JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 86/08

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	**FRANK PHIPPS** **PEARL PHIPPS**	**APPELLANTS**
AND	**HAROLD MORRISON**	**RESPONDENT**

R.N.A. Henriques, Q.C., & Kathryn Phipps for the appellants

Vincent Nelson, Q.C., Ms. Maliaca Wong & Ms. Lisa Russell, instructed by Myers , Fletcher & Gordon for the respondent.

June 1, 2, 3, September 25, 2009 & January 29, 2010

PANTON, P.

1. My learned sister Harris, J.A. has stated the relevant facts and events in this matter, in her reasons for Judgment. I agree with her reasoning; hence my concurrence with the decision dismissing this appeal. However, I wish to add a few words.

2. The complaint by the appellants is that Beswick, J. should have set aside the consent order made by Anderson, J. at the behest of the parties, through their attorneys-at-law. There is no dispute that this order was drawn up and filed by Clough, Long & Co., the appellants' attorneys-at-law. As Mr.

Nelson, Q.C. has pointed out, Messrs. Clough, Long & Co., were the attorneys-at-law on the record for the appellants at all relevant times in the proceedings.

3. It is well settled law that the court will not interfere with an order made by consent at a time after the order had been perfected*:* ***Marsden v Marsden*** [1972] 3 WLR 136 at 141C. This order had long been made, signed and filed before the appellants approached the court to set it aside. This was so in a situation where what Clough, Long & Co. did, was well within the sphere of authority that attorneys-at-law have.

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

HARRIS, J.A.

5. In this appeal the appellants seek to set aside an order of Beswick, J, made on June 11, 2008, dismissing an application by the appellants to discharge a consent order made on January 7, 2003, and to discharge an injunction granted on December 7, 2007, and extended on December 21, 2007. On September 25, 2009, we dismissed the appeal and promised to put

our reasons in writing. This we now do.

6. The appellants were the registered proprietors of lands comprised in Certificates of Title registered at Volume 1026 Folio 164 and at Volume 1020 Folio 618. In 1992, a part of the land comprised in Certificate of Title registered at Volume 1020 Folio 618 was sold by them to the respondent. Following the sale, a subdivision was obtained and a new Certificate of Title registered at Volume 1246 Folio 932 was secured by the appellants for that part of the land which they retained.

7. Several restrictive covenants were endorsed on both Certificates of Title. The following encumbrances were endorsed on Certificate of Title registered at Volume 1026 Folio 164:

> "<u>Incumberances above referred to:-</u>
>
> 1. No bath water or water used for domestic purposes in respect of the land above-described (hereinafter called "the said land") or any part thereof or any water except storm water shall be permitted or allowed to flow from the said land or any part thereof on the remaining portion of the said land or any road street or lane adjacent thereto.
>
> 2. The registered proprietor or proprietors of the land comprised in this subdivision shall not in any manner restrict or interfere with the discharge of storm water flowing off the roads onto the said land and the Road Authority shall not under any circumstances be liable to the registered proprietor or occupier of the land for any damage occasioned by storm water flowing off the roads.
>
> 3. The drains shall not be blocked or obstructed in any way.

4. No building shall be erected within 100 feet of the centre line of the gully course.

Dep. Registrar of Titles."

8. The encumbrances on the Certificate of Title registered at Volume 1246 Folio 932 are as follows:

"Incumbrances above referred to:

The restrictive covenants set out hereunder shall run with the land above-described (hereinafter called "the said land") and shall bind as well the registered proprietors their heirs personal representatives and transferees as the registered proprietor and shall enure to the benefit of and be enforceable by the registered proprietors for the time being of the land or any portion thereof now or formerly comprised in Certificate of Title registered at Volume 1020 Folio 618.

