[2020] JMSC Civ 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 01870

BETWEEN	**HERBERT REID**	**CLAIMANT/RESPONDENT**
AND	**MICHELLE NEITA REID**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Mr. Ruel Woolcock instructed by Ruel Woolcock and Co for the Claimant/Respondent

Mr. Jevaugn St. J Leon instructed by Alton E. Morgan for the Defendant/Applicant

Heard: January 20th 2020 and March 6th 2020

Slip rule – liberty to apply – ambiguities or clarification – in what circumstances can a perfected order be altered – set off – can a court overrule the order of a court of concurrent jurisdiction

T. HUTCHINSON, J (AG.)

INTRODUCTION

[1] On the 22nd of February 2019 a Notice of Application for Court Orders was filed by the Defendant. It was supported by an affidavit from her in which she seeks the following orders;

1. That pursuant to paragraph (f) of the Court's judgment of November 15th, 2016 the sale of the Respondent/Claimant's 50 % beneficial interest in the Bridgemount Heights property contained in the Certificate of Title registered at Vol 970 Folio 127 be completed at a price set at 15 million dollars.

2. The consideration payable shall comprise the Transfer of the Applicant's half share in 7 Hollywood Close plus payment of the sum of $9,093,839.55 which was later adjusted to $6,797,589.55 on an updated value of $23.2 million dollars this sum being inclusive of the money due as part of the rental income and costs.

3. That the $9,093,839.55 be paid to the Respondent's Attorney-at-law upon an undertaking to do so after registration of the Transfer by the Respondent of the property contained in Certificate of Title registered at Volume 970 Folio 127 to the Applicant and their 2 children of the marriage Duncan Reid and Graeme Reid.

4. Costs of the Application to the Applicant to be taxed if not agreed.

5. Such further and other remedies as the Court deems just.

BACKGROUND

[2] On the 15th of November 2016, Bertram-Linton J delivered judgment at the end of a trial between the parties in relation to the division of two properties acquired by them during the course of their marriage. In the course of her judgment, the Learned Judge made a declaration that the residence located at 7 Hollywood Close, Kingston 6 was the family home and was owned in equal shares (50/50) by the parties. She also made a declaration that the property located at 25 Bridgemount Heights was equally owned as well.

[3] Having made these declarations, the Judge then made a number of orders to include orders for the sale of both properties and the division of the proceeds of sale between the parties in equal shares. In respect of the Bridgemount Heights property, an order was also made that Mr Reid (hereinafter referred to as the Respondent) should be paid the sum of $2,337,599.55 as his share of the proceeds of rental income collected by Mrs Reid (hereinafter referred to as the Applicant) in respect of same and this sum was to be deducted from her share of the sale proceeds.

[4] The Learned Judge then went on to make orders granting the respective parties first option in the purchase of the relevant properties, that is, the Respondent was given first option to purchase the Applicant's interest in the family home and she was given first option to purchase his interest in the Bridgemount Heights property. It was stated that this option was to be exercised 'within 90 days of the making of this order.' (Paragraph (f) of the Formal Order).

[5] An order was also made for the valuator to be agreed upon by the parties at their joint expense to value the properties for sale 'within 90 days hereof' failing which the properties may be valued by one party and the half cost recovered from the net proceeds of the sale.

[6] By way of letter dated December 5th, 2016, Counsel for Respondent suggested the names of two Valuators to Counsel for the Applicant for consideration. It appears that no agreement was arrived at as the Applicant elected to instruct Langford and Brown to carry out a valuation on the Bridgemount Heights property only. The report in respect of same dated the 17th of January 2017 was later produced by her to the Respondent and is attached to her affidavit in support of this application. The market value of the property is stated therein as $30 million dollars and the forced sale value as $24 million dollars.

[7] On the 10th of March 2017, approximately 115 days after the date on which judgment had been delivered, a letter dated March 2nd, 2017 was received by Mr Woolcock from the Applicant's Attorney in which reference was made to her intention to exercise her option to purchase the Respondent's interest in the Bridgemount Heights property. It was also indicated that in order to do so the Applicant had made an application to a reputable mortgage institution. Included in the correspondence was the Particulars of the Proposed Statement of Account which noted that the offer was on the basis that the Respondent's interest was valued at $12 million, that is, half the forced sale value of $24 million dollars.

[8] It was also outlined in the same correspondence that a value of $18 million was being ascribed to the 7 Hollywood Close property as this value had been stated in a valuation which had been done previously. It was later conceded that this figure may have been based on an offer as opposed to an actual valuation done. In respect of this property the Applicant proposed that her half interest be transferred to the Respondent and the value of same be used to set off the amount that should then be paid by her to him.

