[2017]JMCC Comm 13

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00164

BETWEEN	**LITTLE BELIZE CORN MILL CO. LIMITED**	**1ST CLAIMANT**
AND	**PEDRO WIENS T/A NORTHERN FARM PRODUCTS**	**2ND CLAIMANT**
AND	**JOHAN REDECOP T/A NORTHERN FARM PRODUCTS**	**3RD CLAIMANT**
AND	**HORIZON DISTRIBUTORS LIMITED**	**DEFENDANT**

IN CHAMBERS

Miss Kashina Moore instructed by Nigel Jones & Company for the claimants

Mr. Evan Evans for the defendant

April 6, 27 and May 12, 2017

Enforcement of judgment - provisional attachment of debt order – application to set aside

Consent Order – application to vary

SIMMONS J

[1] This is an application to set aside a provisional attachment of debt order and for the terms and conditions of the Consent Order dated the 10th January 2017 to be reinstated. In the alternative, the defendant seeks an order for the variation of the said Consent Order as follows:-

(i) To provide for the payment of interest up to August 2019;

(ii) Payment of the sum of US$1,200.00 for eight months thereafter being March to October 2017;

(iii) The balance by twenty two equal monthly instalments of US$1,971.60 for the period November 2017 to August 2019;

(iv) Interest of US$10,354.70 to be paid in three equal monthly instalments commencing February 2018.

(v) That the claimants shall be entitled to enforce the judgment in full in the event that the defendant fails to make two consecutive payments; and

(vi) That in the event that the debt is settled before August 2019 the amount of interest is to be adjusted accordingly.

Background

[2] On the 9th June 2016 the claimants filed an action in which they claimed certain sums due and owing for goods sold and delivered to the defendant. The sum of United States thirty thousand five hundred and seventy four dollars and twenty five cents (US$30,574.25) was said to be owing to the first claimant. The defendant was also stated to be indebted to the second and third claimants in the sum of United States thirty two thousand five hundred dollars (US$32,500.00).

[3] The defendant in its defence admitted that it had purchased the goods from the claimants but disputed the amounts outstanding.

[4] On the 2nd November 2016 the claimants filed an application for Judgment on Admission based on the contents of a letter from the defendant dated the 4th December 2015. The defendant in that letter proposed a payment schedule based on what it regarded as the “correct balances”.

[5] The parties went to mediation and arrived at a settlement. On the 10th January 2017 a consent order was made in accordance with the terms of that settlement. It states as follows:-

(vii) The defendant is indebted to the first claimant in the sum of US$26,475.25 plus interest at the rate of 4% per annum;

(viii) The defendant is indebted to the second and third claimants in the sum of US$36,500.00 plus interest at the rate of 4% per annum;

(ix) Interest is payable from January 28, 2015 on the sums stated until the debt is extinguished and amount to US$8,413.20.

[6] The parties also agreed in clause 3 that the debt would be liquidated as follows:-

(i) Payment of the sum of US$5,000.00 on or before January 30, 2017;

(ii) A second payment of the sum of US$5,000.00 on or before February 28, 2017;

(iii) Payment of the sum of US$1,200.00 for six months thereafter being March to August 2017;

(iv) The balance by ten equal monthly instalments of US$4,577.43;

(v) Interest of US$8,473.20 in two equal monthly instalments commencing February 2018.

It was also agreed that if the defendant failed to make any of the above payments in accordance with the terms of the order, the claimants would be entitled to enforce their judgment in full against the defendant.

[7] The claimants obtained a Provisional Attachment of Debt Order on the 27th February 2017 on the basis that the defendant failed to make any payments towards the satisfaction of its debts. The hearing of the application for the provisional order to be made final was scheduled for the 6th April 2017.

[8] On the 23rd March 2017 the defendant filed an application to either set aside or discharge the provisional order and for the terms of the Consent Order to be

reinstated. The grounds on which it relied are that the breach of the terms of the order was unintentional and that the sums due in January and February had been paid.

[9] Three affidavits were filed in support of the application. In summary, they indicated that the defendant's sales declined in 2016 and that it suffered a loss in that year. It was also indicated that part payment of the sum due in January was paid on February 17 and payment of the remainder was to follow in short order.

[10] The affidavit of Mr. Robert Pinkerton the defendant's Managing Director, indicated in detail the problems which the defendant is said to have experienced in 2016. He stated that the breach of the Consent Order was unintentional and arose out of difficulties with the defendant's cash flow. Mr. Pinkerton also stated that when the Consent Order was arrived at, the defendant had expected to receive a shipment of goods in December 2016. Those goods, he said did not arrive until February 2017 and resulted in an "unexpected downturn" in sales. He also indicated that the defendant was experiencing difficulty with the collection of its receivables.

