

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

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

Claim No.: BVIHCV2016/0315

BETWEEN:

O'CAROL WILLIAMS

Claimant

and

JARL CLAXTON

Defendant

Appearances: Ms. Marie Lou Creque of Counsel for the Claimant
No Appearance of Counsel for the Defendant

**2020: January, 29
March, 30**

JUDGMENT

Introduction

[1] **SANDCROFT, M. [Ag.]**: This is an application by the claimant to vary a final order previously made on 4th December, 2018 by my brother, Moise, M., as he then was.

Background

[2] The order the claimant seeks to vary arose out of an application for assessment of damages, wherein Moise, M., having considered the witness statements tendered and the submissions filed in support of the application, made the following order:

IT IS HEREBY ORDERED:

1. The defendant is to pay the following in damages to the claimant:
 - (a) \$160,117.79 representing special damages for the costs of remedying the defect to the stairs, the loss of parking space and loss of rental income;
 - (b) Interest on special damages in the sum of 2.5% from the date of the filing of the claim;
 - (c) General Damages in the sum of \$10,000 for the delay and inconvenience caused to the claimant;
 - (d) Interest on general damages at a rate of 5% per annum from the date of judgment;
 - (e) Prescribed costs on judgment in favour of the claimant.

Claimant's/Applicant's Submissions

- [3] Ms. Creque submitted that in addition to the sums ordered by Moise, M., the defendant ought to be ordered to pay a further sum in damages. She relied on rules 12.10(1) (b) and 26.9 of the **Eastern Caribbean Supreme Court Civil Procedure Rules, 2000** (the "CPR"), as the basis upon which the defendant may be ordered to pay the claimant a sum in respect of the judgment in default of acknowledgement of service awarded to the claimant by order of Actie, M., as she then was, on 20th March 2018.
- [4] Ms. Creque further submitted that granting the application to vary the order of Moise M would not be prejudicial to the defendant who had not actively participated in the proceedings, save and except on one occasion. She also submitted that to deny the application would be unjust to the claimant and contrary to the aims and objectives of the CPR, by denying the claimant a sum due under a judgment awarded in her favour. I note here that the precise aims and objectives of the CPR being referred to were not identified.

Issue

- [5] The fundamental issue is whether this Court is empowered to vary a final order/judgment previously made by a court of concurrent jurisdiction. It is common ground that the pronouncement of Moise, M., on the application for assessment of damages, given on 4th December, 2018 was a final order.

Analysis

[6] As a general rule, once a judgment or order is perfected it brings litigation to an end. It follows therefore, that a court cannot revisit an order which it has previously made. The extent of the court's jurisdiction does not go beyond that which is pronounced in its final order. Despite this, certain exceptional circumstances may arise, which may cause the court to revisit a prior order. In the Australian case of **Bailey v Marinoff**¹, Barwick CJ, speaking to the foregoing principles said:

"Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court."²

[7] In the same case, Gibbs J said:

"It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it ... The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court."³

[8] In **Gamser v The Nominal Defendant**⁴, in addressing the principle, Barwick C.J. said:

"I regard it as unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it. It is of course a most important principle, based on sound grounds of policy, that there should be finality in litigation. However, exceptional cases may arise in which it clearly appears from further evidence that has become available that a judgment which has been given rested on assumptions that were false and that it would be manifestly unjust if the judgment were allowed to stand. In my opinion it is desirable that the Court of Appeal should have a discretion – however guardedly it might have to be exercised – to reopen its judgments in cases such as that in which the needs of justice require it."

¹ [1971] HCA 49, 125 CLR 529

² At page 530.

³ At page 539.

⁴ [1977] HCA 7, 136 CLR 145

[9] In **Harley v Harley**⁵, Harris, J.A. examined rule 26.1(7) of the Civil Procedure Rules of Jamaica. It is to be noted that the provisions in our CPR are limited to varying or setting aside a default judgment and also, that rule 14.13 of the CPR, 2000 does speak to a variation of order, which empowers a court to vary or revoke an order it has made. She considered the conditions that would entitle a judge to revoke an order made by another judge exercising parallel jurisdiction. Harris, J.A. stated as follows:

“[39] The case of Mair v Mitchell and Others SCCA 123/08 delivered in February 2009, affords guidance as to the principles which the court ought to employ in dealing with an application under rule 26.1 (7). In that case Smith J.A., in considering the question as to the power of the Court to vary an order under rule 26.1(7), relied on the ratio decidendi as enunciated by Patten J, in Lloyd’s Investment (Scandinavia) Limited v Ager-Harrisen [2003] EWHC 1740. Patten J, in dealing with an application to vary an order under Part 3.1 (7) of the English CPR, at paragraph 11 said:

Although this is not to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1 (7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether, innocently or otherwise, as to the correct factual position before him.

[40] Smith J.A. in adopting the ratio pronounced by Patten J, said:

‘Although Patten J. was dealing with an application to vary the conditions attached to an order setting aside a default judgment and not one to vary a procedural regime, as in the instant case, I am of the view, that the reason for his decision represents a correct statement of the principle of law applicable to the exercise of the judge’s discretion, under Rule 26.1(7) of the CPR. Indeed this principle was approved by the English Court of Appeal in Collier v Williams (supra)’. ”⁶

[10] Harris, J.A., then concluded that a court would only revisit a previous order if the applicant seeking to revoke that order shows some change of circumstances or demonstrates that the judge who made the earlier order had been misled.⁷ Ms. Creque has not invoked this Court on any of the aforesaid bases.

⁵ (unreported) Court of Appeal, Jamaica, SCCA No. 72/2007 judgment delivered 23 March 2010.