1. There shall be no sub-division of the said land. 2. No building of any kind other than a private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and outbuildings shall in the aggregate not be less than Five Thousand Pounds. 3. All gates and doors in or upon any fence or opening upon any road shall open inwards and all outbuildings shall be erected to the rear of the main building. 4. No building erected on the said land shall be used for the purposes of a shop, school, chapel church or nursing home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof. 5. No bath water or water used for domestic purposes in respect of the said land or any part thereof or any water except storm water shall be permitted or allowed to flow from the said land or any part thereof on the remaining portion of the said land or any road street or lane adjacent thereto. 6. The registered proprietor or proprietors of the said land or any part thereof shall not in any manner restrict or interfere with the discharge of storm water off the roadways on to the said land and the Road Authority shall not under any circumstances be liable to the registered proprietor or

> occupier of the said land for any damage occasioned by storm water flowing off the roadways. 7. The drains shall not be blocked or obstructed in any way. 8. The gullies shall not be blocked or obstructed in any way. 9. Natural drainage onto the said land shall be unimpeded. 10. No building or any other permanent structure shall be erected within Forty Feet of the centre line of Durie Drive or within Twelve Feet of the paved drain. 11. The said land shall be held with adjoining land registered at Volume 1026 Folio 164 and held therewith as one holding.
>
> The land comprised in this Certificate (section B) shall be attached to the land comprised in Certificate of Title registered at Volume 1026 Folio 164 and held therewith as one holding.
>
> Dep. Registrar of Titles."

9. On January 29, 2002, by an originating summons, an application was made by the appellants, through their attorneys-at-law Messrs. Clough, Long & Co., for an order for the modification of certain covenants endorsed on the titles. The order sought reads:

> "1. There shall be no subdivision of the said land
>
> 2. No building of any kind other than a private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and such outbuildings shall be in the aggregate not less than **FIVE THOUSAND POUNDS (£5,000.00)"**

Affecting the said land **BE MODIFIED** so that it shall read:

> 1. There shall be no subdivision of the said land save and except as shall be approved by the appropriate relevant authorities.

2. No building or any kind other than private dwelling houses with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land value of such private dwelling houses and such outbuildings shall be in the aggregate not less than **FIVE THOUSAND POUNDS £5,000.00).”**

10. On March 11, 2002, the respondent filed an objection to the appellant’s application to modify or discharge the restrictive covenants. The application was listed for hearing on several occasions and on January 7, 2003 a consent order was entered in the following terms:

“**BY AND WITH THE CONSENT** of the Applicants and the Objector in this suit, **IT IS HEREBY AGREED** as follows:

1. To amend the one holding covenant on the Certificate of Title registered at Volume 1026 Folio 164 to read:
   “The land comprised in this Certificate shall be attached to the land comprised in Certificate of Title registered at Volume 1246 Folio 932 and held therewith as one holding. The registered proprietors of the land comprised in this Certificate and the land comprised in Certificate of Title registered at Volume 1246 Folio 932 shall be entitled to erect on each of the said lots of land a single family private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith and the value of each of the said private dwelling houses and such outbuildings shall be in the aggregate not less than SIX MILLION DOLLARS ($6,000,000.00)”.

2. To amend the first restrictive covenant on the Certificate of Title registered at Volume 1246 Folio 932 to read:
   “Subject to the registered proprietor’s entitlement referred to in Restrictive Covenant No. 2 endorsed hereon and in the amended notation of the one holding covenant endorsed hereon, to erect a single family private dwelling house on the land comprised in this Certificate and the land comprised in Volume

1026 Folio 164, there shall be no sub-division of the said land."

3. To amend the second restrictive covenant on the Certificate of Title registered at Volume 1246 Folio 932 to read:

"No buildings of any kind other than a single family private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith and the value of the said private dwelling house and such outbuildings shall be in the aggregate not less than SIX MILLION DOLLARS ($6,000,000.00)."

4. To amend the 11th restrictive covenant imposing one holding covenant on the Certificate of Title registered at Volume 1246 Folio 932 to read:

"The said land shall be held with adjoining land registered at Volume 1026 Folio 164 and held therewith as one holding. The registered proprietors of the land comprised in this Certificate and the land registered at Volume 1026 Folio 164 shall be entitled to erect on each of the said lots of land a single family private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith and the value of each of the said private dwelling houses and such outbuildings shall be in the aggregate not less than SIX MILLION DOLLARS ($6,000,000.00)."

