JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 37/2011

APPLICATION NO 84/2015

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**DALFEL WEIR**	**APPLICANT**
AND	**BEVERLY TREE**	**RESPONDENT**

Dr Leighton Jackson for the applicant

Gordon Steer and Mrs Judith Cooper-Batchelor instructed by Chambers Bunny and Steer for the respondent

25 November, 18 December 2015 and 4 March 2016

MORRISON P (AG)

[1] This is an application to vary an order made by this court on 17 March 2014 ('the original order'), at the conclusion of an appeal in which the present parties were appellant and respondent, respectively. On 18 December 2015, this court (by a majority) made an order amending the original order. I have had the privilege of reading, in draft, the reasons for making the amended order prepared by Phillips JA, who was herself the author of the leading judgment in the appeal, and I agree entirely with them. However, in doing so, I find myself in the unhappy position of disagreeing with Brooks JA, who was also a member of the court which made the original order,

and who would not have granted the order to amend it. In all the circumstances, particularly since I am the only newcomer to this matter, I think it might be best for me to indicate briefly my reasons for preferring the conclusion arrived at by Phillips JA.

[2] The applicant and the respondent were husband and wife and this is a case concerning the division of their matrimonial property. In proceedings in the court below, the applicant sought an order that he be given "a right of first refusal to buy the [respondent's] interest, if any, in the family home …". The family home was described as follows:

> "ALL THAT parcel of land part of NORWICH in the parish of PORTLAND being the being the Lot numbered NINE on the approved Subdivision Plan part of [sic] prepared by FG Nembhard, Commissioned Land Surveyor and being part of the lands registered at Volume 899 Folio 23 of the Register Book of Titles"

[3] By his order dated 24 March 2010, the learned trial judge awarded the applicant a one-half share of the value of the dwelling house on the land described above. Although there was no evidence that the dwelling house had been separately valued, the learned trial judge ascribed to it a value of $2,600,000.00 and accordingly entered judgment for the applicant in the amount of $1,300,000.00.

[4] In his appeal to this court, the applicant sought, among other things, orders that he be declared to be beneficially entitled to a one-half share of the family home and that he be given the first option to purchase it. His appeal was allowed and, by the terms of the original order, he was declared to be entitled to a one-half share of the

family home (described as stated at paragraph [2] above). The original order then went on to state the following:

> "(c) An updated valuation shall be done by DC Tavares & Finson Realty Ltd and utilised by the parties to arrive at the value of the one-half share of the family home, namely the dwelling house together with the land comprising lot 9 to which the appellant is entitled.
>
> (d) Lot 9 shall be sold by private treaty or public auction and the proceeds divided equally or the appellant shall have the first option to purchase same and such option must be exercised within three months of the order for sale, failing which it shall lapse…"

[5] The inclusion of sub-paragraph (c) was necessitated by the fact that, by the time the appeal came to be heard, the valuation report originally been prepared by DC Tavares & Finson Realty Ltd (DCTF) on 9 November 2009 for use in the proceedings in the court below was over four years old. Accordingly, in her judgment in the appeal (with which Panton P and Brooks JA agreed), Phillips JA considered (at para. [69]) that the valuation should be "… updated to reflect the current market value of lot 9 including the dwelling house situated thereon".

[6] The problem which arose in the carrying out of the original order developed in the following way. At the hearing of the appeal, the applicant (then the appellant) and the respondent were represented by Dr Leighton Jackson and Mrs Judith Cooper-Batchelor, respectively. Both counsel are agreed that, upon leaving court after the delivery of the court's judgment embodying the original order on 17 March 2014, they spoke about the matter. Although there is a disagreement between them as to precisely

what was said in that conversation, it seems reasonable to suppose that, as Dr Jackson deponed (at paragraph 10 of his affidavit sworn to and filed on 5 May 2015), they spoke about the future of the matter. At all events, by letter dated 24 March 2014, Mrs Cooper-Batchelor wrote to DCTF, referring to the November 2009 valuation and requesting an updated valuation.

[7] In a message sent by electronic mail (email) on 4 April 2014, Mrs Cooper-Batchelor advised Dr Jackson that she had contacted DCTF and that "[t]he valuator will be calling you shortly to arrange an inspection of the property …". In an email response dated the same day, Dr Jackson advised Mrs Cooper-Batchelor that he had spoken to the applicant and alerted him that the valuator would be coming and further that he had given the valuator both the applicant's and his son's cellular telephone numbers. Then, in a later email message dated 8 May 2014, Mrs Cooper-Batchelor further advised Dr Jackson that the valuation had been done, that she had received an invoice from DCTF for $20,022.97, and that "[s]ince our client paid for the last valuation we believe that it is reasonable for your client to pay for this one". On 28 May 2014, Dr Jackson advised Mrs Cooper-Batchelor that the applicant had now put him in funds and that he would "bring it tomorrow". And, on the following day, 29 May 2014, Dr Jackson personally delivered a manager's cheque for $20,022.97 (made out to DCTF) to Mrs Cooper-Batchelor. As would subsequently emerge, DCTF did not receive this cheque until 13 June 2014**.**

[8] By email message dated 16 June 2014, Mrs Cooper-Batchelor advised Dr Jackson that she had now received the DCTF report and that it was available for collection at

her office. The following day, 17 June 2014 (exactly three months after the date of the original order), Dr Jackson collected the report from Mrs Cooper-Batchelor's office and sent it on to the applicant's son. On 19 June 2014, having now received instructions, Dr Jackson wrote to Mrs Cooper-Batchelor, confirming the applicant's willingness to go ahead with the purchase, and enquiring "how much time he [the applicant] has to get the money together". On 30 June 2014, Mrs Cooper-Batchelor replied as follows:

> "My reading of the order is that your client had 3 months to indicate an intention to purchase. He would have had up to June 16th, 2014. The option has lapsed. The property is now for sale on the open market and my client has indicated that she would like to purchase his share of the property. Please prepare an agreement for sale."

[9] Dr Jackson responded immediately by an email message dated that same day, 30 June 2014, in which he protested, "Come on, how could he have exercised the option without knowing the price via the valuation?" Dr Jackson then went on to state that "[w]e will have to go back to the court for instructions or variation".

[10] It is against this background that the applicant filed this application on 5 May 2015. The principal order sought by him was as follows:

> "That the ambiguity which has produced an inconsistency with this Court's intention in the order of this Court made on 17 March 2014 be clarified to explain that the option to purchase the respondent's one-half share of the family home upon the order of sale made in the same order is exercisable within three months of the date of the receipt of the updated valuation report failing which it shall lapse; …"

[11] In support of this application, the applicant relied on the following grounds:

> "1. The order of this Honourable Court dated 17 March 2014 is ambiguous.
>
> 2. This Honourable Court has the inherent jurisdiction to clarify, vary or re-open Orders made by it.
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> 3. That the order of this Honourable Court as written defeats the purpose and/or objective of the Order made by this Honourable Court on March 17, 2014;
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> 4. The effect of the Orders of this Honourable Court without clarification, amplification or variation will create injustice, critically undermine the integrity of the earlier litigation process, prejudice and subject the parties, jointly and/or severally, to expense and continuing litigation.
>
> 5. That the Appellant has exercised the first option and is ready, willing and able to purchase the Respondent's half interest and effect the Transfer of her interest as is the spirit and intendment of the order of this Honourable Court."