[11] It was also stated that the defendant's account is overdrawn by almost JA$1,000,000.00 and other funds have been hypothecated by the bank. Mr. Pinkerton also indicated that the defendant's ability to trade and earn has been "severely hindered" as a result of the inaccessibility of its account.

[12] The claimants in their affidavit in response confirmed that the defendant had made the payments as indicated. However, they expressed the view that based on a letter received from the defendant's bank, the defendant used an account with United States twenty thousand two hundred and thirty eight dollars and twelve cents (US$20,238.12) to secure its overdraft facility.

[13] That letter which is dated March 21, 2017 indicates that the defendant is in overdraft to the tune of Jamaican eight hundred and twenty eight thousand eight hundred and eight dollars and twenty five cents (J$828,808.25) leaving

(J$171,191.75) at its disposal. The letter also indicates that United States two dollars and eighteen cents (US$2.18) is available from the account used to secure the overdraft.

[14] The defendant's application was amended on the 18th April, 2017 as set out in paragraph 1 of this judgment.

Applicant's /defendant's submissions

[15] Mr. Evans stated that the cases have established that consent orders largely fall into two categories. He indicated that in the case of ***Siebe Gorman and Co Ltd v Pneupac Ltd*** [1982] 1 All ER 377 it was established that the words "by consent" in an order were ambiguous and could be taken to mean that the order evidenced a real contract between the parties or merely that the parties did not object to the order being made. This principle he said was also stated in ***Chandless - Chandless v Nicholson*** [1942] 2 All ER 315 at 317 by Lord Greene MR.

[16] Counsel also stated that prior to the ***Civil Procedure Rules 2002*** (***CPR***) the court's power to vary a consent order depended on which of the two types of consent order was in issue. He submitted that based on the case of ***Siebe Gorman and Co Ltd v Pneupac Ltd*** (supra), where the consent order gave effect to a real contract between the parties the court would only interfere on the same grounds as any other contract (such as misrepresentation or mistake). Where however, the consent order was one to which the parties did not object, such an order could be altered or varied by the court in the same circumstances as any other order made by the court without the consent of the parties.

[17] Mr. Evans submitted that one of the issues in the instant case, is whether the order evidences a real contract between the parties or falls into the category of one made in the absence of any objection. He also sought to distinguish the principle in ***Siebe Gorman and Co v Pneupac Ltd*** (supra) on the basis that it was decided under the old English Rules of the Supreme Court.

[18] In this regard, reference was made to case of ***Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig*** (2015) EWCA Civ 739 where the principles governing the exercise of the court's discretion to extend the time for complying with a consent order were examined. In that case, the defendant failed to make the required payments on time. As a result, the claimant applied for a warrant of possession. The defendant sought to remedy the situation by paying the arrears and interest. He also paid an instalment in advance. The Court of Appeal upheld the decision of Judge at first instance to extend the time for compliance.

[19] Counsel also referred to ***Pannone LLP v Aardvark Digital Ltd*** [2011] EWCA Civ 803 as authority for the principle that the court must apply the overriding objective of dealing with cases justly when it exercises any of its powers and may extend the time for compliance with any order. Mr. Evans submitted that the exercise of the court's discretion to vary a consent order is not limited to situations in which there are "unusual circumstances." He emphasized that the exercise of the court's discretion will depend on all the circumstances. He also stated that that fact that the agreement disposed of the substantive dispute as against one dealing with case management decision is very important and decisive of the issue.

[20] It was further submitted that based on the provisions of Part 26 of the ***CPR*** the court has the inherent jurisdiction to vary and/or reinstate the order in the instant case.

[21] Reference was also made to the case of ***WA v Executors of the Estate of HA (Deceased) and others*** (2015) EWHC 2233 (Fam) in which the court stated that a consent order may be set aside if there is a supervening event, where:-

(i) an event has occurred since the making of the order which either, invalidates the basis or fundamental assumption upon which the order was made, so that an appeal would be certain or very likely to succeed;

(ii) the new event occurred within a relatively short time of the order having been made;

(iii) the application for leave to appeal out of time was made reasonably promptly in the circumstances of the case; and

(iv) the grant of leave to appeal out of time will not prejudice the rights of third parties who have acquired in good faith and for valuable consideration interests in property which is the subject matter of the relevant order.