5. To amend the one holding covenant endorsement on the Certificate of Title registered at Volume 1246 Folio 932 to read:

"The land comprised in this Certificate shall be attached to the land comprised in Certificate of Title registered at Volume 1026 Folio 164 and held therewith as one holding. The registered proprietors of the land comprised in this Certificate and the land registered at Volume 1026 Folio 164 shall be entitled to erect on each of the said lots of land a single family private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith and the value of each of the said private dwelling houses and such outbuildings shall be in the aggregate not be less than SIX MILLION DOLLARS ($6,000,000.00)."

6. Costs to Objector up to October 7, 2002, Certificate for Counsel is granted. Thereafter each side bears their own costs."

11. On January 5, 2004, Miss Dawn Satterswaite, attorney-at-law wrote to the Registrar of Titles surrendering Certificates of Title registered at Volume 1026 Folio 164 and Volume 1246 Folio 932 and requesting that a new Title be issued. The letter reads:

"2004 January 5

Mr. Alfred McPherson
Attorney-at-Law
The Registrar of Titles
National Land Agency
Hanover Street
Kingston

Dear Mr. McPherson

Re: Lands registered at Volume 1246 Folio 932
& 1026 Folio 164

I hereby surrender Certificate of Titles registered at Volume 1246 Folio 932 and Volume 1026 Folio 164.

You will note that there is a one holding covenant and Certificate of Title registered at Volume 1246 Folio 932 was erroneously endorsed with covenant number 1 "there shall be no sub-division of the said land".

When the title, which comprises the both pieces of land is issued, please correct the error by deleting the aforesaid consent.

Yours faithfully,
DAWN M SATTERSWAITE (MISS)"

A new Certificate of Title registered at Volume 1380 Folio 664 was secured in

place of the surrendered documents of title. All restrictive covenants were deleted from this new title. There is no evidence of any order of the court permitting the discharge of the covenants.

12. In December 2007, the appellants served notice on the respondents that they had taken preparatory steps to commence subdivision and development of their land, which was by that time registered at Volume 1380 Folio 664. On December 7, 2007, the respondent sought and obtained an ex parte injunction restraining the appellants from subdividing and building a multiunit development on the lands.

13. The appellants averred that they did not consent to the order, as, on the filing of the objection by the respondent, they had retained Mr. R.N.A. Henriques, Queens Counsel to appear on their behalf. They further stated that they first became aware of the consent order when it was sent to them in September 2003 by Messrs Clough, Long & Co, and that Queens Counsel had not appeared on their behalf on January 7, 2003. Following this, they issued instructions to Miss Dawn Satterswaite, attorney-at-law to make an application to set aside the consent order as having been entered without their approval or stated intent.

14. On February 25, 2008, an application was made by Miss Satterswaite, on behalf of the appellants to discharge the injunction and to discharge or vary the consent order. The matter came on for hearing on March 4, 5 and 6,

2008 and on July 11, 2008, the learned judge made the following orders:

> "(1) the discharge of the injunction granted on December 7, 2007 and extended on December 21, 2007 to be discharged; and
>
> (2) The Consent Order dated January 7, 2003 to be discharged or varied, are both refused."

15. The following are the grounds of appeal:

> "(a) The learned Judge failed to adjudicate on the issues raised, that the Consent Order was clearly unworkable and could not relate to the Restrictive Covenants and the issues between the parties.
>
> (b) The learned trial Judge failed to appreciate that a Consent Order made by an Attorney-at-Law without instructions of the client is not valid and enforceable order despite same having been drawn up and filed by the Attorney.
>
> (c) The leaned trial Judge held that the Appellants were presumed to have knowledge of the content of the Consent Order despite the fact that the evidence before the Court is to the contrary.
>
> (d) The unchallenged evidence of the Appellants is that they gave no instructions to the Attorney to enter into any Consent Order, in particular, the Consent Order was (sic) made on the 7th day of January 2003.
>
> (e) The fact that the learned trial Judge erred when she held that as the order states it is a consent of the parties, that the parties were represented by the Attorney-at-Law on the record, they are deemed to be bound by same despite the fact that there was evidence that no such instruction was given to the Attorney.
>
> (f) The learned trial Judge erred when she held that the Consent Order did not fall within Rule 42.7 of the Rules of the Supreme Court because it was a Final Order determining issues on the Originating Summons

for modification of covenants.