[12] I should say at once that I approach this application on the basis that, in my view, no particular blame attaches to the applicant for the time which it took for the updated valuation to be obtained. There was, it is true, an almost three week delay on his part in putting Dr Jackson in funds to pay for DCTF's fee for the valuation. But there were also other delays, including the inexplicable two weeks which elapsed between the delivery of the manager's cheque to pay the fee to Mrs Cooper-Batchelor's offices and its receipt by DCTF. On the face of it anyway, it certainly appears that, right up until 30 June 2014, when Dr Jackson was informed by Mrs Cooper-Batchelor that, in her view, the option had lapsed, the parties were moving cooperatively towards the satisfactory conclusion of the matter.

[13] Both Dr Jackson for the applicant and Mr Gordon Steer for the respondent made detailed and very helpful submissions on this application. The submissions and the various authorities deployed in support of them have been admirably summarised and analysed by Phillips JA and it is therefore unnecessary for me to rehearse them here.

[14] But I will make brief mention of three of the authorities to which we were referred. Firstly, there is **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16. The applicants in that case sought an order from this court, "to clarify or correct" its own previous order. The ground of the application was that there was an inconsistency between the judgments delivered by the members of the court and its orders as drawn. 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".

[15] Secondly, there is **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. It is unnecessary for present purposes to recite the facts of the case, but I must point out the way in which the matter was approached by some of

their lordships. 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.

[16] And thirdly, there is the decision of the Privy Council on appeal from this court in **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6. In that case, considering the proper approach to the construction of a judicial order, Lord Sumption said this (at paras [13]-[14]):

> "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."

[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[1].

[18] In this case, Phillips JA has concluded (at paragraph [67]) that, in making the original order, it was the intention of the court that the updated valuation should be first obtained "before the property could be sold by private treaty or by public auction, and before the first option granted to the applicant could be exercised". I have found this conclusion to be irresistible. Given the history of the matter, there can have been no other reason for the reference in sub-paragraph (c) of the original order to the obtaining of the updated valuation to be "utilized by the parties to arrive at the value of the one-half share of the family home … to which the appellant is entitled". This is a clear indication, in my view, that the original order contemplated that the result of the updated valuation should inform either (i) the price at which the applicant would be entitled to exercise the first option given to him by sub-paragraph (d); or (ii) in default of the applicant exercising the first option within the time limited for the purpose, the sale or reserve price to be set on a sale of the family home by private treaty or public auction.

[19] It seems to me to follow from this that, as Phillips JA has also concluded, "[t]he date in respect of which the option ought to have been exercised was clearly meant to

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[1] For a good example of a case in which this was held to have happened, see **Adam & Harvey Ltd v International Maritime Supplies Co Ltd** [1987] 1 All ER 533, referred to and discussed in **American Jewellery Company Ltd and others v Commercial Corporation Jamaica Ltd and others** [2014] JMCA App 16, para. [22].

be subsequent to the receipt of the valuation". For, to borrow and adapt Dr Jackson's rhetorical enquiry of Mrs Cooper-Batchelor in his email message of 30 June 2014, how could the applicant sensibly have been expected to exercise the option without knowing the value attributed to it by the updated valuation?

[20] I therefore consider that there is an ambiguity in the original order as entered. Read together, the clear implication of sub-paragraphs (c) and (d) is that the updated valuation called for by the former was to be a precondition to the exercise of the applicant's first option to purchase the respondent's one-half share of the family home or its sale by private treaty or public auction as provided for by the latter. But yet, on the face of it, contrarily, sub-paragraph (d) standing alone states that the option must be exercised within three months of the date of the original order, that is, 17 March 2014, apparently irrespective of when the valuation is obtained.

[21] In this regard, I think that it is also relevant to bear in mind that, although the original order required that the updated valuation should be done by DCTF, neither party, nor indeed the court, had any control over the time frame within which this would be done. In these circumstances, I find it impossible to suppose that the court making the original order could have intended that the applicant should lose his first option because, as has now happened, the updated valuation did not become available until the very day when, on a literal reading of sub-paragraph (d), his right to exercise it expired. I therefore cannot divorce sub-paragraph (d) from its context and, in so doing, attribute to the order as a whole a meaning quite the opposite of what plainly appears to have been intended.

[22] These are my reasons for concluding, in agreement with Phillips JA, that this application should be granted and sub-paragraph (d) of the original order amended to read as follows:

> "Lot 9 shall be sold by private treaty or public auction and the proceeds divided equally and the appellant shall have first option to purchase same and such option must be exercised within three months of the date of the receipt of the updated valuation report failing which it shall lapse."

PHILLIPS JA

[23] This is an application to secure directions, reopen, amplify or to vary the orders made by this court on 17 March 2014 in the substantive appeal no 37/2011, by seeking the following orders:-

> "1. That the ambiguity which has produced an inconsistency with this Court's intention in the order of this Court made on 17 March 2014 be clarified to explain that the option to purchase the respondent's one-half share of the family home upon the order of sale made in the same order is exercisable within three months of the date of the receipt of the updated valuation report failing which it shall lapse;
>
> i. That the Registrar of the Supreme Court is empowered to sign any and all documents necessary to effect a registrable Transfer if either of the parties herein is unable or unwilling to do so.
>
> ii. No order as to costs.
>
> 2. Such further or other relief as in the premise appears just to this Honourable Court."

The application was made on the following grounds:

> "1. The order of this Honourable Court dated 17 March 2014 is ambiguous.
>
> 2. This Honourable Court has the inherent jurisdiction to clarify, vary or re-open Orders made by it.
>
> 3. That the order of this Honourable Court as written defeats the purpose and/or objective of the Order made by this Honourable Court on March 17, 2014;
>
> 4. The effect of the Orders of this Honourable Court without clarification, amplification or variation will create injustice, critically undermine the integrity of the earlier litigation process, prejudice and subject the parties, jointly and/or severally, to expense and continuing litigation.
>
> 5. That the Appellant has exercised the first option and is ready, willing and able to purchase the Respondent's half interest and effect the Transfer of her interest as is the spirit and intendment of the order of this Honourable Court."

[24] On 18 December 2015, by a majority, we made the following order based on reasons to be given in due course:

> "Paragraph (d) of the order of the court made on 17 March 2014 is hereby amended to read as follows:
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> > Lot 9 shall be sold by private treaty or public auction and the proceeds divided equally and the appellant shall have first option to purchase same and such option must be exercised within three months of the date of the receipt of the updated valuation report failing which it shall lapse."

These are the reasons for that decision. It is necessary to set out some background facts in order to properly grasp the complaint made by the applicant on this application.

Background facts

[25] The matter in the court below concerned the applicant, a Jamaican national and farmer, who met an established businesswoman who was ordinarily resident in California, United States of America, but who was drawn to visit the island regularly where she met and later married the applicant. The parties agreed on very little in the evidence below. Suffice it to say, the main issue in the court below and on appeal was the extent of the applicant's interest in the lands purchased by the respondent shortly before the marriage and registered in her name only, comprising about 16.5 acres in property located at Norwich in the parish of Portland, being part of lands registered at Volume 899 Folio 23 of the Register Book of Titles. Lot 9 comprising 6 acres was the real disputed area, as that was where the applicant began living within a year of the marriage and where he farmed, and on which he set up a shack. He planted crops on the land and later constructed a dwelling house thereon, which became his home and the parties' home when the respondent was in Jamaica. Throughout their married life the respondent would visit Jamaica about three times for the year for a period of three to four weeks. The dwelling house structure was later altered as the applicant changed all the board structure into concrete. The property was later subdivided and it was his case that he continued to live and farm on the said Lot 9.

