlene Anne Johnson filed an originating Summons on August 20, 1998 upon which a Consent Order was later made in the division of the matrimonial property by His Lordship the Honourable Mr. Justice Lennox Campbell on July 20, 2000. The Order that was made had stipulated, inter alia:

i. 'Premises at Lot 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew registered at Volume 982 Folio 230 is owned in the proportion of 45% to the Wife/Applicant, 45% to the Husband/Respondent and 10% to the relevant children of the marriage, Kevin Johnson and Andre Johnson;

ii. The said house is to be valued by a Valuator to be agreed between the parties and if the parties fail to agree, the Registrar of the Supreme Court to choose the Valuator. That the costs of the valuation to be shared equally between the parties;

iii. *The Wife/Applicant to pay the Husband/Respondent 45% of the value of the said premises at Lot 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew registered at Volume 982 Folio 230;*

iv. *The said premises to be transferred to the wife/Applicant and the said relevant children, Kevin and Andre as tenants-in-common in the proportion of 90% to the wife/Applicant and 10% to the said children;*

v. *The husband/Respondent to pay the wife/Applicant 40% of the value of 1992 Toyota Hiace minibus registered PP175T.'*

THE NOTICE OF APPLICATION AND AFFIDAVITS FILED

[3] Clarence George Johnson filed a Notice of Application for Court Orders on April 1, 2014 and supporting Affidavits on the basis that, Sephlene Anne Johnson had not complied with the Order that was made by His Lordship the Honourable Mr. Justice Lennox Campbell on July 20, 2000.

[4] The Notice of Application for Court Orders sought the following orders:

1. *'That in compliance with Court Order of 20th July 2000 filed on the 19th May 2001, that the parties proceed to effect transfer of 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew being the Lot numbered 8 on the plan of Nos. 1 and 3 Friendship Park in the parish of Saint Andrew and registered at Volume 982 Folio 230 of the Register Book of Titles within thirty (30) days of the date of this Order.*
2. *That the said house is to be valued to obtain current market value of the property by a Valuator to be agreed between the parties and if the parties fail to agree, the Registrar of the Supreme Court shall choose the Valuator. That the costs of the Valuator to be shared equally between the parties.*
3. *That the Valuation Report of D.C. Tavares & Finson Realty Limited of September 2002 be rendered invalid and no longer applicable due to the significant time period which has elapsed.*

4. *That the wife/Applicant pay the husband/ Respondent forty-five (45%) of the value of the said premises at Lot 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew being the Lot numbered 8 on the plan of Nos. 1 and 3 Friendship Park in the parish of Saint Andrew and registered at Volume 982 Folio 230 of the Register Book of Titles pursuant to the aforementioned Order of 20th July 2000 within sixty (60) days from the date of this order.*
5. *That the said premises is to be transferred to the wife/Applicant and the said relevant children Kevin and Andrew as Tenants-in-Common in the proportion of ninety percent (90%) to the wife/Applicant and ten percent (10%) to the said children Kevin and Andrew pursuant to the said Order of 20th July 2000.'*

That application was heard, 'On Paper' and thus, written submissions were filed, in respect thereof, by the respective parties' Counsel.

[5] The grounds on which Clarence George Johnson is seeking the Orders are as follows:

1. *'The Wife/Applicant has not complied with the Court Order dated 20th July 2000 by Justice Lennox Campbell (Ag).*
2. *That the Wife/Applicant has since remarried and resides in the home with her current husband for several years and had been (sic.) deprived your Respondent of the benefits of the said dwelling.'*

[6] With the greatest of respect to counsel, extensive evidence was provided and detailed submissions were made in support of their position regarding the application. Whilst it is not intended to be disrespectful to counsel in any way, it must be stated at the onset, that most of the evidence and nearly the entirety of their respective submissions were not appropriate for the application at hand. That is because the parties' counsel had proceeded on the assumption that the Court had jurisdiction to make the requested Orders and accordingly went further, putting forward various contentions and matters of evidence, pertinent to how the Court should go about exercising that jurisdiction.

[7] Having carefully read the matter, I have taken the view that the Court did not have jurisdiction to vary the Orders that were earlier made and I will set out hereafter my reasons for so having concluded.