[22] Counsel stated that the Defendant's failure to pay the sums due in accordance with the terms of the Consent order was not intentional or an attempt to circumvent the terms of the order. He referred to Mr. Pinkerton's affidavit in which it was stated that the breach was due to unforeseen difficulties and financial hardship experienced in 2016. It was also stated that the Defendant was not fully aware of the depth of financial loss for year 2016 when the Consent Order was made.

[23] Mr. Evans also made the point that the Defendant has paid up all the outstanding amounts to March 2017 which total United States eleven thousand two hundred dollars (US$11,200.00) or Jamaican one million four hundred and fifty thousand dollars (J$1,450,000.00). He stated that the defendant's actions clearly demonstrate an intent and desire to adhere to the terms and conditions of the Consent order. He also argued that in the normal course of business it was sometimes impossible to accurately predict earnings and cash flow.

[24] Counsel stated that the defendant has continued to suffer financial hardship and has made serious attempts to restructure and streamline its operations. He said that it is expected that this will result in significant improvements in the defendant's earnings and cash flow. He argued that a variation of the order would enable the defendant to adhere to its terms and conditions.

[25] Mr. Evans asked the court, as an alternative, to reinstate the original consent order on the basis that it would be just to do so the breach was due to supervening events such as the late receipt of a shipment of raw materials which caused a reduction in the defendant's earnings towards the end of 2016.

[26] He submitted that based on the case law the Defendant has provided adequate reasons for either the variation or the reinstatement of the original consent order to make it useful and ensure that the defendant's viability.

[27] Where the provisional attachment of debt order is concerned, counsel argued that it serves no useful purpose. He stated that one of the purposes of the bank account in question is to facilitate payments and transactions to third party suppliers. He submitted that the continued freeze on the account will cripple the defendant's operations to the extent that it will not be in a position to honour its financial obligations.

[28] Counsel also stated that an attachment of debt order will be of no benefit to the Claimants as the defendant's account has been operating in an overdraft position for some time and any other accounts that are not operating in a deficit position have been hypothecated by its bankers in respect of other matters. Mr. Evans also submitted that the continued freezing of the defendant's bank accounts will continue to adversely affect the Defendant's relationship with its bankers and creditors, thus creating fewer opportunities for the Defendant to successfully and quickly settle its obligations to the Claimants.

[29] Counsel also submitted that a variation of the order was permitted within the ambit of the overriding objective, to deal with cases justly. Reference was made to rule 1.1 (2) of the ***CPR*** which states that dealing with a case justly includes:-

> *"a. ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;*
>
> *b. saving expense;*

c. dealing with it in a way which take into consideration -

i. the amount of money involved;

ii. the importance of the case;

iii. the complexity of the issues; and

iv. the financial position of each party;

d. ensuring that it is dealt with expeditiously and fairly; and

e. allotting to it an appropriate share of the court's resources whole taking into account the need to allot resources to other cases."

[30] Mr. Evans submitted that based on the case law and the ***CPR***, the orders should be granted as prayed.

Claimant's/respondent's submissions

[31] Miss Moore submitted that the defendant is bound by the terms of the Consent Order. She stated that the consent order can only be invalidated and/or varied where it was obtained by fraud, misrepresentation, non-disclosure of material facts or any other ground which a party could use to set aside a contract. Reference was made to the cases of ***Dorrett Maud Richardson v Ernest Beresford Richardson*** (unreported) Supreme Court, Jamaica [2012] JMSC Civil 12 and ***Michael Causwell and Another v Dwight Clacken and Another*** (unreported) Court of Appeal, Jamaica, SCCA No. 129/02, judgment delivered 18 February 2004.

[32] With respect to the case of ***Seibe Gorman & Co Ltd v Pneupac Ltd*** [1982] 1 All ER 377 on which the applicant relied, she submitted that that case actually supports the claimants' case. She stated that the Court in that case made a distinction between the case before it and a case where the consent order reflected a contract between the parties. Specific reference was made to the

following passage where Lord Denning MR stated:-

> *"We were referred to several cases. In Huddersfield Banking Co Ltd v Henry Lister & Son Ltd [1895] 2 Ch 273, [1895-9] All ER Rep 868 there was a consent order dealing with a large amount of machinery and plant. Everyone agreed that it should be sold on certain terms. That was clearly a contract between the parties with which the court would not interfere except on the same grounds as any other contract...*
>
> *I cannot put any such interpretation on the order which was drawn up in this case....*[1]

[33] Counsel submitted that the facts in the instant case are similar to those considered in ***Huddersfield Banking Co Ltd v Henry Lister & Son Ltd.*** [1895-9] All ER Rep 868. In this regard she stated that the parties attended mediation and arrived at a fully binding agreement on how the matters between them should be resolved. She further stated that having done so, the defendant should not be permitted to resile from that agreement.