[26] In his fixed date claim form, the applicant had originally claimed that he was beneficially entitled to Lot 9 by virtue of a contractual licence given to him by the respondent, she having promised him that she intended to give him the lot, and had encouraged him to expend significant sums to build a dwelling house on the land. He

claimed however in the alternative, for a declaration that both he and the respondent were beneficially entitled pursuant to section 6 of the Property (Rights of Spouses) Act (PROSA) to equal shares of Lot 9 and the dwelling house thereon, being the family home. He also asked that he be granted first option to purchase the respondent's interest in the family home, if any; that there be a valuation at the time of sale by an agreed valuator; and that the costs of transferring the title, and the costs of the valuation, be borne by the parties equally.

[27] It was the respondent's contention that although she had discussed the purchase of the land with the applicant before doing so, he had not participated in identifying the land, nor the purchase of the same. She denied that she had ever agreed to put the property into their joint names although she had given the applicant possession of the land shortly after their marriage. It was her position that although the applicant had farmed the land, he had done so by virtue of her funds that were given to him to do so, and she had not benefitted from his farming of the same. With regard to the dwelling house on Lot 9, it was her contention that she had never lived in the dwelling house as a concrete structure and she had a different recollection with regard to its various stages of development. In any event, she was shocked at the changed concrete construction, as it had been effected without her permission. She denied his proprietary interest in Lot 9 and had not filed any documentation making any specific claims on her own behalf.

[28] The learned trial judge found that the applicant was not entitled to any beneficial interest in the land and that the only property which could have been said to have been

acquired by the couple during the marriage was the house built on the land and as a consequence, the only interest that could have accrued to the applicant was one-half of the value of the dwelling house on Lot 9. Accordingly, on 25 March 2010, he gave judgment for the applicant in the sum of $1,300,000.00, being half the value of the dwelling house on Lot 9 which he said was in keeping with the valuation report of DC Tavares and Finson Realty Ltd (DCTF), which valuation had been made pursuant to an order made by Beckford J. However as this court recognised in its judgment (paragraph [68]) the valuation report did not contain any specific value of the dwelling house on lot 9.

[29] Based on those competing contentions of the parties and on the ruling of the trial judge, the issues on appeal were as follows:

(i) whether the board house and the concrete structure could be considered the dwelling house within the meaning of section 2 of PROSA;

(ii) whether the dwelling house and the lands appurtenant to the house, were used mainly for the purposes of the household and could therefore be considered as part of the family home within the meaning of section 2 of PROSA, and divided equally accordingly; or

(iii) could the house and the said adjoining lands be 'other property' to be considered under section 14 of PROSA; and

(iv) was the order of Beckford J directing DCTF to effect the valuation of Lot 9 made in compliance with the provisions of section 12(3) of PROSA?

[30] After hearing detailed and comprehensive submissions from counsel for the applicant and the respondent, the court took time to consider the issues which arose in the appeal and, as mentioned above, on 17 March 2014, gave its decision as follows:

> "(a) The appeal is allowed and the order of D O McIntosh J made on 25 March 2010 is set aside;
>
> (b) The appellant is entitled to one-half share of the family home, comprising the dwelling house together with land on the lot numbered 9 on the approved subdivision plan part of Norwich in the parish of Portland, prepared by F G Nembhard, commissioned land surveyor, and being part of the lands registered at Volume 899 Folio 23 of the Register Book of Titles.
>
> (c) An updated valuation shall be done by DC Tavares & Finson Realty Ltd and utilised by the parties to arrive at the value of the one-half share of the family home, namely the dwelling house together with the land comprising lot 9 to which the appellant is entitled.
>
> (d) Lot 9 shall be sold by private treaty or public auction and the proceeds divided equally or the appellant shall have the first option to purchase same and such option must be exercised within three months of the order for sale, failing which it shall lapse.
>
> (e) Costs of the appeal and the proceedings below shall be the appellant's to be taxed if not agreed."

The application for clarification

[31] The real complaint by the applicant (and his serious issue on this application) was whether there was a mistake or an omission by the court reflected in the judgment and orders set out herein in paragraph [9] with regard to the time within which the option to purchase the respondent's one-half share was to be exercised by the applicant. The applicant relied on his own affidavit sworn to on 1 May 2015 and filed on 5 May 2015, and also on the affidavit of Leighton M J Jackson sworn to and filed on 5 May 2015. In response, the respondent relied on the affidavit of her attorney-at-law Mrs Judith Cooper-Batchelor sworn to and filed on 19 June 2015, and on her second affidavit filed on 27 January in Claim No 2014 HCV 04569. The facts and arguments in relation to the complaint unfolded in the following manner.

[32] Dr Jackson deponed that subsequent to receiving the judgment from this court, he spoke to Mrs Cooper-Batchelor in the precincts of the court, informing her that the applicant would be exercising the option to purchase the property at Norwich, Portland. Mrs Cooper-Batchelor wrote to DCTF requesting the updated valuation and the parties arranged the site visit to the property to facilitate the valuation. On 8 May 2014, he was informed by the respondent's counsel that the valuation had been effected and that an invoice had been received from DCTF in the amount of $20,022.97 to be paid by the applicant since the respondent had paid for the first valuation. The applicant paid this amount on 29 May 2014 using a manager's cheque from the National Commercial Bank Jamaica Limited that was enclosed in a letter which, he said, referred to their "agreement in respect of the judgment".

[33] Counsel deposed further that on 16 June 2014, he received an e-mail from the respondent's attorney indicating that she was in receipt of the valuation and that it was available for collection from her offices. Pursuant to that information he proceeded on the following day, 17 June 2014, to their offices and collected the valuation as directed. He then sent it to the applicant's son who was assisting with the funding for the purchase, a portion of which was to be obtained from the National Housing Trust (NHT).

[34] On 19 June 2014, Mr Jackson said that he had confirmed to the respondent's attorney by email the applicant's intention to go ahead with the purchase of the respondent's half share of the property and requested information with regard to the time limit for completion of the transaction which, he stated, had to be included in the agreement for sale. He placed on record his concern as to the ambiguity of the judgment in respect of the triggering date for counting the three months which were stated in the judgment within which the option ought to be exercised.

[35] It was only subsequent to that request, on 30 June 2014, that, to his chagrin, the respondent's counsel informed him that on her reading of the order of this court, the applicant had had three months from the date of the judgment to indicate his intention to exercise the option, and so he would have had up until 16 June 2014. Having not done so, counsel informed that the option had lapsed, and the property was then for sale on the open market, and that her client had indicated that she would like to purchase the applicant's half share in the property.

[36] Counsel said that he pointed out to the respondent's attorney, his disagreement with her view, that an agreement for sale was necessary in order to exercise the option, even before receipt of the valuation, as in his view it would be absurd for one to exercise the option without knowing the price of the respondent's half share which would have been available by way of the valuation.

