IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN	**CARIBBEAN OUTLETS LIMITED**	**1ST PLAINTIFF**
A N D	**BEVERLEY BARAKAT**	**2ND PLAINTIFF**
A N D	**JENNIFER MESSADO**	**3RD PLAINTIFF**
A N D	**DAVID RICKMAN**	**4TH PLAINTIFF**
A N D	**GARTH BARAKAT**	**5TH PLAINTIFF**
A N D	**MAS INVESTMENTS LIMITED**	**DEFENDANT**

CONSOLIDATED WITH
SUIT NO. C.L. 2002/M 181

BETWEEN	**MAS INVESTMENTS LIMITED**	**PLAINTIFF**
A N D	**JENNIFER MESSADO**	**1ST DEFENDANT**
A N D	**BEVERLEY BARAKAT**	**2ND DEFENDANT**
A N D	**DAVID RICKMAN**	**3RD DEFENDANT**
A N D	**GARTH BARAKAT**	**4TH DEFENDANT**

Mrs. Georgia Gibson-Henlin instructed by Nunes Scholefield, DeLeon & Co for the Applicant Mas Investments Ltd; Ms. Carol Davis for the Respondents Beverley Barakat, Jennifer Messado and Garth Barakat

Heard February 23, 24; March 18 and May 19, 2004; Further Hearing November 5, 2004.

ANDERSON, J.

On the 19th day of May, 2004, I had purported to deliver a ruling on an application for summary judgment in relation to this matter. In that ruling, I granted the application after a review of the affidavit evidence filed herein and having had the benefit of fulsome submissions by counsel on both sides. Shortly after delivery of my ruling, counsel for the Respondents against whom the ruling had been made

pointed out that I had in my written judgment adverted to an affidavit of which she had only received an unsigned copy as at the first day of the hearing on February 23, 2004. That was the further affidavit of Joe Mahfood sworn February 20 2004 and filed on the 23rd February 2004. From the recollection of both counsel, it seems that there had been an agreement to exclude this affidavit from consideration, although my own notes of that day's hearing, does not record this. After two days of hearing, the matter was adjourned part-heard on February 24, and came back before me over three weeks later, on March 18, by which time the Respondent had provided a further affidavit in relation to the incorporation of the company, Caribbean Outlets Limited. The issue of the unsigned affidavit was not raised at the subsequent continuation, and the court is not aware whether a properly executed copy was served on the Respondents attorney-at-law. In any event, Respondent's attorney asked that I vacate the judgment and order that the summary judgment hearing be started de novo before another court. Counsel for the successful applicant resisted this.

I requested and received written submissions with authorities, on what would be the appropriate way to deal with this matter and having had the benefit of submissions from both, I now affirm that the ruling should stand for the reasons set out below. I should point out a review of the information confirms that there is nothing in that affidavit which affected the decision at which I arrived. Nor does it affect the issue of whether there was a defence to the application for summary judgment which was made.

Ms. Davis for the respondent, conceded that a Judge can always amend in order. The order has not been perfected. The order may be "withdrawn, altered or modified" and she cites **NOGA v ABACHA [2001] 3 All. E.R. 513 at 517.**

She submits, however, that this power should only be exercised in circumstances such as "a plain mistake by the court, a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant or discovery of new facts subsequent to the judgment being given.

Another good reason was if the applicant would argue that he was taken by surprise by a particular application from which the court rules adversely to him and that he did not have a fair opportunity to consider."

While I agree with the first part of the submission, I hold that the second part beginning with "another" is clearly not applicable on the facts here.

Mrs. Gibson Henlin for the applicant agrees that it is trite law that a Judge does not have jurisdiction to vary or discharge his order once it has been drawn up and perfected.

In a case from 2001 in the Western Australia Supreme Court **JEWEL WALK PTY LTD AND ANOR v KONDININ GROUP, 2001 WL 1161282 (WASC) 2001 WASC 264** Roberts-Smith J had to consider the meaning of Order 21 r 10 of the rules of the Supreme Court of Western Australia. The rule is in the following terms:

> "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission may at anytime be corrected by the court on motion or summons without are appeal."

