[2023] JMSC Civ 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00014

IN THE MATTER OF ALL THAT parcel of land part of **ACADIA** now known as **NUMBER TEN ROSEBERRY DRIVE** in the parish of **SAINT ANDREW** being the Lot numbered **ONE HUNDRED AND FORTY-EIGHT** on the plan of Acadia aforesaid deposited in the Office of Titles on the 5th day of May, 1959 of the shape and dimensions and butting as appears by the plan thereof and being all the land comprised in the Certificate of Title registered at **Volume 1202 Folio 746** of the Register Book of Titles **also known as** 10 Roseberry Drive, Kingston 8, St. Andrew;

AND

IN THE MATTER of the subdivision of the said land;

AND

IN THE MATTER of the restrictions affecting the use thereof;

AND

IN THE MATTER of the Restrictive Covenants (Discharge and Modification) Act.

BETWEEN **BELGRAVIA DEVELOPMENT COMPANY LIMITED** **APPLICANT**

AND **JALEEL HANDAL** **1st OBJECTOR**

AND **GUILDA HANDAL** **2nd OBJECTOR**

HEARING IN CHAMBERS

Mrs. M. Georgia Gibson-Henlin K.C. and Ms. Sharine Willis instructed by Henlin, Gibson-Henlin for the Applicant.

Mr. Gavin Goffe and Mr. Matthew Royal instructed by Myers, Fletcher & Gordon, watching on behalf of the Objectors.

Heard: 31st January, 2023 and 28th February 2023.

Notice of Application for court orders vacating previous order – Rule 26.1(7) of the Civil Procedure Rules 2002, as amended – Applicable principles – Whether Court should exercise its discretion to revoke an earlier judgment and orders.

N. HART-HINES, J

BACKGROUND

[1] On December 20, 2021, I delivered a judgment in this matter, refusing the application in the fixed date claim form ("FDCF") filed on January 3, 2019, for modification or discharge of restrictive covenants pursuant to section 3(1) of the Restrictive Covenants (Discharge and Modification) Act ("the Act"). The application was refused for various reasons including:

1. The Applicant had not demonstrated that there had been a change in the character of the property or the neighbourhood, or that there are other circumstances which render the covenants obsolete (paragraphs 42, 43 and 51 to 55 of the judgment delivered on December 20, 2021).
2. The Applicant had not demonstrated that the existing covenants impeded the reasonable use of the land or that the current restriction preventing multi-family residential homes would not secure any practical benefit sufficient to justify its continuation (paragraph 63 of the judgment).

3. The Objectors, who benefitted from the restrictive covenants, had not agreed expressly or impliedly to their discharge or modification (paragraph 74 of the judgment).

4. The proposed discharge or modification would cause injury in the form of a reduction or an erosion of the Objectors' privacy and the tranquility they currently enjoy on their property (paragraph 78 of the judgment).

5. The proposed discharge or modification was also likely to cause injury to the community as there was an increased risk of on-street parking since the approved parking spaces on the property are insufficient for the expected number of occupants of the thirty-two bedrooms and other habitable rooms (paragraph 79 of the judgment).

6. The Applicant's proposal to create extra parking by removing the reed bed and onsite sewage treatment facility, and instead piping sewage from the complex through a gully to the main sewage line of the National Water Commission ("NWC") on Evans Avenue, was not approved by the National Resource Conservation Authority ("NRCA") and the NWC and which posed a potential environmental hazard (paragraphs 22 and 82 of the judgment).

7. It was not just or equitable to grant the application to modify the relevant covenants, having regard to the inappropriate conduct of the Applicant through its officers. In exercising my discretion, I took into account public considerations, such as the need to ensure compliance with and respect for the rule of law, and the conduct of the Applicant, firstly in commencing construction while the application was pending, and secondly, in building in breach of the building approval (paragraphs 10, 11, 91 through to 94). I found that the breaches of the building approval were not limited to the second floor.

8. According to the building approval, the Applicant's non-compliance with the said approval, meant that the approval would be "null and void" (paragraph 95).

9. There were fifteen (15) units and the bedrooms or rooms which might easily be converted to bedrooms totalled thirty-two (32) and there was a separate living room space in each unit. The total number of habitable rooms (including living rooms) was therefore 47. I also gave consideration to the fact that *POLICY MP H 3* of the 2017 Provisional Development Order directed that *"density shall not exceed … 50 habitable rooms per acre",* and the number of habitable rooms in the Applicant's development therefore far exceeded the amount of habitable rooms appropriate to a lot with an estimated size of less than one-half (½) acre (paragraphs 46 and 94 of the judgment).

10. My observations on my visits to the locus in quo were set out at paragraph 22 of my earlier judgment in this matter.

[2] After delivering the judgment, and making orders, the matter was adjourned to January 12, 2022 for the court to hear submissions in relation to the consequential orders. The formal order was not drawn up in order to facilitate a hearing in relation to consequential orders. On December 20, 2021, the parties were given copies of the judgment. However, some typographical errors were later spotted and corrections made, and counsel were advised to collect the signed judgment from the court on the morning of December 21, 2021. The Applicant's counsel at the time, Ms. Cummings, indicated by email that "*the soft copy is sufficient*". The corrected judgment was published and placed on the physical and electronic file.

THE NOTICE OF APPLICATION SEEKING ORDERS FOR DEMOLITION

[3] On January 12, 2022, there was no Notice of Application for Court Orders before the court to permit the court to consider making consequential orders. The hearing was therefore adjourned to February 28, 2022. On January 14, 2022, the Objectors filed a Notice of Application for Court Orders seeking several orders. The Objectors sought an order requiring the Applicant, Belgravia Development Company Limited ("Belgravia"), to demolish the structure erected on the property comprised in certificate of title registered at Volume 1202 Folio 746 of the Register Book of Titles, known as 10 Roseberry Drive in the parish of Saint Andrew ("the property"), to the extent that it violates the restrictive covenants endorsed on the certificate of title. The Objectors also sought orders restraining Belgravia from taking any other action that would be in breach of the restrictive covenants until the orders of this court are carried out, and restraining Belgravia from putting anyone into occupation of the premises or any part thereof.