[37] Through investigation and communication, the applicant discovered that although he had submitted the cheque to the respondent's attorneys for payment of the valuation on 29 May 2014, which had been sent to DCTF by way of letter on 2 June 2014, and the report being made available shortly thereafter, the valuation was not collected by the attorneys for the respondent until 16 June 2014, the expiration date of three months from the date of the order of the Court of Appeal.

[38] Dr Jackson further deponed that he had instructed Johnson and Downer, attorneys-at-law, to represent the applicant to complete the transaction. Johnson and Downer had been given, he stated, all funds necessary to purchase the respondent's half share to be held in escrow for the said purchase pursuant to the order of the Court of Appeal. They have also prepared the instrument of transfer under the Registration of Titles Act. All outstanding property taxes owed on the family home have also been paid in anticipation of completing the transfer. The agreement for sale was duly prepared, signed by the applicant, and on 15 July 2014 sent to the attorneys for the respondent, but he said that it had been returned with a request that the attorneys prepare instead an agreement which transferred the applicant's half share to the respondent.

[39] It was therefore Dr Jackson's contention that he had acted in 'cooperative agreement' and in good faith with the respondent's attorneys in order to comply with the order of this court. Furthermore, there had been no appeal from the decision of the court; that he had been expecting the parties to effect the transfer with dispatch; and to go on with their separate lives. He maintained that the impasse which had occurred was due to the ambiguity in the judgment and if the applicant was unable to exercise the option, which was the intention of the court from the judgment, it would wreak manifest injustice to him, both in settling finally, the acquisition of his home where he had resided over for the past 28 years, and also to prevent the multiplicity of actions which had been filed subsequently in the court below in relation to the said property. He stated, to the contrary, that the respondent had suffered no prejudice as a result of the delay, as she would ultimately receive an increased value for her half share in the property.

[40] The applicant deponed to an affidavit in support of the application. His main concern was that he had filed his fixed date claim form in the court below in order to persuade the court that he was entitled to a half share in Lot 9, the family home, which comprised the dwelling house and the lands appurtenant thereto. Having not obtained that order, he appealed. This court having found in his favour, he stated that he had instructed his attorney, Dr Jackson, to proceed to protect his interests in exercising the option. He obtained assistance financially from his sons so that he was in a position to pay for the updated valuation, the survey, the deposit and finally, all sums required to complete the transaction. He indicated that he was in communication with his attorney

and that he had been advised on the steps to be taken to exercise the option, and that the respondent's attorneys were informed of his intention to do so.

[41] Mrs Cooper-Batchelor deposed to an affidavit in opposition to the application. She agreed that immediately after the parties had received the judgment from this court counsel had engaged her in a conversation. She vehemently denied however that counsel for the applicant had ever, prior to the expiration of the applicant's option, indicated to her his client's intention to purchase Lot 9. She further strenuously denied giving any undertaking to counsel for the applicant in respect of obtaining the updated valuation, although she stated that she had contacted DCTF and commissioned the same. She made the point that it took the applicant's attorney three weeks to deliver to her offices the cheque for payment of the valuation.

[42] The respondent also deponed to an affidavit in opposition to the application. It was her contention that the applicant had failed to exercise the option within the time set out by the Court of Appeal. She referred to the correspondence which had passed between the attorneys as being confirmatory of that. She reiterated the position she had taken before the court with regard to Lot 9, particularly the "new" dwelling house which she stated she had never resided therein. She also said that she had not benefitted from the sums that she had sent to the applicant to farm the property. Additionally, she deponed that she was older now, and unable to work as she had when married to the applicant, when she was a landscaper in the San Francisco Bay area. She stated that her finances were precarious, and that the only property she owned was the farm at Norwich. She therefore requested that the application be refused.

The submissions

For the applicant

[43] Counsel for the applicant provided very detailed and comprehensive submissions in writing for the assistance of the court. To the extent that they are only referred to in a summary fashion in this judgment, is no disrespect to the industry of counsel.

[44] Counsel firstly submitted that the difficulty which has arisen, and which is being experienced by the applicant, has been brought about by a typographical error in the form of the order sought by the applicant before the Court of Appeal in that the word "hereof" should have been "thereof". The order sought in the notice and grounds of appeal read as follows:

> "(c) That the property comprised in Volume 899 Folio 23 of the Register Book of Titles together with the dwelling house situated thereon, be valued by a Valuator to be agreed by the parties and thereafter be sold with the Claimant having the first option to purchase same such option to be exercised within three months of the date **hereof** failing which the said premises to be sold by Private Treaty or Public Auction with the Valuation price to be the reserved price."

In counsel's submissions that error made the sentence absurd, as when read with the word "thereof" it would have referred to and meant three months of the valuation, but when read as "hereof" it did not "refer to any plausible subject, and could not have referred to the date of the order which had not been referred to in the paragraph and had not yet been issued". The order in the decision of this court granted substantively the applicant's prayer in the notice of appeal as filed, so counsel took responsibility for the error as he described it.

[45] Counsel submitted that there were four alternative bases which could ground the court's jurisdiction relative to the application for clarification namely:

1. The inherent jurisdiction of the court to correct errors and omissions in its judgment and orders to reflect the manifest intention in making its order. Counsel submitted that the test for the exercise of this jurisdiction is enunciated clearly in the decision of some antiquity from the House of Lords, namely **Hatton v Harris** [1892] AC 547, which states that had the errors or omissions been brought to the attention of the court at the time, the correction would at once have been made. Counsel submitted that this jurisdiction and this test have recently been applied by this court in **American Jewellery Company Limited et al v Commercial Corporation Jamaica Limited et al** [2014] JMCA App 16.

2. The liberty to apply jurisdiction which counsel submitted "if not expressed in the order is implied to enable the court to work out the implementation of its order and in a proper case to make supplemental orders for the purposes of giving assistance in working out a judgment". The distinction he said between the

liberty to apply and the inherent jurisdiction is that it accepts the correctness of the order but points to some issue which has arisen later which requires the decision of the court in the form of supplemental orders to "work out" the original order". The test for the exercise of this jurisdiction, counsel argued, is whether without the further orders or decision the purpose of the order is rendered meaningless.

3. The court interpreting its orders as it would do any other legal instrument. In this case, the approach counsel contended, is a purposive one and the contextual analysis is important, more so than a search for linguistic ambiguity of the words used.

4. Re-opening its judgment pursuant to its inherent jurisdiction to correct an injustice that has arisen. However, this is an exceptional category - the possibility of significant injustice must be clearly established- there must be no effective alternative remedy. (Counsel indicated that he would not be relying on this basis so I will say no more about it.)

[46] Counsel submitted that there were several cases where decisions had been given in the courts below, which contained orders: for the sale of jointly held property; for the

land to be valued; which gave a party the option to purchase; and which gave time within which to exercise the option. Counsel listed several cases in an appendix to his submissions, namely: **Diedrick v Diedrick** Claim No 2007HCV3069 delivered 18 December 2007; **Graham v Graham** Claim No 2006HCV03158 delivered 8 April 2008; **Lambie v Lambie** Claim No M00296/2006 delivered 12 August 2008; **Murray v Murray** Claim No HCV3700/2007 delivered 3 April 2009; **Leader v Leader** Claim No 2007HCV03094 delivered 30 April 2010; **Guthrie v Guthrie** Claim No HCV3430/2009 delivered 19 July 2011; **Malcolm v Malcolm** [2013] JMSC Civ 161; **Wiggan-Chambers v Chambers** [2014] JMSC Civ 18; and **Hendricks v Hendricks** [2014] JMSC Civ 149.