There is a similar provision in our own CPR at rule 42.10 which provides:

1. The Court may at anytime (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 correction without notice.

It is to be noted that in this case there has been no formal application for "correction", though in the circumstances of the case, it may be correct to treat what is before me as such. In any event, the court invited submissions upon what would be a proper course given the court's purported reference to a document which the parties had agreed would not be considered but which, in my view on reflection, added nothing new to the other available evidence and does not prejudice the respondents.

In the Jewel Walk Pty Ltd case, the learned trial judge had made an order and had given reasons in writing. The order had not been perfected, and it emerged subsequently that there was an error of fact having to do with costs attendant upon an affidavit which the parties thought was before the court, but which was not so.

The question was whether the order could be amended after the fact but before its being perfected by virtue of the fact of the "slip rule" (Order 21 r 10 referred to above), or the inherent jurisdiction of the court.

While both parties urged upon the court the view that it had jurisdiction to hear the application under the slip rule, the judge reminded them that it had already been held that parties could not, by agreement, confer upon the court a power to make orders where the court did not have the power to make such orders. As in this case, he invited substantive submissions on the applicability of the slip rule. Correctness of proposition that the slip rule is confined to cases where the judgment recorded has failed to express the intention of the court. This is the narrow view. Note slip rule is not confined to rectification prior to perfection.

I agree with the view of the learned judge in the Jewel Walk Pty case that:

> The slip rule gives the court a wider power to amend a judgment than that which arises under the inherent jurisdiction. It extends to correcting a judgment to include a matter not dealt originally through inadvertence: {Raybos Pty Ltd & Anor v Tectram Corporation Pty Ltd & Ors [1987-88 77 ALR 190; R v Cripps ex p Muldoon [1984] 94 ALR 310, 316}

In the said case, Roberts-Smith J. said and I adopt his reasoning:

> A court or judge does have power to reconsider a judgment or order which has not been perfected (per Fry LJ in Re Suffield & Watts, Ex Parte Brown & Ors [1886-1890] All E.R p. 276). The power extends to complete reversal of the original judgment or order. Thus, in Re Crown Bank, 1890 44 Ch D 634, judgment had been given for the winding up of a company on a shareholders' petition. Minutes granting the petition and for the winding-up were delivered but not passed or entered. Thereafter the parties compromised and applied

> for a rehearing and an order dismissing the petition. North J held that he had jurisdiction to rehear and ordered the petition be dismissed.

In the instant case, what the respondents are seeking is not an amendment or variation of the order which I had previously made, but a vacating of that order and a further order for the matter to be heard de novo, because the court may have been influenced by looking at the extra affidavit of Mr. Mahfood. The question is: Does the Court have to do this or may it pursue some other path? According to Roberts-Smith J. in Jewel Walk Pty Ltd,

> "The nature and scope of the power of a court to withdraw, alter or modify a judgment or order on application by a party, or of its own motion, at any time before the judgment or order is drawn up, passed and entered, was explained by the High Court in Smith v New South Wales Bar Association [1992] 176 CLR 256 at 265".

He then cited the following section of the judgment from that case which I also adopt for the purposes herein.

> "It has long been the common law that a court may review, correct or alter its judgment at any time until its order has been perfected (For early cases see, e.g., Abbott v Feary (1860) 6 H & N 113, at pp 118-119 [158 ER 47, at pp 49- 50]; In re Suffield and Watts; Ex parte Brown (1888) 20 QBD 693, at p 697, As to more recent cases, see, e g, Texas Co (Australasia) Ltd v Federal Commissioner of Taxation (1940) 63 CLR 382, at R 457: Pittalis v Sherefettin p19861 DB 868, at p 879). Part 40, r 9(1) of the Supreme Court Rules (NSW) also provides that '[that] Court may set aside or vary a judgment where notice of motion for the setting aside or variation is filed before entry of the judgment', The power is discretionary and, although it exists up until the entry of judgment, it is one that is exercised having regard to the public interest in maintaining the finality of litigation (Wentworth v Woollahra Municipal Council (1982) 149 CLR 672. at p 684). Thus, if reasons for judgment have been given, the power is only exercised if there is some matter calling for review (Marinoff v Bailey (1970) 92 WN (NSW) 280. at R 284: National Benzole Co Ltd v Gooch r19611 1 WLR 1489. at DO 1492-1494). And *there may be more or less reluctance to exercise the power depending on whether there is an avenue of appeal* (State Rail Authority of NSW v Codelfa Constructions Pt~ Ltd (1982) 150 CLR 29. at RR 38-39. 45-46; Wentworth v Rogers [No 9] (1987) 8 NSWLR 388. at pp 394- 395. It is important that it be understood that these considerations may tend against the re-opening of the case, but they are not matters which

bear on the nature of the review to be undertaken once the case is re-opened, as this case was.

