

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. NEVHCV2020/123

BETWEEN:

**THE TRUSTEE IN BANKRUPTCY OF THE
ESTATE OF RICHARD Paul Joseph Pelletier
(by her Agents Margot MacInnis and Hugh Dickson)**

CLAIMANT

AND

- (1) OLGA PELLETIER**
- (2) SEVEN MILE INVESTMENTS LIMITED**
- (3) SEVEN MILE HOLDINGS INC.**

DEFENDANTS

BEFORE: His Lordship, the Honourable Justice Ermin Moise

APPEARANCES:

Mr. Colin Mc. Kie Q.C. with Ms. Elizabeth Harper and Ms. Michelle Slack of Daniel Brantley, Counsel for the Claimant/Respondent.

Mr. Satcha S-C. S. Kissoon and Ms. Joia W. S. Reece of Dentons Delany, Counsel for the Defendants/Applicants.

2021: March 5th, 8th

JUDGMENT

- [1] **Moise, J:** This is an application, by the defendants, pursuant to rule 42.10 of the CPR. In the alternative, the defendants seek to invoke the court's inherent jurisdiction to protect its process and do justice between the parties. Essentially the application is for an order correcting and/or amending the order dated 27th January, 2021 which was sealed by the court on 22nd February, 2021. I have determined that the application should be granted and the order corrected to reflect the court's true intention as expressed at the hearing on 27th January, 2021. In the event that I am

wrong in my finding that the provisions of 42.10 of the CPR ought to be invoked, I have also determined that the order as sealed on 22nd February, 2021, should be set aside, amended and/or varied in the exercise of the court's inherent powers to do justice and to protect its own process. These are the reasons for my decision.

The Facts

- [2] Although there are certain areas of disagreement, the facts upon which this application is based are not generally in dispute. The claimant has brought an action against the defendants seeking a declaration that various transfers of assets by the defendants are void on the ground that they were intended to defraud the creditors of Mr. Richard Pelletier. The proceedings were initially commenced by an ex parte application for a worldwide freezing order against the assets of the defendants, along with other interlocutory orders. The court heard the initial ex parte application and granted the orders sought on 1st December, 2020 with a return date set for 29th December, 2020. When the matter came up for the inter partes hearing on the return date the court was informed that the application and the order had not been served. At the request of counsel for the claimant an extension of time was granted, the injunction was also extended and a new return date of 27th January, 2021 was set.
- [3] On 27th January, 2021, counsel appeared on behalf of the defendants and confirmed that the application as well as the freezing order was in fact served. Counsel however indicated that the defendants were not in a position to comply with certain aspects of the freezing order which related to disclosure. Counsel also indicated that the freezing order made no provision for the defendants' access to any funds in order to assist in meeting the costs of this litigation. The dispute between the parties is subject to cross jurisdictional litigation, with similar freezing orders against the defendants in the Cook Islands and Cayman Islands as well as Canada. Counsel for the defendants submitted that the order made here in Nevis effectively limited the defendants' ability to meet the cost of litigation, both within and outside of the jurisdiction. This also hampered the ability to properly instruct counsel so as to be prepared for the inter partes hearing on the application for the grant of the worldwide freezing order.

- [4] Although there is some dispute between the parties as to the effect of the representations made to the court on that date, I am of the view that the defendants' counsel's submissions essentially requested an amendment to the freezing order to allow for access to funding for legal costs as well as an adjournment of the inter partes hearing and an extension of time to comply with certain aspects of the freezing order. The court also heard submissions from counsel for the claimant on the issues raised at that hearing.
- [5] In a perusal of the transcript of the proceedings, I am satisfied that the court acquiesced to those requests made on behalf of the defendants in that the interim freezing order was amended to allow for access to funding up to a limit of \$150,000.00US in order for the defendants to meet certain legal expenses associated with the litigation. The court also agreed that the inter partes hearing should be adjourned and made certain orders for the filing of additional affidavits and submissions. The matter was then adjourned to 23rd February, 2021. In my view, it is clear from a reading of the transcript of the proceedings that this date was set as the return date for the inter partes hearing of the freezing order.
- [6] At the hearing on 27th January, 2021, the court ordered that the defendants were to have carriage of the order but invited counsel for both sides to agree on the terms of a draft to be presented to the court. On 9th February, 2021 the court was in receipt of correspondence from counsel for the claimant on which counsel for the defendants was also copied. The court was informed that the parties were at variance with certain aspects of the draft order. The court had sight of drafts presented by both sides, although carriage of the order had in fact been that of the defendants. The court examined the areas of dispute between the parties and settled the draft thereafter. The order was sealed on 22nd February, 2021. I note that counsel for the defendants contend that the order was sealed without prior knowledge of the defendants, despite them having had carriage of the order.
- [7] The areas of variance as highlighted in the two drafts presented to the court are not issues for consideration in this application. What is important to note is that both drafts contained the following clause in identical terms:

The Worldwide Freezing Order dated 1 December, 2020 and continued at an ex parte hearing on 29 December, 2020 shall remain in full force and effect, save as amended

below, until trial or further order of the Court. On 23 February, 2021 the Court will consider any application in relation to the variation of the Worldwide Freezing Order that the Respondents may wish to issue.

[8] Essentially, the draft order presented by both parties contained an order continuing the injunction until trial. This was clearly not in keeping with the court's express intention at the hearing of 27th January, 2021, where a return date was set for the inter partes hearing. Nonetheless the order of the court, as it specifically relates to this issue, was sealed on the terms which were set out in both drafts as orders numbers 1 and 2 of final order. When the matter came up for hearing on 23rd February, 2021, the parties agreed that there needed to be a further adjournment in order for additional affidavits to be filed and the further management of the case in general. However, on that date, counsel for the claimant expressed the view that the order sealed on 22nd February, 2021 effectively continued the ex parte order for a worldwide freezing order until trial; the effect of which was that an inter partes hearing was no longer possible, as any variation or amendment of the order had to be made by way of a notice of application. Counsel for the defendants disagreed and expressed the view that the matter was specifically adjourned to facilitate the inter partes hearing and that the defendants continued to anticipate that this hearing would take place.

[9] On that basis a formal application was filed to correct the order which was sealed on 22nd February, 2021. By way of affidavit evidence, the defendants noted that in correspondence with the claimants in order to settle the draft of the order of 27th January, 2021, the initial draft which they proposed did not contain any order continuing the freezing order until trial, but rather setting a return date of 23rd February, 2021. This order extending the freezing order until trial was included in a draft submitted by the claimant in response to the defendants' counsels' own email. It is suggested that the changes made to this particular order were not flagged and counsel had simply overlooked the change without expressly agreeing to it. Counsel concedes that his chambers was copied on the email in which the two drafts were presented to the court and no objections were raised concerning this very issue. However, the defendants attached a number of email correspondence between the parties in order to prove that there was no agreement to the extension of the freezing order until trial.

[10] The issues for consideration therefore are whether there has in fact been a clerical error or omission in the order sealed on 22nd February, 2021, sufficient to invoke the court's powers under part 42.10 of the CPR. If the answer to that question is no, then the court must consider whether it ought to amend or to set aside the order by invoking its inherent jurisdiction to protect its process and do justice between the parties.

The Law

[11] In general when the court makes an order which is sealed by the court office, the judge is functus officio. Though the court is empowered to amend or vary the terms of its order in certain circumstances, what it cannot do is to essentially revisit and change the substance of the order itself. If the court was wrong in law or relied on the wrong facts in making an order, then the proper approach is for the order to be appealed, as the court cannot sit as an appellate body against itself. However, Part 42.10 of the CPR provides that ***“[t]he court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.”*** As Rawlins JA noted in the case of ***Saint Christopher Club Ltd v Saint Christopher Club Condominiums et al***¹ this rule ***“cannot be taken to empower a court to correct any error of substance in a judgment or order except on an appeal.”*** Rawlins JA also went on to note that the amendment of the order under this rule can only be made to correct a clerical error or an accidental slip or omission.

[12] However, Rawlins JA went on to acknowledge that what constitutes an accidental slip or omission is not always easy to determine. In examining the peculiar facts of that case he found that ***“[s]ince the errors complained of are errors of substance the application cannot succeed under part 42.10 of CPR 2000.”*** An appeal would have therefore been the most appropriate course of action to take. Counsel for the claimant, in reliance on this case, submits that what the defendants complain of is an error of substance and can therefore not be corrected under the slip rule. Counsel argues that despite the intention of the court at the hearing on 27th January, 2021, the defendants had acquiesced to the draft order on the terms set out therein. This was based on the fact that the parties were encouraged by the court to agree on the terms to be settled in the order.