[9] It was also proposed that the costs due to the Respondent be capped at $1 million. A number of other proposals were made in the Statement of Account with the net sum payable to him, after the set off and other adjustments were applied being $5,711,319.55. This figure was subsequently adjusted to $9,093,839.55 in the Notice of Application filed in this matter and further adjusted to $6,797,589.55 based on the most recent offer of $23.2 million for the Hollywood Close property. This offer was not accepted by the Respondent and paragraph 4 of his affidavit filed August 8th, 2019 indicates that there were concerns as to value assigned to the property in the valuation report, while paragraph 6 speaks to the Applicant's failure to exercise her option within the specified time.

[10] On 22nd of June 2017, the Respondent filed an Application for Court Orders in which he sought permission to have a new valuation done for the Bridgemount Heights property, this application was heard and denied on the 10th of May 2018.

[11] By way of letter dated the 18th of July 2018 Mr Leon informed Mr Woolcock that an offer of $18 million had been accepted by the Applicant for the sale of the Hollywood Close property. An objection was raised to this sale by the Respondent in a letter dated the 27th of July 2018 on the basis that an offer could not be accepted as no time limit had been set by the Court in respect of his exercise of his option to purchase the Applicant's interest in the property. An objection was also raised that this sum had been accepted in the absence of a valuation report to determine the true market value of the property.

[12] In response to these objections, Mr Leon dispatched correspondence dated the 14th of August 2018 in which the net payment of $9,093,839.55 was offered for the Respondent's half interest in the Bridgemount Heights property. This figure was said to be 'the difference between half the value of the two properties plus costs and rental income awarded.' The statement of account attached disclosed that a value of $15 million had now been ascribed to the Respondent's half interest. The offer was made on the basis that the Bridgemount property had been valued within the time stipulated by the Court and as such that value should bind the parties.

[13] There being no agreement to this proposal, the Applicant subsequently filed this Notice of Application for Court Orders.

APPLICANT'S SUBMISSION

[14] In his written submissions Mr Leon indicated that the issues for the Court are as follows;

a. Whether the order was made when it was executed by the Registrar for and on behalf of the Honourable Mrs. Justice Bertram-Linton (or) when she delivered judgment on 15th of November 2016.

b. Whether the Claimant/Respondent by his application filed on the 22nd of June 2017 is entitled to benefit from his own delay in circumstances where his application when heard was refused by a Judge of competent jurisdiction.

[15] In putting forward his submissions in support of the orders being sought, Mr Leon referred the Court to the authority of ***Dalfel Weir v Beverly Tree [2016] JMCA App 6*** and commended the approach taken by the Court therein where the order made was varied to reflect the Court's intention.

[16] It was submitted by him that with the refusal of the Judge to permit a new valuation of the Bridgemount Heights property this Court is bound by the valuation done just over 3 years ago in January 2017.

[17] Counsel also submitted that the statement by Bertram-Linton J in respect of the options being exercised 'within 90 days of the making of this order' was not a reference to the 15th of November 2016 but to the date of the filing of the Formal Order. This he submitted was to be viewed as different from the order in respect of the valuation which was to be completed 'within 90 days hereof.'

[18] He argued that the word 'hereof' was a reference to the 15th of November 2016 as the date from which time would begin to run for the preparation of the valuation report. Counsel submitted that on a proper construction of the Court's order this interpretation was no doubt intended to give the respective parties sufficient time to obtain mortgage financing to make the purchase since each was and is a senior citizen.

[19] In support of this position, Mr Leon referred to and relied on the Privy Council decision of ***Sans Souci Ltd v VRC Services Ltd [2012] UKPC 6,*** with specific reference to the dicta of Lord Sumpton at paragraphs 12 to 14 of the judgment. He also referred to and relied on rule 42.8 of the CPR. In respect of the relevance of rule 42.8 Counsel submitted that the rule applied insofar as it allows for the time for the obtaining of the valuation to be distinguished from the time for the exercise of the options as the parties would need to be informed of the value of the properties before moving on to exercise their option.

[20] He noted that this situation was different from that which had existed in ***Dalfel Weir*** as in that case there was a specific date set for the option to be exercised whereas in the instant matter, time was to begin running from a specific event, namely the filing of the formal order which was eventually done by his Chambers on the 5th of June 2018. Mr Leon also noted that since the order was not perfected until the 18th of November 2018 time could conceivably begin to run from then.

[21] Mr Leon also submitted that if the Court did not agree with this submission it could still find that the Applicant had exercised her option as required as the valuation was done within 90 days after which an application seeking a stay of execution of the order and an extension of time was filed on the 23rd of February 2017. Additionally, by letter dated the 2nd of March 2017 she had proposed to exercise her options in the terms referred to above. Counsel also argued that the Applicant's proper exercise of the option has been frustrated by the Respondent's refusal to accept the market value appraised for the Bridgemount property.