[47] Counsel therefore urged the court to make an order on the application before it, through the court's inherent jurisdiction :-

(i) to correct an error which misstates the court's intention, so that the corrected order reads that the time period within which the option is to be exercised is to be reckoned from the date of receipt of the updated valuation; or

(ii) issue a supplemental order to work out the effective and efficient execution of the order; indicating that the option is exercisable within three months of the order of sale and was therefore exercisable within three months of the receipt of the updated valuation; or

(iii) through clarification of the meaning of its order using the principles and rules of interpretation, by deleting the words "the order" and substituting the words "the receipt by the appellant of the valuation".

For the respondent

[48] Counsel, Mr Gordon Steer, submitted that the court should be careful to draw the distinction between those matters where the order has not yet been perfected or "drawn up" which he said was the situation in many of the cases referred to by counsel for the applicant, and which was not so in the case at bar.

[49] Counsel maintained that the order of this court had given the applicant an option to purchase the respondent's one-half interest in the property from the date of the order for sale. The order directed by the court, counsel stated, was not a contract to buy the property. The effect of the order, counsel argued, was a benefit to the applicant, the person who had been given the right to exercise the option, as the other party, the respondent, could do nothing with her right of ownership of the land, until the period within which the option was to be exercised had elapsed. A vendor cannot sell the land during the period of the option, counsel stated. However, he averred, once the period has elapsed, and the right has not been exercised, the right to purchase would have lapsed, and it cannot be revived, save by the other person giving consent, which counsel noted had not occurred in the case at bar. Counsel relied on the dictum of Morrison JA (as he then was) in a case out of this court, **Annie Lopez v Dawkins**

Brown and Glen Brown [2015] JMCA Civ 6 and the case of **Janet Robertson v Surbita Property Developments Limited** [1982] 19 JLR 90 for this principle.

[50] Counsel submitted that the option granted by the court had nothing to do with the valuation or the price of the land. Indeed, simply put, counsel stated, the issue of the option was divorced from that of the valuation. The option, he argued, ought to have been exercised without having knowledge of any price. The exercise of the option did not bind the applicant, as there was no contract for the purchase of the land. What was required, counsel submitted, and what the applicant ought to have done, was merely to indicate his intention to buy Lot 9, because even if he was unable to afford the property, the option would have taken place once he had indicated his intention to purchase within three months of the order for sale.

[51] In any event, counsel submitted that there were no ambiguities in the order that required any clarification. Counsel maintained that the order was perfectly legible and should be "left alone". He stated categorically that "the order for sale" equals "the date of judgment", and any other matters which required "working out" could be done at some other time. Additionally, counsel submitted that if clarification of the order was required (which was not accepted), then the applicant ought to have filed the application within the three month period set out in the judgment.

[52] Counsel referred to **Sarah Brown v Alfred Chambers** [2011] JMCA App 16, which was also referred to by counsel for the applicant, and agreed that a similar application had been made in that case, which as already indicated, was in essence an

application for more time to comply with the order of the court, and he reiterated that this court had quite stridently indicated that it had no power to so order. Counsel submitted that the real issue in the application for clarification was whether the court meant at paragraph (d) of its order that the period of three months stated therein, related to the option and not to the purchase of the respondent's one-half interest. Counsel maintained that the order stated what the court intended, and the court had no power to vary its order, which he submitted, was what the applicant was endeavouring to make the court do, because of the predicament that he found himself in, having failed to comply with the clear terms of the court's order.

For the applicant in response

[53] Counsel submitted that counsel for the respondent had confused two concepts of law. He argued that contrary to counsel's submissions, once the applicant had exercised the option as directed by the court, he would have been contractually bound. He referred to the language of the order and insisted that the words did not refer to "an intention to be bound" but that the option "must be exercised". He submitted that the court meant by the use of those words that the option was to be exercised based on the valuation of the property, which must therefore first be effected. Counsel asked the question "why would the court have granted three months within which the option was to be exercised if only an intent was required, and the applicant was not to be contractually bound?" His answer to his own question posed, was that time was given to permit the applicant to put himself in a position whereby he could be contractually bound. Counsel drew the distinction with the facts in the case at bar with the factual

situation that obtained in **Brown v Chambers** to note that the application filed subsequent to the order of the court in that matter, was attempting to deal with a point in the litigation, which was not the jurisdiction that the applicant was praying in aid in the application before this court. To the contrary, counsel submitted, the application was based on the fact that there had been an error or a slip in the order of the court, and in those circumstances all the authorities say that in an effort to ensure that the order reflects the court's intention the court has the duty to correct it so that it does.

Discussion and analysis

[54] In my view, the issues in this application can be summarized as follows:

(i) Were there errors or omissions in the order of this court dated 17 March 2014 or was the order free from any ambiguity?

(ii) If the order does contain errors or omissions does the court have the power to correct the same? And

(iii) In the circumstances of this case ought the court to do so?

Issue (i) Errors or omissions in the order of this court

[55] There is no doubt in my mind that the intention of this court in its judgment of 17 March 2014 was to give the applicant the first option to purchase the respondent's one-half share in Lot 9, the family home. It was also the intention of the court that the

value of the property and therefore the respondent's one-half share was to have been ascertained through the valuation of DCTF. They were the valuators that the court had accepted were reputable and capable with the necessary expertise to have conducted the first valuation which had been submitted before the court below. It had been an issue whether that company ought to have been accepted as valuers as their appointment had not been made in complete compliance with section 12 of PROSA. This court found that DCTF were well respected and had the competence to effect the updated valuation and that position was expressed in paragraph (c) of the judgment/order.

[56] The next question was what did paragraph (d) of the order mean? Was it the intention of the court that the property was to be sold by private treaty or public auction based on the valuation having first been obtained before the proceeds of the same were divided equally? And was it the intention of the court that the applicant was to have the first option to purchase same based on the said valuation which must therefore have first been obtained, but yet the first option must be exercised within three months of the order for sale? This would raise another question as to whether the order for sale of the property was equated with the date of the judgment, bearing in mind the order made at paragraph (c) of the judgment, that an updated valuation of Lot 9 must be obtained?

[57] I have no doubt in my mind that it was the intention of the court for the valuation to have first been obtained which would have guided the sale of the property and or the exercise of the first option of the applicant, as the value of the same was

crucial to both activities. I am satisfied that had the ambiguity/error been pointed out to the court at the time of the judgment it would have been corrected. What then ought the court to do? I am guided by the several authorities which have been submitted by counsel.

Issues (ii) and (iii) Does the court have the power to correct the errors or omissions and ought it to do so?