[34] It was further submitted that even if the court finds that the Consent Order in the instant case is not of the nature/kind discussed in ***Huddersfield Banking Co Ltd v Henry Lister & Son Ltd.*** (supra), it is clear from the decision of ***Seibe Gorman & Co Ltd v Pneupac Ltd*** (supra) that the parties can agree that the Court should have no power to vary same. Reference was made to the following passage where Eveleigh J said:-

> *"An order of this kind when made by the court itself after argument is always subject to Ord 3, r5, that is to say, the power of the court under Ord 3, r 5, to extend the time. Is the court's discretion under the rules of court to be excluded because there was consent to the order? To ask for an extension of time in accordance with Ord 3, r 5, is not going back on the agreement that the order should be made. The plaintiffs are only asking the court to exercise a*

---

[1]Page 380

> *discretion, to prevent injustice, which it has under Ord 3, r 5. If the court's power under Ord 3, r 5, can be excluded by the agreement of the parties and if the intention was to exclude this jurisdiction, then to my mind it must be made abundantly clear."*[2]

[35] She stated that in the instant case it is an express term of the Consent Order that:-

> *"The parties further agree that should the Defendant not make any payment as set out in three 3 above the Claimants shall be entitled to enforce their judgment in full against the Defendant."*

She submitted that even if the Court were to treat the Consent Order as an one stipulating the payment of sums made by the Court and not as a contract between the parties, the above clause which provides the consequence of breach prevents the Court from extending the time for compliance with order 3 where there has been a breach. She did however maintain that this is a case in which a contract exists between the parties.

[36] In relation to the case of ***Chandless – Chandless v Nicholson*** [1942] 2 All ER 315 which was also relied on by the defendant, it was submitted that the decision was of no assistance. Miss Moore submitted that the statement of Lord Greene MR. that the order before him was one "giving relief on terms to be performed within a specified time" and that in such a case the "court retains jurisdiction to extend time if circumstances are brought to its notice which would make it just and equitable that extension should be granted" is inapplicable to the instant case as the learned Master of the Rolls was not dealing with a consent order. She stated that when dealing consent orders different considerations are to be applied. Reference was made to the following passage at page 317 of the

---

[2]Page 381

judgment where Lord Green MR said :-

> *"Now the original order which Master Ball himself made is not upon its face expressed to be a consent order at all, and, if it was a consent order, it can only have been by a very regrettable mistake or inadvertence that that circumstance was not expressed in the order itself. Here again I would like to say quite distinctly that, if an order is made by consent, the practice should invariably be that it should, on the face of it, be expressed so to have been made. When the court finds an order which is not expressed to be made by consent, it certainly is not going to treat it as a consent order, unless it is satisfied that it was in fact a consent order. In the present case I am left in considerable doubt as to whether this order really was a consent order in the strict sense at all. There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression, and I am not satisfied, having regard to the somewhat conflicting statements which we have before us as to how this order came to be drawn up, that it was a consent order in the technical sense…"*

It was therefore our submission that the approach adopted in ***Chandless*** is not open to this Court.

[37] Where the case of ***Ropac Ltd v Inntrepreneur Pub Co and Another*** (2000) Times Law Report, delivered on June 21, 2000 is concerned, counsel submitted that the consent order that was considered in that case was not one in the nature of a contract and as such that case is of no assistance. It was also submitted that the decision of ***WA v Executors of the Estate of HA (deceased) and Others*** [2015] EWHC 2233 is also of no assistance with determining the issue before the Court in the instant case.

[38] Miss Moore also addressed the cases of ***Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig (deceased)*** [2015] EWCA Civ 739 and ***Pannone LLP v Aardvark Digital Ltd*** (supra). She indicated that in light of the fact that the

Pannone LLP v Aardvark Digital Ltd(supra) decision was referenced and used as a basis for coming to the decision in ***Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig (deceased)***(supra) it was convenient to deal with both decisions together. She stated that the Court in those two decisions found that the distinction previously made in earlier decisions pertaining to consent orders was no longer material in light of the ***Civil Procedure Rules (UK)*** and in particular, the overriding objective. She did however point out that the Court in ***Pannone LLP v Aardvark Digital Ltd*** (supra) expressed the view that:-

> *"...the weight to be given to the consideration that an order is agreed will vary according to the nature of the order and thus the agreement. Where the agreement is the compromise of a substantive dispute or the settlement of proceedings, that factor will have very great and perhaps ordinarily decisive weight, as it did in Weston v Dayman, which was not in any event concerned with an application to extend time. Where however the agreement is no more than a procedural accommodation in relation to case management, the weight to be accorded to the fact of the parties' agreement as to the consequences of non-compliance whilst still real and substantial will nonetheless ordinarily be correspondingly less, and rarely decisive."*

[39] Counsel submitted that insofar as the above cases are authorities for the position that the Court can vary a consent order in furtherance of the overriding objective, that is not the law in this jurisdiction and they cannot be used as a basis to vary the consent order in the instant case.