[22] Mr Leon also sought to ground this application as being made pursuant to the order of Bertam-Linton J granting liberty to apply. He argued that where there is a grant of liberty to apply the Court retains the jurisdiction to enable it 'to work out the implementation of its order and in a proper case to make supplemental orders for the purpose of giving assistance in working out a judgment'.

[23] He submitted that the decision of ***Dalfel Weir v Beverly Tree*** is an exception to the general rule in ***Bailey v Marriott (1971) 125 CLR***, 529 where it was stated;

> *"once an order of a court has been passed and entered and otherwise perfected in a form which correctly expresses the intention with which it was made the Court has no jurisdiction to alter it…"*

[24] Mr Leon also observed that the present application if granted would bring finality to the matter by declaring the value of the Respondent's beneficial interest in the Bridgemount Heights property as being fixed by the value stated in the January 2017 Valuation Report. It was submitted by him that the order of the Court refusing a new valuation is covered by the principle extracted from ***Bailey*** and the Respondent's only remedy in respect of this refusal was an appeal per the decision of the Court in ***Mutual Shipping Corporation of New York v Bayshore Shipping Co of Monrovia [1985] 1 All ER 520.*** He concluded that with the refusal of leave to appeal the value of $30 million now stands as the determinative value for that property.

[25] Mr Leon also referred to and relied on the decision in ***Leymon Strachan v The Gleaner Company Limited and Stokes (Motion No 12/1999, judgment delivered 6***

December 1999, specifically the extract at paragraph 33 which outlined that a judge of co-ordinate jurisdiction does not have the power to correct the error of a colleague. Counsel also submitted that if the Court were to consider exercising its discretion to have a new valuation done there must be material on which to do so. In this regard reliance was placed on the dicta of Lord Guest in ***Ratman v Cumarasamy [1964] UKPC 50*** which was cited in ***Dalfel Weir*****.**

[26] Mr Leon also asked that the Court view this application as akin to a Rule 55.1(1)(b) type of situation involving a Court ordered sale. In these circumstances he submitted the Court has the jurisdiction to fix the minimum price for the acquisition of the Respondent's interest.

[27] In respect of the Applicant seeking to exercise an equitable set off Counsel relies on the Courts inherent jurisdiction to grant this on the basis that it can be permitted wherever the claim is so closely connected with the debt that it would be inequitable to take account of one and not the other. He relied on ***Hanak v Green [1958] 2 WLR 755*** and the dicta of Lord Justice Buxton where he stated;

"Equitable set off is not confined to debts or liquidated damages and so long as the cross-claim is sufficiently closely connected with the debt as to make it inequitable to take account of one without taking account of the other, then the set off of the claim operates to reduce or eliminate the debt...."

[28] Counsel highlighted that the matters were closely connected as this was a court ordered sale of both properties with competing interest of the same parties. He submitted that not to allow a set off would be contrary to Rule 1.1(2) of the CPR as the Applicant would be severely prejudiced by her financial position to acquire the Respondent's interest.

RESPONDENT'S SUBMISSION

[29] In his opening submission it was noted by Mr Woolcock that a judgment takes effect from the date it is given. He also highlighted that Rule 42.8 confirms that it does unless the Court specifies that it takes effect on a different day

[30] In respect of the valuation for the Bridgemount Heights property, Mr Woolcock highlighted that this was obtained by the Applicant who made no effort to agree a valuator with the Respondent. He also stated that contrary to the assertions of Mr Leon, Langford and Brown had not been agreed on between the parties during the course of the trial.

[31] He also made the observation that the letter dated the 2nd of March 2017 in which the Applicant 'sought to exercise her option' utilised the forced sale value as the basis for her offer. Counsel noted that in addition to this factor the attempt by the Applicant to exercise her option was out of time and the Respondent quite correctly resisted this effort.

[32] Mr Woolcock submitted that by asking the Court to make the orders sought the Applicant was pre-supposing that she had complied with the orders made on the 15th of November 2016. He submitted that contrary to the submissions made by Mr Leon, the orders made by the Court were unequivocal and compliance with them should have taken place no later than February 14th, 2017.

[33] Mr Woolcock argued that this Court does not have the power or jurisdiction to alter the perfected order of the trial judge and in this regard he referred to and relied on the decision in ***Lyndel Laing v Lucille Rodney [2013] JMCA Civ 27.***

[34] He also noted that R 42.10 commonly known as the slip rule cannot be used to alter the clear terms of the order. He asked the Court to consider the guidance provided in ***Dalfel Weir v Beverly Tree*** where it was observed that where a Court is considering whether to exercise the power to vary an order under the slip rule, it will be guided by what appears to be the intention of the Court which made the original order.