[58] **Hatton v Harris** concerned an issue where funds were paid out incorrectly on a bond in respect of principal and interest representing a sum in excess of the penalty on the bond. Lord Herschell made the point, referring to the 103rd General Order of 1843 which was in force at the time, that although the order did not create any rights "it declared the practice and rule then prevailing in Equity". It provided that "any clerical mistake in a decree, or any error arising from any accidental slip or omission, may at any time be corrected on motion or petition". Later in his judgment he made the following statement, which I found extremely instructive for the issue under consideration:

> "Therefore, my Lords, 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. I myself think that it was a mere accidental omission that the words were not inserted that in the case of a bond the amount should not exceed the penalty; and if attention had been called to the fact that those words were not so inserted, and that one imcumbrancer might thereby be prejudiced as against another in respect of the omission, I cannot doubt that the correction would at once have been made."

When dealing with the delay in making the application he said this:

> "...It is true that many years have elapsed since the date of this order; but on the other hand nothing has been done since the date of this order until recently, when the money being found in Court the matter was revived. I cannot see any difference in the circumstances of this case for what they would have been if the matter had arisen immediately after judgment was pronounced."

He expressed what could be a considerable concern in this way:

> "There is one observation which I ought to make, and it is this, that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the decree and ignorance of any circumstances which would tend to show that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made…… But, my Lords, no facts were put before your Lordships in the present case which would justify the Court in so refusing to correct the error…"

Lord Watson made this comment:

> "...When 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…"

Lord Macnaghten made his contribution to this powerful discourse thus:

> "Lastly it was suggested that possibly the Lord Chancellor's decree of 1853 as regards the direction as to interest was made advisedly. Everything is possible. Even a Lord Chancellor may possibly make a mistake. But one must use one's common sense, and there are some mistakes which it is hardly decent to attribute to the Court. I have no doubt that the Court intended to make the 'usual order'. Probably counsel only asked for the usual order, and the Court simply assented. It is impossible to conceive that the Court, with its

> eyes open, could have given interest beyond the penalty of the bond. The law is perfectly clear. The Court has never done more than give interest beyond the penalty as against the obligor himself, in consequence of some misconduct on his part or by way of relieving him from the penalty if he came for relief, a 'whimsical' mode of relief, as the Lord Chancellor observes in Clarke v Seton 57, 'for they relieved him against the penalty; but the consequence was that he was obliged to pay a great deal more, for then they made him pay the original debt with the interest which was much beyond the penalty."

He later concluded:

> "In the result therefore, I am of opinion that there is a mistake in the decree of 1853, occasioned by an accidental omission, and that that mistake ought to have been corrected' as a matter of course."

[59] So in this case it was clear that if the court made an accidental error it was to be corrected as soon as it became evident. There was no difference to that time as against if it was discovered at the time when the judgment was pronounced. Additionally, if there was no prejudice to any third party then even the delay of years in making the application would not deter the court from correcting the obvious error by inserting the words which had originally been omitted. In the case at bar, counsel for the respondent submitted that the option granted by the court had nothing to do with the valuation or the price of the land. I cannot agree with that position. Both are clearly connected; one being dependent on the other. Counsel for the applicant argued that it was a simple error which required correcting so that the intention of the court could be made clear, which was that the applicant should exercise the option once the value of the interest he would wish to purchase had become known. As indicated, that equates with

common sense. Additionally, in my opinion, the 13 months delay between the decision of the court in March 2014 and the application filed on 5 May 2015 would not prejudice the respondent, as she would be paid the full value of her half interest which was what the court had intended.

[60] In this court we endorsed the above principles in **American Jewellery Company Limited et al v Commercial Corporation Jamaica Limited et al**. This case concerned the inconsistency between the judgments delivered by the members of the court and its orders as drawn. Morrison JA (as he then was) in paragraph [2] of the judgment referred to rule 42.10(1) of the Civil Procedure Rules 2002, (CPR) which he indicated "provides that 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". This, he reminded, was the well-known slip rule but which was not one of the rules of the CPR which had been explicitly incorporated into the rules of this court by rule 1.1(10) of the Court of Appeal Rules. He stated however that it is common ground that the court can by virtue of its inherent jurisdiction to control its process "correct a clerical error arising from an accidental slip or omission".

[61] The issue in that case, was whether, as the 4th respondent had been ordered to pay interest on a certain sum as damages for breach of a professional undertaking, was she also responsible for payment of the principal sum, which the court found had been wrongly deducted from the balance of purchase money. The court resolved the matter adverse to the attorney and, in so doing, Morrison JA said the following at paragraph [31] of the judgment:

> "I confess that I have not found this to be an easy matter to resolve. Indeed, as counsel may well recall, during the hearing of the application I was particularly struck by the fact that the result for which Mrs Kitson contended would mean that, despite Commercial, by virtue of the agreement arrived at on its behalf by Mrs Messado, not having any liability to pay the sum of $575,000.00, Mrs Messado herself would be liable to pay it. But this is, of course, no part of the court's business at this stage: what we are now concerned with is what order the court which heard this appeal intended to and did make, and not with any view that this court might have as to the justice or otherwise of that order. So while the consequence that would flow from one view or the other may have some relevance as a measure of what the court might have intended, where that intention is clear, as it appears to me to be in this case, it is that intention that must prevail. It is in any event necessary to keep in mind, it seems to me finally, that, as Cooke JA was at pains to emphasise, there is a clear difference between monies payable by virtue of contract and any order that the court may make as damages for breach of a professional undertaking."

In the circumstances, the correction was made for the attorney to pay the principal sum and the interest for a stipulated period. In the case at bar, as indicated, the court was also by virtue of its inherent jurisdiction empowered to correct an error in order to ensure that the court's intention was manifest and operative.

[62] I found the decision of Sackar J in the Supreme Court of New South Wales in **Mainteck Services Pty Limited v Stein Heurtey SA and Stein Heurey Australia Pty Limited** [2013] NSWSC 1563, interesting and applicable to the issues before us. In that case, the court had incorrectly carved out of the costs order sums in relation to certain "Variation Claims". Sackar J firstly set out the error, the way in which he recognized that the law provided for the correction of it, pointing out the distinction that

he discerned between errors made in a judgment and the court having a different view on the subject of the litigation. On page 1563 of the judgment he said this:

> "From the submissions of the plaintiff and defendants, I incorrectly understood, perhaps as a result of the paragraph just quoted, that the parties were not agitating any issue relating to the costs of the Variation Claims, and that the defendants did not seek any costs orders in relation to the Variation Claims, and I therefore carved out from the indemnity cost consequences commencing from after 2 July 2010, the costs incurred by the parties in relation to the Variation Claims. In my view, for the reasons below, the error is one capable of being corrected under rule 36.17 of *the Uniform Civil Procedure Rules 2005*."

He referred to **Hatton v Harris** with particular reference to what he termed the hypothetical enquiry, namely whether if the supposed error had been drawn to the attention of the court or the parties at the relevant time it would have been corrected as a matter of course, which he answered in the affirmative. He gave his view on the process as follows:

> "In my opinion, I have power to correct the mistake made by me in entering judgment due to my misunderstanding of the position taken by counsel for the defendant. Apart from anything else, how would a Court of Appeal be able to say whether or not I acted under a mistaken impression? Surely it is the person whose mind was afflicted by the mistake who is the one to identify it and correct it."

I find these comments to be straightforward and applicable. The ambiguity in the order was made by the court and it must be so stated and dealt with, so that the intention of the court is preserved and protected.