(g) The learned trial Judge further erred when she failed to appreciate that Rule 42.7(3) and (4) are the provisions of the Civil Procedure Rules 2002 which specifically stipulate when the rule does not apply. The Consent Order in this matter does not fall within either Rule 42.7(a) and (4).

(h) The learned trial Judge therefore erred when she failed to set aside the Consent Order on the evidence as same was not one agreed by the Appellants as the Attorney acted without any instructions to enter into the Consent Order that was made.

(i) The learned judge further erred when she held that the circumstances in this matter were not such as was appropriate for the Court to invoke its jurisdiction to set aside the Consent Order despite the unchallenged evidence of the Appellants that it was made without their knowledge or consent and without any instructions to the Attorney so to do."

16. The issues arising are:

(a) Whether the consent order was made in the absence of and or contrary to instructions from the appellants to their attorneys-at-law and is therefore invalid.
(b) Whether the consent order was not made in compliance with the provisions of the Restrictive Covenants (Modification and Discharge) Act and is thereby rendered a nullity.

(c) Whether Rule 42.7 of the Civil Procedure Rules applies.

(d) Whether the learned judge had erred in refusing to discharge the injunction.

17. Mr. Henriques Q.C., argued that the consent order is invalid and does not constitute a binding contract between the appellants and the respondent. The attorneys-at-Law who were retained in the matter were never given

instructions to enter into a consent order nor were they given authority to instruct an attorney-at-Law who was unknown to the appellants to enter into a consent order without the appellants' express instructions, he argued. It was his further submission that the consent order was contrary to the provisions of the Restrictive Covenants (Discharge and Modification) Act and as a consequence, a nullity.

18. Mr. Nelson Q.C., submitted that the consent order was valid and the court has no jurisdiction to set aside a consent order unless such an application is brought by way of fresh proceedings. The consent order, he argued, was concluded after extensive discussions between the parties and was made in conformity with the Restrictive Covenants (Discharge and Modification) Act and the relevant rules of court. He argued that the attorneys-at-law on the record as appearing for the appellants had the authority to compromise an action and in support of this submission cited several cases.

19. As a general rule, an order obtained by the consent of parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose - **Kinch v. Walcott and Others** [1929] A.C. 482. The bringing of fresh proceedings would normally be grounded on the obtaining of the consent order by fraud, mistake or misrepresentation.

20. However, the court may exercise jurisdiction to intervene in setting

aside a consent order or judgment prior to the perfection of such order or judgment. There is a line of authorities which shows that if a consent order has not been perfected and it is brought to the court's attention that there is some circumstance which would operate to vitiate it, the court is at liberty to set it aside - See **Holt v. Jesse** (1876) 3 Ch.D. 177; **Neale v. Gordon Lennox** [1902] A.C. 465 and **Stewart v. Kennedy** (1890) 15 A.C. 75.

21. It was argued by Mr. Henriques Q.C. that the court may set aside a consent order in circumstances where same, although perfected, is devoid of genuine consensus of the parties. In support of this proposition he cited the cases of **Marsden v. Marsden** [1972] 3 W.L.R 136; **Siebe Gorman & Co. Ltd. v. Pneuipac Ltd**. [1982] 1 W.L.R. 185 and **Weston v. Dayman** [2006] EWCA 1165.

22. The word "consent" may convey one of two meanings. It, on one hand, may mean that a valid contract has been concluded by the parties, in which event the court cannot intervene. On the other hand, it may be construed as one which was made without objection by the parties. In such circumstance, it would not be considered a genuine consent and may be varied or altered by the court. Lord Denning, in **Siebe Gorman & Co. Ltd v. Pneupac Ltd** (C.A.) (supra) in affirming that the court has jurisdiction to set aside a consent order which cannot be construed as a real consent of the parties, said at page 189:

> "We have had a discussion about "consent orders." It

> should be clearly understood by the profession that, when an order is expressed to be made "by consent," it is ambiguous. There are two meanings to the words "by consent." That was observed by Lord Greene M.R. in *Chandless-Chandless v. Nicholson* [1942] 2 K.B. 321, 324. One meaning is this: the words "by consent" may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words "by consent" may mean "the parties hereto not objecting." In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?"