[4] On February 28, 2022, the Applicant filed an affidavit in response sworn by Mr. Cliff Rochester-Butler, the sole director of Belgravia. Mr. Rochester-Butler objected to the reliefs sought on the basis that:

1. The court has no jurisdiction to order demolition;
2. Section 3(2) of the Restrictive Covenants (Discharge and Modification) Act requires the judge to direct inquiries as she may deem fit to the local planning authorities and give notice to interested persons.
3. Interested persons were notified in accordance with section 3(2).
4. The local planning authorities provided their responses, the Objectors provided their objection and the Court heard all parties on the basis of the inquiries and materials that were placed before it.
5. The Court therefore has no jurisdiction to consider the matter in the terms sought by the Objectors as the issues raised by them were already considered and orders granted in relation to the matter.
6. Since the hearing of the Application, the local planning authority (the Kingston and St. Andrew Municipal Corporation) issued a Stop Notice on January 5, 2022, and the Applicant has complied with the Stop Notice.

[5] Mr. Rochester-Butler averred at paragraphs 6 and 7 of his affidavit that in light of the judgment and the subsequent stop notice the Applicant took "*steps to have the building plan redrawn or redrafted to allow for conformity with the 12-bedroom structure that was approved by the KSAC*" and that there was modification of "*the drawings to remove walls, to repurpose living spaces for storage, laundry and entertainment and amenity zones in an effort to be within the confines of a 12-bedroom structure*". He also averred that these drawings were submitted to the Kingston and St. Andrew Municipal Corporation ("KSAMC") for approval and exhibited the drawings along with a receipt from KSAMC dated February 25, 2022. It was also averred by Mr. Rochester-Butler that the Applicant has spent $120,000,000 in the construction of the development so as to provide vital housing in Arcadia, St. Andrew, and that it will suffer severe hardship and significant financial loss and ruin if the development is to be demolished. He stated further that this irremediable harm will not only stop at the Applicant but also extend to its shareholder and investor(s) who have contributed to this investment and were awaiting the sale of the units to see a return on their investment.

[6] Due to the late filing of the Applicant's affidavit in response on February 28, 2022, the hearing on that date was adjourned to April 26, 2022. The hearing was further adjourned on April 26, 2022 and June 22, 2022, due to the late filing and service of submissions by counsel for both parties. The hearing on July 4, 2022 did not proceed due to my unavoidable absence. The application was heard on October 21, 2022 and judgment reserved to December 8, 2022.

[7] Counsel for the parties filed written submissions and made further oral submissions on October 21, 2022. The submissions are summarised as follows:

Submissions on behalf of the Applicant

1. It was submitted on behalf of the Applicant that the court was *functus officio* and did not have jurisdiction to order demolition in those circumstances where the local planning authority had issued enforcement proceedings under section 45 of the Building Act. Further, it was submitted that there were limited exceptions to *functus officio* doctrine and a court should sparingly exercise its power to revisit a final judgment or order. King's Counsel submitted that the consequential order was not necessary to give effect to the order made on December 20, 2021. It was also submitted that the court had no jurisdiction to grant consequential orders or reliefs not previously sought or claimed at the trial, and which would cause great hardship and injustice to the Applicant.

Submissions on behalf of the Objectors

2. Counsel Mr. Goffe submitted on behalf of the Objectors that the court was not *functus officio* as the orders made on December 20, 2021 have not been perfected. Mr. Goffe stated that it is an uncontroversial principle that a court only becomes functus after its orders are made final by perfection. Support for this is taken from the recent decision of the Court of Appeal in ***Advantage General Insurance Company Ltd. v Marilyn Hamilton*** [2021] JMCA 25

where it was noted at paragraph 28 that, *"…a judge is not competent to alter a judgment or an order once it has been drawn up and perfected".* The Court of Appeal also confirmed that *"a judge may, at any time prior to the perfection of an order reconsider and vary his decision"*.

[8] During the hearing on October 21, 2022, King's Counsel Mrs. Gibson-Henlin conceded that the court has the power to make further orders after judgment, but further submitted that the court could only address matters previously dealt with which would require a review. It was submitted that the Objectors were in effect asking for a reopening of the matter to permit them to obtain a mandatory injunction, a relief not previously sought by them, and, in essence, that that had been a procedural error by the Objectors. King's Counsel submitted that in order for justice to be done between the parties, there would have to be an ancillary hearing with the court hearing expert evidence as regards the proposed modification to the drawings and floor plan. King's Counsel further submitted that damages could be awarded in lieu of an injunction, but submitted that there was no evidence before the court to assist the court to assess the extent of the harm when assessing the damages.

Settlement reached post-judgment

[9] On or about December 1, 2022 an email was sent to the Civil Registry of the Supreme Court by counsel for one or both of the parties indicating that the parties had arrived at a settlement. On December 6, 2022, a draft Consent Order was filed on behalf of the Applicant seeking several orders including an order that the Objectors withdraw their application for the demolition of the building, that the Objectors withdraw their objection to the FDCF and an order that the restrictive covenants be modified in keeping with the orders sought in the FDCF.

[10] On December 8, 2022, the previously scheduled hearing took place. I briefly heard from counsel for the parties but indicated that I would not be reversing the judgment delivered or orders made on December 20, 2021 as I believed that I was *functus*

officio as regards those orders and there was no application or affidavit before the court to indicate the change in the position of the Objectors as regards the FDCF. However, the Objectors were permitted to withdraw the Notice of Application filed on January 14, 2022, which sought the demolition of the subject building. Counsel for the Objectors was directed to file the formal order stating the following:

1. The application for modification of restrictive covenants numbers 1, 2, 3, 5 and 7 endorsed on Certificate of Title registered at Volume 1202 Folio 746 of the Register Book of Titles is refused.
2. Costs to the objectors in respect of FDCF filed on January 3, 2019 to be agreed or taxed.
3. The Notice of Application filed on January 14, 2022 is withdrawn.
4. No order as to costs as regards the hearing of the said application.
5. Attorneys-at-Law for the objectors/applicants are to prepare, file and serve this order.