¹ CIVIL APPEAL No. 4 OF 2007

When the email correspondence was sent to the court office there were drafts from both sides with this specific order continuing the injunction until trial. By his silence on the issue counsel for the defendants was therefore submitting a different order to the court on its substance and therefore cannot rely on the slip rule to have it corrected at this stage. Whilst I do appreciate the force of this submission, after consideration of all of the issues I express my disagreement with it.

[13] There are a number of distinguishing elements between the case of ***Saint Christopher Club Ltd v Saint Christopher Club Condominiums et al*** and the one at bar. It appears to me that the order under review by Rawlins JA was precisely the order which the judge intended to make in the first place. The facts of that case seem to suggest that the judge had arrived at his decision in reliance on the wrong facts. What Rawlins JA seems to suggest therefore was that in substance there is no error or accidental slip or omission sufficient to invoke the court's powers under rule 42.10. A decision of a court based on the wrong facts is a matter for an appeal and not a correction under the rules. In the present case however, the order was sealed on terms which were substantively different from that which was clearly expressed by the court on 27th January, 2021. Insofar as that is the case, I note that Rawlins JA cited the Green Book where it was stated that “[t]he rule allows the court to amend the terms of a decision to give effect to its original intention but the rule does not enable the court to have second or additional thoughts.” It is not a question of the court being called upon to change its mind here, but rather to give effect to what it clearly expressed as the intention of its order on 27th January, 2021. I doubt very much that in preparing a draft order, the parties are entitled to change the substance of the court's order without express submissions on the basis for doing so; and I would not agree that counsel's silence on the email of 9th February, 2021 would amount to such a submission.

[14] In the Jamaican case of ***American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others***² Morrison JA noted there that in applications of this nature the decision turns on “**what was the true meaning and intention of the judgments of this court.**” There the court of appeal referred to the White Book where it states that “**the Court has an inherent jurisdiction to vary its own order to make the meaning and intention of the Court clear and can use the slip rule to amend an order to give effect to the intention of the**

² [2014] JMCA App 16

Court". In that case Morrison JA felt *"impelled"* to conclude *"that the intention of the court was, contrary to what its order as drawn says..."* Whilst he was prepared to accept that such decisions are not easy to make, he was none the less prepared to set the order aside on the basis of the slip rule after concluding that the final order as drawn up was inconsistent with the express intention of the judgment of the court.

[15] In another Jamaican case, that of *Dalfel Weir v. Beverly Tree*³, Morrison P (a.g.) also considered the court's power to use the slip rule in correcting a previous order. In that case he stated that *"[t]his court has the power to correct errors in an order previously made by it arising from accidental slips or omissions, so as to bring the order as drawn into conformity with that which the court meant to pronounce. In considering whether to exercise this power, the court will be guided by what appears to be the intention of the court which made the original order."* Again the issue here seems to hinge upon an assessment of the intention of the court when the original order was made. Morrison P then went on to give further guidance on how the court is to approach such an application. He states as follows:

"In order to determine what was the intention of the court which made the original order, the court must have regard to the language of the order, taken in its context and against the background of all the relevant circumstances, including (but not limited to) (i) the issues which the court which made the original order was called upon to resolve; and (ii) the court's reasons for making the original order. While ambiguity will often be the ground upon which the court is asked to amend or clarify its previous order (as in this case), the real issue for the court's consideration is whether there is anything to suggest that the actual language of the original order is open to question."

[16] To my mind, there can be no doubt as to the issues which the court was called upon to resolve when it made its original order on 27th January, 2021. An application had clearly been made for the adjournment of the inter partes hearing. Counsel for the defendants had clearly provided the grounds for this application, albeit orally, and the court was clear that a return date was to be set for the full inter partes hearing of the application. There was nothing about this order which was ambiguous or open to question. However, the order as drawn up clearly incorporated terms which

³ [2016] JMCA App 6

were not in keeping with the court's original intention. As Master Sandcroft (a.g.) noted in the case of *O'Carol Williams v Jarl Claxton*⁴ “[t]he purport and spirit of the rule is to bring a judgment or an order, in which an error, omission or mistake arises in harmony with that which a judge intended to pronounce.” The court is not here reversing its decision on substance, but giving effect to its clear intention as pronounced on 27th January, 2021 that there was to be an inter partes hearing on the application for a worldwide freezing order. I am satisfied that the order should be amended to express that clear intention. However, in the event that I am wrong, I have also determined that the court should exercise its inherent jurisdiction in setting aside the order as sealed and ordering that the inter partes hearing is to take place.