[63] Sackar J then quoted a passage from the English Court of Appeal case of **Mutual Shipping Corporation of New York v Bayshore Shipping Co of**

Monrovia [1985] 1 All ER 520 dealing with the court's approach when it was having second thoughts on a matter. It read:

> "It is the distinction between having second thoughts or intentions and correcting an award of judgment to give true effect to first thoughts or intentions which creates the problem. Neither a judge nor an arbitrator can make any claim to infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting judgment will be erroneous but it cannot be corrected. The remedy is to appeal."

[64] In **Fritz v Hobson** (1880) 14 Ch D 542, the issue related to costs of an adjourned motion which counsel had inadvertently omitted to ask for at the judgment, and so the court was asked to vary its judgment to include those costs. The application was made pursuant to an implied "liberty to apply" in the judgment. Fry J concluded that it was an accidental omission of counsel to call his attention to the adjourned motion when he pronounced his judgment, when the motion had been before him at the trial and so, he commented it was a very natural omission to make, as counsel's attention at the time had been directed to matters of greater importance. He considered therefore that he had jurisdiction to grant the order. In the instant case, one could view the resulting confusion as having been brought about by counsel, as the notice of appeal before the court was worded in such a manner, that it may have inadvertently impliedly referred to the date of the judgment instead of the receipt of the updated valuation as the triggering event, for the exercise of the option, or alternatively had failed to draw specific attention to what date the triggering even should be.

[65] This position is to be distinguished from the facts which obtained in **Preston Banking Company v William Allsup & Sons** [1895] 1 Ch 141 where it was held that

the court has no jurisdiction to rehear or alter an order after it had been passed and entered, provided that it accurately expressed the intention of the court. Indeed, Lord Halsbury in dismissing the appeal stated the principle that if by mistake the order has been drawn up, but did not express the intention of the court, the court must always have the jurisdiction to correct it. However, in that case, the situation was different as he stated:

> "...But this is an application to the Vice Chancellor in effect to rehear an order which he intended to make, but which it is said, he ought not to have made….. he has no jurisdiction to rehear or alter this order."

LJ Lindley confirmed that opinion by commenting that:

> "This is not an application to alter an order on the ground of some slip or oversight. Nor is it a case in which the order has not been drawn up. Here the order has been drawn up, and it expresses the real decision of the Court; and that being so, the Court has no jurisdiction to alter it…"

Lindley LJ went on to state that:

> "...it is of the utmost importance, in order that there may be some finality in litigation, that when once the order has been completed it should not be liable to review by the Judge who made it..."

[66] Our court in **Brown v Chambers**, in endorsing those particular principles stated in **Preston v Allsup** when dealing with the issue as to whether the court is empowered to extend time after a final judgment or order has been made, which in that case was a decision upholding an order to vacate the premises pursuant to an order of possession, stated that it was the general rule that once a judgment or order is perfected it brings the litigation to an end, and the court cannot revisit an order which

had been previously made. However, Harris JA on behalf of the court, referred to the exceptions to that statement of the law, and endorsed the principles earlier referred to herein, but on this occasion as stated by Gibbs J in **Bailey v Marinoff** (1971) 125 CLR 529 that:

> "...it is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it... The rule rests on the obvious principles that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in rules of court."

This court examined its powers under section 10 of the Judicature (Appellate Jurisdiction) Act and concluded that the section could not be interpreted so as to mean that the court was empowered to re-open its judgments or final orders save and except in the exceptional circumstances referred to above.

Conclusion

[67] As a consequence, in my view, it is clear that when examining the order of this court given on 17 March 2014, it was the intent of the court that paragraphs (c) and (d) of the order must be read together. Thus the valuation must first be obtained before the property could be sold by private treaty or by public auction, and before the first option granted to the applicant could be exercised. In fact, the valuation was to be utilised to arrive at the value of the one-half share in the family home, namely Lot 9. The updated valuation was to be undertaken by DCTF. That too was clearly the

intention of the court. The date in respect of which the option ought to have been exercised was clearly meant to be subsequent to the receipt of the valuation. It was not the intention of the court that the option would lapse before the valuation had been obtained without any fault on the part of the applicant. Had this anomaly been brought to my attention at the time of pronouncing the judgment, I would have had no difficulty making that clear. It was an error of the court and in keeping with all the authorities the court must correct it.

[68] In my opinion, there is no need to refer in any detail to the other bases in respect of which the court could exercise its jurisdiction in order to preserve the clarity and functioning of its order, save to say that if a supplemental order was needed for the "working out" of the order pursuant to the implied liberty to apply jurisdiction, I would make the order as indicated above. Additionally, with regard to the interpretation of the order, I accept counsel's submission that the valuation of the property could be considered a condition precedent to the sale of the same, and the exercise of the option, could therefore be considered a term of the order for sale.

[69] It is to be noted that the speed with which the applicant exercised the option subsequent to the receipt of the valuation could indicate that obtaining the valuation was the first step. It is also noteworthy that there were no arguments by counsel when the decision of the Court of Appeal was being considered as to the wording of paragraph (d), that is with regard to the triggering event, and I have no doubt that had the parties consulted on the date from which the exercise of the option was to be reckoned, there would have been no dissent that the date should be that of the receipt

of the valuation, bearing in mind all the cases having similar issues which have been before the court below, which have been referred to herein and in respect of which the courts have decided accordingly.

[70] In the light of all of the above these are the reasons why I agreed with the majority to make the clarification of the order as stated in paragraph [24] herein.

BROOKS JA (DISSENTING)

[71] My learned sister Phillips JA has comprehensively set out the relevant background leading to this claim and it is unnecessary to repeat it for this dissenting judgment. A recap of the litigation arising from the claim by Mr Dalfel Weir against his former spouse, Ms Beverely Tree, shows that on 25 March 2010, D O McIntosh J, after hearing the evidence of the former spouses, gave judgment for Mr Weir. The judgment awarded Mr Weir the sum of $1,300,000.00, representing one-half of the value of a dwelling house situated on land registered in the name of Ms Tree, but occupied by Mr Weir. The figure was derived from a valuation that had been done in 2009, for the purposes of the litigation, by the well-established and respected appraisers, DC Tavares and Finson Realty Ltd.

[72] Mr Weir was unhappy with that judgment and in his appeal to this court, he sought a number of orders including the following:

> "That the property...be valued by a Valuator to be agreed by the parties and thereafter be sold with [Mr Weir] having the first option to purchase same such option to be exercised within three months of the date hereof failing which the said

premises to be sold by Private Treaty or Public Auction with the Valuation price to be the reserved price."