LEGAL ISSUES

[8] The legal issues that have arisen in respect of the pertinent application are as follows:

i. Whether or not the orders sought amount to variation of an Order?

ii. Whether or not the issues surrounding the property of 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew and the Notice of Application filed amount to an issue of Res Judicata?

iii. Whether or not the Court has the power to vary a previous Consent Order of a Court of concurrent jurisdiction/equal jurisdiction?

iv. Whether or not the Notice of Application filed by Clarence George Johnson should be granted or denied wholly or partially given that a previous Consent Order was made by another Judge of equal jurisdiction regarding said matter.

RES JUDICATA

Law

[9] The doctrine of res judicata, (from the latin term, 'res judicata pro veritate accipitur,' meaning, 'a thing adjudicated is received as the truth'), holds that where a judicial decision is made by a Court of competent jurisdiction, said decision is conclusive between the parties, and the same matter cannot be re-opened by the parties save on appeal.

[10] According to the Court of Appeal case of ***Hon. Gordon Stewart et al v. Independent Radio Company Limited and Wilmot Perkins*** [2012] JMCA Civ 2 para 38:

'The purpose of the doctrine is to protect Courts from having to adjudicate more than once on issues arising from the same cause, to protect litigants from having to face multiple suits arising from the same cause of action, and to protect the public interest that there should be finality in litigation and that justice be done between the parties.'

[11] The learned authors of ***Halsbury's Laws of England,*** *4th edition, Volume 16, paragraph 1527* has recognized that the doctrine of res judicata is not a technical one applicable only to records, but that it is a fundamental doctrine of all Courts, that there must be an end to litigation. Ordinarily, it is conveniently treated as a branch of the law of estoppel. It is said by some legal practitioners, however, that res judicata is different from estoppel in the sense that res judicata is a matter of procedure, while estoppel is a matter of evidence.

[12] The Jamaican Court of Appeal decision of ***The Assets Recovery Agency v Hamilton, Andrew and Hamilton, Dorothy et al*** *[2017] JMCA Civ 46* is instructive regarding the doctrine of res judicata, whereby it was stated at paragraph 75 that:

'The phrase res judicata is apt to denote three distinct, though related, ideas. In its first, narrower, sense, it describes the species of estoppel ("cause of action estoppel") which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. So, if the cause of action was determined by a judgment of the court to exist, or not to exist, the matter is res judicata and no action can subsequently be brought by the losing party to assert the opposite.'

[13] Further at paragraph 75 and 76 it was averred that:

[75] 'In its second, perhaps looser, sense, it speaks to a situation in which a particular issue forming a necessary ingredient in a cause of action has been litigated and decided; but, in subsequent proceedings

between the same parties, involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue. In such circumstances, the doctrine of issue estoppel is said to apply to prevent the reopening of the particular issue. However, the principle of issue estoppel is subject to an exception in special circumstances where further material becomes available, whether factual or arising from a subsequent change in the law, which could not by reasonable diligence have been deployed in the previous litigation.'

[76] Then thirdly, as Lord Kilbrandon pointed out in the judgment of the Privy Council in ***Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another****, '... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings". This is what is sometimes described as* ***Henderson v Henderson*** *abuse of process, deriving as it does from the classic statement of Wigram VC in the nineteenth century case of* ***Henderson v Henderson*** *"… where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'*

[14] In **Halsbury's Laws of England**, 4th edition, Vol.16, paragraph 1528, The passage reads, in part:

'In order for the defence of Res Judicata to succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovery and but for his own fault might have recovered in the first action that which he seeks to recover in the second action… A plea of Res Judicata must show either an actual merger, or that the same point has been actually decided between the same parties. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it was actually put in issue or claimed.'

