[2022] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00046

BETWEEN	**LESLIE DACOSTA WILLIAMS**	**APPELLANT**
AND	**TELEITH EVELYN WILLIAMS**	**RESPONDENT**

Rudolph Smellie instructed by Watson & Watson for the appellant

Gordon Steer instructed by Chambers, Bunny & Steer for the respondent

20 October 2020 and 29 July 2022

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of Edwards JA and agree with her reasoning and conclusion. There is nothing I could usefully add.

EDWARDS JA

Introduction

[2] This is an appeal against the refusal of Barnes J (Ag) ('the learned judge'), to vary the terms of a consent order made between Leslie DaCosta Williams (the 'appellant') and Teleith Evelyn Williams (the 'respondent'). The appellant, by way of an amended notice of application for court orders, had sought several orders with respect to the consent order, which were all refused by the learned judge on 9 April 2019. An agreement between the appellant and the respondent had been made following court-ordered mediation and a consent order was made by a judge of the Supreme Court, in the terms

of the mediation agreement, pursuant to rules 42.7 and 74.12(1) of the Civil Procedure Rules, 2002 ('the CPR'). Despite the passing of several years, the consent order was never executed or enforced. The appellant applied to the court to vary the consent order due to the impact of the passage of time.

Background facts

[3] The facts are briefly that the parties, who were married in 1994, were registered on 9 March 1988, as joint tenants of property located in Ironshore District, West End, Negril, in the parish of Westmoreland ('the property'). They lived there as man and wife up until about 2001 to 2002, when, according to the appellant, the marriage broke down and he moved out. On 5 November 2003, a transfer instrument was registered on the duplicate certificate of title, purporting to transfer the property into the sole name of the respondent, for a consideration of £60,000.00. The transfer was effected pursuant to an instrument dated 30 July 2003, purporting to be signed by both parties. At the time of the purported transfer, the appellant alleged that he was living overseas and did not sign the transfer document.

[4] As a result, the appellant filed a claim against the respondent in the Supreme Court in 2007, alleging, among other things, that the transfer to the respondent was fraudulent, and that the signature, purporting to be his signature on the transfer document, had been forged.

[5] After attending mediation, on 6 April 2009, the parties came to an agreement as follows:

> 1. "The [respondent] shall have the option to pay the [appellant] the sum of $9,106,692.00 for his interest in the property situated at Torah Drive [part] of Ironshore, in the parish of Westmoreland and [registered] at [volume] 260 [folio] 581 of the [Register Book of Titles].
>
> 2. The [respondent] shall be given 120 days to exercise the option to purchase the interest of the [appellant] for $9,106,692.00.

3. If the [respondent] fails to exercise the option in 1 and 2 above the said property is to be sold by Private treaty with a Reserve Price of JA$25,000,000.00, and the [appellant] be paid the aforesaid sum of $9,106.692.00 out of the proceeds of sale.

4. The [appellant] undertakes to remove caveat number 1399785 lodged on the 26th day of February 2006 at the appropriate time to facilitate the carrying into effect of the order.

5. No order as to costs of the suit."

[6] On 28 July 2009, the consent order was made by the court in the terms of that compromise agreement.

[7] The consent order, therefore, gave to the respondent the first option to purchase the subject property, failing which, the property was to have been sold by private treaty and the stated portion of the proceeds given to the appellant. The respondent failed to exercise the option and no sale took place. In fact, no action was taken to give effect to the agreement until 22 June 2017, some eight years later, when the respondent sought to exercise the option in clause 1 by way of a professional undertaking from her attorney-at-law to pay the sum set out in the consent order on completion of the sale of the property. By letter dated 29 June 2017, the appellant's then attorney-at-law wrote to the respondent's attorney, sharing the appellant's concerns as to the effect of the significant time lapse since the settlement agreement, and the resultant 'unanticipated' and 'inequitable' windfall the respondent would receive if the appellant was only to receive the sum stated in the order, from the sale proceeds. The respondent's failure to account to the appellant for his interest in the property was also noted, and it was suggested that the parties allow the sale to proceed and the 'unanticipated windfall' be held on escrow until the matter could be settled. This was rejected by the respondent, who, by way of letter from her attorneys-at-law dated 11 November 2017, insisted that the appellant was entitled to no more than the sum of $9,106,692.00, as stated in the agreement.

[8] Consequently, on 14 June 2017, the appellant filed a notice of application for court orders seeking to rescind the agreement, or alternatively, to vary it, or to restore the substantive claim and fix a date for a case management conference. Those orders were sought on the basis that the intent of the agreement had been frustrated by the *mala fides* of the respondent, and that the agreement had become unworkable due to the lack of cooperation by the respondent and the lapse in time. This was supported by an affidavit sworn to by the appellant, in which he deponed to those matters, as well as to the fact that the respondent had: (a) failed to make reasonable efforts to sell the property in which she resided and over which she had control; (b) failed to account for rental monies collected in respect of the property; (c) been attempting to sell the property behind his back. He indicated a fear that the proceeds of sale would be dissipated and that the respondent would return to the United Kingdom where she is a national.

[9] On 28 February 2018, the appellant filed a notice of application for an interlocutory injunction, seeking to restrain the respondent from dealing with the property, pending the outcome or settlement of the action. This was supported by a further affidavit sworn to by the appellant, filed the same date, in which he set out: (a) the circumstances in which the alleged fraudulent transfer took place, (b) the circumstances under which the mediation agreement had been arrived at (which, he said, was based on an approximation of the parties' contribution and a market value of the property of $25,000,000.00, and which did not contemplate a delay of 10 years), (c) the respondent's failure to account to him for rent collected for the property during that time, and (d) the injustice to be caused to him if the injunction was not granted. The appellant also averred that the value of the property, as at that date, was between $40,000,000.00 to $45,000,000.00. However, no valuation was presented to the court but the appellant had attached an offer to purchase form to his initial affidavit, indicating the property had been offered for sale, by the respondent, for a price of US$335,000.00.

[10] The respondent gave a brief response by affidavit, filed 17 April 2018, denying any liability, and stating that the sum agreed was based on a set sum of money and not upon any valuation of the property.

[11] The appellant, thereafter, on 11 June 2018, substantially amended his notice of application for court orders, seeking that the court clarify, interpret, or construe the agreement to include several implied terms in respect of his entitlement to an equity in the property. This was further amended on 27 March 2019, so that, what was sought before the learned judge was the following:

> "1 That the Settlement Agreement dated the 6th day of April 2009 and the Order dated the 23rd day of July 2009 made in terms thereof, be varied (clarified, interpreted, or construed) to include the following consequentially implied terms:
>
> (a) that the Claimant is entitled to an equity in the property equivalent to the percentage of the value thereof that the sum of $9.1m holds to the reserve price of $25m, that is, to 36.4% of such value.
>
> (b) that therefore the Claimant is entitled to an equity in the property of 36.4% of whatever price of $25m or above which the property may be sold for, plus said percentage of all the income derived therefrom, from the date of the Settlement Agreement, minus such percentage of all the reasonable expenses incurred on or in relation to the property from the said date
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> (c) That the property be sold by private treaty within 30 days of the determination of this matter, to which end either party may identify a suitable purchaser, failing which it be sold by public auction at the request of either of the parties or their Attorneys-at-Law.
>
> (d) That the Claimant's Attorneys-at-Law shall have carriage of sale of the said property, and if either party shall fail or neglect for more than 14 days after being requested in writing by the Attorney-at Law [sic] of the other party to sign any document pursuant to said sale, then the Registrar of the Supreme Court is empowered to sign same in such party's stead.

2. That, accordingly, the said agreement be varied to read at 3 as follows

'If the Defendant fails to exercise the option in 1 and 2 above, the property is to be sold by private treaty within a reasonable time of the expiration of the said 120 days, with a reserve price of JA$25,000,000.00, and the Claimant be paid the sum of $9,106,692.00 out of the proceeds of sale if there is unreasonable delay in such sale by private treaty for reasons other than the Claimant's default, the Claimant being entitled to an equity in the property equivalent to the percentage of the value thereof that the sum of $9.1m holds to the reserve price of $25m, or to 36.4% of such value, the Claimant is therefore entitled to an equity in the property of 36.4% of whatever price of $25,000,000.00 or above which the property may be sold for, plus said percentage of all the income derived therefrom, from the reasonable date on which the sale on the open market should have been effected, minus such percentage of all the reasonable expenses incurred on or in relation to the property from the said date'.

3. Alternatively, that the said Settlement Agreement and Order made in terms thereof be varied (clarified, interpreted or construed) to include the following consequentially implied term:

(a) that the Claimant is entitled to interest at the rate of 15% per annum on the sum of $9.1m from the date by which it is found by the court that it was reasonable for the property to have been sold by private treaty in accordance with the Settlement Agreement." (Emphasis as in original)

[12] These orders were sought on the grounds that they were necessarily implied by the existing agreement to give it business efficacy in the light of the "changed circumstances" of the delay; that otherwise, where the agreement was silent on certain matters through inadvertence, it was fair, reasonable, and just for the execution and enforcement of the agreement; and that the court had the power to vary the agreement due to the use of the words "liberty to apply", which is accepted in law as permissible where necessary to work out an order.

[13] As indicated, the learned judge refused the application and ordered costs to the respondent.

The learned judge's reasons

[14] In refusing the application, the learned judge considered that the issues to be decided were: (1) what was the effect of a mediation/consent agreement and if and how it could be changed or modified; (2) whether the court could draw the inference that the sum of $9,106,692.00 stated in the agreement should remain constant regardless of the value of the property at the time of sale; and (3) whether the sum awarded was a final sum, subject only to the addition of interest payable on judgment debts.

[15] Having considered rule 42.7 of the CPR, and several authorities, including **Michael Causwell and Anor v Dwight Clacken and Anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 129/2002, judgment delivered 18 February 2004, **Dalfel Weir v Beverly Tree** [2016] JMCA App 16, **Norman Harley v Doreen Harley** [2010] JMCA Civ 11, and **Patrick Allen v Theresa Allen** [2018] JMCA Civ 16, the learned judge found that the court was not empowered to vary or change a mediation agreement or consent order, unless for the purpose of correcting a clerical mistake or an error arising from an accidental slip or omission, there had been a change in circumstances, or, the judge who made an earlier order had been misled. She found there was no such mistake or error, change in circumstance or "misleading of any judge", and that the court could not "go behind any discussions or agreements properly arrived at via mediation" to impute words into the agreement that were not there. She also found that the authority of **Weir v Tree** did not apply, as this matter did not involve matrimonial property and the Property (Rights of Spouses) Act (PROSA) as did that case, and that, in any event, the evidence showed that the appellant had contributed to the delay by failing to take steps which were open to him to have the property sold "within a reasonable time". This failure, she said, could not avail him in order to have the terms "reasonable time" or "equity at 36.4%" be imputed into the agreement.