It is said in Ritchie's Supreme Court Procedure that the power to review a judgment in a case where the order has not been entered will not ordinarily be exercised 'to permit a general re-opening' (Ritchie's Supreme Court Procedure, New South Wales, vol 1, p 2855). As a general statement that is correct, both as to whether leave to re-open will be granted and, if it has been, as to the nature of the review involved. But it is a general statement only and, once a matter has been re-opened, the nature and extent of the review must depend on the error or omission which has led to that step being taken. Very little will be required in a case where, for example, all that is involved is a mathematical error in the calculation of some particular item of loss or damage. And, in the case of a factual error, the extent of the review will vary depending on whether the error goes to the heart of the matter or whether its significance is confined to some discrete subsidiary issue."

Autodesk Inc v Dyason [No 2] 176 CLR 300, was cited by Mrs. Gibson-Henlin, and the head-note, which I find instructive, is in the following terms:

Before judgment was entered in Autodesk Inc v Dyason [1992] 173 CLR 330, the unsuccessful litigants applied to vacate the judgment on the ground that, without fault on their part, they had no opportunity to be heard on three issues involved or decided in that judgment.

Held, by Brennan, Dawson and Gaudron JJ., Mason C.J. and Deane J. dissenting, that the application should be dismissed, on the ground that the respondents were given an opportunity to be heard, and were heard, upon the matter they sought to raise again, and by Gaudron J. on the further ground that the interests of justice did not require that the judgment be vacated because it was not fairly arguable that the judgment involved a misunderstanding of the facts or misapplication of the law in relation to one or more of the issues on which the respondents wished to put further argument.

Per Brennan and Dawson JJ. A court has jurisdiction to recall a judgment, at least before the formal entry of the Judgment, If It has been pronounced against a person who, without his or her fault, has not had an opportunity to be heard as to why that judgment should not be pronounced.

> Per Gaudron J. The jurisdiction to reopen a judgment is not confined to circumstances in which a party has not been given an opportunity to be heard on the issues involved in the judgment but extends to any case in which the interests of justice so require.
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> Per Mason C.J. (dissenting) the exercise of the jurisdiction to reopen a judgment and to grant a rehearing is not confined to circumstances in which, by accident and without his or her fault, the applicant has not been heard. The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when the court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law and where the court's misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing.

In the circumstances of the instant case, I believe that our CPR 42.10 allows the court to apply the slip rule to correct an "error arising in a judgment or order from any accidental slip or omission", the "accidental slip" being to have looked at the affidavit. I take the view that this rule is adequate to allow the court to revisit the evidence to ascertain whether any new and material evidence was produced by the affidavit. I do not believe that it does provide any such material evidence. But I also am prepared to and so hold, that the cases referred to herein contain principles wide enough to allow the court to consider *all aspects* of its judgment, and to reverse it if the justice of the case so requires. "All aspects" must be taken to include the reasons previously given. On the other hand it seems clear to me, especially on the authority of Autodesk No 2, by which I am, admittedly, not bound but which I find very persuasive and I adopt, that if the court is of the view that excluding any consideration of the affidavit in question does not affect the conclusion to which the court *must* come, then the court may so find. I find that any references to the offending affidavit were not directed at the essential question of the right to secure summary judgment, and they did not affect the factors which I needed to consider in determining that question.

I accordingly think that it is appropriate to treat this as an application to vacate my judgment. Just as it would have been open to the court to reverse itself, it is also possible to conclude that there is nothing wrong with it. I agree with Gaudron J. in

Autodesk (No 2) that the court must consider the justice of the case, and I do not believe that it is appropriate to vacate the judgment herein previously given.

I therefore deny the application, and re-affirm my earlier ruling to hold that the Applicant is entitled to Summary Judgment as previously ordered.

Leave to Appeal granted, if necessary. Execution stayed for four (4) weeks.