23. The fact that the court, in the exercise of its discretion, may set aside an order which cannot be construed as having been consensual is not open for debate. It is without doubt that a court may, by its own motion, set aside an order which is irregular. However, it must be shown that an irregularity exists and is such that the court is compelled to set aside any judgment or order made as a consequence of the irregularity.

24. In **Marsden v Marsden** (supra) a petition for dissolution of marriage was opposed by the wife on the ground that the divorce would cause financial hardship. During the hearing, counsel for the wife entered into a compromise agreement contrary to her express instructions. On presentation of the agreement in court, the judge made an order in terms of the agreement.

25. On the day on which the order was perfected, an application was made by the wife to set aside the order. On a day or two prior to the making of the application the court had been informed of the intention to make it. It was held:

> "The application would be granted for the following reasons —
>
> (i) although it was well settled that the court would not entertain an application to set aside an order after the order had been perfected, since action had been taken to inform the court of the intention to make an application before the perfection of the order, and the application had been made on the day on which the order had been perfected, the court would entertain the application, despite the fact that it might not have been made before perfection of the orders, so that no grave injustice would result to the applicant (see p 1166 j to p 1167b, post): Neale v Gordon Lennox [1900 – 3] All ER Rep 622 distinguished;
>
> (ii) In cases, unknown to the other party, where the usual authority of counsel was limited by express instructions and counsel had nonetheless entered into a compromise for which he had no authority, the court had power to interfere and might, in the exercise of its discretion, set aside the compromise and order based on it, if grave injustice would be done by allowing the compromise to stand; the undertakings given by the wife's counsel as part of the compromise agreement were important matters to her, and grave injustice might be visited on her if the orders were to stand."

26. It can be clearly seen, that the case supports the general principle that a court will not entertain an application to set aside an order after it has been perfected. The question as to whether there was genuine consent turned on the peculiar circumstances of that case. Steps had been taken to inform the court of the proposed application to set aside the order prior to its perfection. The application to set aside the order was made on the day on which the

order was perfected. Grave injustice would have been done to the wife by reason of the undertakings given by her counsel as part of the compromise agreement.

27. The critical issue in this case is whether the consent order is irregular, in that it had not been made consensually and it could not be said that the parties had entered into a binding agreement. Was there real consent by the parties in the making of the order?

28. This leads me to first consider whether the attorneys-at-law on the record for the appellants were without ostensible or implied authority to consent to the making of the order. What is the role of an attorney–at–law in the conduct of proceedings on behalf of his client? There is a plethora of authorities which clearly establishes that an attorney-at-law is his client's agent and is clothed with express and implied authority to compromise an action in any manner which he deems best for his client.

29 In **Strauss v. Francis** (1866) L.R.1 Q.B. 379 the plaintiff brought an action against the defendant for libel. The plaintiff's counsel agreed to a compromise without reference to him. The plaintiff repudiated the compromise but his effort to continue the action failed. At page 381 Blackburn J. said:

> "Counsel … being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of

> his discretion, he may think best for the interests of his client in the conduct of the cause: and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding."

30. The cases of **Marsden v. Marsden** (supra); **Matthews v. Munster** [1887] 20 Q.B.D 141; **Carruthers v. Newen** [1903] 1 Ch. 812 and **Waugh & Ors. v. H.B. Clifford & Sons Ltd.** [1982] 1 Ch. 374 cited by Mr. Nelson Q.C. also confirms the extent of an attorney-at-law's authority in the conduct of his client's case.

31. The case of **Matthews v. Munster** (supra) is an authority which shows that even an attorney-at-law's managing clerk who is sufficiently familiar with a case may enter into a compromise of the case in the absence of a solicitor and the client. In that case the plaintiff brought an action against the defendant for malicious prosecution. The defendant's counsel, without referring to the defendant, agreed to settle the action on his paying damages and withdrawing certain imputations against the plaintiff. The managing clerk for the defendant's solicitor who was present in court requested counsel on the other side to await the arrival of the defendant and his solicitor but the order was made. The defendant sought to repudiate the compromise and continue the action. The compromise was upheld.