[16] Further, the learned judge deduced that the agreement clearly intended for the appellant to be entitled to the set sum of $9,106,692.00, because that sum, she said, is

mentioned as the appellant's interest in orders 1, 2 and 3 of the consent order (see paragraph [26] of judgment).

The appeal

[17] The appellant filed a notice of appeal on 15 May 2019, seeking to have the learned judge's orders set aside and for the consent order to be varied "to allow for the payment either of the percentage equity or the interest, as prayed".

[18] Those orders were sought based on the following grounds:

> (i) "the learned judge erred in holding that the principles/basis enunciated in the case of Weir v. Tree for a variation of the order therein were irrelevant to this matter, as that case involved a claim of a share of the matrimonial home under the PROSA, unlike this one.
>
> (ii) the learned judge erred in holding that the application of the [appellant] for the injunction contributed more than minimally to the delay in the sale of the property [sic]
>
> (iii) the learned judge erred in failing to appreciate that the dicta of Smith JA in the Causewell v Clacken [sic] matter, in referring to variation for the clarification and working out of judgements [sic], were not merely reiterating the provisions of Rule 42.10 of the CPR allowing for the correction of such things as clerical errors and mistakes in final judgements [sic] and orders, but postulated the more substantive variation of such orders for such purposes.
>
> (iv) the learned judge, in failing to appreciate that the court had the power, in light of changed circumstances not caused by the applicant's active default, to vary a binding final consent order by inserting/importing into same, clearly omitted but intended terms/clauses, in order to gave [sic] effect to what the parties clearly must have intended in such circumstances, erred in failing to import into paragraph 3 of the agreement clauses such as *'within a reasonable time'* and *'as soon as practicable'* to indicate the time frames within which the sale and the payout to the [appellant] were to take place, as well as clauses providing for the consequences of such time frames not being met [sic]

(v) the learned judge erred in holding that there was a substantive distinction to be made between the use, in the consent agreement, of the term *'reserve price'* as against the term *'value'* of the property, and that, to the extent that the agreement spoke of a reserve price for, and not of the value of, the property, then the [appellant] could not rely on a change in the value of the property as a change in circumstances which would allow for a variation of the consent agreement.

(vi) the learned judge erred in holding that the terms of the consent agreement could only properly be interpreted to mean that the [appellant] was entitled merely to a discrete monetary sum, and not to an equity interest in the property based on its value and the changes in same over time.

(vii) alternatively, the learned judge erred in failing to hold that in any event, the terms of the agreement implied that in light of the changed circumstances of the delay in the sale not caused by the [appellant's] active default, and of the rich benefits that the [respondent] was deriving from such delay, the [appellant] was entitled to interest on the said monetary sum from the date when it was reasonable for the sale on the open market to have taken place and the payout to the [appellant] of the stated sum made [sic]

(viii) the learned judge erred in holding that the fact that the [appellant] had other possible recourses and could have applied for an enforcement of the consent order, or taken steps to sell the property himself, or taken steps to recover the stated sum as a judgement debt [sic], meant that the application for a variation had inevitably to be rejected [sic]

(ix) the learned judge erred in holding that, the consent order, being a final order, cannot be varied, except by application for a fresh order, an appeal or a rehearing.

(x) the learned judge erred in holding that the consent order could only be varied if there was a mistake, fraud or misrepresentation [sic]

(xi) the learned judge erred in failing to appreciate that the application for enforcement of the order would be no less complex and taxing on the court's time and resources than the present one for variation, and

(xii) the learned judge erred in holding that the court cannot vary or change a Mediation Agreement/consent order, and in failing to appreciate that the court is empowered to vary such an existing agreement, by clarification, reasonable interpretation and augmentation of its terms, where the court considers it necessary for the just working out and putting into effect of the existing agreement, and to give effect to what the court determines to have been the intention of the parties in light of the terms of the agreement, and all the material existing and changed circumstances of the matter."

The issues

[19] The grounds of appeal can be conveniently subsumed into the following issues:

i. whether the learned judge erred in finding that the court had no power to vary the consent order in the circumstances (grounds (i), (iii), (ix), (x), (xii));

ii. whether the learned judge erred in finding that the consent order could not be interpreted to mean what the appellant asserted it should and that the terms specified could not be implied (grounds (iv), (v), (vi), (vii)); and

iii. whether the judge erred in attributing substantial delay to the appellant (grounds (ii), (viii), (xi)).

Issue 1 - Whether the learned judge erred in finding that the court had no power to vary the consent order in the circumstances (grounds (i), (iii), (ix), (x) and (xii)

A. <u>The appellant's submissions</u>

[20] Counsel Mr Smellie, on behalf of the appellant, submitted that the court has the power to vary a consent order that is a binding compromise agreement, in order to clarify its terms or to allow for the "working out of the order", by inserting terms that can

reasonably be inferred that the parties had intended to include but left out inadvertently. The authority of **Weir v Tree** was relied on to support this proposition.

[21] Counsel submitted that the terms, as set out in the relief sought, should be inserted into clause 3 of the original order, to state the timeframe within which the sale of the property and the payout to the appellant should take place. It was further submitted that the authorities show that the court also has the power to vary a consent order where there had been a material change in circumstances. The authorities of **Cristel v Cristel** [1951] 2 All ER 574, **Causwell v Clacken**, **Desmond Gregory Mair v Phyllis Mitchell** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 123/2008, judgment delivered January 2009, **Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen** [2003] EHWC 1740 (Ch), and **Harley v Harley** were relied on in this regard.

[22] Counsel argued that the "massive delay" in carrying out the sale, since the date of the consent order, qualified as such a "material change in circumstances" that had affected the parties substantially, and which warranted a further variation of clause 3 of the order in the appellant's favour (particularly, he said, since that delay was caused by the respondent).

[23] Counsel also argued that what was being sought by the appellant did not purport to change the substance of the original order but it would merely allow them to be worked out in the light of the omissions and the change in circumstances, where the original order was silent on the consequences of delay. Counsel submitted that the delay was not "envisaged", and "the court is entitled to make this variation to facilitate the working out of the order in light of the changed circumstances". The learned judge, it was asserted, failed to consider these factors sufficiently or at all, and "overlooked and misconstrued" the principles in **Causwell v Clacken** to wrongly find that the court could do no more than correct accidental slips, omissions, or clerical errors as provided for in rule 42.10 of the CPR.

[24] Counsel submitted further that the learned judge further erred when she (a) confined the applicability of **Weir v Tree** to PROSA cases; (b) found that the appellant's application for an injunction contributed "more than minimally" to the delay of the sale; and (c) found that the referral in the order to a reserve price precluded the drawing of conclusions as to whether the value of the property had increased due to the delay and that this could not avail the appellant as a change in circumstance.

[25] Counsel also submitted that the learned judge erred in failing to consider, in the alternative, that a variation of the order could be made to make provision for the payment of interest to the appellant, in the light of the delay.

[26] The appellant relied, as instructive, on **Weir v Tree** and the dicta of Peter Smith J in **Independent Trustee Services Ltd v GP Noble Trustee Ltd and Others** [2010] EWHC 3275 (Ch) to support the proposition that based on the wording of rule 26.1(7), the court has the discretion to vary or set aside a final order of a judge, based on the particular circumstances of each case.

B. The respondent's submissions

[27] Counsel for the respondent, Mr Steer, asserted that the consent order needed no clarification, as the mediation agreement which it embodied, was clear and unambiguous. He maintained that under the terms of that agreement the appellant's share in the property was to be fixed as the monetary sum stated and not by way of a percentage. He said that the intention was for the appellant to be paid $9,106,692.00 out of the proceeds of the sale of the property, at a reserve price of $25,000,000.00. He argued that the appellant cannot now seek to get a larger sum than agreed when that was not what was contemplated by the parties. It was the appellant's own fault, counsel intimated, that he did not seek to enforce the consent order for the property to be sold, as soon as the 120 days for the respondent to exercise the option had expired.

[28] Although counsel agreed that the court had the authority to vary consent orders agreed on by parties, in certain circumstances, he submitted that those circumstances

only referred to cases where there is fraud, mistake, misrepresentation or a supervening event. He submitted that none of those have occurred in this case, nor was there even an assertion that this was so. Further, although counsel accepted that an unforeseen change in circumstances was a ground upon which a consent order might be varied, he submitted that the case law suggests that a natural fluctuation in the price of property, however dramatic, does not qualify as sufficient to warrant the variation of such agreement.

[29] The authorities of **de Lasala v de Lasala** [1979] 2 All ER 1146, **Barder v Barder** [1987] 2 All ER 440, and **Livesey (formerly Jenkins) v Jenkins** [1985] AC 424 were relied on for the limited circumstances in which the court may vary a consent order, as well as **B v B** [2007] EWHC 2472 (Fam) and **Little Belize Corn Mill Co Ltd and others v Horizon Distributors Limited** [2017] JMCC Comm 13, in respect of how the court treats with unforeseen price fluctuations.

[30] Finally, counsel submitted that, in any event, too much time had passed since the consent order was made, and even if the court were to countenance an argument as to the existence of an unforeseen change in circumstances, according to the authorities, the appellant would have had to approach the court within a short period of time after the consent order had been made.

C. The appellant's reply

[31] In his reply to the submissions of the respondent, filed 14 October 2020, counsel for the appellant conceded that the first two clauses of the consent order were clear and unambiguous and were not in need of any clarification. However, counsel submitted that paragraph 3 of the agreement required clarification in respect of the absence of an express indication as to the time by which the property was to be sold. It was submitted that "by all tenets of conveyancing practice and of reasonableness, as well as having regard to the time strictures as it relates to the time within which the respondent was to exercise the option, it was to be assumed that it was clearly not intended for the sale to be done at the leisure of the [respondent] as opposed to within a reasonable time". There

was no need, he said further, for an express provision as to the time the property was to be sold, as this would have been implicitly understood, in the same way it was implicitly understood that the payment from the proceeds of the sale was to be made "as soon as practicable, thereafter". A need would then arise, he said, for a provision as to the attendant consequences, if it was not done within a reasonable time.