[35] Mr Woolcock submitted that in the instant case, the Court was careful to stipulate the time for the doing of each action. In respect of the order by the Judge allowing for one party to obtain a report if no agreement was arrived at, he submitted that this

was done to ensure there was no delay and to eliminate any question as to when time would begin to run for the exercise of the option.

[36] Counsel also submitted that in any event the Applicant was never in a financial position to purchase the Respondents interest as she was now seeking, 3 years later, to do so through her adult children. In respect of the 2017 valuation, Counsel asked the Court to consider that if a 3-year-old report is used, the Applicant would benefit but the Respondent would be prejudiced as he would be paid far less for his interest than it is actually worth. He also observed that it was a self-serving submission that the valuation obtained in 2017 should still bind the parties especially in light of evidence that the property was attracting higher values.

[37] In respect of Mr Leon's comment on the intention of the Court in refusing the application for a new valuation, Mr Woolcock pointed out that the Learned Judge gave no reasons for her refusal. He also urged this Court in exercising its powers under the grant of liberty to apply to allow for a new valuation in order to work out this situation between the Applicant and Respondent.

[38] In respect of Mr Leon's submission that the Court could use the liberty to apply order to effect the changes being sought, Mr Woolcock referred to and relied on ***Sarah Brown v Alfred Chambers [2011] JMCA App*** as clear authority that a grant of liberty to apply is not applicable to variation of another Court's order.

[39] He also submitted that Counsel's proposal that time should run from the date on which the Formal Order was filed is strained. He argued there was no ambiguity on the face of the Court's order and the interpretation which was meant by the Judge was best obtained by looking at the words themselves.

[40] In respect of ***Dalfel Weir***, Mr Woolcock observed that it can be distinguished from the instant case because of it facts as in that case there had been no time constraints set by the Court of Appeal for when a valuation was to be done.

[41] In respect of the set off Mr Woolcock pointed out that this would only come into play if the Court found that Mrs Reid had exercised her option on time. He also described the approach of operating without an actual valuation of the Hollywood Close property as messy and speculative.

ADDITIONAL SUBMISSIONS

[42] In the course of the hearing reference was made to the affidavit of the Applicant which was filed on the 19th of November 2019 which referred to an offer of 23.2 million dollars being made in respect of the 7 Hollywood Close property and Mr Leon indicated that this updated figure was now being relied on as the current value and half of same would be credited to the Respondent as being the set off amount. As a result of this indication he was invited to provide an updated statement of account in respect of the exchange of properties which he did on the 20th of January 2020. It was this adjusted document which showed that the net sum payable to the Respondent on this value would be $6,797,589.55.

[43] Mr Woolcock was permitted to file a response to this adjusted statement of account which he filed with the Court on the 24th of January 2020. In this document Mr Woolcock again urged the Court to refuse the application. He noted that not only is the Applicant still relying on an offer instead of a Court ordered valuation in respect of the Hollywood Close property but by insisting on using a 3-year-old valuation for the Bridgemount property the Respondent's half interest and eventual pay out decreases. He submitted that not only is this an unfair approach but it was never the intention of the Court that the Respondent would be paid less than the property was worth.

[44] He reiterated that the set off being relied on was only valid in circumstances where there had been compliance with the Court's order within the relevant period. This not having occurred and the order having since been perfected, the Applicant has lost this opportunity as the perfected order cannot now be varied by a judge of equal jurisdiction.

ISSUES

1. Does the Court have the jurisdiction to extend/vary or otherwise amend the Perfected Order of the Court to grant the orders sought in respect of paragraph (f) of the November 15th, 2016 order?

2. Are there ambiguities, errors or omissions in paragraph (f) of the Court Order made on the 15th of November 2016 that would need to be amended or otherwise varied in keeping with the Court's intention?

3. Should the Defendant's application be granted and a set off allowed in respect of both properties?

LAW

[45] In their submissions on the approach which should be adopted by the Court both Attorneys have referred to the decision of ***Dalfel Weir v Beverly Tree*** which is helpful not only in terms of the guidance provided but also the legal principles which were examined and extracted from a number of other decisions.

[46] It was noted that in the course of his reasons for judgment in that decision, Morrison P examined 3 authorities, the first was ***American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others [2014] JMCA App 16*** in which the applicants sought an order from the Court of Appeal, "to clarify or correct" its own previous order. The ground of that application was that there was an inconsistency between the judgments delivered by the members of the court and its orders as drawn.