NOTICE OF APPLICATION SEEKING REVOCATION OF JUDGMENT AND ORDERS

[11] Following the hearing on December 8, 2022, the formal order was filed on December 20, 2022. However, before the formal order was filed, a Notice of Application was filed on December 13, 2022, seeking the following orders:

1. The Court permits the Objectors to withdraw their objection to the modification of restrictive covenants 1, 2, 3, 5 and 7 registered on the title at Volume 1202 and Folio 746 of the Register Book of Titles.
2. The judgment delivered on the 20th December 2022 be vacated.
3. The Court substitutes an order as reflected in the draft order filed on the 6th December 2022 and attached hereto.

[12] The application seeks to invoke the court's powers under Rule 26.1(7) of the Civil Procedure Rules 2002 ("CPR"), to make an order to vary or revoke an order previously made.

Submissions on behalf of the Applicant

[13] A hearing was convened on January 31, 2023 and the court heard submissions from counsel. Mrs. Gibson-Henlin K.C. relied on several authorities including ***Re L and Children (care proceedings: power to revise judgment)*** [2013] UKSC 8, ***Lethe Estate Limited & Anor v Jamaica Public Service Limited*** [2018] JMCC Comm 08, ***Norman Harley v Doreen Harley*** [2010] JMCA Civ 11, *and* ***PetroJam Limited v Sea Ventures Shipping Limited & Ors*** [2013] JMCC Comm 16. The thrust of the oral submissions made on behalf the Applicant was that:

1. It was a material consideration for the court that the objection has been withdrawn and that the parties have reached a settlement. This was a material change in circumstances to justify the revocation of the orders previously made in respect of the FDCF.

2. The court should look at the overall justice of the case and the administration of justice, and dispense justice between the parties in light of the settlement.

[14] In response to some questions asked by the court, King's Counsel submitted that the other matters considered by the court at the time of the delivery of the judgment are now immaterial having regard to the fact that the objection falls away. There was therefore no basis for maintaining the order. King's Counsel opined that a revocation of the judgment would not put the judiciary or administration of justice in disrepute because the judgment was believed to be in draft. As regards the existing breaches and the existence of the Stop Notice, it was submitted that KSAMC would have to revisit the property and inspect it in any event.

[15] Mr. Goffe expressed the view that the Objectors had not agreed to the vacating of the judgment itself, but rather, that they agreed to the granting of the orders sought in the FDCF. King's Counsel disagreed. The court is not privy to all the matters agreed by the parties, save and except what is stated in the draft Consent Order.

THE LAW

[16] Rule 26.1(7) states that a power of the court under the CPR to make an order "*includes a power to vary or revoke that order*".

[17] When a court exercises any power given to it by the CPR the discretion must be exercised to give effect to the overriding objective to deal with cases justly (CPR Rule 1.2). Save that the power under Rule 26.1(7) to revoke an order is to be exercised with regard to the overriding objective, the CPR offers no further guidance as to the principles upon which the discretion may be exercised or as regards what factors must be taken into account. Guidance may be found in case law, and it is now settled law that a court has the power to revoke its decision at any point before the order is perfected where there has been some change of circumstances since the making of the order, or where the judge who made the earlier order had been misled in some way as regards a correct factual position.

[18] At paragraph 32.43, the learned editors of **Blackstone's Civil Practice 2012** refer to Rule 3.1(7) of the English CPR, which is equivalent to our Rule 26.1(7) and refer to paragraphs [39] to [40] of the judgment in ***Collier v. Williams*** [2006] 1 WLR 1945. There, Dyson LJ is noted to have said that it was believed that employing Rule 3.1(7) only in cases of a change of circumstances or where the judge had been misled was too narrow. However, it was clear that Rule 3.1(7) could not be used to have a second attempt relying on the same evidence as on the first application, or where additional evidence or submissions are to be deployed which were available, but for whatever reason, were not used on the first application. In such a case, the only available route is to appeal. The editors went on to say that:

> *"Great caution is needed if the court is asked to vary an order made at trial (Mid Suffolk District Council v Clarke [2006] EWCA Civ 71 …. Probably the only basis for doing so is if there has been a material change in the relevant facts since the trial (Kensington Housing Trust v Oliver (1997) 30 HLR 608)."*

What should be considered when deciding if the discretion should be exercised?

[19] In ***Collier v. Williams***, after examining authorities which considered CPR rule 3.1(7), the England and Wales Court of Appeal found that once a court has finally determined a case, or part of a case, considerations of a material change in circumstances will generally be displaced by the much larger, if not overriding, public interest in finality.

[20] In ***Norman Harley v Doreen Harley*** [2010] JMCA Civ 11 our Court of Appeal contended with the issue of what circumstances would permit a judge to make an order pursuant to CPR Rule 26.1 (7) revoking an order made by another judge exercising parallel jurisdiction. The Court of Appeal said at paragraph 41 of the judgment that:

> "…. *The rule does not provide an open door permitting a court to reverse its decision merely because a party wishes the court so to do. A court therefore, will only revisit an order previously made if an applicant, seeking to revoke that order, shows some change of circumstances or demonstrates that a judge who made an earlier order had been misled*."

[21] The Appellant sought to challenge the orders of a Master in Chambers to refuse an application to strike out the Respondent's statement of case and an application to grant the Appellant leave to revoke a previous unless order or grant him relief from sanction. The Court of Appeal considered the affidavit evidence of the Appellant and found that there was no evidence put forward to indicate why the Appellant was unable to comply with the court orders, and found that there was nothing before the learned master to show any change of circumstance which would have prevented the Appellant from obeying the orders previously made. The affidavit before the learned master therefore did not provide a basis for revoking the orders made.