[15] Hence it must be shown that the parties are the same and the issues of law and of fact are the same. It is my belief that the circumstances of this case, would fall under the rubric of res judicata or alternatively, the principle of estoppel would apply to prevent the pursuit of that which would amount to an abuse of process of the Court, in that, the Applicant is seeking to have this Court adjudicate once more, issues that had been earlier adjudicated by the same Court in which the parties have entered into Consent Judgement. Further, if the Orders are granted it could give rise to an issue of res judicata as the matter was already determined by a competent Court. The Notice of Application filed is somewhat duplicative in nature. The request for new evaluation certainly does not make the Order any different. The doctrine of res judicata is applicable to issues, defences, applications and/or causes of actions which have been heard and determined on the merits. The issues have been determined on their merits and a Consent Order made. Consequently, bearing in mind the basis upon which I propose to resolve this application, it is unnecessary to make a detailed analysis of the principles of res judicata. Res judicata would be applicable, given that a Consent Order was made, which is considered binding, with no applicable exception as to variation of the Order.

[16] In the event that I am wrong in having reached that conclusion, I will go on to consider whether the law permits a variation as to a present day valuation. This is the variation being sought, that the valuation that was completed in 2002 by

appointed D.C. Tavares & Finson Realty be discarded and a new valuation prepared.

POWER TO VARY A CONSENT ORDER/FINAL ORDER OF A JUDGE OF CONCURRENT JURISDICTION

Law

[17] Section 6(1) of ***Judicature (Supreme Court) Act*** provides that:

> '*Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided, equal power, authority and jurisdiction.'*

[18] ***Rule 26.1(7)*** of the **Civil Procedures Rules** provides that the 'power of the Court under these Rules to make an order includes a power to vary or revoke that order.'

[19] In the Court of Appeal case of ***Bardi Limited and McDonald Millingen*** *[2018] JMCA Civ 33*, Phillips JA opined that she,

> '*was fortified in her analysis of the case given her reliance on* ***The Halsbury's Laws of England, Volume 11, 2015, paragraph 32*** *on the topic "****Decisions of co-ordinate courts****", where the learned authors had posited that:*
>
> *"There is no statute or common law rule by which one court is bound to abide by the decision of another court of coordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of earlier decisions.'*

[20] The issue of whether a Judge of equal jurisdiction can vary a Final Order made by another Judge of the Supreme Court was addressed, whereby Phillips JA in the Court of Appeal case of ***Bardi*** added much on the fact that a Judge of equal jurisdiction can most certainly vary an Order by another Judge. Her ladyship opined at paragraph 32 that:

> *'I do not think that Dingemans J had that interpretation in **Parr**, when he stated, referring to the obvious potential difficulties judges experienced when setting aside or varying orders made by judges of co-ordinate jurisdiction, that the authorities establish that "the circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a Judge was misled, or where there was fraud." It was clear that his use of the word "include" in this context, meant that this was not an exhaustive list, and was not a pre-requirement for the exercise of the discretion of the judge in the making or reviewing of provisional or final charging orders. It was not, in any event, a statement made exclusively in relation to an ex parte jurisdiction. At any rate, the rules provide, as indicated, that any order made by the court can be varied or revoked by the court'*

[21] In said ***Bardi Case*** F Williams JA concurred with his learned sister Phillips JA at paragraph 48 that:

> *'I too take the view that on a proper reading of the dictum of Dingemans J in **Richard Parr v Tiuta International Limited** [2016] EWHC 2 (QB), the categories of circumstances in which a judge may review an order of another judge of co-ordinate jurisdiction, are not closed. This, to my mind, is indicated in the said dictum as follows: [T]he circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a judge was misled, or where there was fraud.'*

[22] A judge can also choose to vary an Order if the presiding judge failed to comply with the existing practice and procedure, or where a matter was part-heard and

no decision was made as to the merits of the case. A variation of a previous order made can also be varied if the presiding judge is unavailable. See: ***Mason v Desnoes and Geddes Limited*** *(1990) 27 JLR 156.*

[23] It should however be noted that there are circumstances under which a Judge can vary an Order made by another Judge, as were partially set out, in the ***Bardi case:***

> *'the circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a Judge was misled, or where there was fraud.'*

This is not an exhaustive list.

[24] The issue of whether a Judge of equal jurisdiction can vary an Order made by a Judge of concurrent jurisdiction was illustrated in the case of ***Prime Sports Jamaica Limited and Lori Morgan*** *[2017] JMCA Civ 32*. In ***Prime Sports Jamaica Limited*** an appeal was sought to set aside Orders made by Sinclair-Haynes J (as she then was) whereby she varied Orders made by Hibbert J. In this case the Appellant highlighted that Sinclair Haynes J erred in exercising her discretion in varying the Orders of made by Hibbert J, when the case ought to have been struck out pursuant to the Unless Order that was previously made by Hibbert J.