[47] In respect of the approach taken by that Court the Learned President stated;

> *In considering the matter, the court accepted (at paragraph [2]), applying its own previous decision in Brown v Chambers [2011] JMCA Civ 16, that "this court may, by virtue of its inherent jurisdiction to control its process 'correct a clerical error or an error arising from an accidental slip or omission … in its judgment or order'". The order sought was accordingly granted, on the basis of what the court took to be the clear intention of the court which had made*

> *the previous order. As I sought to explain in my judgment in that case (at paragraph [31]), with which Dukharan and Brooks JJA agreed, "…where that intention is clear … it is that intention that must prevail" (emphasis added)*

[48] The Learned President then went on to examine ***Hatton v Harris [1892] AC 547***, in which the House of Lords corrected a decree entered by the Lord Chancellor on the ground that it contained an accidental slip or omission. At paragraph 15 of his decision he examined the approach of the Court as follows;

> *Lord Herschell said (at pages 557-8) that "… having regard to the nature of this case, I am unable to see any ground upon which it can be said that this order, in the terms in which it was made, could have been intended to be made by the Lord Chancellor … if attention had been called to [the error] I cannot doubt that the correction would at once have been made". Then, after setting out the nature of the error complained of in the Lord Chancellor's decree, Lord Watson observed (at page 560) that "[w]hen an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce". And finally, Lord Macnaghten approached the matter (at page 564) on the basis that, although "[e]ven a Lord Chancellor may possibly make a mistake", he found it "impossible to conceive that the Court, with its eyes open", could have made the order which it was being sought to correct.*

[49] The final authority which was considered by the Learned President was ***Sans Souci Limited v VRL Services Limited [2012] UKPC 6*** a decision of the Privy Council on appeal from the Jamaican Court of Appeal. In respect of that case, Morrison J cited with approval the proper approach to the construction of a judicial order, as outlined by Lord Sumption:

> *"13 … the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.*
>
> *14. It is generally unhelpful to look for an 'ambiguity', if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether*

> *the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity."*

[50] Having completed his examination of these cases, the Learned President then concluded thus;

> *[17] These cases appear to suggest at least the following. This court has the power to correct errors in an order previously made by it arising from accidental slips or omissions, so as to bring the order as drawn into conformity with that which the court meant to pronounce. In considering whether to exercise this power, the court will be guided by what appears to be the intention of the court which made the original order. In order to determine what was the intention of the court which made the original order, the court must have regard to the language of the order, taken in its context and against the background of all the relevant circumstances, including (but not limited to)*
>
> *(i) the issues which the court which made the original order was called upon to resolve; and*
>
> *(ii) the court's reasons for making the original order. While ambiguity will often be the ground upon which the court is asked to amend or clarify its previous order (as in this case), the real issue for the court's consideration is whether there is anything to suggest that the actual language of the original order is open to question (emphasis supplied)*

[51] In ***Sarah Brown*** the Court was faced with a similar application. In that situation, the Applicant had sought a variation to extend the time for her to vacate premises, as a period had already been stipulated as to when this should occur. It was argued by Counsel for the Applicant that the Court could make this order on the basis that it was incidental to the enforcement of the judgement. Having reviewed the submissions from respective Counsel Harris JA stated as follows;

> *[14] The application, by its very nature, is effectively one for the variation of the judgment of the court and would clearly be inappropriate in the circumstances of this case. It cannot be denied that rule 1.7 (8) of the COAR provides the court with the ammunition to revoke or vary an order. However, this does mean that the court should do so simply at the behest of a party. The court will exercise its power to revisit a prior Judgment or order, upon a party being granted "liberty to apply". This facilitates the working out of such Judgment or order. The grant of "liberty to apply" is not applicable to the variation of a judgment or order. See Cristel v Cristel [1951] 2 KB 725. However, there are instances in which the court will vary. It will do so where there has been some material change of circumstances since the judgment, or, where the court, in making an earlier order, had been misled as to the correct factual position before them - See Collier v Williams [2006] 1 WLR*

> *1945. The matter under consideration is not a case in which there has been any change in the applicant's circumstances which would warrant her succeeding in invoking the court's jurisdiction. Nor is there any evidence showing that the court was misled in pronouncing its judgment. The facts upon which the applicant places reliance do not lend support for the order which she seeks. (emphasis supplied)*

[52] In ***Lyndel Laing v Lucille Rodney etal [2013] JMCA Civ 27*** the appellants had sought to have the Judge correct a judgment signed by him and stay execution of the order. The basis of this application was found in the fact that while the minute of order stated that Judgment had been entered in a specific sum against the appellants, the Formal Order stated a sum which was more than two times greater. This application was placed before the Judge after the order had been perfected and same was refused. An appeal was then made to the Court of Appeal.