[22] In ***Re L and Children (care proceedings: power to revise judgment)*** [2013] UKSC 8, the issue for the court's consideration was whether a judge who had announced her decision was entitled to change her mind, and if so, whether this power should have been exercised. The first question was answered in the affirmative by the Court of Appeal and the Supreme Court of the United Kingdom,

that a judge had jurisdiction to reverse her decision at any time before her order was drawn up and perfected. As regards the second question, the Supreme Court noted that a judge was not limited to reversing a decision only for exceptional circumstances as had previously been stated in earlier cases decided in the courts below. The Court held that the exercise of that power would depend upon the particular circumstances of each case, but in considering whether to reverse a decision, the starting point was the overriding objective in the CPR, to deal with cases justly. Other relevant factors were, whether any party had acted upon the decision to his detriment and whether it was expected that they might do so before the order was formally drawn up. The discretion must be exercised judicially and not capriciously. It was also said that one way of doing so was to provide the parties with the opportunity of addressing the judge on whether or not she should change her decision.

[23] In ***PetroJam Limited v Sea Ventures Shipping Limited & Ors*** [2013] JMCC Comm 16, Mangatal J considered the decision in ***Re L*** and stated the following principles:

1. *The Court could consider whether there are any compelling reasons justifying the Court revisiting its orders or judgment; ….*
2. *When being asked to revisit its order or judgment (to allow an amendment to a statement of case), the Court should consider the timing of the application (**Stewart** v **Engel and another** [2000] 1 WLR 2268).*
3. *The Court should also consider whether any party had acted upon the decision to their detriment in deciding whether to grant or refuse the application.*
4. *Whether justice required the revisiting of a decision, for no more reason than the judge having a carefully considered change of mind.*

[24] However, the learned judge found that no satisfactory reason for the failure to make the application for amendment at the proper time was advanced by the 3rd Defendant and she therefore refused the application.

[25] Likewise, in ***Lethe Estate Limited & Anor v Jamaica Public Service Limited*** [2018] JMCC Comm 08 Simmons J (as she then was) discussed the relevant

factors which a court must consider when determining whether to reverse a decision, as considered in the case of ***Re L***. The application which was filed post-judgment, seemed to have been made on the basis that the judge had been misled. The learned judge had to decide whether to grant the defendant's application, to pierce or lift the corporate veil and treat the 1st Claimant as bound by the wayleave agreement between the Defendant and Mr. Francis Tulloch, who was the majority shareholder of the 1st Claimant (holding 999 of 1000 shares). At paragraph [356] of the judgment, the learned judge said that "*due to the fact that the allegations of impropriety were not investigated at trial*" she could not confidently conclude that Mr. Tulloch's actions in respect of the 1st Claimant were carried out with a view to evade or frustrate the enforcement of his legal obligations or that he was using the corporate personality of the company for the purpose of concealing the true facts. In the circumstances, the learned judge would not vary or revoke her judgment or order.

[26] In the recent case of ***AIC Ltd v Federal Airports Authority of Nigeria*** [2022] UKSC 16, the Supreme Court of the United Kingdom reviewed the earlier decision in ***Re L*** and restated the relevant principles to be applied when considering whether to exercise its discretion to re-open a judgment or order which was not sealed. The reason for the restatement was two-fold. Firstly, because the overriding objective in the contexts of the Family Procedure Rules 2010 ("FPR") is different from the overriding objective in the CPR, and secondly, because the overriding objective in the CPR had itself been subject to change after an amendment in 2013 which added the reference in CPR rule 1.1(2)(f) to "*enforcing compliance with rules, practice directions and orders*". In summary, the Supreme Court stated as follows:

1. "*The principle of finality is of fundamental public importance*" (paragraph 31) and there is a strong public interest in the finality of litigation in the context of commercial litigation under the CPR (paragraph 28).
2. Once a case is finally decided, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision

on the first occasion but failed to raise, in the absence of special circumstances (paragraph 29).

3. A judge faced with an application to reconsider a judgment and/or order before the order has been sealed is to do justice in accordance with the overriding objective (paragraph 30).

4. The finality principle is likely to be at its highest importance in relation to a final judgment or orders made at the end of a full trial, subject only to appeal and the finality principle deserved "*central importance*" and "*applies with almost full force*" (paragraphs 35, 45 and 59).

5. A judge should not start from anything like a position of neutrality or evenly-balanced scales but must ask herself whether the application should even be entertained at all. *"It may be a perfectly appropriate judicial response just to refuse the application in limine after it has been received and read, if there is no real prospect that the application could succeed".* (paragraph 32).

6. "*The weight to be given to the finality principle will inevitably vary, depending in particular upon the nature of the order already made, the type of hearing at the end of which it was made and the type of proceedings in which it was made.… finality is likely to be at its highest importance in relation to orders made at the end of a full trial*" (paragraph 35).

7. The finality principle takes effect, when the order is made, not merely when it is sealed. However, "*after the order is sealed, the finality principle applies in a more absolute way*" (paragraph 35).

8. At paragraphs 36 and 37 of the judgment, the Supreme Court briefly considered words or phrases which might be used to *reflect the weight attributable to the finality principle, or, conversely,* which might be used to *"describe the weight of the factor or factors which will be needed to prevail over the desirable adherence to finality".* The court opined that the phrases like "*exceptional circumstances*" failed to encapsulate anything other than unusualness, and while the words *"strong", "weighty" or "compelling" were "somewhat better",* they still did not provide a definitive test. The court said further that it was not feasible to state such a test. Instead, an "*evaluative judgment has to be made, but it has to reflect and respect the importance in this context of the principle of finality*".

[27] At paragraph 27 of the judgment, the Court observed the following:

> *"In her judgment,* ***Baroness Hale emphasised two features which reduced the weight attaching to finality in Re L****: (i)* ***it was a case involving orders affecting***

> ***the upbringing of children, in relation to which the welfare of the children was a predominant concern****; and (ii) since the order was made at a preliminary stage in the proceedings it was a case management decision which the court had power to revoke under the relevant rules."* (Emphasis added)

[28] In other words, in ***Re L*** the court was concerned with doing justice in accordance with the overriding objective under the FPR in which the overriding objective emphasised the welfare of the children, but the overriding objective under the CPR (as amended) "*tends to emphasise … the importance of finality attaching to the … order*" (paragraph 30). While I am mindful that the Supreme Court looked at the overriding objective through the lens of the amendment in CPR rule 1.1(2)(f), it must also be noted that the court observed (at paragraph 29) that one of the principles regarding what justice requires in litigation, is that there should be finality in litigation. The overriding objective (prior to the 2013 amendment and after) therefore sought to give effect to the principle of finality, and this finality principle was a weighty consideration.