Discussion and disposal of issue 1

[32] Settlement agreements resulting from mediation are partially governed by the CPR and partly by case law. I will discuss the principles which emanate from the case law first.

A. *The legal principles: case law*

[33] There are certain general principles which emanate from the cases, which I will state broadly here. Consent orders which record the terms of a compromise agreement made at mediation are contractual. Such orders are immediately enforceable as an order of the court, unless otherwise stated in the order itself and there is no requirement to bring fresh proceedings on the compromise agreement itself. Such consent orders will not be set aside unless vitiating circumstances exist such as would cause the court to ordinarily set aside a contract. Once a consent order is drawn up and sealed the court has no power to vary it in the same action. A fresh claim must be initiated to have it varied or set aside (see **Beverley Simms and anor v Lionel Johnson** [2019] JMCA Civ 19). A consent order may be set aside in a fresh action brought for that purpose on any ground on which the compromise agreement it embodies could have been set aside. Compromise agreements have been set aside on the grounds of uncertainty, illegality, fraud, misrepresentation, non-disclosure of a material fact, duress, mistake or lack of authority (see **Purcell v FC Trigell Ltd and Anor** [1967 P No 170]; [1971] 1 QB 358 and **Siebe Gorman and Co Ltd v Pneupac Ltd** [1982] 1 ALL ER 377).

[34] In a fresh action brought for that purpose, a consent order that embodies a contract may also be set aside as being void for uncertainty or as being discharged by frustration or any other reason akin to frustration, which arose after the consent order

was made and which would render performance impossible or totally different from what was contemplated by the parties when they entered the agreement. However, it is only where there is an absence of agreement on vital terms that a consent order will be set aside on the basis of uncertainty (see **Scammel and others v Dicker** [2005] EWCA Civ 405; [2005] 3 ALL ER 838). The court may, however, lend assistance in clarifying or working out the consent order, where the difficulty lies in the interpretation or execution of the order, so as not to undo what was meant to be a formal settlement of a claim. Consent orders may, therefore, be the subject of clarification.

[35] An application to set aside a consent order cannot be made in the original action or by way of an appeal where no evidence of the vitiating factors had been ventilated in the court below in fresh proceedings (see 3rd edition Halsbury volume 22 paragraph 1672 page 792 and the case of **Re Affairs of Elstein** [1945] 1 ALL ER 272, cited therein. That case was considered and applied recently in this court in **Beverley Simms and anor v Lionel Johnson**). A court may also refuse to set aside a consent order that it could otherwise have set aside, on the basis of delay in the making of the application to set aside

[36] The principles are the same where the application is one to vary a consent order. In **Causwell v Clacken**, Smith JA stated the following, at pages 15 to 16, in relation to the scope of the court's jurisdiction to vary a consent order generally:

> "A Consent Order has all the attributes of an order made after a contest save that the parties cannot appeal without leave. It is not in dispute that generally a judge may not change a final order once it is perfected and entered. There are, of course, a few exceptions, for example the correction of a clerical error, or the clarification of the judgment, or a variation to facilitate the working out of the order".

[37] The power of the court to vary or set aside is even more restricted where the consent order is of a type that amounts to a contract between the parties, as is the case here. In that regard, at page 16 of **Causwell v Clacken**, Smith JA said the following:

> "The authorities show that where a consent order evidences or embodies a real contract between the parties the court will only interfere with it on the same grounds as it would with any other contract, for example misrepresentation, mistake or fraud.
>
> Therefore, where it appears that a Consent Order embodies the conclusion of negotiations between the parties, the Court will give effect to it where one party is in breach, and will not vary it by giving extra time to perform its terms-see **Tigner-Roche & Co. v. Spiro** [1982] 126 S.J. 525 and **The Supreme Court Practice** [1999] Volume 2 paragraphs 17 A-24." (Emphasis added)

[38] Smith JA went on to note that where an order is expressed to be made by consent, the court had to determine whether the consent order amounted to a binding contract between the parties or whether it was a mere order of the court to which the parties did not object. This is because different principles apply to each. If the consent order was one which was an order of the court to which the parties did not object, then rule 26 (the court's case management power to extend or abridge time) would not be ousted. Then, at page 17, Smith JA said further:

> "In the case of a final order which embodies or evidences a real contract, as said before, the court will normally not interfere with it. Where, however, in the case of a final judgment or order the necessity for a subsequent application is foreseen, it is usual to insert in the judgment or order words expressly reserving liberty to any party to apply to the court for further directions. The insertion of 'liberty to apply' does not enable the court to deal with matters which do not arise in the course of the working out of the judgment or to vary the terms of the order except, possibly, on proof of change of circumstances – see Cristel v Cristel (supra). A judgment or order is not rendered any less final because liberty to apply is expressly reserved." (Emphasis added)

[39] The case of **Causwell v Clacken** concerned a consent order embodying a binding contract made between the parties in settlement of a dispute arising from a petition filed by the respondents to wind up a company, under provisions of the Companies Act. Both the appellants and the respondents were shareholders in the company. The original consent order contained provisions and specific time frames for the performance of certain acts in respect of the purchase of shares by the respondents, from the appellants,

who were the minority shareholders. It contained an expressed liberty to apply clause to each party, generally. Utilising the "liberty to apply" clause, the court varied that order, on the agreement of the parties, to enlarge time for the valuation of the shares and for the parties to agree on the adjustment of the other dates in the initial order. The valuation of the shares was still not completed within the extra time allotted, and the respondents filed a summons seeking to further vary the terms of the initial consent order under the "liberty to apply" provision. This was opposed by the appellants, but was, nonetheless, granted by the judge, who substantially varied the order to include terms setting timetables, which had not been included in the initial order. This court had to grapple with whether it was permissible for the judge at first instance to vary the terms of the first consent order, without the consent of both parties, and, if so, to what extent.

[40] The appellants, in that case, argued that the judge had erred in finding that the court had jurisdiction to vary the consent order as it did, and in fundamentally altering the conditions agreed by the parties. In assessing this issue on appeal, Smith JA accepted that the "liberty to apply" clause gave the court the jurisdiction to extend or abridge time periods with a view to facilitating the working out of the order but did not give the court the jurisdiction to alter the terms of the agreement. He determined that the important question was whether the variations done were for the working out of the order or if they had altered what the parties had agreed, with particular reference to the inclusion of a clause stipulating the consequence of a failure to complete the valuation of shares in time, which had not been included in the initial and second order agreed to by the parties.

[41] Smith JA found that the variations, with one exception, were indeed for the working out of the order and did not fundamentally alter what the parties had agreed to. This was because the previous orders did not provide for what was to be done if the shares were not valued in the allotted time, the time given in the consent order had long passed, and there were other dates fixed in the order that were consequential upon that date which were rendered moot by the delay. Smith JA pointed to the fact that the consent order provided for many things to be done within time periods that needed to be

worked out. Aspects of each time period impacted on the others and the variations, therefore, were designed to facilitate the working out of the order in a manner that would be fair to all the parties.

[42] Smith JA, however, did find that one variation of the consent order, to provide for a winding up of the company as the consequence of a failure to meet any of the time periods in the order, was fundamental, and was a substantial alteration of the terms of the consent order and was not for its "working out". Consequently, that variation was struck down by the court.

[43] **Causwell v Clacken** is, therefore, not authority for any suggestion that the jurisdiction of the court, under the "liberty to apply" clause, extends to a discretion to change the essence of what the parties had agreed to. In fact, at page 24, Smith JA made it clear that the court, in exercising the jurisdiction granted to it under the "liberty to apply" provision, cannot interfere with a consent order which embodies a true contract between the parties, simply because it finds that one party is experiencing difficulties.

[44] It can be seen from the cases too, that it often becomes necessary, after an order or judgment is given, for the parties to return to court for directions or assistance in working out the rights, which have been declared by that order or judgment. A "liberty to apply" clause will generally be expressly reserved in the order for that purpose. However, even if such a clause is not reserved, all orders of the court carry with them, *in gremio*, (which literally means "in the bosom of the law") a "liberty to apply" to the court (see Halsbury Laws of England 3rd edition volume 22 paragraph 1663 and cases referred therein). So even if not expressly reserved in the order, such a "liberty to apply" will generally be implied, especially in orders which are not final. However, in final orders and judgments it is usual to expressly insert such words reserving "liberty to apply" to any party.

[45] However, the authorities show that there exists an implied provision for "liberty to apply" in the orders of the court in favour of either party, where it is deemed to be

necessary for the court to revisit an order to clarify it or otherwise vary it, to facilitate its working out (see **Cristel v Cristel**, for instance). So, in the instant case, although the words "liberty to apply" were not stated in the consent order, liberty to apply may be implied. However, it does not give the court any power to vary the terms of the consent order to make it a different agreement from that contemplated by the parties.

[46] In **Causwell v Clacken**, this court relied on **Cristel v Cristel** for the proposition that the words "liberty to apply" only permits the "working out of the actual terms of the order", and that it is only in exceptional circumstances that those words could justify an alteration of the terms of a consent order. The facts in **Cristel v Cristel** were that a husband and wife, who were separated, consented to an order that the wife deliver up occupation of the matrimonial home, in which she resided with their two children, to the husband upon his provision of a "2 or 3 bedroomed house or Bungalow" for her. The husband, finding himself in financial difficulties, subsequently applied to vary the order to provide, instead, a two bedroomed 'flat'. The matter came before a master who refused to vary it, but on appeal to a judge, the judge varied it. The judge's decision to vary was appealed. On the appeal, the appellate court found that the words "liberty to apply" was an indication that the working out of an order may involve matters on which it might be necessary to obtain the decision of a court but did not confer any right to vary or alter the terms of the order. It found that a flat did not carry the same meaning as a house or bungalow and, therefore, the judge had altered what had been originally agreed between the parties, which he was not entitled to do under the "liberty to apply" provision. The court found that only in a very "exceptional context" or if there had been an "unforeseen change of circumstances" would the liberty to apply provision be used to alter what was agreed by the parties.