[53] In addressing the approach of the Learned Judge it was stated as follows by Harris JA;

> *[13] However, a judge may, at any time prior to the perfection of an order reconsider and vary his decision - see In re Suffield and Watts Ex parte Brown [1888] 20 QBD 693. It is only permissible for the judge to correct a mistake or an error in a perfected judgment or an order in circumstances where rule 42.10 of the CPR applies.*
>
> *The rule reads:*
>
> *"42.10 (1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.*
>
> *(2) A party may apply for a correction without notice."*
>
> *[14] This rule only comes into operation where, in a judgment or an order a clerical mistake, or an error emanating from an accidental slip or omission, is manifested. The purport and spirit of the rule is to bring a judgment or an order in which an error, omission or mistake arises in harmony with that which a judge intended to pronounce. Therefore, a judge is not competent to alter a judgment or an order once it has been drawn up and perfected, if it accurately expresses the intention of the court or the judge. To qualify under the rule, an applicant must show that the error, omission or mistake is one in expressing the manifest intention or the judge. (emphasis added)*

[54] Having stated these principles, the learned judge continued;

> *[15] In R v Cripps Ex parte Muldoon and Others, an order for costs was made by the commissioner. Subsequent to the order being formally drawn up, he revisited it and issued further directions in respect of the costs. On appeal, the Divisional Court quashed the commissioner's further direction for the reason that he was functus officio at the time he issued the further directions.*
>
> *[16] Sir John Donaldson MR, speaking to the ambit of the slip rule, at page 695, said:*
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> "It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely to allow the court to amend a formal order which by accident or error does not reflect the actual decision of the judge: Preston Banking Co. v. William Allsup & Sons [1895] 1 Ch. 141. But it also authorises the court to make an order which it failed to make as a result of the accidental omission of counsel to ask for it: In re Earl of Inchcape [1942] Ch. 394, approved by the Judicial Committee of the Privy Council in Tak Ming Co. v. Yee Sang Metal Supplies Co. [1973] 1 W.L.R. 300, 304. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended: Adam & Harvey Ltd. v International Maritime Supplies Co. Ltd. [1967] 1 W.L.R. 445. However, it cannot be over-emphasised that the slip rule power can never entitle the trial judge or a court to reconsider a final and regular decision once it has been perfected, even if it has been obtained by fraud: per Lord Halsbury in Preston Banking Co. v. William Allsup & Sons [1895] 1 Ch. 141,143." (emphasis added)

[55] In addition to the cases which have been examined above, both Attorneys have referred to Part 42 of the CPR and the relevant sections for the purpose of this application have been examined and outlined below;

> *42.8 A judgment or order takes effect from the day it is given or made*
>
> *unless the court specifies that it is to take effect on a different date.*
>
> *42.9 A party must comply with a judgment or order immediately, unless-*
>
> *(a) the judgment or order specifies some other date for compliance;*
>
> *(b) the court varies the time for compliance including specifying*
>
> *payment by instalments; or*
>
> *(c) the claimant, on requesting judgment in default under Part 12 or judgment on an admission under Part 14, specifies a different time for compliance.*

42.10 (1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.

(2) A party may apply for a correction without notice

[56] In respect of the additional authorities which have been cited, they have been carefully reviewed and the legal principles stated therein have been noted.

DISCUSSION/ANALYSIS

Does the Court have the jurisdiction to extend, vary or otherwise amend the Perfected Order of the Court to grant the orders sought in respect of paragraph (f) of the orders made on November 15th, 2016?

[57] It is clear from the language used Rule 42.10 that a Court has limited jurisdiction to make changes or corrections where a judgment or order has been perfected. The ambit of the Court's power to make such changes has been examined and explained in a number of decisions some of which have been reviewed above.

[58] What is evident from these decisions is while the Court possesses the power to make changes in certain circumstances, it must ensure that any rectification being done is in a situation where the order whether by accident or error does not reflect the actual decision of the Court.

[59] It was made clear in ***Lyndon Laing*** that the rule which permits this rectification only comes into operation where a clerical mistake is made in a judgment, or an error arises from an accidental slip or omission. Additionally, it is settled law that this Court would not be able to alter an order once it has been perfected, if it accurately expresses the intention of the court or the judge. For this applicant to qualify to have an amendment or variation made under this rule, it is clear that she must show that the error, omission or mistake complained of failed to express the manifest intention of the judge.

[60] In respect of Mr Leon's submission that the variation or amendment sought could also be done under the grant of liberty to apply, in view of the decision in ***Sarah Brown v Alfred Chambers*** this Court can only exercise its power under this grant if the sole purpose is to facilitate the working out of the Judge's Order.

[61] In the alternative the Court would have to be presented with evidence which shows that there has been some material change of circumstances since the judgment was delivered, or, that the previous Court had been misled as to the correct factual position before it.

[62] In light of the foregoing, it is clear that in order to determine if it possesses the jurisdiction to make the orders sought, the Court must conduct a careful examination of the evidence presented to determine if there is a basis on which these changes can be effected.

Are there ambiguities, errors or omissions in paragraph (f) of the Court Order made on the 15th of November 2016 that would need to be amended or otherwise varied in keeping with the Court's intention?