[29] The appeal in the ***AIC*** case arose out of a dispute concerning the enforcement of an arbitral award from proceedings which commenced in Nigeria. At the end of the arbitration, AIC was awarded in the sum of US$48.13 million plus interest. The respondent in the arbitration was the Federal Airports Authority of Nigeria ("FAAN"). While FAAN sought to challenge that award in the Nigerian courts, AIC started proceedings in England and Wales seeking permission to enforce the award there and obtained an ex parte order granting it permission to enforce the award (the "enforcement order"). The first instance judge adjourned the enforcement claim pending the outcome of the Nigerian proceedings on condition that the FAAN provide security in the form of a guarantee in the sum of US$24,062,000. AIC was granted the right to seek permission to enforce the award if the guarantee was not forthcoming by a specified deadline. The deadline was subsequently extended to 6 December 2019. The guarantee was not provided and no further extension of time sought. Consequently, at the hearing on 6 December 2019 at about 14:20 hours, the High Court judge by oral judgment gave permission for AIC to enforce the award. Less than three (3) hours later, FAAN obtained the

guarantee and provided a copy of it to AIC, indicating that it intended to apply to the judge to re-open her judgment and the enforcement order made that afternoon. The enforcement order was not sealed on 6 December 2019, pending the hearing of the application. In its application for a reopening of the order, made on 6 December 2019, coupled with an application for relief from sanctions imposed for the late provision of the guarantee, FAAN's explanation for the delay was that it had to secure approval from various government Ministries and the Central Bank of Nigeria for the arrangements to establish the guarantee. FAAN had known since June 2019 that security would be sought but the Central Bank was only approached on 2 December 2019.

[30] At the hearing on 13 December 2019, the judge reopened her order, granted an extension of time for the provision of the guarantee and granted relief from sanctions. The judge adjourned the application for enforcement of the award pending the outcome of the Nigerian proceedings. AIC appealed and the judge's orders were reversed by the Court of Appeal. Following the appeal, AIC obtained full payment under the guarantee from the FAAN'S bank and thereby obtained a partial discharge of the award debt. FAAN thereafter obtained permission to appeal to the Supreme Court.

[31] The Supreme Court said that the principle of finality and FAAN's tardiness in providing the guarantee in breach of the court's order ought to have been the prevailing considerations. Despite noting that the first instance judge did not give sufficient weight to the finality principle, the Supreme Court upheld her decision in reopening her judgment. However, the Court also found that it was the delay by FAAN which caused the enforcement order to be made and the Court reiterated that there must be respect of the Court's orders and deadlines. Notwithstanding, the Supreme Court found the fact that the guarantee was provided to AIC within a few hours of the making of the enforcement order to be an important change in circumstances. The Court ultimately looked at the intent of the judge who first granted AIC's application for a guarantee, the effect of the order which was sought to be reopened, and the effect of the change in circumstances, and it noted that

respect ought to be paid to the judge's reason for reopening the judgment, namely that she had observed that the enforcement order had the effect of giving AIC a procedural windfall while an appeal was pending in Nigeria. The Court therefore unanimously set aside the enforcement order, pending the outcome of the Nigerian Proceedings. However, the Supreme Court also considered a post-judgment change of circumstances to be significant, namely that the guarantee had been called upon and paid. So while the Supreme Court decided that it was appropriate to set aside the enforcement order, it was also appropriate and in keeping with the overriding objective to allow AIC to retain the USD$24 million enforced under the guarantee.

THE ISSUES

[32] The sole issue for my consideration is whether it is appropriate to revoke my earlier judgment and orders.

ANALYSIS

[33] It is accepted that a court is not *functus officio* once the order is not sealed. A court has the jurisdiction under CPR Rule 26.1(7) to exercise its discretion to reopen a hearing or revoke an order in such circumstances once there has been a change of circumstances or where the judge had been misled as regards some fact. However, the power is to be exercised with caution in light of the public interest in the finality of proceedings. The guidance from case law suggests that it ought not to be invoked simply to give litigants "a second bite of the cherry".

[34] I will now discuss the factors which I have considered in this case.

The principle of finality

[35] I attach significant weight to the finality principle when considering the application in the instant case. I am guided by case law as regards the importance of the

principle of finality. In addition to the cases referred to above, I am also guided by dicta which was approved by our Court of Appeal in some recent cases.

[36] In ***Jebmed SRL v Capitalease SPA Owners of M-V Trading Fabrizia*** [2017] JMCA Civ 45, at paragraph [20] the Jamaican Court of Appeal approved dictum in the judgment in **Independent Trustee Services Ltd v GP Noble** [2010] EWHC 3275 (Ch) that "…. *as regards final orders it would be hardly ever appropriate to set aside a final order*". At paragraph [22] the Court of Appeal quoted extensively from the judgment of Batts J where he said:

> *"[34] A final judgment or order of the court is also rather difficult to vary. …These circumstances must be extremely rare because litigants are not to re-litigate issues already determined particularly where the order is final."*

[37] Likewise, in ***Advantage General Insurance Company Ltd v Marilyn Hamilton*** [2021] JMCA App 25, McDonald-Bishop JA found dictum in ***Blue Cell (Pty) Ltd (in liquidation) v Blue Financial Services Limited and others*** (unreported), Republic of South Africa, In the High Court of South Africa, Case No: 8456/07, delivered 16 May 2014, to be helpful and cited Matojane J at paragraph 39 of the Court of Appeal judgment. I too find the following dictum to be helpful:

> *"… On the assumption that the court has a discretionary power this should be sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded - interest reipublicae ut sit finis litium."*

[38] In essence, in the ***AIC*** case, the Supreme Court said that the principle of finality is the most important consideration, although it might be displaced by other factors depending on the circumstances of the case. In the end the Supreme Court upheld the first instance judge's decision to revoke the enforcement order, but the Court in essence said that judges should be reluctant to interfere with a final judgment which, in the interests of finality, should remain in place, subject only to an appeal.