[47] The case of **de Lasala v de Lasala** involved a consent order made by the court upon the settlement of matrimonial proceedings involving, among other things, financial arrangements agreed between husband and wife in a deed of arrangement and trust deeds. The consent order provided for the dismissal of the wife's applications for

maintenance of herself and the parties' child, upon the fulfilment of its provisions by the husband and liberty to apply was reserved in respect of the implementation of the deeds. The husband fully executed the financial arrangements. The wife subsequently applied for a variation of the consent order or to have it set aside. Her application was dismissed in the Supreme Court of Hong Kong. She appealed to the Court of Appeal of Hong Kong which allowed her appeal. The husband appealed to the Privy Council and his appeal was allowed. The Privy Council noted that once a financial agreement between parties is made the subject of a consent order, its legal effect is derived from the court order and the parties may apply to the court for enforcement of its provisions, to the extent that they remained executory. The Board made a distinction between a maintenance agreement (under the Hong Kong Matrimonial Proceedings and Property Ordinance), which was enforceable by action, and a court order which was enforceable by judgment summons. With regard to that, the Board said, at page 1155 :

> "Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order no longer depend on the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order; and the method of enforcing such of their provisions as continue to be executory (in the instant case the provisions of trust deeds A and B) is not by action but by summons under the court order pursuant to the liberty to apply, reserved in the instant case by para 8 of the consent order…"

[48] The Board said further:

> "Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside. The test whether a judgment or order finally disposes of the issues raised between the parties is not determined by enquiring whether for the purposes of rules of court relating to time or leave to appeal it attracts the label 'final' or 'interlocutory'. **The test is: has the court that made the order a continuing**

> **power to vary its terms, as distinct from making orders in aid of enforcing those terms under a liberty to apply**?" (Emphasis added)

The Board found that the judge in the Supreme Court had no jurisdiction to vary the consent order in favour of the wife and her only recourse was to apply to set it aside in a fresh action.

[49] I will only refer to three other interesting cases referred to by counsel in this case. All three deal with consent orders for financial provisions upon divorce and where the power to make those orders is conferred by statute. The first of the three is **Livesey v Jenkins**, a decision of the House of Lords. This involved a consent order, which embodied a settlement agreement made following the wife's application under the Matrimonial Causes Act of 1973 for financial provision and property adjustment. The consent order was made by a Registrar of the court, in the terms agreed by the parties without taking account of the circumstances of the case and the applicable provisions of the statute. In the consent order, the husband agreed, amongst other things, to transfer his share in the matrimonial home to the wife, with the intention that it would be a home for her and the children of the marriage. In return, the wife agreed to bring an end to the proceedings against the husband. Unbeknownst to the husband, the court and, indeed, the wife's legal representative, she became engaged to another man whom she wed two days after the transfer was effected. Having discovered this state of affairs, the husband applied for leave to appeal out of time, to have the consent order set aside and the proceedings restored. He was granted leave to appeal, but his appeal was dismissed both by a judge at first instance and the Court of Appeal. He further appealed to the House of Lords. The House of Lords allowed his appeal and approved the principle in **de Lasala v de Lasala**, that the legal effect of the agreement is derived from the consent order.

[50] The House of Lords held that there was a duty of full and frank disclosure of all material facts owed to the court and to the parties, and that this duty applied not only to contested proceedings but also to exchanges of information leading to consent orders, without further enquiry by the court. The wife's engagement was a circumstance directly

relevant to the case, and to which the court would have had to have regard in exercising its discretion, pursuant to the applicable statutory requirements. It, therefore, should have been disclosed. The Law Lords pointed to the fact that, if the matter had been contested, disclosure would have been governed by rules of court with which both parties would have been compelled to comply. The wife's engagement having not been disclosed, the consent order should be set aside. Disclosure was no less required because there was a settlement.

[51] Several principles emanate from that case that overlap with the principles discussed so far. Firstly, it recognised the importance of the clean break principle, emphasising that consent orders, properly negotiated with all material disclosures and which effect a clean break, should not be lightly set aside. That is no different from saying, consent orders which embody a contract should not be interfered with and that finality of litigation should be encouraged. Secondly, where the order is made without the relevant disclosure, the court which made the order, and the party who agreed with it, would have been misled.

[52] It is patently clear that despite the overlap in the principles, **Liversey v Jenkins** cannot avail the appellant, as the instant case is not a family law matter and, further, no issue regarding lack of disclosure or misleading of the court exists. A distinction should also be made between the principles guiding a court in setting aside a consent order and those for varying it. The power to vary a consent order for financial provisions in family matters, will only be considered where there has been a change in circumstances after the date of the order, and leave to appeal the order out of time must be obtained. That takes me to the cases of **Barder v Barder** and **B v B** [2007] EWHC 2472 (Fam).

[53] In **Barder v Barder**, a consent order was made embodying the terms of an agreement, on a clean break basis, in matrimonial proceedings, requiring amongst other things, that the husband transfer his interest in the matrimonial home to the wife. After the consent order was entered into but before it was executed, the wife killed the two children of the marriage and committed suicide. The husband sought leave to appeal the

consent order out of time, and to set it aside. Leave was granted, and the order was set aside at first instance. The wife's mother, who was given leave to intervene as the administrator of her daughter's estate, successfully appealed to the Court of Appeal, which restored the order. The husband appealed to the House of Lords. The House of Lords held, inter alia, that "…if by reason of supervening events occurring within a relatively short time, the fundamental assumption on the basis of which such an order was made has become totally invalidated", the order will be set aside or varied.

[54] In **B v B**, a financial agreement was reached by a husband and a wife in divorce proceedings, which was embodied in a consent order made by the court on 3 February 2006. The order was for a lump sum, the provisions of which centred around the matrimonial home and an office suite, the value of which, the wife was to receive half after redemption of the mortgage and associated costs. The payout on the matrimonial home was based on a valuation of the property of £1,250,000.00. On 15 April 2006, the wife saw the house advertised for sale for £1,850,000.00 and she was advised that an offer was made for £1,600,000.00. She sought leave to appeal the consent order out of time on the basis, inter alia, that there was a supervening *Barder* event by reason of a sudden "unforeseen and unforeseeable" increase in the value of the house, such that it should cause the court to revisit the consent order. Sir Mark Potter P, in determining whether leave to appeal should be granted, considered that the case turned on the main issue as to whether the change in the value of the house was a new unforeseeable event occurring since the making of the order, which invalidated the fundamental assumptions on which the consent order was made.

[55] Sir Mark Potter P relied, at paragraph [15] on the statements of principle set out by Hale J (as she then was) after her review of the authorities in **Cornick v Cornick** [1994] 2 FLR 530, which were as follows:

> "On analysis, therefore, there are three possible causes of a difference in the value of assets taken into account at the hearing…

> (1) An asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which parliament has quite obviously and deliberately declined to enact.
>
> (2) A wrong value was put upon that asset at the hearing, which had it been known about at the time would have led to a different order. Provided that it is not the fault of the person alleging the mistake, it is open to the court to give leave for that matter to be reopened. Although falling within the *Barder* principle it is more akin to the misrepresentation or non-disclosure cases than to *Barder* itself.
>
> (3) Something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about substantial change in the balance of assets brought about by the order. Then, provided that the other three conditions are fulfilled, the *Barder* **principle may apply. However, the circumstances in which this can happen are very few and far between. The case-law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle**." (Emphasis added)

[56] The application in **B v B** was dismissed on the basis that there was nothing to show that the original valuation was done in error, neither was it shown that the increase in value was a supervening event, which invalidated the fundamental assumption upon which it was made. Sir Mark Potter P found that the increase in value of the asset was due to the refurbishing work done by the husband and the rising property market since the consent order was made. He found that these were matters which were foreseeable and that the increase in value was not inordinate. He also found that the circumstances in which the **Barder** principles are applicable are few and far between and that the case before him did not come within those principles.

[57] These two latter cases, therefore, could not assist the appellant, in the instant case.

B. *The legal principles: the CPR*

[58] Rule 74.10(5) of the CPR requires that "[a]ny agreement reached by the parties at the mediation shall be recorded in writing and signed by the parties and their attorneys-at-law (if any)". Rule 74.12(1), which deals with action to be taken by the court following the filing of the mediation report, provides that where an agreement has been reached, "the court must make an order in the terms of the [mediation] report". That rule also stipulates that the order to be made by the court must be in the form of a consent order pursuant to rule 42.7. Such an order must be drawn in the terms agreed by the parties, expressed as being 'by consent', signed by the attorney-at-law for each party, and filed at the registry for sealing (rule 42.7(5)).

[59] With respect to the mediation report, the rules provide that this must be filed by the mediator in the form and time stipulated, including information such as the date of the mediation, persons in attendance, and whether a full or partial agreement was reached (rule 74.11(1)). The signed agreement ought to accompany the report or be filed at the registry, unless the agreement is to be confidential (rule 74.11(2)).

[60] In the instant case, the relevant order was made in accordance with these requirements. The parties attended mediation, and arrived at an agreement which was signed by both parties. There is no indication that the order was signed by the attorneys for the parties, however, no dispute has been raised as to the validity of the agreement, nor has there been any challenge to the judge's jurisdiction to make the consent order which embodied the terms of the mediation settlement agreement.

[61] This court has unequivocally stated, in **Patrick Allen v Theresa Allen** [2018] JMCA Civ 16, at paragraphs [77] and [100], that a mediation agreement made pursuant to the CPR represents a binding contract between the parties as to how they wish to settle their dispute. The terms of the agreement dictate how the order of the court made under rule 74.12 is to be framed (see paragraph [99]). The effect of this, the court said, is that such an order must be enforced in the same way as a final order of the court. At

paragraphs [92] and [93], Phillips JA explained how a consent order borne out of mediation should be treated and enforced:

> "[92] The order endorsing the mediation agreement must be enforced as a court order in the usual way. This demonstrates the connection between the court and the mediation process established under the CPR.
>
> [93] The facts on which the decision in **Green v Rozen** is based are obviously distinguishable from the instant appeal, as the court in the instant case, has made an order in terms of the agreement, and that order would clearly be a consent order, and would be valid and enforceable as an order of the court."

[62] This court, in that case, also held that any question relating to the enforcement of orders made in relation to mediation agreements is governed by the CPR, as are orders made by the court in general (see paragraph [98]).

[63] Consent orders entered into, after a settlement at mediation, are, therefore, governed by the CPR as with any other court order. A judge has wide case management powers under the CPR, and there is some authority that the court's powers to interfere with consent orders may have been enlarged by these rules. Rule 26.1(7) of the CPR states that the power of the court to make an order under the rules also includes the power to revoke or vary that order. In considering the approach taken by the authorities in other jurisdictions, which rely on similar provisions in their CPR, it is prudent to consider such cases as **Ropac Limited v Inntrepreneur Pub Co (CPC) Ltd** [2001] CP Rep 31; [2000] Lexis Citation 1350, and **Chaggar v Chaggar and another** [2002] EWCA Civ 1637; [2002] ALL ER (D) 455.