[25] The background to the ***Prime Sports Jamaica Limited*** is that Lori Morgan, the Respondent, was employed at Prime Sports Jamaica Limited (Coral Cliff Entertainment), the appellant, when on April 2, 2010 an incident occurred on the appellant's premises. As a result, she said, she received injuries to her back which significantly impacted her ability to stand or walk for long periods. At the Case Management Conference, Hibbert J made the order that, '*Unless the claimant attends the Pre-trial Review and all orders made at the Case Management Conference are complied with on or before July 31, 2015, then the Statement of Case of the Claimant shall stand struck out.'* It was Counsel for the Appellant's primary contention that the learned Judge erred in law in varying the Unless Order of Hibbert J which took effect on October 7, 2015

when the Respondent failed to attend the adjourned pre-trial review hearing. Counsel submitted that the learned judge had no material before her on which she could properly exercise her discretion in varying the Orders of Hibbert J, since the Respondent had failed to file an application for relief accompanied with the required affidavit in support as per ***Rule 26.7*** of the ***CPR***. Counsel's final submission related to the issue of whether the learned judge had the discretion to set aside the Order of a Judge of concurrent jurisdiction. He contended that since there was no evidence of fraud/misrepresentation or material non-disclosure on the part of the appellant which caused Hibbert J to make the Orders, there was no legal basis on which Sinclair-Haynes J could properly have exercised her discretion to set aside those Orders and as such she did not have jurisdiction to vary the Final Order of Hibbert J.

[26] The Court of Appeal averred at paragraph 31 in their judgment that:

> *'it is first necessary to acknowledge that the learned judge did have the power to vary the order (see rule 26.1(7)). The position is that the court may indeed vary the terms of an unless order if in the interests of justice it is appropriate to do so.'*

[27] Further at paragraph 36 it was confirmed that:

> *'Ultimately it cannot be said that the orders made by the learned judge in exercise of her discretion were "palpably wrong" warranting this court's intervention.'*

[28] As such the Court held that Sinclair-Haynes J, had the jurisdiction to exercise her discretion to vary the Unless Order made by Hibbert J.

[29] A similar issue of a Judge's concurrent jurisdiction and variation of a Final Order, which was made by another Judge of equal jurisdiction, was depicted in the case of ***Patterson Ranique and Sharon Allen*** *[2017] JMCA Civ 7*. In ***Patterson,*** Ms Ranique Patterson sought permission to appeal against an Order, which was made on 21 October 2016, by K Anderson J. The learned judge refused her application to set aside an order made by Campbell J on May 13, 2015. The latter Order was made in Ms. Patterson's absence. Ms.

Patterson's complaint was that Anderson J erred in deciding that he had no jurisdiction to set aside Campbell J's Order and by the time the application came up for hearing Campbell J proceeded on pre-retirement and therefore, was not available then, to hear the matter. Ms. Patterson's contention was that Anderson J also failed to recognise that she had not been given notice of the application on which Campbell J made his Order. Counsel for Ms. Patterson submitted that Anderson J also erred in deciding that he did not have the jurisdiction to set aside the decision of a judge, who exercised equal jurisdiction to his.

[30] The Court of Appeal however, at paragraph 26, highlighted that:

> *'On the issue of jurisdiction, it must also be said that* ***Mason v Desnoes and Geddes Limited*** *(1990) 27 JLR 156* ***and Leymon Strachan v The Gleaner Company Limited and Another*** *[2005] UKPC 33 demonstrate that a judge may, in certain circumstances, set aside an order made by a judge of concurrent jurisdiction. Examples of such circumstances are, firstly, if the application before the first judge was made, in the absence of a party, or, secondly, where the merits of the case were not decided at that first hearing. It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned. Where, however, as in this case, that judge is not available, another judge may hear and decide the application to set aside the first order.'*

[31] In their conclusion, the Court of Appeal averred that Anderson J erred in ruling that he had no jurisdiction to set aside the order of made by Campbell J.