[63] The submissions which have been advanced in this matter by Counsel for the respective Parties are poles apart. Mr Woolcock has expressed the view that the words used by the Judge in making this order are clear and unequivocal. He submitted that they would have had the effect of putting both parties on notice that time was of the essence. He argued that they would have appreciated that the valuations needed to be obtained and their respective options exercised within 90 days.

[64] Mr Leon on the other hand has stated that the formulation of words used in reference to the option as well as to the valuation makes it clear that the Court was making a distinction as to when time would begin to run. He contends that in respect of the exercise of the option the clear intention of the Court is that this would be from the date of the filing of the formal order and not the date on which Judgment was delivered.

[65] The challenge that this latter interpretation faces is this, if the formal order had been filed on the 15th of November 2016 or shortly thereafter the 90-day period would have already run by the time his client sought to exercise her option in the letter dated the 2nd March 2017. As such the strength of this argument clearly depends on the fact that the formal order was not filed until over a year later in June 2018.

[66] The fallacy of this interpretation is also revealed in the fact that on the 23rd of February 2017 the Applicant filed an application for an extension of time within which to exercise her option. By filing this application, albeit ten days after the time had expired, the Applicant clearly recognized that the time for exercising her option had already run and she was now out of time to do so which led her to seek the Court's intervention in order to gain additional time.

[67] It is clear from the evidence that the Applicant appreciated the need to act expeditiously as she elected to instruct a valuator and obtained a value for the Bridgemount Heights property within 90 days of the order. As such she would have been aware of same from well before the 90-day period had run and been in an informed position to exercise her option before the time had expired. In those circumstances, it appears that her application on the basis of an ambiguity in the language used may well have been influenced by the need to obtain additional time as opposed to there being some uncertainty about the Court's true intention.

[68] While there is some merit to Mr. Leon's submission that the valuation report had likely been ordered to enable the parties to act from an informed position, it cannot be assumed that the Court had in mind that the parties would then have needed time to apply for mortgages. By stipulating the 90-day period for the obtaining of the report and the exercising of their options, the Learned Judge was making it clear that time was of the essence and everything needed to be done as a matter of urgency. This was also evident in her order that if the parties could not agree on the valuator either of them could proceed to instruct someone to carry out this exercise, as this would avoid the possibility of delay.

[69] The mischief that adopting the interpretation proposed by the Applicant could create is, where a Formal Order had not been filed or perfected for an extensive period, the Parties could find themselves locked in a state of limbo where they were not able to exercise options or even have the property listed for sale in order to receive the benefit of the Court's award. If this Court were to adopt that approach it would fall into the very error which was warned against by Lord Sumpton in ***Sans Souci Limited*** when he referred to looking for 'ambiguities.'

[70] I believe that the words used by the Learned Judge were unequivocal and clearly communicated the intention of the Court that the parties should act expeditiously. Additionally, Rule 42.8 makes it clear that a judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date. Having examined the wording of the order, I am unable to agree that the formulation used by the Judge had the effect of changing the date from which time would run in respect of the options and I adopt the description of Mr Woolery that such a conclusion would indeed be 'strained'.

[71] I have also considered if the grant of liberty to apply could assist in these circumstances, there being no clerical error or other factors to give effect to the slip rule. In respect of this limb of Counsel's submission, I have already noted that if the purpose of this application is to have the order varied to include what in effect would be an extension of time this goes beyond what would be permissible for this Court. Additionally, there has been no material change of circumstances identified neither has there been any ground disclosed on which the Court had been misled in order to justify taking this approach.

<u>Should the Defendant's application be granted and a set off allowed in respect of both properties?</u>

[72] It was submitted by Mr Leon that even if the Court disagreed with his submissions as to when time would actually begin to run, it could still find that the Applicant had exercised her option within time or shortly thereafter and the orders sought could still

be granted. Mr Woolcock on the other hand has said that the Applicant was out of time and as such the option had lapsed and the Court should refuse her application.

[73] It is settled law that where an option to purchase is granted the party seeking to rely on same must comply strictly with the conditions stipulated for its exercise, failing which the option will lapse. This was the view of the Court in ***Annie Lopez v Dawkins Brown etal [2015] JMCA Civ 6*** in which they adopted and relied on the dicta of Patterson J to like effect in ***Janet Robertson v Surbiton Property Developments Ltd (1982) 19 JLR 90*** which was quoted as follows;

> *At common law, stipulations as to time in a contract were, as a general rule, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent. Equity, on the other hand, regarded stipulations as to time, in the absence of express or implied evidence to the contrary, not to be of the essence of the contract, save in mercantile contracts. The doctrine of Equity that time is not of the essence, is especially true in the case of contracts for the sale of land but it is not one of universal application. It is well settled that 'an option for the renewal of a lease or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse.' (See Halsbury's Laws of England Vol 8, 3 rd edition, 165.) There is no difference as regards stipulations for time between the rule of the common law and the rule of equity. Where time is limited the option must be exercised within the time in which it is expressed to be given, both at law and in equity. Where six months' notice in writing was necessary, a shorter notice was held to be insufficient (Riddel v Durnford [1893] W.N. 30)."*

[74] With the failure of the Applicant to exercise her option to purchase the Bridgemount Heights property within 90 days of the 15th of November 2016 the option had lapsed and it could only be revived if the Respondent gave his consent to same which has not been done.