[64] In **Ropac**, Neuberger J (as he then was) concluded "hesitantly" that because the provisions in the English CPR gave the court more wide - ranging and flexible powers to manage cases, it had a greater power to interfere with consent orders than it previously had under the Rules of the Supreme Court (RSC), even those which embodied the terms of a contract. He recognised, however, that the courts ought to be slow to interfere where the parties have arrived at a consent order embodying a contract between the parties in

clear terms, save in unusual circumstances. Note must be taken, however, of the fact that, in **Ropac**, Neuberger J did not interfere with the consent order to extend time, as the applicant in that case, had requested.

[65] That case was approved in **Pannone LLP v Aardvark Digital Ltd** [2011] EWCA Civ 803 (the court's power, reserved to itself, to extend time under the CPR in order to grant relief from the agreed consequences of non-compliance with a consent order in relation to a procedure in preparation for trial) which itself was followed in **Safin (Fursecroft) Ltd v Estate of Dr Said Ahmed Said Badrig (deceased)** (2015) EWCA Civ 739 (appeal from an order extending the time to comply with procedures in a consent order, embodying a real contract, where the court found that the power to extend time for compliance was not ousted in a case of an unless order made by consent). See also **WA v Executors of the Estate of HA (Deceased) and others** (2015) EWHC 2233 (Fam), which took a similar approach.

[66] In **Chaggar v Chaggar**, at paragraphs 17, 18 and 19 , it was held that the consent order, being a real contract between the parties, fell into the first category of cases described in **Siebe Gormon and Co Ltd v Pneupac Ltd**. However, the court found that the terms of the agreement included the "mechanics" for the pursuit of a sale, which left open the probability that those "mechanics" would have had to be worked out, if necessary, by directions under an order for sale, under the English CPR part 40.16. For this reason, the court found that it was not one of the cases in which it could be said that the court could not interfere. The court recognised, however, that if the agreement had merely embodied the parties' agreement without the need to work out the "mechanics", the court could not intervene.

[67] If the approach in **Ropac** as well as the other cases cited above, including **Chaggar v Chaggar**, holds good, then it would seem that the power of the court to interfere will depend on the nature of the order. It appears, therefore, that the court, utilizing its case management powers under the CPR, could interfere with a consent order, even where it embodies a contract between the parties, where the "mechanics" of its

enforcement have to be worked out, or where it is necessary to extend the time table and provide relief from sanctions where there is a failure to comply with an agreed case management procedure. In **Fivecourts Limited v JR Leisure Development Co Ltd** [2001] L & TR 5, in following **Ropac**, the court agreed that the case management powers may be used to interfere in the case of a consent order where there was a change in circumstances or where unusual circumstances arose since the consent order was made. In that case, the court preferred the use of the term "exceptional circumstances".

[68] It must be noted, however, that the Court of Appeal in **Pannone LLP** pointed out that **Ropac** was dealing with an agreement on substantive issues and commented that in cases which were no more than a procedural accommodation in relation to case management, there was no requirement for unusual circumstances to exist before the court will interfere. The Court of Appeal in **Safin** took it further to hold that the discretion to interfere in a consent order to extend time, extended to consent orders which resolved substantive disputes also, and was not limited to the existence of unusual circumstances. This power, it said, however, should be exercised sparingly in such cases.

[69] In my view, however, none of these cases are applicable to the instant case as the learned judge was not asked to exercise her case management powers to extend time for compliance with the consent order nor to grant relief from sanctions for non-compliance.

[70] The case of **Harley v Harley** was also cited but, in my view, that case is equally inapplicable to the instant case. That case involved an appeal against orders of a Supreme Court judge, which included his refusal to revoke an unless order made against the appellant by a judge of concurrent jurisdiction, or to otherwise grant him relief from sanctions. The appellant had argued, amongst other things, that there had been a material change in circumstances that warranted the revocation of the relevant orders. This court considered the nature and extent of the jurisdiction of a judge of the Supreme Court to vary or revoke such an order under rule 26.1(7) of the CPR. Relying on the authority of **Mair v Mitchell**, which applied the reasoning in **Lloyd's Investment**

(Scandinavia) Limited v Christen Ager-Harrisen, this court found that a court may vary or revoke the order of a judge of concurrent jurisdiction in limited circumstances, which included a demonstration of a material change in circumstances or that the judge who had made the initial order had been misled. It said at paragraph [41]:

> "[41] It is patently clear that rule 26.1(7) restricts the conditions under which a court may vary or revoke an order. The rule does not provide an open door permitting a court to reverse its decision merely because a party wishes the court so to do. A court therefore, will only revisit an order previously made if an applicant, seeking to revoke that order, shows some change of circumstances or demonstrates that a judge who made an earlier order had been misled…"

[71] This court found that the affidavit evidence put forward by the appellant did not show any change of circumstance, and so the judge in the court below was correct in refusing to revoke the order. This court also did not find any evidence that any of the judges that made the relevant orders had been misled.

[72] In **Mair v Mitchell**, this court was concerned with the question as to the circumstances in which a judge could exercise his or her discretion to vary a regime and trial date that was fixed by another judge. The case involved the variation of directions and trial dates by a judge in respect of an amended notice of application for court orders seeking to vary directions relating to an election petition. At paragraph 19 of that decision, the court stated the law as follows:

> "19. In my judgment, the principles applied by the English Courts should be followed in this jurisdiction when the power of the Court to vary an order under R.26 1(7) of the CPR is invoked. **The applicant must show that there has been a significant change of circumstances since the order was made or that the judge who made the order was misled in some way**. Otherwise [sic] it would be open to a judge of the Supreme Court to entertain what would in effect be an appeal from an order of another judge exercising parallel jurisdiction." [Emphasis added]

[73] Those cases can easily be distinguished from the case at bar. They involved a question of the court's discretion to vary an order, pursuant to the case management powers under the CPR, that was neither an order consented to by the parties, nor one that evidenced a binding contract between the parties, as in this case. Having assessed the circumstances and exercised its own discretion, the court made the relevant orders. In the case at bar, there existed no discretion in the judge who made the consent order as to the terms of the order. Once the mediation agreement was reached, she was required to make the order in terms of the report.

[74] The case of **Little Belize Corn Mill v Horizon Distributors Ltd**, which was a decision of Simmons J (as she then was) in the Commercial Division of the Supreme Court, and which was cited by the respondent, also does not assist. In that case, the applicant sought a variation or the setting aside of a consent order, relying on the overriding objective in the CPR and rule 26.1(7). Simmons J considered the general power of the court to vary or revoke an order contained in rule 26.1(7) of the CPR and determined that this was a power which ought not to be exercised lightly. Having examined the cases, she determined that for the court to interfere pursuant to that rule, some material change of circumstances must be shown or the judge who made the earlier order must have been misled in some way. She, however, made the distinction between those cases, in which reliance was placed on rule 26.1 of the CPR, where the orders which were sought to be varied were not consent orders, and the order before her which was a consent order. Simmons J stated the general rule in the case of consent orders which was that they signify the end of the dispute between the parties unless they have been impeached in some way. She considered the principles, as stated in **Causwell v Clacken** and the cases cited therein, and concluded that the provisions of rule 26.1 (7) of the CPR were only applicable where the consent order did not involve one which amounted to a real contract between the parties. Having done so, she said the following:

> "[55] In this matter, the terms of the consent order were settled at mediation and subsequently endorsed by an order of the court. In fact, paragraph 4 provides for the enforcement of the judgment

> in the event that the defendant failed to make the payments as agreed. The precise nature of the terms of the order suggests that the defendant was not merely submitting to the wishes of the claimant. Its terms in the words of Templeman LJ in **Tigner-Roache & Co. v. Spiro** (supra) 'could not have been obtained by the plaintiffs by a mere submission' by the defendant. The order is therefore, in my view one which seals the compromise between the parties and can therefore be described as 'a true binding contract'. Such an order according to Cooke, JA in **Windsor Commercial Land Company Limited & others v. Century National Merchant Bank Trust Company Limited & another** (unreported) Court of Appeal, SCCA No. 114/05, judgment delivered 5 June 2009, will not be interfered with as with any other contract'. Such grounds would include mistake, misrepresentation, duress and undue influence. The defendant has not argued that the order was obtained in any of those circumstances."

[75] Simmons J rejected the submission that the overriding objective could be used as a basis to vary the consent order and declined to follow dicta in cases relied on by the party seeking to vary the consent order. Those cases were, in particular, **Pannone** and **Safin**, which, as already noted above, seems to suggest that the court's powers were extended by the advent of the CPR and that the court now had a real discretion to extend time in a consent order, under the rules in the CPR. Simmons J, however, declined to vary the order, particularly because the consent order before her, had specifically stated what was to have been the consequence of a breach of the time stipulation. Since that consent order dealt with the timeframes within which money was to be paid, as well as the consequences for a failure to meet those deadlines, she concluded that there was no basis on which the court could imply that there was liberty to apply, in order to vary the order on the basis of a change in circumstances, namely a downturn in the applicant's financial position. She also considered herself bound by this court's decision in **Causwell v Clacken.**

[76] That case, then, did not require any working out and the court need not have implied a 'liberty to apply' in order to effect a "working out" of the order.

[77] **Weir v Tree** involved an application to vary an order made on appeal by this court in respect of an option to purchase matrimonial property as between former spouses. The applicant had filed a claim against his former wife, seeking interest in property registered solely in her name, but on which he had lived for several years. A judge of the Supreme Court awarded him a half-share of the value of the dwelling house but not of the appurtenant land. He appealed to this court and was awarded a half-share of the family home together with the land. The court also made orders for the valuation of the property and for the applicant to have first option to purchase the property, failing which the property was to be sold on the open market. Trouble arose, however, as to the time-frame in which the option was to be exercised, this court having stated in the initial order that the option should be exercised three months from the order for sale. By the time the valuation was completed and paid for and the applicant indicated his intention to exercise the option, three months had passed and the respondent took the view, on the advice of counsel, that the option had expired, she, herself, now wishing to purchase the applicant's share in the property. The applicant filed an application before this court asking the court to vary the terms of the order to reflect that the time frame was intended to be three months from the receipt of the valuation.