[40] Miss Moore stated that the general powers bestowed on the Court and laid out in the ***Civil Procedure Rules 2002*** (***CPR***) cannot be resorted to do that which the Court has no jurisdiction to do. She emphasized that the Jamaican Courts have maintained that there is no jurisdiction to interfere with a contract made by parties save very limited instances as set out in ***Causwell*** and ***Richardson***. She stated that the ***CPR*** merely sets out how the Court's power can be used but cannot be used to alter established principles of law. Reference was made to the decision of the Court of Appeal ***Best Buds Limited v Garfield Dennis*** (unreported) Court

of Appeal, Jamaica, [2012 JMCA Civ 1 in support of that submission. In ***Best Buds*** the Court was asked to determine whether the Judges of the Supreme Court had power to make an award for interim payment. The Court of Appeal found that the Court had no jurisdiction and found that the ***CPR*** while they can regulate the exercise of an existing jurisdiction they cannot confer jurisdiction.

[41] She submitted that in light of the fact that the Jamaican Courts having repeatedly maintained that they have no jurisdiction to interfere with contracts between parties save in exceptional circumstances, such a power cannot be conferred upon the court by rules of Court. She stated that in the circumstances the Court does not have the power to make the orders sought by the Defendant.

Discussion

[42] The general power of the court to vary or revoke an order is contained in Rule 26.1 (7) of the ***CPR*** which states:-

> *"A power of the court under these Rules to make an order includes a power to vary or revoke that order."*

[43] It is to be noted however, that the court's power is not to be exercised lightly. In ***Harley v. Harley*** (unreported) Court of Appeal, Jamaica, SCCA No. 72/2007 judgment delivered 23 March 2010, Harris, JA stated that the case of ***Mair v. Mitchell and Others*** (unreported) Court of Appeal, Jamaica, SCCA 123/08, judgment delivered in February 2009 "affords guidance as to the principles which the court ought to employ in dealing with an application under rule 26.1 (7)". In ***Mair v. Mitchell and Others*** (supra), Smith JA, in his consideration of the question as to the power of the court to vary an order under rule 26.1 (7), relied on the case of ***Lloyd's Investment (Scandinavia) Limited v. Ager-Harrisen*** [2003] EWHC 1740 . where Patten J, in dealing with an application to vary an order under Part 3.1 (7) of the ***English CPR***, said:-

> *"Although this is not to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1 (7) is*

> *exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether, innocently or otherwise, as to the correct factual position before him."*[3]

[44] Smith JA also stated that although Patten J was dealing with an application to set aside a default judgment the principle as stated was also applicable where a party seeks a variation of an order. The learned Judge of Appeal stated:-

> *"Although Patten J. was dealing with an application to vary the conditions attached to an order setting aside a default judgment and not one to vary a procedural regime, as in the instant case, I am of the view, that the reason for his decision represents a correct statement of the principle of law applicable to the exercise of the judge's discretion, under Rule 26. (7) of the CPR. Indeed this principle was approved by the English Court of Appeal in* ***Collier* v *Williams (supra)*.**"

[45] In ***Harley v. Harley*** (supra) Harris JA expressed her agreement with the above principle in the following words:-

> *"It is patently clear that rule 26.1 (7) restricts the conditions under which a court may vary or revoke an order. 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 has been misled."*

[46] It must however be borne in mind that the order which the defendant seeks to vary is one made with the consent of the parties. The general rule is that such an order signifies the end of the dispute between the parties unless it has been impeached. In ***Kinch v. Walcott and others*** [1929] All ER Rep 720 it was stated

---

[3]Paragraph 11

that *"an order by 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".*

[47] The principles pertaining to the variation of consent orders were considered by the Court of Appeal in ***Causwell & another v. Clacken & another*** (supra). In that case, Smith, JA stated that consent orders may only be varied to correct clerical errors, clarify the terms of the judgment or to facilitate the working out of the order. The learned Judge of Appeal also stated that a consent order has the same effect as one arrived at after a trial except that the parties cannot appeal without the leave of the court.