The overriding objective

[39] The overriding objective requires the court to exercise its discretion in the interests of justice and to ensure that cases proceed swiftly and in the most cost-efficient manner possible. The focus is to deal with parties fairly.

[40] In ***AIC*** the Supreme Court said that the overriding objective under the CPR seeks to give effect to the finality principle. In this case, in light of the draft consent order, both parties now seek the revocation of the judgment and orders previously made. I have to weigh the fact that the parties have reached a settlement, against the finality principle and decide what weight to attach to it.

[41] I am mindful that at paragraph 31 of the judgment in ***AIC***, learned judges seemed to address their minds to the situation where an application for a reopening of a hearing might be made by the unsuccessful party. The court approved dictum of Coulson LJ in the court below, and considered that "*the successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory*". It might not have been in the contemplation of the Supreme Court judges at that time, that there might be a joint application by the successful party and the unsuccessful party, or that the change of circumstances might emanate from a post-judgment agreement entered into by the parties.

[42] In deciding whether it is just and appropriate to revoke my judgment and orders on account of the fact that the parties reached an agreement in the matter, I must examine the effect of such an agreement and what weight to give it when balancing it against the principle of finality.

Material change in circumstances and weight to be attached to the settlement

[43] It must be observed that a restrictive covenant is a contract or agreement which runs with the land and which restricts the use of the land by the owners who in turn benefit from the term of the covenant imposed. It is a burden upon the land of the covenantor which is enforceable against the assignees. Restrictive covenants are usually imposed by the original developer of the land to preserve the character of

the neighbourhood or the subdivision. With the passage of time, restrictive covenants might be modified or discharged if one of the conditions in section 3(1) is met, and if it is just to so order.

[44] In this case, the agreement entered into post-judgment has the effect of addressing one of the matters which I considered in coming to my decision, namely, that the development would injure persons entitled to the benefit of the covenant (section 3(1)(d) of the Act). It is notable that the parties have reached a settlement in this matter as regards a partial demolition of the second floor which overlooks the Objectors' property and impacts their privacy.

[45] However, I am not of the opinion that this change of circumstances is significant enough to make it appropriate for me to revoke my judgment and orders made on December 20, 2021. It was within the power of the parties to settle the matter between July 27, 2020 and the start of the trial in October 2021. The parties could have settled the matter after my first visit to the *locus in quo* on July 27, 2020. At that time, the properties of both the Applicant and the Objectors were briefly visited by the court and the parties, and Mr. McLeod and Mr. Rochester-Butler should have been able to better understand the concerns of the Objectors, as their pool was overlooked by the first floor of the Applicant's building, even at that stage. While no orders were made in relation to my observations on July 27, 2020, the parties were encouraged at that time to have settlement negotiations and the developers were warned not to carry out any further building works. Despite that warning, construction continued. Now, after a decision on the merits and after receiving a written judgment setting out the breaches observed during the trial, the parties would seek to have me reverse my decision and, in effect, ratify the said breaches. That is an untenable position.

[46] In my opinion, greater weight ought not to be attached to the fact that a settlement was reached post-judgment, than the weight to be attached to the finality principle. I give significant weight to the finality principle.

When is the appropriate time for a settlement to be reached?

[47] The English CPR rule 36.3(g)(ii) indicates that a settlement offer might be accepted up to the end of the trial, but while a trial is in progress, the court's permission to settle is required pursuant to rule 36.11(3)(d). The Ontario Rules of Civil Procedure, Revised Regulations of Ontario 1990, Regulation 194 goes further to make it clear at Rule 49.04(4) that "*[a]n offer may not be accepted after the court disposes of the claim in respect of which the offer is made*".

[48] The Jamaican CPR provides guidance as regards when an offer to settle may be made. CPR rule 35.4 states that a party may make an offer to settle under Part 35 "*at any time before the beginning of the trial*". However, the CPR appears to be silent on when a settlement offer might be accepted. Prudence would nonetheless dictate that the parties should endeavour to reach a settlement before the end of a trial, since thereafter, the judge might deliver a judgment at any time, including the last date of the trial or hearing.

[49] The parties had a duty to assist the court to further the overriding objective (CPR Rule 1.4) in dealing with cases expeditiously, and that included having negotiations and reaching a settlement before the matter was heard at a trial.

[50] In the ***AIC*** case, the Supreme Court said at paragraph 31 of the judgment:

> *"Litigation cannot be conducted at proportionate cost, with expedition, with an appropriate share of the court's resources and with due regard to the rules of procedure unless it is undertaken on the basis that a party brings his whole and best case to bear at the trial or other hearing when a matter in dispute is finally to be decided (subject only to appeal)"*

[51] I adopt this dictum of the Supreme Court and add that litigants are expected to deploy their best efforts to succeed at litigation, whether by presenting their best evidence at a trial or by seriously engaging in settlement negotiations before the trial, but not after. In this case, the time for a settlement as regards the application in the FDFC itself was before the matter was heard in October 2021 or before the

delivery of a reasoned judgment in December 2021. Thereafter, the only matter which the parties could reasonably seek to settle was the Objectors' application for the building to be demolished.

[52] I believe that at the hearing on April 26, 2022, mention was made of the parties having discussions. It was open to the parties to choose to settle the application for demolition by agreeing to a partial demolition of the portions of the building which overlooked the Objectors' back yard and pool. However, I could not reasonably have envisaged that the parties' settlement discussions would seek to address matters outside of the parties' control, namely an order (post-judgment) permitting the discharge of the restrictive covenants, as I had already ruled on that matter on December 20, 2021. In my opinion, in order for the parties to obtain such an order, the hearing would have to be reopened for further evidence to be considered (which would be inappropriate), or a fresh FDCF would have to be filed.