[78] This court discussed a plethora of cases, including **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16, **Brown v Chambers** [2011] JMCA Civ 16 and **Hatton v Harris** [1892] AC 547, that make it clear that the court has the inherent jurisdiction to "correct a clerical error arising from an accidental slip or omission" in an order so as to "ensure that the court's intention was manifest and operative" (see **Weir v Tree**, paragraph [61]). The court, in that case, found (by a majority) that there was no doubt that the intention of the panel that had made the impugned order had intended for the husband applicant to have the first option to purchase the property, and that same ought to have been guided by the valuation of the property which would have had to have been obtained first. The valuation would have also been central to any sale of the property.

The court surmised that this was common sense and the only reason why the court, in its initial order, would have ordered that the property be valued.

[79] Of this court's jurisdiction to interfere with a final order once it has been perfected, it was said, at paragraph [66] that:

> "[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."

[80] **Weir v Tree**, in my view, is not applicable to the instant case, albeit for reasons other than those given by the learned judge. For although it is authority for the fact that this court is vested with the power to correct accidental errors and omissions in its own order (the slip rule), and to vary an order to facilitate its working out, whether or not "liberty to apply" is stated, this is relative to an order made by the court of its own volition. This court was not there dealing with a consent order agreed to by the parties, in the same way that this case does not relate to an order made by the court evidencing the court's intention. The *ratio decidendi* of the majority in **Weir v Tree** was centred, in large part, around the jurisdiction of a court to vary its own order to correct errors and omissions therein so that that order accurately reflected what the court had intended based on the circumstances of the case. In the case at bar, there can be no question as to what the court intended because the consent order was simply drawn up in the terms of what was agreed by the parties in the mediation agreement.

[81] In the case at bar, as already stated, the consent order was not made as an exercise of the court's discretion. The case is, therefore, not helpful in determining the

issues in this case. It cannot, therefore, be said that the learned judge was wrong to find that the case was "irrelevant" to the matter.

[82] In my view, the cases that suggest that there was an extension of the powers of the court to interfere with a consent order which embodied a contract between the parties, introduced by the advent of the CPR, say no more than that which has been said in other cases such as **Causwell v Clacken**, that is, that there is generally no power to interfere with a consent judgement which embodies a contract, except to the extent that it requires working out. The working out may be for a time-table to be set or for some time period to be extended or modified in the light of any changing or exceptional circumstances, where the consent order itself can accommodate those variations. What those authorities do not say is that the rules or the overriding objective in the CPR, gives the court the power to alter what the parties have agreed or make new terms which do not reflect the intention of the parties at the time of the agreement, or which takes away the right of one party under the contract because the other party might be experiencing difficulties. Even Lord Tomlinson LJ, in **Pannone** was tentative in his approach to the extension of the powers he found existed in the CPR to interfere with consent judgments. Referring to the power to interfere with a concluded settlement of substantive disputes, he said this at paragraph [27] of his judgment:

> "[27] Assuming that there is a power so to do, where the settlement is embodied in an order of the court, it can rarely be appropriate for the court to intervene further than to the extent to which the contract can, by its own terms or pursuant to general contractual principles, be modified or discharged in the light of changed circumstances."

[83] Outside of the approach in those cases, which rely on the power of the court in the CPR to extend or abridge time, the general rule is that once a consent order was made and perfected, the ability to set aside or indeed, vary that order, depends on there being a remedy, which has to be sought in a fresh action, and the court's powers, under the CPR, to vary an order or to abridge or extend time, will not extend to variation of substantive matters in a consent agreement or the consent order resulting from it (see

also **Community Care North East (a partnership) v Durham County Council** [2010] EWHC 959; [2010] 4 ALL ER 733).

[84] The cases show the various ways in which a consent order may be challenged, such as by an appeal to set it aside, a fresh action to vary or set it aside or an application to reopen proceedings to vary or set it aside. Some of the cases may appear, at first blush, difficult to reconcile. However, it is easier to do so, if the cases are confined to their various categories. The upshot from the case law is that a consent order made by the court, which embodies a contract made by the parties at mediation, as was done in this instance, is to be treated as a binding contract between the parties, and it is enforceable in a similar way as any final order of the court, without the need to bring a fresh action on it. The court may only interfere with this type of consent order insofar as is necessary for the working out of the order under a "liberty to apply" provision, whether expressed or implied. The court is not empowered to vary such a consent order unless such is for the purpose of correcting a clerical mistake or an error arising from an accidental slip or omission. It may also be varied to provide a suitable 'mechanism' for its enforcement. Leave may also be granted to appeal a consent order out of time where unusual or exceptional circumstances exist or where there has been a material unforeseen change in circumstances, occurring soon after the consent order was made. A consent order which does not embody a real contract between the parties may be set aside or varied by reopening proceedings on it, where it can be shown that the judge who made the consent order had been misled or where there had been a failure to disclose a material and relevant fact.

[85] A summary of the principles distilled from the cases, therefore, reflect the following position in law:

i) Orders made by the court may be corrected before they are perfected, under the slip rule where there are clerical errors, slips or omissions made in the order.

ii) Where a court order is drawn up which does not reflect the true intention of the court, the order may be corrected: **Weir v Tree** and the line of cases on which it relies.

iii) Where a court makes an order in the exercise of its own discretion, that order may only be varied or set aside by a judge of coordinate jurisdiction if the judge who made it was misled, material and relevant facts were not disclosed or where there has been a material change of circumstances since the order was made: **Mair v Mitchell**; **Harley v Harley**; **Lloyds Investments Limited v Christen Ager –Hanssen** and the line of cases on which they rely.

iv) Where parties to a claim enter into a compromise agreement, that agreement supersedes the claim. Where there is a failure to comply with the terms of the compromise agreement, the injured party must seek his remedy by bringing a fresh action to vary or set aside the compromise agreement: **Green v Rozen and others** [1955] 2 ALL E R 797.

v) Where parties to a claim arrive at a settlement agreement which is in the nature of a contract and that agreement is made the subject of a consent order made by the court, that order is enforceable by application for enforcement of the order without resort to a fresh action on the agreement: **Patrick Allen v Theresa Allen**. Such an order will not be interfered with by the court, unless on grounds which would vitiate a contract and a fresh action will have to be brought to set it aside on those grounds: **Purcell v Trigell**; **Siebe Gorman and Co Ltd v Pneupac Ltd**.

vi) Where a consent order embodies a contract between the parties, and as drawn up, it requires clarification or interference by the court for the proper working out of the existing terms of the order, the court may intervene under the "liberty to apply" provision expressed or implied in the agreement. Possibly, only in exceptional circumstances or an unforeseen change in circumstances,

will a court be justified in using the "liberty to apply" provisions to vary or alter the terms of the order: **Causwell v Clacken**; **Cristel v Cristel**.

vii) Consent orders which embody a real contract between the parties will, generally, not be interfered with but under the "liberty to apply" provisions, terms may be implied in the contract or it may be varied only where it is necessary to provide a mechanism for the proper working out of the consent order: **Causwell v Clacken**.

viii) Consent orders may be interfered with under the wide powers given to the court under the CPR to extend time, but possibly only where it does not embody a real contract between the parties, or rarely, where there is a real contract between the parties, and it is appropriate to do so. This, however, will only be for the purpose of imposing or extending time where the provisions of the order can accommodate it: **Ropac; Chaggar v Chaggar ; Pannone** and **Safin.**

ix) Consent orders made in family law matters for financial provisions and distribution of property, may be set aside on appeal if there has been a failure to disclose material and relevant facts, changes in circumstances or supervening events which occurred within a relatively short time of the order being made and the application to appeal out of time against the order is made promptly: **Barder v Barder**; **B v B**; **Jenkins v Livesey**; **WA v Executors of the Estate of HA (Deceased) and others**.

x) In the instant case, the question arises as to whether the learned judge, hearing this application under the "liberty to apply" provision implied in the order, was correct to refuse to vary the consent order, as prayed, bearing in mind those principles. The CPR does not specifically speak to the legal effect of a consent order or to what are the circumstances in which the court may vary or otherwise interfere with it. However, as to the variations of orders generally, rule 42.10(1) permits the court to "correct a clerical mistake in a

> judgment or order, or an error arising in a judgment or order from any accidental slip or omission". Also, pursuant to the court's general case management powers under rule 26.1(7), a judge may revoke or vary an order of the court. The rules provide for no exceptions (that is, it does not provide that consent orders are exempt from the rule), and gives no basis upon which a judge should vary or revoke an order. The case law does, suggest, however, that the power to revoke and vary an order under the CPR does not unqualifiedly apply to consent orders which embody a contract between the parties. The power to vary such orders is limited to exceptional circumstances occurring within a short time of the order being made or, where it is wholly necessary, to work out the mechanics for the enforcement of the consent order.

[86] In my view, therefore, the learned judge did not misinterpret the law as to the discretion of the court to vary a consent order, as she accurately recounted the law upon which she relied, and was not in error in relying on those principles to make a determination as to whether she should vary the consent order in the manner requested by the appellant.

[87] Grounds (i), (iii), (ix), (x), and (xii), would, therefore, necessarily fail.

Issue 2 - Whether the learned judge erred in finding that the agreement could not be interpreted to mean what the appellant asserted it should or erred in failing to imply the terms which were requested (grounds (iv), (v), (vi), and (vii))

Discussion and disposal of issue 2

[88] There is little doubt that the agreement was poorly drafted and that it omitted to make provision for several eventualities, including time periods, completion dates, who was to have carriage of sale and the consequences of delay by either party. It is not difficult to imagine that further orders are necessary to make it workable in its present state, given the failure of the respondent to exercise the option granted to her in the

consent order, and the failure of the parties to carry out the sale, consequent on the respondent having declined to exercise the option.

[89] The pertinent question is whether the learned judge was correct in going on to find that, in this case, there was no mistake or error, change in circumstance or "misleading of any judge" so as to warrant the variation or clarification sought by the appellant. Ancillary to that is the question of whether the variation sought by the appellant is actually for the "working out of the order", or whether it seeks to change the essence of what the parties had agreed.

[90] The respondent has already failed to carry out the option given to her under paragraph 1 of the consent order and, therefore, the property is to be sold in accordance with paragraph 3 of the said order, which provides for the sale of the property as the consequence of a failure to exercise the option.

[91] The appellant applied to the court for orders which, in his view, ought to result in the just enforcement of the consent order. In my estimation, however, some of the orders sought to overreach the powers of the court to grant them, and the learned judge was correct to refuse them.