[75] In addition to the failure to act within the prescribed period, there were questions surrounding whether the Applicant had acted in keeping with the intention of the Court in the exercise of her option. In making the order for a valuation to be done, it would have been the Court's clear intention that the parties should be aware of the market value of their property in order to receive the full benefit of same whether on an open market sale or the sale of their respective interest to each other.

[76] In her 'option to exercise' dated the 2nd of March 2017, the Applicant sought to offer to the Respondent the forced sale value, an approach which would have yielded the benefit to her of being the sole owner of a property which was valued far more than what she was prepared to pay the Respondent for his interest. The Respondent on the other hand would have been paid several million dollars less than his interest was actually worth. Contrary to the assertion in that letter, this was not a Part 55.1(1)(b) situation and the Learned Judge was not attempting to fix a minimum price.

[77] In addition to the conduct identified above, it was also noted that the Applicant sought to rely on a set off of her interest using an assumed value of the Hollywood Close Property against the assessed value of the Bridgemount Heights property. Again, this would have been contrary to the Court's clear directives that reports should be obtained in respect of both properties as this would be necessary in order to maintain transparency and guide the parties in their dealings

[78] In light of the Applicant's conduct, the refusal of the Respondent to accept her offer was not unreasonable as not only had she failed to make her offer in time but she had not acted in good faith in seeking to purchase the Respondent's interest. The situation was further compounded by the concern as to whether she would have been able to complete this purchase given that she was seeking to obtain a mortgage then and currently relies on the assistance of her sons to do so now. In any event the option having been exercised outside the specified timeline the Applicant could not now seek to rely on same or seek the intervention of the Court to enforce between the Parties what no longer existed.

DISPOSITION

[79] The Court having come to the conclusions stated above the Application for orders sought by the Applicant is refused. The upshot of this is with the option no longer being in existence between the parties, the option for sale on the open market must now take precedent. In respect of the 7 Hollywood Close property a valuation report

had never been obtained for same by either party. It would follow that this portion of the Judge's order must now be given effect.

[80] In respect of the Bridgemount Heights property, a valuation was done in January 2017 which set the value at $30 million dollars. It has been argued by Mr. Leon that no appeal having been made from the ruling of J Pusey J the parties should be bound by same as the determinative value.

[81] While it is correct that this Court cannot overrule an order of a Judge of concurrent jurisdiction, in light of the fact that neither party would benefit from listing the property for sale at a value that is over 3 years old, it is clear that an updated valuation report is required. This is especially important given the evidence that property values in the Bridgemount Heights neighbourhood have increased since this order was made.

[82] In this situation the Court can utilise the grant of liberty to apply to work out the Judgment in a manner which benefits both sides. This approach is also in keeping with the overriding objectives. As such, I direct that an updated valuation report should be obtained in respect of this property in order to clearly identify its current market value.

[83] Accordingly, the orders of the Court are as follows;

1. Orders sought in Applicant/Defendant's notice of application filed on the 22nd of February 2019 are denied.

2. The Parties are to agree on a valuator to provide a report in respect of the 7 Hollywood Close property and an updated valuation report in respect of the Bridgemount Height Property by or before the 5th of June 2020 and the cost of each report is to be borne by the parties in equal shares. In the absence of agreement, the Registrar of the Supreme Court is to appoint a valuator and the cost for these reports is to be borne by the Parties in equal shares. The Parties are to grant access to the respective properties for the purpose of the valuation.

3. The Family Home, 7 Hollywood Close is to be sold and the net proceeds divided equally between the Applicant and Respondent.

4. The Bridgemount Heights property is to be sold and the net proceeds of sale divided equally between the parties save and except that the Respondent is entitled to recover the outstanding rental income of $2,337,599.55 as previously ordered from the Applicant's share of the net proceeds of sale.

5. The Respondent's Attorney-at-Law shall have carriage of sale.

6. The Registrar of the Supreme Court is empowered to execute any document or documents to effect the sale and/or transfer in the event that either party refuse or is unable to sign within 14 days of being requested to do so.

7. Costs of this Application to the Respondent to be taxed if not agreed.

8. Formal Order to be prepared, filed and served by Respondent's Attorney.

9. Leave to Appeal is granted.