⁶ At paragraphs [39] and [40].

⁷ At paragraph [41]

[11] In the case of **Lyndel Laing v Dawn Llewelyn McNeil et al**⁸ where Harris, J.A. at paragraph 12 of the judgment enunciated:

“It is a well established principle that a court or judge is devoid of the power to amend or correct any defect in its judgment or order after it has been perfected. In R v Cripps, Ex parte Muldoon and Others, Sir John Donaldson MR speaking to the rule, at page 695, said:

“...once the order has been perfected, the trial judge is functus officio and in his capacity as the trial judge, has no further power to reconsider or vary his decisions whether under the authority of the slip rule or otherwise. The slip rule power is not a power granted to the trial judge as such. It is one of the powers of the court, exercisable by a judge of the court who may or may not be the judge who was in fact the trial judge.” (Emphasis added)

[12] However, a judge may, at any time prior to the perfection of an order reconsider and vary his decision – see **In Re Suffield and Watts Ex parte Brown**⁹. It is only permissible for the judge to correct a mistake or an error in a perfected judgment or an order in circumstances where rule 42.10 of the CPR applies.

[13] The rule reads:

**42.10 (1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
(2) A party may apply for a correction without notice.**

This rule only comes into operation where, in a judgment or an order a clerical mistake or an error emanating from an accidental slip or omission is manifested. The purport and spirit of the rule is to bring a judgment or an order, in which an error, omission or mistake arises in harmony with that which a judge intended to pronounce. Therefore, a judge is not competent to alter a judgment or an order once it has been drawn up and perfected, if it accurately expresses the intention of the court or the judge. To qualify under the rule, an applicant must show that the error, omission or mistake is one in expressing the manifest intention of the judge.

[14] In **Independent Trustee Services Limited v G.P. Noble**¹⁰, Peter Smith, J examined English CPR 3.1(7) which is equivalent to our CPR 26.1(7), and quoted the judgment of the Court of Appeal in

⁸ [2013]JMCA Civ 27

⁹ [1888] 20 QBD 693

¹⁰ [2011] FLR 174 at paragraph [92]

Collier v Williams¹¹, where Patten J's judgment in **Lloyds Investment (Scandinavia) Limited v Ager-Harrisen**¹² was cited. In **Collier**, the Court of Appeal endorsed Patten J's approach. In Peter Smith J's analysis of the Court of Appeal authorities, he stated that there was nothing in those decisions which suggests that the rule to vary or revoke should be cut down so as to be completely inapplicable to any final order. He did conclude, however, as follows:

"...That is not to say that a final order can be set aside by a judge willy-nilly. It is a matter of discretion to be exercised according to the particular circumstances of the case. That, in my mind, is all that the Court of Appeal judges to which I have referred say when they support Patten J's judgment. They say in effect as regards final orders it would be hardly ever appropriate to set aside a final order."¹³

[15] Peter Smith J reviewed the factual circumstances before him in order to determine whether he should revisit his earlier determination, as at the time he made the order, the applicant's potential interest may have been overlooked. He concluded that he would not do so.

[16] The cases demonstrate that a final judgment or order of the court is rather difficult to vary.

Peter Smith J. opined in **Independent Trustee Services Limited v G.P. Noble** that the court should also adopt a more flexible approach as it relates to the variation of final orders:

"One of the main purposes of the CPR was to give the courts complete flexibility over the proceedings before them and this is an important ancillary tool. I can see nothing in the rule which justifies it not applying to final orders if appropriate according to the facts of the case."¹⁴

[17] However, these circumstances must be extremely rare because litigants are not to re-litigate issues already determined particularly where the order is final. The court may adjust, change or even revoke these orders upon good and sufficient cause being demonstrated, such as a material change of circumstances as stated in **Harley**, or upon new material as stated in **Collier v Williams**. The text **Civil Procedure (The White Book Service)**¹⁵ contains the following quotation:

"In short, therefore, the jurisdiction to vary or revoke an order under CPR 3.1 (7) should not normally be exercised unless the applicant is able to place material before the court, whether in the form of evidence or argument, which was not placed before the court on the earlier occasion."

¹¹ [2006] EWCA Civ 20

¹² [2003] EWHC 1740 (Ch)

¹³ **Independent Trustee Services Limited v G.P. Noble** [2011] FLR 174, at paragraph [100]

¹⁴ At page 196 at paragraph [101]

¹⁵ Vol. 1 (2007) at Note 3.1.9, per Dyson LJ at paragraph 120 of **Collier v Williams** [2006] EWCA Civ 20

[18] The limited discretion to consider exceptional circumstances as it relates to variation of final orders does not assist the claimant's cause. No material change in circumstances has been shown, nor has any new material been placed before the Court. In any event, I am of the view that the proposed variation would likely do great injustice to the defendant.

[19] Applying the reasoning of the aforementioned cases to the facts of the instant case, having made the order, the learned master must be taken implicitly to have decided that he had jurisdiction to make it. If he has erred, whether in law or fact, this, can only be corrected by the Court of Appeal. He had not exceeded his jurisdiction by the making of the order later said to be in error and there is no power in this court, being a court of concurrent or co-ordinate jurisdiction to correct it. The decision of Moise, M. is binding on the parties unless and until it is reversed by the Court of Appeal. The orders as perfected are res judicata. For these reasons, the order sought is refused.

Orders

[20] In view of the foregoing, I hereby order as follows:

1. The application is refused.
2. The claimant shall file and serve this order.
3. No Order as to costs.

Ricardo Sandcroft
High Court Master [Ag]

By the Court

Registrar