32. In **Waugh & Ors. v. H.B. Clifford & Sons Ltd** (supra) Brightman L.J. eminently and undubitably makes it clear that an attorney-at-law does

not only exercise express authority over a client's case but also implied authority to compromise an action. At page 387 he said:

> " The law thus became well established that the solicitor or counsel retained in an action has an *implied* authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter "collateral to the action"; and *ostensible* authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that a compromise does not involve "collateral matter" merely because it contains terms which the court could not have ordered by way of judgment in the action; for example, the return of the piano in the *Prestwich* case, 18 C.B.N.S. 806; the withdrawal of the imputations in the *Matthews* case, 20 Q.B.D. 141 and the highly complicated terms of compromise in *Little v Spreadbury* [1910] 2 K.B. 658."

33. An attorney-at-Law has complete control over a case in which he is retained to represent his client. The client cannot restrict the exercise of his authority in the due conduct of the case or matters incidental thereto which are relevant to the due disposal of the matter. Until his retainer is withdrawn, the attorney-at-Law continues to act for the client. The authority reposed in the attorney-at-law also represents to the opposing litigant that he acts for the client. Such authority continues until it has been expressly withdrawn.

34. At the time of the making of the order, Messrs Clough, Long & Co. were the attorneys-at-law on the record as appearing for the appellants from the inception of the proceedings. It is clear that the firm remained the attorneys-at-law for the appellants and continued so to do subsequent to the date of the order. They, being authorized to act for the appellants in the

conduct of the proceedings had unlimited power, and in their discretion was empowered to do what was best for the appellants. It is not unreasonable to expect that they could not have agreed that the application ought not to have proceeded to a full hearing, and as a consequence thought it prudent to reach a compromise.

35. At the time of the making of the order, there is nothing to show; either that the firm had no longer represented the appellants or that the respondent's attorneys-at-law had been made aware that it did not act for them. The order was made after negotiations with the respondent's attorneys-at-law and must be regarded as having been agreed within the reasonable scope of the Messrs. Clough, Long & Co.'s authority. The appellants, therefore, having not withdrawn their authority, would have been taken to have agreed to the course proposed in the order which was approved by Anderson, J. It follows therefore that, the appellants' attorneys-at-law would be bound by the terms of the order. The appellants cannot now seek to be released from the order as they are also bound by it.

36. The appellants state that Mr. Henriques Q.C. was retained to represent them at the hearing on January 1, 2003. On that date, Mr. Henriques Q.C. was absent. However, Mr. Donovan Rodriques from the firm of Messrs Clough, Long & Co. appeared at the hearing on behalf of the appellants. During the hearing of the appeal Mr. Henriques Q.C. brought to the court's attention that Mr. Rodriques was not listed as an attorney-at-law qualified to

practice in the courts of Jamaica. This, in my opinion, would not aid the appellants. Mr. Rodriques' presence in court on the day of the order was in the capacity of Messrs Clough, Long & Co.'s agent and by necessary implication, the appellant's agent.

37. The learned judge acknowledged that Mr. Henriques Q.C. was not present on the date of the making of the order. She correctly found that the appellants were represented. She said:-

> "However, Counsel from the firm of Mr. Clough represented Mr. and Mrs. Phipps and there is no evidence that any complaint was made to the presiding judge concerning absent Counsel Henriques. Mr. Clough's firm had continued to be on the record for the Phippses. The evidence is unchallenged that the Consent Order was drafted by Clough Long & Company and was filed in Court by them. If the Phippses have any remedy for their matter proceeding in the absence of Mr. Henriques, or for the Consent Order not reflecting their instructions, it is not to be obtained in this claim.
>
> It is my view that the Phippses must be presumed to have knowledge of the content of the Consent Order. The matter had been scheduled for a Court hearing, the attorneys-at-law on the record for them attended the hearing, were party to the making of the Order on their behalf before the Judge had perfected the Order and had served it."

38. I will now proceed to the question as to whether the consent order is valid. The court, in deciding whether a real agreement had been brokered by parties, must look at the objective intent of the parties. The subdivision of the properties was at the heart of the application for the modification of the restrictive covenants. The encumbrance numbered (11) on the Certificate of

Title registered at Volume 1246 Folio 932 expressly stipulates that the titles must be held as one holding. As a consequence, both parcels of land fall under the umbrella of covenant (11) and are subject to the same restrictive covenants.