Equitable principles and public interest factors

[53] In considering an application for the modification or discharge of restrictive covenants, the court need only find that one of the grounds in section 3(1) of the Act has been met in order to favourably consider the application. However, the court must still go on to consider whether it is just and equitable to grant the application. The fact that the court may consider other matters outside of those set out in section 3(1) of the Act, suggests that an application under that section is not a normal *inter partes* hearing which is resolved solely on the evidence of an applicant and objectors. The court must consider the broader public interest. I have noted that section 3(1) of the Act does not expressly refer to public interest considerations (unlike section 84(1) of the UK Law of Property Act 1925). However, I believe that a court is empowered to consider public interest factors in determining if it is just and equitable to grant the application.

[54] In ***23 - 25 Seymour Avenue and 14 Upper Montrose Road*** Claim Nos. 2008 HCV 03060, 2008 HCV 03061 and 2008 HCV 03062, Supreme Court Jamaica, judgment delivered on 7 September 2011, Brooks J (as he then was) said this:

> *"[20] Even if the applicant satisfies one or more of those requirements, it must also satisfy the court that it is just and equitable, in the circumstances, that the court should grant an application for discharge or modification of the relevant covenant. This is because the discharge or modification of restrictive covenants falls within the equitable jurisdiction of the court. In Re Covenant Community Church (1990) 27 JLR 368, Theobalds J, in considering an application for the modification of restrictive covenants affecting lands situated at Old Hope Road, addressed this additional requirement. He said, at page 370 G:*
>
> > *"However if the applicant succeeds on any one ground he may be entitled to the order as sought. There still remains a final discretion in the trial judge to refuse an application where one ground has been made out if in his view there are proper and sufficient grounds for such refusal.'*

[55] While the settlement reached by the parties seeks to specifically address section 3(1)(d) of the Act, I am also mindful of the other matters which I considered in coming to my decision, including the conduct of the Applicant in erecting multiple floors without first obtaining an order discharging the covenants. I have noted that King's Counsel submitted that once the parties have reached an agreement, the objection falls away and so would the matters which the court considered, since the court would not have given consideration to those matters but for the objection. This submission does not find favour with me since the agreement was reached post-judgment and not before.

[56] It is perhaps appropriate to interject here that English case law makes it clear that even if the parties arrived at a settlement after a trial but just before the delivery of a judgment, the court is not obliged to not deliver the judgment on that basis. In ***Barclays Bank Plc v Nylon Capital LLP*** [2011] EWCA Civ 826, the Court of Appeal listed some of the factors which it considered when deciding whether to hand down the judgment after being informed that the case had been settled. It was said that

> *"[w]here the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties"[1].*

[57] Similarly, in a case where an application is made pursuant to CPR rule 26.1(7) on the basis that the parties reached a settlement, the court is not obliged to give effect to the post-judgment settlement, but instead, must be guided by relevant principles enunciated in case law and by public interest considerations.

[58] In addition to considering the principle of finality of litigation, I believe it is also appropriate to determine the propriety of granting the application for a revocation of my earlier judgment and orders by weighing the benefits of a settlement to the parties in this claim against any potential harm that might be caused to the administration of justice or to the public interest.

[59] The settlement in this case, insofar as it was indicated to the court in the draft consent order, seeks to serve the interests of the parties. Ordinarily, a court would make an order giving effect to the terms of an agreement between the parties, particularly when they have been assisted by experienced and well-respected counsel, as they have in this case. However, the court is not only obliged to consider the effects of an order on the parties, but its effects on the administration of justice.

[60] In this particular case, I believe it is appropriate to give consideration to the fact that vacating my judgment would set a bad precedent. It would send the wrong message that a property developer who commences building before the restrictive covenants have been modified (and therefore chooses to breach them) might simply broker a settlement with objectors after the court became aware of breaches of the restrictive covenants, in order to have the court ignore the breaches and grant the application for the modification or discharge of the

[1] Per Lord Neuberger MR at paragraph 74 of the judgment.

covenants. In other words, I believe that I should give consideration to the effect the vacating of the judgment and orders might have on future similar litigation.

[61] Many court cases involve issues which affect many more persons than the parties involved in the case. This is so whether the decision is on the particular facts of the case, or whether the decision concerns points of law that would be of general public importance. A court has a duty to bear this in mind.

[62] Every judge has a duty to inspire public confidence in the integrity of the administration of justice. The principle of finality helps to inspire such confidence. Vacillating or recanting from a previous position, without good reason could undermine respect for and confidence in the administration of justice. In my opinion, to revoke my judgment and orders made on December 20, 2021 because the parties have now reached an agreement after the delivery of the judgment would bring the administration of justice into disrepute.

[63] While the instant case involves a dispute between two parties as regards whether or not the restrictive covenants should be modified and/or discharged, it also involves public interest issues in that it involves consideration of:

1. The conduct by the Applicant in this case, and
2. The rights of other persons entitled to the benefits of the restrictive covenants to have a say now that the building has been erected.

Conduct of the Applicant

[64] As regards the conduct of the Applicant, I find the recent judgment in ***Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*** [2020] UKSC 45 to be instructive. There, a property developer erected a multi-family unit before an application to modify or discharge the restrictive covenant was granted. The Upper Tribunal nonetheless granted its subsequent application under section 84(1) of the UK Law of Property Act 1925, which is similar (but not identical) to section 3(1) of our Restrictive Covenants (Discharge and Modification) Act. That decision was

overturned by the Court of Appeal, and the Applicant appealed to the Supreme Court which held that the Upper Tribunal made an error of law by failing properly to take account of the Applicant's conduct when exercising its discretion under section 84(1) of the 1925 UK Act. At paragraph 36 of the judgment, the Court described the conduct of the property developer Millgate in "*deliberately committing a breach of the restrictive covenant with a view to making profit from so doing*" as a "*cynical breach*". The Court went on to say at paragraph 59, that it is important to deter a cynical breach under section 84. The Supreme Court exercised the discretion afresh, set aside and re-made the decision of the Upper Tribunal by refusing the application for the discharge the restrictive covenant.