[73] After hearing the appeal and considering the material provided by counsel for the respective parties, this court ruled in favour of Mr Weir and on 17 March 2014 made the following orders:

> "(a) The appeal is allowed and the order of D O McIntosh J made on 24 March 2010 is set aside;
>
> (b) The appellant is entitled to one-half share of the family home, comprising the dwelling house together with land on the lot numbered 9 on the approved subdivision plan part of Norwich in the parish of Portland, prepared by F G Nembhard, commissioned land surveyor, and being part of the lands registered at Volume 899 Folio 23 of the Register Book of Titles.
>
> (c) An updated valuation shall be done by DC Tavares & Finson Realty Ltd and utilised by the parties to arrive at the value of the one-half share of the family home, namely the dwelling house together with the land comprising lot 9 to which the appellant is entitled.
>
> (d) **Lot 9 shall be sold by private treaty or public auction and the proceeds divided equally or the appellant shall have the first option to purchase same and such option must be exercised within three months of the order for sale, failing which it shall lapse**.
>
> (e) Costs of the appeal and the proceedings below shall be the appellant's to be taxed if not agreed." (Emphasis supplied)

[74] As has been recounted by Phillips JA, Mr Weir allowed the three months, mentioned in paragraph (d) of the order, to elapse without his having exercised the

option to purchase that the order had afforded him. He seeks in this appeal to recover his position by asserting that the order was ambiguous.

The application

[75] His application, based on that position, is for the court to declare that its order made on 17 March 2014 was ambiguous and that the court meant in paragraph (d) to order that the three months were to run from the date of the receipt of the updated valuation. It is his assertion that paragraph (d), in order to have been consistent with the circumstances of the case, ought to have allowed the three months from the date that the updated valuation was secured. How else, Dr Jackson asked on his behalf, could an informed decision be made as to the price at which the property would be purchased?

[76] Learned counsel pointed to other cases in which more detailed orders had been made concerning options to purchase. He submitted that the order in this case should be consistent with those other cases.

The analysis

[77] I have the misfortune to be of a different view from the majority of the court. In my view, the starting point of the exercise is whether the order is, in fact, unclear. One does not get to the point of discussing the slip rule, the issue of delay or the powers of the court to correct errors in judgments, unless it is found that there is in fact an error. It cannot be ignored that the terms of paragraph (d) were entirely consistent with the order that Mr Weir sought on appeal. I, nonetheless, accept that if paragraph (d) had

used the word "this" instead of "the" in reference to the order, so that the relevant portion read "such option must be exercised within three months of **this** order for sale, failing which it shall lapse", we would have been spared this application. It is nonetheless my respectful view, that the order is clear, and paragraph (d) is unambiguous.

[78] This application calls for nothing else than an interpretation of paragraph (d). In the Privy Council decision in **Sans Souci Ltd v VRL Services Ltd** [2012] UKPC 6, Lord Sumption gave guidance in respect of the interpretation of orders of the court. He said at paragraph 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."

[79] In this case, other than for an expression of the order that the circumstances required, neither the import of, nor the reasoning behind, paragraph (d) was specifically discussed in the judgment. Phillips JA stated her position concerning the required order. The rest of the panel agreed with her stance. The learned judge of appeal said at paragraph [70] of her judgment:

> "Pursuant to section 23 the court is empowered to make an order for the sale of the property or a part thereof and for the division, vesting or settlement of the proceeds and for the payment of a sum of money by one spouse to the other spouse (section 23(a) and (i)). I would order that lot 9 be sold by private treaty or public auction and the proceeds divided equally **but that the appellant [Mr Weir] have the first option to purchase same with such option being exercised within three months of the order for sale**." (Emphasis supplied)

[80] The paragraph shows that the court intended to give Mr Weir an opportunity to purchase the property on which he had established his home. Catering to his interest was not intended to be unmindful of Ms Tree's. She, like him, was entitled to get on with life after litigation. He could not have an unlimited time for exercising his option. The court made its order in those circumstances. It is my further opinion that when the order was handed down, neither the court nor any of the parties envisaged that there would have been any further court order required in order to bring Mr Weir's intended purchase to fruition. Paragraph (d) was complete and final in respect to the logistics of the sale.

[81] Another principle is also of assistance in this analysis. There is a principle in statutory interpretation that the interpretation of a statute is not usually secured by comparing its provisions with those of other statutes. Lord Wright in **Rowell v Pratt** [1938] AC 101 made that observation at page 105 of the report:

> "…it is seldom that the construction of one statute can be determined by comparison with other statutes. Apart from some general rules of construction, each statute, like each contract, must be interpreted on its own merits."

So it is, in my view, with orders of the court. The reference by Dr Jackson to the orders in other cases is unhelpful in these circumstances.

[82] Mr Weir sought to find a weakness in paragraph (d) through the term "three months of the order for sale". He suggested that that date is unclear. I respectfully disagree. Paragraph (d) was the order for sale, and the date of the order was 17 March 2014. There was no ambiguity. The parties ought to have worked toward meeting that date.

[83] The time allowed by paragraph (d) was not unreasonable. This was not a case where the order was patently flawed, as in **Hatton v Harris** [1892] AC 547, or unworkable, or inconsistent, as in **American Jewellery Company Limited et al v Commercial Corporation of Jamaica Limited et al** [2014] JMCA App 16. There had been a previous valuation of the property by the appraisers. It would have been feasible for an updated valuation report to have been acquired in short order, had the parties kept their respective focus on the deadline. An informed decision could easily have been made by Mr Weir in sufficient time, as to whether he would exercise his option to purchase, on the basis of the updated valuation.

[84] Nonetheless, there were delays. Although the updated valuation was requested, fairly promptly, by Ms Tree's attorneys-at-law, there was a delay in the preparation of the valuation report. The valuation report was requested by letter dated 24 March 2014, yet the valuation was not completed until 6 May 2014, according to a letter from

the valuators. It is not clear why the valuators took as long as they did to prepare the report.

[85] Having received word that the report was ready, again Ms Tree's attorneys-at-law acted fairly promptly. By e-mail of 8 May 2014, they informed Mr Weir's attorney-at-law that the valuation had been done and requested the payment of the cost thereof. Despite the delay in the report being prepared, there was still ample time to exercise the option and have an agreement in place before 16 June 2014. However, Mr Weir did not act quickly. He did not send the required payment to Ms Tree's attorneys-at-law until 29 May 2014. Nonetheless, there still would have been time to have an agreement in place.

[86] Although Mr Weir's payment was by way of a manager's cheque, made payable to the valuators, it took Ms Tree's attorneys-at-law over two weeks to hand over the cheque to the valuators and secure the valuation report. Despite the fact that their covering letter for the cheque was dated, 2 June 2014, they made the payment on 13 June 2014. It was on 16 June 2014 that they collected the report and informed Mr Weir's attorney-at-law that they had received it. They passed on the information by e-mail at 3:26 pm; almost at the close of business for that day. Their next e-mail to Mr Weir's attorney-at-law was to inform him that his option had expired on 16 June 2014. Neither Ms Tree nor her attorneys-at-law have explained this critical delay in securing the report. It proved the deathblow for any chance that Mr Weir had in exercising the option given to him by the order.

[87] It is evident from that chronology, and the outline of the case contained in the judgment of Phillips JA, that Mr Weir was not focussed on the goal to be achieved. There is no evidence of his pressing for the securing of the valuation to allow him time to exercise his option. He also failed, in light of the rapidly evaporating time, to apply to the court for an extension of time, based on the delay by the valuators in preparing the valuation report, the delay by Ms Tree's attorneys-at-law in securing the report, or even his own delay in rendering the required payment, for whatever reason. He allowed the time to roll by as if there had been no deadline.

[88] He cannot, in my view, properly blame his loss on the court's order.

[89] It is for those reasons that I respectfully disagreed with the reasoning of the majority.