39. The proposed development of the land was for its user as one holding. The respondent objected to the amendments as proposed. It follows that the matter would have ordinarily proceeded to trial. However, it is clear that, before the date of trial, correspondence passed between Messrs Clough, Long & Co. and the respondent's attorneys-at-law, the tenor of which suggests that there were negotiations as to a compromise. On November 21, 2002 Messrs Clough, Long & Co. wrote to the respondent's attorneys-at-law stating:

> "With regard to your letter of October 14, 2002 we affirm that the purpose of the subdivision is to erect a dwelling house on each lot and not to sell each lot without a dwelling house erected thereon."

The letter of October 14, was not exhibited.

40. At the time of the order, the covenants which were sought to be modified were bound by restrictive covenants. In a letter from Miss Satterswaite on November 21, 2003, to the respondent's attorneys-at-law, she raised a query about the consent order. In their response, in a letter dated December 2, 2002, the respondent's attorneys-at-law stated that, "The order was negotiated and agreed". There is no reason why the respondent's counsel's word cannot be accepted as true. It would not be unreasonable to

hold that there was an agreement for the modification of the covenants which was subsequently approved by Anderson J.

41. I must pause here to state that, it has been observed that subsequent to the consent order, the appellants surrendered the Certificates of Title registered at Volume 1026 Folio 164 and Volume 1246 Folio 932 and obtained a new title recorded at Volume 1380 Folio 664. It is also not without significance that Miss Satterswaite's letter does not disclose that the consent order had been submitted to the Registrar of Titles for endorsement on the Certificates of Title. However, paragraph 3 of the letter states, inter alia, "please correct the error by deleting the consent". If there had been an error, it could only have been corrected by an order of the court.

42. I now turn to the effect of the Restrictive Covenant (Discharge and Modification) Act with regard to the appellants' application and the consent order. Section 3 of the Act empowers the court to modify or discharge, wholly or partially, any restrictive covenant endorsed on a Certificate of Title. The section reads:

> "3. (1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied -

(a) …

(b) …

(c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(d) …

(2) The Judge shall, before making any order under this section, direct such enquiries as he may think fit to be made of the Town and Country Planning Authority and any local authority, and such notices as he may think fit, whether by way of advertisement or otherwise, to be given to the Town and Country Planning Authority and any persons who appear to be entitled to the benefit of the restriction sought to be discharged, modified, or dealt with.

(3) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.

(4) Rules of court may be made regulating applications under this Act, the recording and registration of orders made under this Act, and all matters incidental thereto."

43. As specified by section 3 (c), a person who is entitled to the benefit of a restrictive covenant may consent to its modification or the discharge. It is

clear that this section of the Act makes it perfectly permissible for a beneficiary of a restrictive covenant to consent to its modification. Section 3 (4) provides for the promulgation of rules under the Act. This demonstrates that all applications falling within the purview of the Act are governed by the Act and the rules made thereunder.

44. Under section 3 (1) of the Act, a judge is empowered to order the discharge or modification of a restrictive covenant. Although section 3 (1) (c) permits a party who is entitled to the benefit of a covenant to agree that the same be discharged or modified, any modification or discharge of a covenant must be anchored in the approval of the judge.

45. Mr. Henriques, Q.C. contended that prior to the approval of a consent order, the judge is obliged to obtain the views or objections of the relevant authorities. With this submission, I feel compelled to disagree. Under section 3 (2) the judge, before making the order, shall direct such enquiries as he may think fit. The use of the word "shall" is not mandatory. The words "as he may think fit" qualifies the word "shall". The phrase grants to the judge a discretion as to whether he ought to make an enquiry of the local authority prior to the making of any order. It is not obligatory on his part to embark upon an inquisitorial expedition from the relevant authorities, in order to determine whether a covenant should be discharged or modified. In any event, the authorities would have been notified of the hearing, as the rules mandate that they be notified in circumstances where an objection has been

filed.