[48] In that case, Smith JA referred to ***Tigner - Roache & Co. v. Spiro*** [1982] 126 S.J. 525 as authority for the principle that where a consent order appears to incorporate the conclusion of negotiations between the parties a court will not vary the order by giving a party additional time to comply with its terms. In such matters the court must determine whether a true binding contract was created *"…to which is superadded the command of the judge and which bears his imprimatur, or whether it is a mere order of the court to which the parties agreed or did not object".* In the latter case the court has the jurisdiction to extend or abridge the time within which a party is required to do an act.

[49] Smith, JA also made it clear that where the order evidences a real contract the court will not as a general rule, interfere with its terms. He said:-

> *"Therefore, where it appears that a Consent Order embodies the conclusion of negotiations between the parties, the Court will give effect to it where one party is in breach, and will not vary it by giving extra time to perform its terms".*

[50] This principle was applied in ***Richardson v Richardson*** (supra) by Mangatal J

who said:-

> *"In my view, it is correct that the parties are bound by the terms of the consent order.* ***It is clear that a judgment or order given or made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order This would be grounds such as where the judgment or order is obtained by fraud, misrepresentation, nondisclosure of material facts, and other such grounds upon which an agreement may be invalidated.*** *In this case, the Consent Order represents a true binding contract between the parties commanded by and bearing the imprimatur of the Judge. The fact that the order contained the term "liberty to apply" does not provide the Court with carte-blanche to recreate or restructure what the parties have agreed, Those words inserted in this type of Consent Order do not enable the Court to deal with matters that do not arise in the course of the working out of the Judgment. They do not give the Court power to alter the agreement and to reopen the question of the parties' respective entitlement to the property. The Consent Order was not rendered any less final because of the inclusion of the words "Liberty to Apply"- see S.C.C.A. No. 129 of 2002, Causwell v. Clacken , judgment delivered 18 February 2004."*

[My emphasis}

[51] That approach is also in accordance with that taken by the court in ***Purcell v F C Trigell Ltd (trading as Southern Window and General Cleaning Co) and another*** [1970] 3 All ER 671. In that case Winn L.J. stated:-

> *"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."*[4]

---

[4]Page 676

[52] This principle was applied in ***Huddersfield Banking Co, Ltd v Henry Lister & Son, Ltd*** [1895-99] All ER Rep 868, where Lindley LJ said:-

> *"A consent order I agree is an order, and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that point. But that a consent order can be impeached not only on the ground of fraud but upon any grounds which invalidate the agreement it expresses in a more formal way than usual, I also have not the slightest doubt. If authority for that be wanted, it will be found in two cases which were referred to in the course of the argument, and which I do not propose to examine at any length. I mean Davenport v Stafford (1) and A-G v Tomline (2)".*

[53] In ***Seibe Gorman & Co Ltd v Pneupac Ltd*** (supra) the court made a distinction between "consent" orders which evidenced a real contract between the parties and those made in the absence of any objection. In the latter case Lord Denning stated that the court had the power to alter or vary its terms as it would where there was no consent. In that case, the court having assessed the terms of the order in question held that there was no contract between the parties as it could have been made without their consent. Accordingly, it was held that the time for compliance with its terms could be extended utilising the provisions of order 3 rule 5 of the ***Civil Procedure Rules (UK)*** which is similar to rule 26.1 (7).

[54] It is therefore evident that the provisions of rule 26.1 (7) of the ***CPR*** may only be applicable where the consent order in question does not amount to a real contract between the parties.

[55] In this matter, the terms of the consent order were settled at mediation and subsequently endorsed by an order of the court. In fact, paragraph 4 provides for the enforcement of the judgment in the event that the defendant failed to make the payments as agreed. The precise nature of the terms of the order suggests that the defendant was not merely submitting to the wishes of the claimant. Its terms in the words of Templeman LJ in ***Tigner - Roache & Co. v. Spiro*** (supra) *"could not have been obtained by the plaintiffs by a mere submission"* by the

defendant. The order is therefore, in my view one which seals the compromise between the parties and can therefore be described as *"a true binding contract"*. Such an order according to Cooke, JA in ***Windsor Commercial Land Company Limited & others v. Century National Merchant Bank Trust Company Limited & another*** (unreported) Court of Appeal, SCCA No. 114/05, judgment delivered 5 June 2009, will not be *"interfered with or disturbed by a court on grounds other than those in which it would interfere with any other contract".* Such grounds would include mistake, misrepresentation, duress and undue influence. The defendant has not argued that the order was obtained in any of those circumstances.