The Court's Inherent Jurisdiction

[17] From the onset I wish to state that the invocation of the court's inherent jurisdiction to set aside its own order as sealed, comes with a very important caveat, in that it is a jurisdiction which ought to be used sparingly. As the Privy Council has noted ***“[t]he importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties’ opportunities for reopening matters procedural or substantive which have been judicially decided.”***⁵ In protecting its own process, the court recognizes the need to bring litigation to an end. Further, one of the important aspects of the judicial function is its desire to bring not merely finality but certainty to litigation. This is especially the case in commercial matters. If the court were to be too quick to simply revisit its orders on a whim then it would significantly undermine its authority in dispensing justice.

[18] However, in *Sans Souci Limited v. VRL Services Ltd.* the Privy Council also went on to note the following:

Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test

⁴ BVIHCV2016/0315

⁵ *Sans Souci Limited v. VRL Services Ltd* [2012] UKPC 6

is more exacting. The order will be varied only in exceptional circumstances, when the party can demonstrate that the form of the order can be attributed to a miscarriage of justice...”

[19] One of the fundamental principles of natural justice is a right to be heard. In circumstances where the court grants an order ex parte, this right becomes even more significant as one party has been given a full opportunity to put its case to the court in the absence of the other. An ex parte freezing order, as that which was granted on 1st December, 2020, can have a significantly devastating impact on an individual against whom it is granted. An inter partes hearing in such circumstances is not discretionary and to deny an individual a right to be heard would be a breach of the rules of natural justice; especially if that denial is made on a misunderstanding, as is the case in the current proceedings.

[20] In returning to the judgment of Rawlins JA in the case of ***Saint Christopher Club Ltd v Saint Christopher Club Condominiums et al***, I note that the court there relied on its inherent jurisdiction to set the order aside notwithstanding the finding that rule 42.10 could not be relied upon. There Rawlins JA referred to E. Patrick Hartt in a Paper entitled, ***“Inherent Powers of the Court”*** where it was stated that ***“in order to avoid a grave injustice, a Superior Court has inherent power to set aside any of its judgments, even a final one, in a proper case.”*** In coming to his own conclusion Rawlins JA noted that:

“A proper case in which a court would set aside its own order or judgment would be an extremely rare thing. However, I think that the present case presents such a rare occasion because the errors that are complained of are so clear on the face of the order of 30th May 2007 that I could not permit it to stand. This is in the interest of justice.”

[21] To my mind, the circumstances of this case are also apt for such an order to be made. As I have indicated earlier, the defendants have not been granted the opportunity to address the court on what is a rather far reaching freezing order which also affects cross jurisdictional litigation. Although it is open for the defendants to apply for a variation of the freezing order, counsel for both sides have accepted and the court agrees, that such an application is an entirely different creature

in its own right. It is substantively different from what the court considers at an inter partes hearing for the continuation of an injunction. Given that the clear intention of the court at the hearing on 27th January, 2021 was to provide such an opportunity to the defendants by setting the date of 23rd February, 2021 as a return date for the inter partes hearing, I am of the view that it would only be in the interest of justice to allow for this intention to be fulfilled. There is nothing in the events which transpired after the hearing of 27th January, 2021 which satisfies me that it would be anything other than just to make such an order.

[22] In the circumstances it hereby ordered that:

- (a) Numbers 1 and 2 of the Order made on the 27th January, 2021 and entered on the 22nd February, 2021 are corrected/varied to state that The Worldwide Freezing Order dated 1 December, 2020 and continued at an ex parte hearing on 29 December, 2020 shall remain in full force and effect, save as amended below, until the Further Return Hearing Date or further order of the Court;
- (b) the further return date, and any additional directions for the inter partes hearing will be set and considered at the hearing on 12th March, 2021;
- (c) the parties are to address the court on the issue of the costs of this application on 12th March, 2021;

**Ermin Moise
High Court Judge**

By the Court

Registrar