[32] The cases of **Mason v Desnoes and Geddes Limited** (1990) 27 JLR 156 and **Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33 illustrated that a judge of concurrent jurisdiction can set aside or vary an Order. In ***Mason*** (op. cit.), the presiding Judge had died, so the decision to set aside the default judgment was within the jurisdiction of the Master. In **Leymon Strachan** (op. cit.), it was highlighted that the Supreme Court of Jamaica is a superior Court, or Court of unlimited jurisdiction, that is to say, that

it can determine the limits of its own jurisdiction. It further noted that unless and until the Court has pronounced a judgment, it is to have the power to revoke expression of its coercive power, where that has only been obtained by a failure to follow any of the applicable rules and/or procedures.

[33] Regarding Consent Orders and in particular, the varying of such an Order it was established in ***Kinch v. Walcott and Others*** *[1929] A.C. 482, that:*

> *'An order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose.'*

[34] At page 493 of said case it was posited that:

> *'for such an order of consent not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Bryne J in* ***Wilding v Sanderson****, must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose. In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged on appeal.'*

[35] In ***Marsden v. Marsden*** *[1972] 3 W.L.R 136* it is well settled law that the Court will not interfere with an Order made by Consent at a time after the Order had been perfected. In ***Marsden***, a husband had filed a petition for divorce and the wife opposed the grant of the decree. The matter came before Watkins J, evidence was led and submissions were made. After a short adjournment Counsel acting for the wife, stated contrary to the express instructions of the wife and her solicitor, that the wife consented to the husband being granted a decree on agreed terms and gave on her behalf an undertaking with respect to the matrimonial home. On the belief that the wife actually consented to the husband being granted a decree, Watkins J, made an Order granting the husband a decree on the terms agreed. The wife later applied to have said Order set aside on the ground that it was made without her consent or that of

her solicitor. Given that Counsel acted contrary to authority, the Court was concerned if the agreement could stand and the law concerning the extent of the authority Counsel has in compromising on a client's behalf an action of a civil nature and the circumstances in which a compromise may or will be set aside by the Court. It was held in said case at paragraph 137:

> *'That although the Court would not interfere at a time after an order made by consent had been perfected, the court would consider the wife's application as she had given notice of her application before the order was perfected and had probably made the application either before or contemporaneously with it being perfected and since there had been no delay and the undertaking were for her important matters the court would exercise its discretion and grant the application.'*

[36] Further at page 139 Watkins J opined that:

> *'with regard to the circumstances in which the court should interfere to set aside an order based upon compromise, I have been referred to a number of authorities. They all show that the court should view such application as this with extreme caution and that a court will not grant such application except in a case which calls clearly for interference with the order made. It is a discretionary remedy to be exercised with care and with regard to the injustice or otherwise of allowing an order to stand.'*

[37] It was demonstrated in the case of ***Phipps v Morrison*** *SCCA No 86/2008 - delivered 29 January 2010* that the learned Judge was not incorrect in not setting aside the Order nor was she incorrect in refusing to discharge the injunction. In ***Phipps v Morrison*** (op. cit.), the complaint by the appellants is that Beswick, J. should have set aside the consent order made by Anderson, J. at the behest of the parties, through their attorneys-at-law. In said case the Justices of Appeal relied on ***Marsden v. Marsden*** *[1972] 3 W.L.R 136* and ***Kinch v. Walcott and Others*** *[1929] A.C. 482*. Panton P at paragraph 4 in ***Phipps v Morrison*** opined that***:***

'Finality in litigation is very important. It is not an exaggeration to say that if every litigant, disgruntled with the exercise of ostensible authority by his attorney, were to turn around and challenge such exercise, chaos would reign in the administration of justice. Furthermore, a challenge to a consent order that comes more than four years after the litigant is aware of the order, is not worthy of the Court's aid.'