The overriding objective

[56] Counsel for the defendant relied on the cases of ***Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig (deceased)*** (supra) and ***Pannone LLP v Aardvark Digital Ltd*** (supra) as authorities for the position that the overriding objective may be used as a basis to vary the order. In ***Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig (deceased)*** (supra) Sir Terence Etherton stated:-

> *"[43]* Pannone *is clear authority that CPR r.1.1 (the CPR are a new procedural code with the overriding objective of enabling the court to deal with cases justly), r.1.2 (the court must seek to give effect to the overriding objective when it exercises any power given to it by the CPR), r.1.4 (the court must further the overriding objective by actively managing cases) and r.3.2(a) (the court may extend the time for compliance with any order) conferred on the Judge a real discretion whether or not to extend the time in the Consent Order and not merely a discretion which, as Mr Jourdan submitted, could only properly be exercised as a matter of settled practice as well as on the facts by refusing an extension.*
>
> *[44] Prior to the CPR, under the former Rules of the Supreme Court ("the RSC"), the court's power to vary a consent order depended on which of two types of consent order was in issue. As Lord Denning MR explained in* Siebe Gorman *(at p.189), where the consent*

order gave effect to a real contract between the parties, the court would only interfere on the same grounds as any other contract (such as misrepresentation or mistake); where, on the other hand, the consent order was no more than an order to which the parties did not object, the order could be altered or varied by the court in the same circumstances as any other order made by the court without the consent of the parties."

[57] In ***Pannone LLP v Aardvark Digital Ltd*** (supra) Tomlinson L.J. expressed the view that the distinction drawn by Lord Denning in ***Seibe Gorman & Co Ltd v Pneupac Ltd***(supra) was made in the context of the old Rules of the Supreme Court and was no longer relevant where the jurisdiction to vary the terms of a consent order is concerned. He stated:-

"These observations were made in the context of the old Rules of the Supreme Court. It may be, as I shall show, that the distinction there being drawn is now of no significance so far as concerns the jurisdiction of the court to grant relief from the "agreed" consequences of non-compliance with an order but it remains in my view of importance in the context of the court's exercise of its discretionary power. ***There is a world of difference between a case management decision made at the instance of one party to which the other party makes no objection, such as occurred in Siebe Gorman and a genuine settlement of a substantive dispute as to the parties' rights , such as was under consideration by this court in*** **Weston v Dayman** ***2006 EWCA Civ 1165*** ***.*** *There a receivership was discharged pursuant to an overall settlement of disputes which dealt with all aspects of the receivership including the utilisation of monies held in the various receivership accounts, the costs of the receiver, a limited indemnity in respect of a particular possible liability of the Receiver and, critically, a release of the Receiver from all liability for any failure properly to manage the estate of the receivership during the period of the receivership. The settlement was enshrined in an order of the court made by consent. The procedure differed therefore from that adopted when proceedings are compromised by a consent order made in Tomlin form, i.e. an order which records the terms of settlement in a schedule to the order but where the terms themselves are not ordered by the court and are not enforceable as*

> *a judgment without a further order. A court has no general power to vary the terms of an agreement set out in the schedule to a Tomlin order save insofar as the circumstances give rise to a power so to do as a matter of the general law of contract – see per Ramsey J in Community Care North East v Durham County Council* 2010 EWHC, 4 All ER 733. *In Weston v Dayman the court was invited to vary the consent order so as to permit the bringing of an action against the Receiver for breach of duty for failing to take proper care of a motor yacht which formed part of the estate of the receivership. Arden LJ, with whom the other members of the court agreed, said that the court "must be very careful in exercising a discretion to vary the terms of an order which represents a contract between the parties"– see at paragraph 24. Assuming without deciding that the court had such a power, the court declined to exercise it, noting that "**a bargain freely made should be upheld**"– see per Arden LJ at paragraph 25. The applicant Mr Weston had himself obtained benefits under the consent order and it would not be right to exercise any discretion to vary it. The court was there being invited to interfere with a concluded settlement of substantive disputes. Assuming that there is a power so to do, **where the settlement is embodied in an order of the court, it can rarely be appropriate for the court to intervene further than to the extent to which the contract can, by its own terms or pursuant to general contractual principles, be modified or discharged in the light of changed circumstances.***[5]

[My emphasis]

His Lordship also went on to state:-

> *"In my view the weight to be given to the consideration that an order is agreed will vary according to the nature of the order and thus the agreement.* ***Where the agreement is the compromise of a substantive dispute or the settlement of proceedings, that factor will have very great and perhaps ordinarily decisive weight****, as it did in Weston v Dayman , which was not in any*

[5]Paragraph 27

> *event concerned with an application to extend time. Where however the agreement is no more than a procedural accommodation in relation to case management, the weight to be accorded to the fact of the parties' agreement as to the consequences of non-compliance whilst still real and substantial will nonetheless ordinarily be correspondingly less, and rarely decisive. Everything must depend on the circumstances..."*[6]