[92] The appellant has essentially asked the court to imply the following terms into the consent order:

(i) That the appellant is entitled to an equity in the property of 36.4%, which is the percentage value of the $9,106,692.00 to the reserve price of $25,000,000.00;

(ii) That as a result of that percentage value the appellant is entitled, upon sale of the property, to 36.4% of the proceeds of sale minus reasonably incurred fees in respect of the sale price, whether that be $25,000,000 or higher, as well as 36.4% of all income derived from the property;

(iii) That the property be sold within 30 days of the determination of the matter;

(iv) That either party may identify a suitable purchaser to buy the property by private treaty. If the property is not sold by private treaty it is to be sold by public auction at the request of either of the parties or their attorneys-at-law;

(v) That paragraph 3 of the order be varied to include that the property be sold by "private treaty" within "a reasonable time" after the expiration of the 120 days allotted for the exercise of the option.

(vi) Alternatively, that the appellant is entitled to 15% interest per annum on the sum of $9,106,692.00 from the date on which the court finds it reasonable for the property to be sold.

[93] There is no gainsaying that the agreement, the terms of which are embodied in the consent order, omitted several crucial terms which would have been necessary for such an order to be executed. The question is whether it is necessary, in the circumstances of this case, to have those terms implied into the order to give efficacy to it. It is imperative, therefore, to look at how the court ordinarily treats with the implication of terms into a contract.

[94] The principles surrounding the implication of terms in a contract were helpfully summed up in the case of **Paymaster Jamaica Limited v Grace Kennedy Remittance Services Limited and Paul Lowe** [2015] JMCA Civ 20. In that case, Harris JA noted that the "presumed intention" of the parties was "the most important consideration in determining the rights of the parties", and that the court will not imply a term unless it is clear that it was the parties' intention to agree that term and to give effect to it. The court cited with approval, at paragraph [115], dicta from page 68 of the *locus classicus* case of **The Moorcock** [1889] 14 PD 64, which stated the following:

> "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

[95] The court cited several other authorities, including **Attorney General of Belize & Ors v Belize Telecom Ltd & Anor** [2009] 2 All ER 1127 ('**AG of Belize v Belize Telecom**'), in which the Privy Council comprehensively reviewed the relevant law and summarized it as follows:

> "[19] The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital* **Board** [1973] 2 ALL ER 260 at 267-268 [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:
>
> '[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. **The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings**: the clear terms must be applied even if the court thinks some other terms would have been more suitable. **An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract**: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: **it must have been a term that went without saying, a term *necessary***

> **to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves**.'
>
> [20] More recently, in *Equitable Life Assurance Society v Hyman* [2000] 3 ALL ER 961 at 970, [2002] 1 AC 408, 459, Lord Steyn said: 'If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.'
>
> [21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. **There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean**?'" (Emphasis added)

[96] Harris JA, then concluded, at paragraph [118], that "the question of the implication of a term of an agreement can only arise where no express provision is made as to what should happen".

[97] In the instant case, counsel for the respondent argued that there is no ambiguity and, therefore, no need to impute terms into the agreement. Counsel did not indicate, however, how the order could be enforced, in its current state, after so many years without the implication of certain terms to make it workable. The consent order does not state who should have had carriage of sale; by when the property should have been sold; what should happen if the property was not sold within a particular time or at all, including as it relates to the accrual of interest and rental income; and what was to occur if the property were to be sold for more than the reserve price. It is clear that the parties could not have intended for the order to be stymied by the failure to specify certain necessary terms for it to be carried out or enforced. Whilst it may have been envisaged that the

respondent would have purchased the appellant's interest at the soonest, so that clause 3 would not have been invoked, with the passage of time and the option having not been exercised, clause 3 becomes the operable clause. Clause 3 in its current state is unworkable as it lacks the necessary machinery for execution.

[98] The questions to be determined at this point onwards are: (i) whether it was necessary for the learned judge to have implied the terms requested by the appellant; (ii) whether the learned judge ought to have provided the necessary machinery for the sale of the property, with reference to clause 3; and (iii) whether the learned judge was palpably wrong to insist that enforcement proceedings be taken out. The answers to all three questions are in the negative.

[99] The question of whether a contract was uncertain and ineffective due to defects in the machinery or whether the courts could provide its own machinery was considered in the case of **Sudbrook Trading Estate Ltd v Eggleton and others** [1983] 1 AC 444, [1982] 3 All ER 1. In that case, there existed a series of leases which granted the lessee an option to purchase, the price of which was to be fixed by two valuers. The valuers were to be appointed one each by the lessor and the lessee. If they were unable to agree they were to appoint an umpire. The agreement failed to take account of what ought to happen in the instance of a failure to appoint a valuer. The lessee sought to exercise the option but the lessor refused to appoint a valuer and sought to argue that the option was ineffective for uncertainty. The House of Lords held that the option was a valid contract despite its defective machinery, since the provision for an appointment of a valuer meant that the price should be a reasonable price. It held that the court could provide its own machinery, if necessary.

[100] However, there are cases where the parties have completed negotiations and agreed terms in writing but it is expressed in such terms that it is impossible to state with certainty what it is they meant or intended (see the case of **Bushwall Properties Ltd v Vortex Properties Ltd** [1975] 2 ALL ER 214).

[101] The questions that arise in the instant case are whether the learned judge, on the application before her, ought to have implied into the consent agreement a machinery for its proper enforcement, and whether some of what is being requested by the appellant is a complete variation of what was agreed which the learned judge was correct to refuse. In order to answer that question, I will consider each term separately. For convenience I will not set them out verbatim.

A. For the property to be sold within 30 days of the determination of the matter or by private treaty "within a reasonable time" after the expiration of the 120 days allotted for the exercise of the option

[102] Generally speaking, unless an agreement provides that an obligation is to be done in a specified time or it can be construed as such, a term will be implied that the obligation must be fulfilled within a reasonable time. What is reasonable depends on the circumstances. In this case, the order for sale is not directed at any of the parties specifically. Bearing in mind that the property is under the control of the respondent who holds the title and who is in possession, one could be forgiven for expecting that she would drive the sale. However, there was nothing to prevent the appellant from enforcing the consent order in the court. The legal effect of the consent order was to give to the appellant a summary method of enforcement. The CPR makes provision to deal with such things. He failed to access that method. The appellant is now asking the court to vary the agreement to include that "the property be sold by private treaty within 30 days of the determination of this matter or within a reasonable time". Almost 10 years has passed since the consent order was made, so any reasonable time for the sale of the property from the making of the consent order and the expiry of the respondent's option, would have long passed. What the appellant is now seeking would amount to a reset of the timetable.

[103] However, the learned judge, effectively, took the view that orders for the sale of the property was best left at the enforcement stage. In the light of Part 55 of the CPR, which provides for the sale of land by order of the court, I do not see any reason to

disagree. The rules under Part 55 are quite comprehensive and cover, *inter alia*, a sale of land which the court considers necessary to enforce a judgment. Application for the sale must be made by affidavit, identifying the land and stating why the sale is necessary. Under rule 55.2(2)(b)(v), the applicant must indicate the proposed method of sale and why that method will prove most advantageous, and under (2)(b)(vii), who it is proposed should have conduct of the sale. A current valuation of the land done by a qualified land valuer or surveyor will also have to be exhibited to the affidavit (rule 55.2(2)(c)). The court on hearing the application, then has the power, under rule 55.3 (b) and (c), to order the sale of the land and to direct who shall have conduct of the sale. On making the order for sale, under rule 55.4, the court may permit the person having conduct of the sale to sell the land in such manner as that person thinks fit or the court may direct the manner in which the land is to be sold. Rule 55.5 also gives the court the power to give directions for the purpose of the sale, including directions on the reserve price, the particulars and conditions of sale and how the net proceeds of the sale are to be applied.

[104] So to be clear, although "mechanics' were needed to effectively enforce the consent order, and by virtue of the decision in **Causwell v Clacken** the court may provide those 'mechanics' where necessary and appropriate, it was not necessary for the learned judge to do so, in the circumstances of this case. In the light of these sweeping powers under Part 55, which do not necessitate the interference with the consent order entered into by the parties, the learned judge cannot be said to be plainly wrong in refusing to make the orders for the working out and sale of the property, which the appellant requested, as those orders and more can be made under the enforcement provisions in Part 55, upon application by the appellant.

B. That either party may identify a suitable purchaser to buy the property by private treaty. If property not sold by private treaty it is to be sold by public auction at the request of either of the parties or their Attorneys-at-Law

[105] There is nothing in the consent order regarding a sale by public auction. This would, in fact, be a variation of the consent order and the question is whether it is necessary to imply such a clause in order to have the consent order properly enforced.

Again, in my view, this is an issue impacting on the enforcement by an order for sale, and the learned judge cannot be said to be palpably wrong in refusing the orders sought and suggesting that enforcement procedures were more appropriate. Even though I agree that some of terms proposed may be reasonably necessary for the working out of the consent order, as the agreement failed to make provision for how the sale was to take place and for any eventualities if the sale by private treaty was not effected within a reasonable time, it is something which can be dealt with under the enforcement procedures in the CPR.

C. *The equity interest*

[106] Although a court may properly imply certain terms into a contract, it cannot imply terms that are inconsistent with the expressed terms of the contract. A term can only be implied by the court if it is necessary to give business efficacy to the agreement. The court by doing so, is doing only what the parties themselves would have done, if they had thought of it themselves (see **The Moorcock**, and the case of **Reigate v Union Manufacturing Company (Ramsbottom) Limited and Elton Cop Dyeing Company Limited** [1918] 1 KB 592 at 605). It must be something so obvious, it goes without saying.

[107] In **Philips Electronique Grand Public SA and another v British Sky Broadcasting Ltd; Phillips International BV and others v British Satelite Broadcasting Ltd and another** [1995] EMLR 472, Sir Thomas Bingham MR noted that the implication of terms in a contract is the exercise of an "extraordinary power". He stated, at page 481, that:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. **It is because the implication of terms**

> **is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power**." (Emphasis added)

[108] There are two broad categories of implied terms, which were outlined by Lord Denning in **Shell UK Ltd v Lostock Garage Ltd** [1977] 1 All ER 481. At pages 487 to 488, he stated that:

> "…there are two broad categories of implied terms. The first category comprehends all those relationships which are of common occurrence, such as the relationship of seller and buyer, owner and hirer, master and servant, landlord and tenant, carrier by land or by sea, contractor for building works, and so forth. In all those relationships the courts have imposed obligations on one party or the other, saying they are implied terms. These obligations are not founded on the intention of the parties, actual or presumed, but on more general considerations… In such relationships the problem is not solved by asking: what did the parties intend? or, would they have unhesitatingly agreed to it, if asked? It is to be solved by asking: has the law already defined the obligation or the extent of it? If so, let it be followed. If not, look to see what would be reasonable in the general run of such cases… and then say what the obligation shall be…
>
> **The second category comprehends those cases which are not within the first category. These are cases, not of common occurrence, in which from the particular circumstances a term is to be implied. In these cases the implication is based on an intention imputed to the parties from their actual circumstances**…" (Emphasis added)

[109] It is the second category that is relevant to the instant case. With respect to this category, Lord Denning went on to say, at page 488, that:

> "Such an imputation is only to be made when it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their mind to the contingency which has arisen. These are the 'officious bystander' type of case… In such cases a term is not to be implied on the ground that it would be reasonable, but only when it is necessary and can be formulated with a sufficient degree of precision."