[38] The Court of Appeal, in the ***Phipps Case***, took the initiative to define consent, at paragraph 22:

'The word "consent" may convey one of two meanings. It, on one hand, may mean that a valid contract has been concluded by the parties, in which event the court cannot intervene. On the other hand, it may be construed as one which was made without objection by the parties. In such circumstance, it would not be considered a genuine consent and may be varied or altered by the court. Lord Denning, in ***Siebe Gorman & Co. Ltd v. Pneupac Ltd (C.A.)*** (op. cit.), *in affirming that the court has jurisdiction to set aside a consent order which cannot be construed as a real consent of the parties, said at page 189: "We have had a discussion about "consent orders." It should be clearly understood by the profession that, when an order is expressed to be made "by consent," it is ambiguous. There are two meanings to the words "by consent." That was observed by Lord Greene M.R. in* ***Chandless-Chandless v. Nicholson*** *[1942] 2 K.B. 321, 324. One meaning is this: the words "by consent" may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words "by consent" may mean "the parties hereto not objecting." In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?'*

[39] Following careful analysis of the various authorities mentioned above, it is confirmed that a Judge of concurrent jurisdiction can vary or set aside an Order that was previously made in the Supreme Court. The basis for such variation depends on whether or not there was a breach of the rules of practice and procedure; where the matter is part-heard and no decision was made on the merits of the case, or where the presiding judge is unavailable. Further to these stipulated parameters for variance of an Order, it should be noted that an Order can be varied if there was evidence that in the interests of justice it would be fair to do so. Further, if there was a material change of circumstances, where a Judge was misled, or where there was fraud. This is not an exhaustive list. The fact that the Court, in the exercise of its discretion, may set aside an order which cannot be construed as having been consensual is not open for debate. It is without doubt that a Court may, by its own motion, set aside an Order which is irregular. It must however, be shown that an irregularity exists and is such that the Court is compelled to set aside any judgment or order made as a consequence of the irregularity.

[40] A Consent Order however, should not be varied, or set aside, unless there are special circumstances or 'compromises' (as was the quoted term referred to, in the ***Marsden*** case (op. cit.)). It should be noted that no definition of 'compromises' was provided in ***Marsden*** case (op. cit.). However, based on the fact pattern of that case, it is fair to say that in the matter at bar, there was no evidence that either counsel for the parties acted contrary to the instructions of their client, there was an agreement and a Consent Order made, there were no compromises. In furtherance, the Court would not interfere at a time after an Order made by Consent had been perfected. A Consent Order is regarded as a binding agreement between the parties in which the Court cannot intervene. An Order by Consent is binding unless and until it has been set aside in proceedings constituted for that purpose.

[41] Having regard to the facts before this Honourable Court regarding the Notice of Application having been filed on the basis of seeking compliance with a prior Order made by His Lordship the Honourable Justice Campbell, it can indeed be appreciated that there is a difference in facts with the case at bar and the

authorities specified above. The difference is seen in the type of Order requested to be varied or set aside by a Judge of concurrent jurisdiction. ***Bardi Case*** spoke to the setting aside of a charging Order, ***Prime Sports Jamaica Limited*** spoke to the setting aside of an Unless Order***, Patterson*** spoke to the setting aside of an Order made by Judge when a party was not present. ***Leymon Strachan*** (op. cit.), spoke to the setting aside of a default judgment and ***Mason*** (op. cit.) spoke to the setting aside of a default judgment by a Master when a Judge was not available. The one element that is consistent with all the cases, is that the Orders can be varied within discretion the Court's discretion in accordance with the applicable legal parameters. The fact pattern in the matter at bar however, pertains to a Consent Order.

[42] That consent Order is most certainly binding on the parties and there was no evidence of fraud/misrepresentation or material non-disclosure on the part of either Clarence George Johnson or Sephlene Anne Johnson. In properly having exercised my discretion, there are no special facts/circumstances or compromises on the given facts. Nothing has changed as to the circumstances of the case. The only evidence of change is the time that has elapsed between the time of the Order and the time the Notice of Application was filed, which is fourteen years. In agreement with Panton P in the ***Phipps Case*** (op. cit.), a challenge to a consent Order that comes more than four years after the litigant is aware of the Order, is not worthy of the Court's aid. Both Sephlene Anne Johnson and Clarence George Johnson were aware of the existence of the relevant consent Order, from as far back, as September, 2000. No evidence was led of an ex-parte hearing. The parties were present and no objections were evident or recorded by either of the parties to the hearing being held, at that time. Clarence George Johnson took no steps to enforce the Order. Now this application is being considered by this Court. The delay is clearly, manifestly excessive and would restrain the Court from exercising its discretion in favour of Clarence George Johnson even if the circumstances were such that would have warranted the setting aside of the Order. The circumstances do not though, in any event, so warrant.