46. This is a matter in which an objection was filed. Paragraph 8 of the Proclamations, Rules and Regulations places duty on the Registrar to notify all interested parties including the authorities. It states as follows:

> "The Registrar shall as soon as practicable after the expiration of the time for filing objections and claims for compensation, fix a time and place for the hearing of the application by a Judge, and shall give notice thereof to the applicant, to the authority, to the local authority and to every person who has duly lodged an objection or claim for compensation."

47. It is clear that, in keeping with the foregoing provisions, the requirement for notification of the relevant authorities would have been observed. The authorities would, mostly likely, have been notified of the hearing date. It would not be unreasonable to infer that a representative of the authorities would have attended to assist the judge in answering any inquiry which he wished to have made.

48. The appellant's application falls within the ambit of the Act and the rules made thereunder. The Act distinctly provides for parties to enter into a consensual arrangement for modification or discharge of a restrictive covenant. The court has the authority to approve a consent order under the Act. The order which is sought to be impeached is in my view, a valid and enforceable consent order.

49. I will now turn to the effect of Rule 42.7. The learned judge found

that the order related to the modification of a restrictive covenant and that rule 42.7 was not applicable. She said:

> "The Consent Order of January 7, 2003 concerns modification of a Restrictive Covenant. It is not a procedural Order. It does not classify as any of the Orders to which Rule 42.7 applies. It was a final Order which fully determined the originating summons originally filed by the Phippses for modification of covenants. It therefore need not meet the criteria specified in Rule 42.7.
>
> It is my view that this Order is valid. It states that it is with the consent of the parties and the parties were represented by their attorneys-at-law on the record. It is signed by a Judge of the Supreme Court. It is filed and served by attorneys-at-law on behalf of the Phippses. It bears the stamp of the Supreme Court. It falls outside the strict requirements of Rule 42.7."

50. Rule 42.7 of the Civil Procedure Rules 2002 governs the procedure with respect to the making of consent judgment and orders. It permits the making of consent orders in certain circumstances. Rule 42.7(2) outlines the permissible circumstances under which such orders can be made. None of these includes the making of a consent order or an application under the Restrictive Covenant (Discharge and Modification) Act.

51. Under Rule 42.7 (3) (d), Rule 42.7 (2) is rendered inapplicable where the court's approval is required by the Rules or by statute. Rule 42.7 (3) reads:

> "This rule does not apply:
>
> (a) …

(b) …

(c) …; or

(d) where the court's approval is required by these Rules or any enactment before an agreed order can be made"

This clearly shows that Rule 42.7 (3) (d) expressly excludes any consent to matters falling within any of the Civil Procedure Rules or an enactment requiring the court's approval.

52. Rule 42.7 (5) states:

"(5) Where this rule applies the order must be: -

(a) drawn in the terms agreed;

(b) expressed as being "By Consent";

(c) signed by the attorney-at-law acting for each party to whom the order relates; and

(d) filed at the registry for sealing."

53. The foregoing rule can only be invoked where the order sought would fall within the province of Rule 42.7 (2). In the present case, it does not. The order sought in these proceedings is not merely one requiring the agreement of the parties but importantly, the court's approval obtained in accordance with the relevant statutory requirement, that is within the framework of the Restrictive Covenants (Discharge and Modification) Act and the relevant rules made thereon.

54. In light of the provisions of Rule 42.7 (3) (d) there is no question that

the Civil Procedure Rules are inapplicable. It was for the learned judge to be satisfied that Restrictive Covenants (Discharge and Modification) Act and the regulatory rules made under that Act permitted the document executed by Anderson J., which was drawn up and expressed to be a consent order, was a binding contract between the appellants and the respondent.

55. The consent order is valid and subsisting. The complaint of the appellants cannot be justified. In my view, the appellants are bound by the terms of the order. They cannot be regarded as having not consented thereto. It follows therefore that the learned judge was not incorrect in not setting aside the order nor was she incorrect in refusing to discharge the injunction.

56. Before leaving the appeal, I find it necessary to state that, it is somewhat of an enigma that the appellants were aware of the existence of the order from as far back as September 2003, yet took no steps to set it aside until 2007; four years later. This delay is clearly manifestly excessive and would restrain the court from exercising its discretion in the appellants favour even if the circumstances were such that would have warranted the setting aside of the order.

57. For the foregoing reasons we dismissed the appeal.

DUKHARAN, J.A.

I agree.