[65] The guidance from this case is that the conduct of an Applicant must be scrutinized and considered when hearing under section 3(1) of the Act. I considered the Applicant's conduct when coming to my decision on December 20, 2021, and must now bear that conduct in mind when considering this application.

[66] I find the instant case to be distinguishable from the ***AIC*** case as the post-judgment settlement, unlike the provision and payment of the guarantee in ***AIC***, could not be regarded as a sufficient change in circumstances to outweigh the finality principle. This is so because regard must be had to the Applicant's conduct and the fact that the breach of the building approvals remains unaddressed. Further, I must have regard to the fact that it was always open to the parties to settle the matter before the judgment was delivered in December 2021, and I have noted the very late stage at which settlement discussions seem to have been embarked upon.

[67] The orders made on December 20, 2021 were final orders and the matters considered in coming to my decision are set out in the written judgment. For ease of reference I have repeated (at paragraph 1 above) the reasons for refusing the application. In summary, I found that none of the grounds in section 3(1)(a), (b), (c) and (d) of the Act were satisfied, and that, having regard to the conduct of the Applicant, it was not just and equitable in the circumstances to grant the application. The post-judgment agreement that the Applicant will demolish the

units on the western section of the second floor of the building seeks to address the Objectors' privacy concerns and by extension, seeks to address section 3(1)(d) of the Act. However, having regard to the existing breach of the restrictive covenants and breach of the building approvals, I am of the view that the post-judgment agreement would be an insufficient basis to cause me to exercise my discretion to revoke my earlier judgment and orders made. The building was erected without first obtaining the order for the modification or discharge of the covenant and the number of units and bedrooms exceed that which was approved by the local planning authority.

The breaches of the building approvals

[68] I have noted that in his affidavits filed on February 28, 2022 and December 13, 2022, Mr. Rochester-Butler has stated that following the first hearing directions in this matter, notices were issued pursuant to section 3(2) of the Act to interested persons and responses were provided by the local planning authority (KSAMC) and the Town And Country Planning Authority (National Environmental Protection Agency "NEPA") and by the Objectors. However, he also stated that KSAMC issued a Stop Notice on January 5, 2022. In my opinion, this is a factor which cannot be overlooked.

[69] Further, while it is clear from the draft consent order that the parties have agreed that the Applicant will demolish part of the second floor, no mention is made of the demolition of any other part of the building. The total number of units seen on the second floor were five (5). Two (2) of the units comprised of three (3) bedrooms each and the other comprised of two (2) bedrooms. Assuming that there is a demolition of two (2) units on the second floor on the side closest to the Objectors, this would mean that thirteen (13) units would remain, which still exceeds the twelve (12) one bedroom units approved by the KSAMC and NEPA.

[70] Despite the passage of nearly one (1) year since he resubmitted drawings to KSAMC, Mr. Rochester-Butler has not provided this court with any documentation

from the KSAMC which indicates its position as regards the proposed modification of units in the building. Neither has he indicated whether the KSAMC is aware that the Applicant now proposes to demolish part of the second floor. It is also unclear whether the Applicant also submitted "*as built*" plans or drawings to KSAMC. Since the KSAMC issued a Stop Notice pursuant to its powers as the local planning authority, it must be taken to have inspected the property and made its own findings before it issued the Stop Notice. The building approvals issued by the KSAMC in 2019 and 2020 indicated that if there was a breach of the approvals, the approvals become null and void. It would therefore be injudicious of me to grant the application to modify the restrictive covenants when the building approvals were breached and when the environmental permits issued by the NRCA/NEPA may also be void, and when the Applicant has not provided anything from either agency indicating that the breaches have been addressed.

Multiplicity of proceedings

[71] Section 48(g) of the Judicature (Supreme Court) Act states:

> *"(g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."*

[72] I am mindful of my duty to address all issues between the parties when disposing of a case, so as to avoid a multiplicity of proceedings. This would save costs and judicial time. Notwithstanding, when I weigh all the factors considered above, and when I consider the facts of this case, it would be inappropriate for me to revoke my earlier judgment and orders.

[73] Having regard to the nature and extent of the building works carried out, it seems only appropriate for all the property owners who benefit from the restrictive covenants to be afforded a second opportunity to express their views on whether

the covenants should be modified or discharged. It might be that these persons did not object previously because they were unaware of the extent of development or they might have been indifferent to the development, particularly if their properties were not overlooked. These persons might choose not to object simply because they would rather see the property occupied than become an unoccupied eye sore. However, it is only fair and just that the property owners who benefit from the restrictive covenants should be afforded an opportunity to comment on the application now that the building has been erected.

DISPOSAL AND ORDERS

[74] In coming to my decision in respect of this application, I have given primary consideration to the public interest in the finality of proceedings. I do not find the fact that the parties reached a settlement (post-judgment) in the present case to be a sufficiently strong factor to outweigh the public interest in the finality in litigation and to cause me to exercise my discretion to revoke my earlier judgment and orders.

[75] Having regard to all the factors considered in this case, I believe that it would not be in the public interest to revoke my earlier orders. No such order could be made by me in the absence of evidence that the breaches unearthed have been addressed, and in the absence of revised building approvals from the KSAMC. In my opinion, the most appropriate procedure would seem to be for the Applicant to first remedy the breaches with the KSAMC, file a fresh FDCF accompanied by the requisite approvals from the KSAMC and NEPA, and then re-serve notices on the property owners who benefit from the restrictive covenants. The fresh claim would be heard afresh by a Master if uncontested, or by different judge if contested.

[76] For the reasons indicated, I therefore refuse the application for me to exercise my discretion to revoke my earlier judgment and orders. The following orders are made:

1. The orders made on December 20, 2021 and on December 8, 2022 stand. The formal order filed on December 20, 2022 may now be sealed.
2. The Applicant's application to revoke the order made on December 20, 2021 is refused.
3. Each party is to bear its own cost on the Notice of Application filed on December 13, 2022.
4. Leave to appeal granted.
5. Attorneys-at-Law for the Applicant are to prepare, file and serve this order.