[43] Furthermore, on the submissions and evidence provided, the Consent Order was valid. There was no evidence adduced that there was an issue with the construction of the Order or the practice and procedure that was used by Campbell J. In fact, there is no issue on the face of the Order and the Consent Order was perfected. What is in issue is whether or not the valuation that was completed in 2002 by appointed D.C. Tavares & Finson Realty should be discarded and a new valuation prepared. Based on the authorities established this is not a special fact/circumstance or compromise.

[44] In furtherance, the parties have even gone ahead, based on the evidence provided in numerous affidavits, to sign and fully execute the instrument of transfer which was exemplified in both parties' affidavits. Hence it can be deemed binding on Sephlene Anne Johnson and Clarence George Johnson as they agreed to the terms upon which the premises at Lot 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew registered at Volume 982 Folio 230 shall be transferred to Sephlene Anne Johnson. The only evidence as to what it was that seemingly stalled the transfer of the property was the fact that Clarence George Johnson's then Attorney-at-law was struck off the roll and prior to that Clarence George Johnson was not forthcoming with the relevant documents needed by the mortgagee to complete the transfer of the Clarence George Johnson's 45% interest in 1F Friendship Park Avenue, Kingston 3 in the parish of Saint Andrew registered at Volume 982 Folio 230 made by both parties and established in said Consent Order. It is also best to note that no valid reason was given as to why a new valuation was relevant and that only that time has elapsed and that the wife continues to benefit from the matrimonial home. Whether or not repairs and improvements were done, is of no relevance, because the order is binding. The registrar has provided assistance with providing a valuator and the property was assessed and the instrument of transfer was signed by both parties. The Court's Order was perfected and compliance with that Order, had thus, already begun.

[45] It should also be noted that Counsel for the Applicant, in her respective submission, placed heavy reliance on ***the Property Rights and Spouses Act (PROSA)***. With all due respect to counsel though, for two equally compelling

reasons, her respective reliance on the provision of that statute, was entirely in apposite. Those reasons are that, firstly, at the time the Order in question, was made it was the ***Married Women's Property Act*** that was applicable to the matter at hand. Consequently, the Orders would have been made in accordance with that statute. Further, the parties had been acting in accordance with the consent order made. Secondly, the prerequisites prescribed for a claim to be made in accordance with ***PROSA*** had not been established, particularly, sections 6 and 7 of said Act.

[46] In light of all that I have said, it is my considered view, that the Consent Order cannot be varied or be set aside and based on that conclusion, the Orders requested, must be denied in totality.

[47] The parties are bound by the terms of the Order. They cannot be regarded as having not consented thereto. The Order was perfected and serves as a final judgment.

ENFORCEMENT OF THE CONSENT ORDER

[48] In the consent Order made by Campbell J on July 20, 2000, the premises of at Lot 1F Friendship Park Avenue, Kingston 3, in the parish of Saint Andrew registered at Volume 982 Folio 230, is owned in the proportion of 45% to the Wife/Applicant, 45% to the Husband/Respondent and 10% to the relevant children of the marriage, Kevin Johnson and Andre Johnson. The house was to be valued by a Valuator. The cost of the valuation was to be shared equally between the parties. The Wife/Applicant was to pay the Husband/Respondent 45% of the value of the said premises and the premises transferred to the wife/Applicant and the said relevant children.

[49] Given the construction of the Consent Order I firmly believe that Clarence George Johnson could have sought enforcement of the Order. I will state nothing further as to that.

[50] My Orders as regards the Respondent's Application for Court Orders are therefore, now as follows:

1. The Respondent's Notice of Application for Court Orders which was filed on April 1, 2014 is denied.

2. The costs of that Application are awarded to Sephlene Anne Johnson with such costs to be taxed if not sooner agreed.

3. The Applicant Sephlene Anne Johnson, shall file and serve this Order.

.....
Hon. K. Anderson, J.