[58] The learned Judge of Appeal in ***Causwell & another v. Clacken & another*** (supra) also discussed effect of the insertion of words expressly reserving liberty to apply. The order in the instant case does not contain those words but according to the case of ***Cristel v. Cristel*** [1951] 2 K.B. 739, such a term may be implied where it is necessary for the working out of the terms of the order. Sommervell L.J was however careful to point out that whether expressed or implied "liberty to apply" does not, without more clear the way for a variation of an order. Denning L.J. in that case, expressed the view that such a variation could only be entertained where there was a change in circumstances.

[59] The order in the case at bar is concerned with the payment of a debt. The amounts that are to be paid and the times when those payments are to be made have been clearly stated. The order also dealt with the consequences of a breach. There is therefore in my view no basis on which the court could imply that there is liberty to apply. The situation is therefore different from that discussed in ***Cristel v. Cristel.*** Perhaps the situation may have been different if the order gave *"liberty to apply"* and a change in circumstances such as that which occurred in ***Abbott v Abbott*** (1931) 47 T.L.R. 207 existed. In that case, the respondent was so seriously ill at the time when the consent order was made, that the court found that he was *"incapacitated"* and incapable of dealing with such a serious matter.

---

[6]Paragraph 33

[60] The defendant has however sought to invoke the assistance of the *"overriding objective"* which clearly did not form part of the ***Rules of the Supreme Court (UK)*** at the time when ***Abbott v Abbott*** (supra) was decided. The impact of such a provision can be seen in the cases of ***Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig (deceased)*** (supra) and ***Pannone LLP v Aardvark Digital Ltd*** (supra)***.*** I must confess that in the circumstances of the case at bar, I find the approach taken in those two cases to be quite attractive.

[61] However, I am bound by the decision of the Court of Appeal in ***Causwell & another v. Clacken & another*** (supra) which was also decided in the era of the overriding objective albeit in its early years. In addition, the impact of the overriding objective was not argued and as such the court made no specific ruling on that point. I am also of the view that the court in ***Pannone LLP v Aardvark Digital Ltd*** (supra) was not seeking to lay down a general principle regarding the application of the overriding objective to consent orders. In fact, the court was careful to point out that where the order sought to be varied represents a compromise of the substantive dispute, that factor will most likely be decisive of the issue. In addition the court in ***Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig (deceased)*** (supra) viewed as critical, the fact that the application for extension of time was made before the expiry of the time limits.

[62] In addition, Miss Moore has quite correctly made the point that rules of procedure cannot take precedence over the law.

[63] The defendant's plea is that the change in its financial position warrants a variation of the terms of the order. It has exhibited copies of its accounts which show that it made a loss of eighteen million eight hundred and thirty two thousand seven hundred and thirty dollars ($18,832,730.00) in 2016 and was therefore unable to make the payments on time. It has also stated its ability to produce and earn has been curtailed by the provisional charging order which was sought and granted in an effort to enforce the judgment.

[64] It is appreciated that the defendant's ability to service its debts may be severely affected if the order is not varied. However, based on my finding that the consent order sealed the compromise between the parties and the decision in ***Causwell & another v. Clacken & another*** (supra), I would be on shaky ground if the order is granted.

[65] I therefore find that there is no basis on which the court can exercise its discretion to vary the order.

Discharge of the Provisional Charging Order

[66] Part 48 of the ***CPR*** deals with the enforcement of a judgment debt by way of a charging order.

[67] In this matter, there is no dispute that the defendant has failed to make the payments due in accordance with the terms of the consent order. It has however asked the court to intervene on the basis that the breach was not intentional and was due to a change in the fortunes of the company. It has also sought to invoke the court's discretion on the basis that it has paid the arrears due and the setting aside of the provisional order would make good commercial sense.

[68] It is indeed unfortunate that the defendant has found itself in this position. Having failed to pay the sums due, the account which it utilizes to maintain its business is now inaccessible and as a result its ability to earn has been curtailed. It has stated that this situation has had and will continue to have a negative impact on its ability to service its debts.

[69] The application for the discharge of the charging order is in my view, contingent on the court's ruling that this is an appropriate case for the variation of the consent order.

[70] Having found that there is no basis on which to do so, the application to discharge the provisional charging order is also refused.

[71] It is ordered as follows:-

(i) The defendant's application is refused;

(ii) Costs of this application are awarded to claimants. Such costs are to be taxed if not agreed;

(iii) Leave to appeal is refused.