[110] It is, therefore, clear that the court may imply terms into a contract only when it is necessary and can be formulated with a sufficient degree of precision in order to give effect to the obvious intentions of the parties. It is also imperative that, in considering whether a term or terms ought to be implied into a contract, the court does not seek to "improve the contract which the parties have made themselves, however desirable the improvement might be". A term or terms can be implied "if and only if the court finds that the parties must have intended that term to form part of their contract". This was made clear in **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board** [1973] 2 All ER 260, where Lord Pearson, at pages 267 to 268, stated that:

> "…the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves."

[111] Further, in **AG of Belize v Belize Telecom**, Lord Hoffman stated, at paragraphs [16] and [21], that:

> "[16] …the Board will make some general observations about the process of implication. **The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means**. However, that meaning is not necessarily or always what the authors or parties to the

> document would have intended. **It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed**: see *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115, [1998] 1 WLR 896 at 912–913. **It is this objective meaning which is conventionally called the intention of the parties,** or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
>
> …
>
> [21] **It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.** It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on—but these are not in the Board's opinion to be treated as different or additional tests. **There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?**" (Emphasis added)

[112] The case law also suggests that a term is not to be implied in a contract on the basis of preventing loss to one or other of the parties. This was noted in **AG of Belize v Belize Telecom**, where Lord Hoffman, delivering the judgment of the Board, stated at paragraph 17 that:

> "17 The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

[113] In this case, the sum of $9,106,692.00 is expressed in the consent order to be for the appellant's 'interest' in the property. The appellant was either to be paid that sum by the respondent or the property was to be sold and he was to be paid that sum from the proceeds. The percentage of the proprietary interest which that sum represented was never established. Neither the agreement nor the consent order, which embodies it, refers to an entitlement to a percentage interest in the value of the property. The language of the consent order does not convey the impression that an agreement was reached for the appellant to have an equity share in the property. The appellant's claim was one for fraud and was not brought under PROSA, as observed by the learned judge, and the consent order sought to be varied makes no mention of a share entitlement. What was established was that the appellant had a claim for fraudulent transfer of property, which he gave up in consideration for the sum stated. Any variation to the consent order to give a percentage of the value of the property would be a totally different agreement and no such variation can be made under an implied "liberty to apply" provision.

[114] Furthermore, even if there was the possibility of varying a consent order due to unforeseen changes in circumstances, an increase in the value of property over several years, in my view, and as shown by the authorities, is not an unforeseen circumstance which would invalidate the underlying fundamental assumptions upon which the consent order was made. Equally significant, the passage of time, would not, by itself, amount to exceptional circumstances, either. Any reliance by the appellant on the approach taken in **Barder v Barder**, **B v B**, and all the cases cited, dealing with changes in circumstances, would be wholly misconceived.

[115] The learned judge was correct to refuse to grant such a variation.

D. *That the appellant is entitled to 15% interest per annum on the sum of $9,106,692.00 from the date at which it was reasonable for the property to be sold*

[116] At paragraph [30] of her judgment, the learned judge declined to make any orders regarding interest. There is no provision in the agreement for interest to be paid and for the reasons given above, no such term can be implied into the agreement. The option

having not been exercised by the respondent, the property is to be sold and the appellant paid in accordance with the consent order. The learned judge suggested that the appellant treat the sum as a judgment debt and seek orders to enforce the same with interest. The consent order is for the property to be sold and the payment of the sum be made from the proceeds of the sale. Any alleged loss or damage resulting from the delay in the execution of the consent order by the respondent will have to be the subject of a fresh claim by the appellant for damages, whether in the form of interest, rent and mesne profits or otherwise (see the case of **Hollingsworth v Humphrey** [1987] Lexis citation 824, the facts of which are surprisingly similar to this instant case).

[117] In that case, the parties, who were husband and wife, entered into a compromise agreement, the terms of which were set out in a schedule to a Tomlin Order. The agreement was for property owned by both as beneficial joint tenants to be sold within three months of the date of the order and the wife was to be paid a certain sum from the proceeds, in consideration of which the appellant's action against the respondent would be stayed. The husband was to have conduct of the sale. The property was not sold and the wife did not seek to enforce the agreement. After five years, the wife brought an action, by motion, to have the stay lifted, and the trial proceed, on the grounds that the contract was repudiated, and the ownership of her property restored. Alternatively, she sought to have the agreement enforced and damages awarded to her for the delay. At first instance, the court refused to lift the stay but granted specific performance of the agreement and damages for the delay in the form of interest on the agreed sum. The wife appealed the refusal to lift the stay and the husband cross-appealed the order for damages. The Court of Appeal found that the judge was correct to refuse to lift the stay and that there was a dispute as to whether the contract was repudiated and whether any purported repudiation was accepted by the wife. It also found that the agreement was for the action to be stayed, except for the enforcement of the compromise, and that no claim for damages for breach of contract could be made in the motion for enforcement. It found that the proper course was to sue for damages in a separate action. The respondent, therefore, succeeded on the cross-appeal.

[118] In the circumstances of this instant case, therefore, where the payment of interest was not part of the agreement, that is something which has to be the subject of a separate claim. It cannot be said that the learned judge was plainly wrong to have refused to imply into the consent order an agreement to pay interest of 15%.

[119] As a consequence, the grounds, which raised this issue, would fail.

Issue 3 - Whether the judge erred in attributing substantial delay to the appellant (grounds (ii), (viii) and (xi))

A. The appellant's submissions

[120] In respect of the learned judge's finding that the appellant "could and should have easily" taken steps to sell the property or to enforce the order as a judgment debt, the appellant submitted that she was wrong to so find and to use that as a basis to refuse the variation sought. This is so, it was argued, as the appellant was hindered by the respondent's lack of cooperation, and such steps, it was submitted, would have in any event, required a similar application to the one that was before the learned judge, and would not have necessarily saved judicial time and resources.

[121] The appellant further argued that the learned judge placed "the balance of relative default and prejudice unreasonably and unfairly too stark" against the appellant by putting the onus on the appellant to have taken these steps. The learned judge, it was submitted, failed to appreciate that, without evidence of the respondent's gross default" and "active conspiracy" to deliberately thwart the sale which was mainly her responsibility, such alternative steps would not have become necessary. The first inkling of an 'unfair' and 'sinister' state of affairs, that the appellant got, it was said, was the respondent's letter of 22 June 2017.

[122] It was further submitted that, in circumstances where the respondent caused and benefitted from her own delay to the detriment of the appellant, the variation sought would "balance the scales of justice".

B. The respondent's submissions

[123] Counsel for the respondent submitted that the delay was due to the appellant's failure to enforce the judgment and that the learned judge was correct in her observations.

C. Discussion and disposal of issue 3- (grounds (ii), (viii) and (xi))

[124] In his evidence, the appellant made assertions that the respondent was uncooperative and intentionally thwarted the sale, but he provided no detail as to how and in what way she did this. The respondent's evidence, too, was sparse in this regard. She did not specifically respond to this allegation but asserted that the appellant was to be blamed for the delay.

[125] There was no stipulation in the agreement as to who was to have carriage of sale and by what time the property was to be sold. The respondent, being the person whose sole name was on the title and the person in possession of the property, would have been reasonably expected to initiate the sale. Furthermore, it was an aspect of the consent order that the appellant was required to lift the caveat lodged by him in order to facilitate the sale, from which it could reasonably be inferred that the respondent would be able to complete the sale once the caveat was lifted. It is also a fact that the appellant was living overseas at the time and would, indeed, have had to rely on the respondent's cooperation to get the property sold himself. In order to effect the sale, without the respondent's cooperation, the appellant would have had to apply to the court, in any event.

[126] As I have said before, however, there is no detailed evidence as to what efforts either party made to get the property sold. The undisputed evidence though, is that the respondent was in possession and was collecting rental income from the property all these years. Therefore, it would, be reasonable to conclude that the respondent, having unilaterally transferred the property to her sole name, was content to remain in

possession of the property, collecting income from it and failing to account to the appellant.

[127] The appellant, however, is not without blame. The learned judge was correct to say that he could have, and ought to have, sought relief from the court to enforce the consent order sooner. The appellant's tardiness in seeking relief, however, would not have been a justification for refusing to provide an enforcement machinery. **Causwell v Clacken** is authority for the proposition that delay does not prevent the court from exercising its jurisdiction to vary a consent order to provide proper machinery, once the agreement is one that needs to be worked out and no third parties would be negatively affected. There is no evidence of third-party rights in this case.

[128] In the final analysis, however, it cannot be said that the learned judge used the issue of delay as a reason for not granting the orders sought. These grounds are, therefore, without merit.

Conclusion

[129] In the result, I would hold that the learned judge could not be said to be plainly wrong in her understanding of the principles governing consent orders, nor can it be said that she was plainly wrong to refuse the orders sought. Although some orders are required to be implied into the agreement in order for it to be enforced, these orders can be made at the enforcement stage without any need to interfere with the consent order. Some of the orders for variation sought by the appellant are outside the scope of this application under the "liberty to apply" clause implied in the consent order, and a fresh claim would have had to have been brought for those orders to be considered.

[130] The appellant is also at liberty to explore other options that might be available to him, in law, to procure other remedies resulting from the delayed execution of the consent order. Accordingly, I would dismiss the appeal, with costs to the respondent, to be agreed or taxed. The delay in the delivery of this judgment is regretted and apologies are extended on behalf of the court.

DUNBAR GREEN JA

[131] I agree with the reasoning and conclusions arrived at by Edwards JA and I, too, would dismiss the appeal. I also agree that the respondent is entitled to her costs.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The decision and orders of Barnes J (Ag), made in the Supreme Court on 9 April 2019, are affirmed.

3. Costs of the appeal to the respondent to be taxed if not agreed.