JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 129/2002

BEFORE: **THE HON. MR. JUSTICE BINGHAM, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN:	**MICHAEL CAUSWELL** **RICHARD CAUSWELL**	**APPELLANTS**
AN D	**DWIGHT CLACKEN** **LYNNE CLACKEN**	**RESPONDENTS**

John Vassell, QC and **Mrs. Julianne Mais-Cox** instructed by **Dunn Cox** for the Appellants

David Batts and **Miss Daniella Gentles** instructed by **Livingston, Alexander and Levy** for the Respondents

12th, 13th, 14th, 15th ,16th May and 23rd, 24th 25th 29th July, 2003
and 18th February 2004

SMITH, JA.:

The appellants Michael and Richard Causwell are shareholders in Equipment Maintenance Limited ("the Company"). The respondents, Dwight and Lynne Clacken are also shareholders in the Company. On the 5th October, 2001, the respondents filed a Petition to wind up the Company pursuant to section 196 and/or section 203 of the Companies Act.

On the 29th May, 2002, Anderson J, by and with the consent of the parties, made an Order (the May Consent Order) which embodied the terms of an agreement between the parties for the resolution of their dispute. The May Consent Order provided specific time frames for the performance of various actions. It also provided for liberty to apply to either party generally. On the 22nd August, 2002 the May Consent Order was varied by Anderson J with the consent of the parties to enlarge the time for the valuation of the respondents' shares.

On the 4th October, 2002 the respondents filed a summons seeking to vary the terms of the May Consent Order pursuant to the "liberty to apply" provision. By Order made on the 20th November, 2003, Anderson J varied the terms of the May Consent Order in the face of opposition from the Causwells. This appeal is from the November 20 Order varying the May Consent Order. The principal issue in this appeal is whether the terms of the May Consent Order may be varied without the consent of the parties and, if so, to what extent.

The Consent Order

In Open Court before the Hon. Mr. Justice Roy Anderson on the 29th day of May, 2002:

> "Upon the Petition of Dwight and Lynne Clacken...IT IS HEREBY ORDERED BY AND WITH THE CONSENT OF THE PETITIONERS AND THE RESPONDENTS THAT:

1. Michael Causwell and Richard Causwell (hereinafter referred to as "the First and Second Respondents") do purchase 6,666 ordinary shares in the capital of Equipment Maintenance Limited (hereinafter referred to as "the Company") presently registered in the name of the Petitioners (as to 3,334 each) at a price to be fixed by the accounting firm of Peat Marwick and Partners of 6 Duke Street, in the parish of Kingston (hereinafter referred to as "the valuer").

2. The Valuer is directed to value the Petitioners' shares in the said company within ninety (90) days of the date of this order, or such other period as may be approved by the Court from time to time, by reference to the market value of all the assets owned by the Company inclusive of fixed and personal property on a net assets value basis as a going concern and shares at market value in Windshield Centre Limited and Rodeo Holdings Limited, goodwill and receivables of the Company as at the 31st day of December, 2001 without any discount for the fact that the Petitioners' shareholding is a minority shareholding. The Valuer shall take into account any assets or funds of the company which have been diverted, utilised or paid by or to any of the shareholders and/or any of the following companies including but not limited to Ranchero Investments Limited, Startech Services Limited, Econocar Rentals Limited and Auto Auctions Limited and/or paid by the Company and/or its subsidiaries, and for this purpose the valuer is authorized to make such enquiries and examine such records, books and documentation including, but not limited to the affidavits and documentation filed in these proceedings as are necessary to ascertain the value of the said assets or the amount of the said funds or any amount of which the company is entitled to demand repayment from the shareholders

concerned and that any such assets, funds and/or amounts shall be brought into account for purposes of the valuation aforesaid and shall attract interest being the Government of Jamaica treasury bill rates as published by the Bank of Jamaica. The valuer may use in-house figures for the financial year ending the 31st day of December, 2001 in the absence of Audited Financial Statement for the said year. In the event of any dispute relative to the aforesaid valuation of the assets the valuer's decision in that regard shall be final.

3. The respondents shall pay to the Petitioners or their legal representatives the purchase price of the said shares as determined by the Valuer aforesaid on the following terms:

   (a) A deposit of 22% of the purchase price to be paid within ninety (90) days after the valuation is delivered to the respondents or their legal representatives whichever is earlier.

   (b) The balance purchase price is to be paid within one hundred and eighty (180) days thereafter or within a further ninety (90) days if the respondents are unable to pay the balance purchase price within the one hundred and eighty days (180) as stipulated.

   (c) Interest shall accrue on the balance purchase price at the Government of Jamaica treasury bill rates as published by the Bank of Jamaica from the date the deposit becomes payable until payment and any such interest shall be computed monthly and payable within five (5) days of the end of each month until the balance purchase price is paid.

4. If the Respondents fail to pay the deposit within the stipulated time or the entire purchase price and interest is not paid within 270 days after the valuation is delivered and upon the expiration of seven (7) days notice served on the Respondents or their legal representatives, it is hereby ordered that the Company be wound up pursuant to the provisions of the Companies Act and a Chartered Accountant, to be agreed upon by the parties and if not agreed to be appointed by the Court under liberty to apply, be appointed liquidator for the purpose of winding-up the Company which shall take immediate effect.

5. On the signing of this Consent Order, the Petitioners shall execute and deliver to their legal representatives, Instruments of Transfer of the said shares to be held by the said legal representatives on their undertaking to send it to the Respondents' Attorneys-at-law on payment and receipt of the purchase price.

6. Pending completion of the said purchase in the aforesaid manner and time the Petitioners shall continue to exercise all rights and privileges as shareholders.

7. Pending completion of the said valuation and purchase of shares and/or winding up of the company as the case may be the respondents, Michael and Richard Causwell are hereby restrained whether by themselves, their servants and/or agents or otherwise, howsoever from removing, dissipating and/or otherwise disposing of the assets of the company except in the ordinary course of business and from excluding the Petitioners from Directors and/or Shareholders meetings.

8. The Petitioners shall not for a period of Eighteen (18 months) from the date hereof use any confidential information obtained in

their capacity as Directors of the Company and shall not solicit clients of the company for the said period of eighteen (18) months.

9. Pending completion of the said valuation and purchase of shares and/or winding-up of the company as the case may be, the Respondents, Michael and Richard Causwell shall maintain the existing insurance as at the 31st day of December, 2001 on all of the properties owned by the company and its subsidiaries specifically, Windshield Centre Limited and Rodeo Holdings Limited except computer equipment and property at 1a Montrose Road such insurance to be based on the existing terms and conditions.

10. Each party is to bear their own legal costs of transfer of the shares.

11. Costs of the valuation to be borne by the Company.

12. Each party is to bear their own legal costs of the Petition.

13. There be Liberty to Apply to either party generally".

The First Application Under Liberty to Apply

Pursuant to paragraph 2 above the valuation of the shares ought to have been completed by the 22nd of August, 2002. As a result of the failure to meet this requirement, the first application under "Liberty to Apply" was heard by Anderson J on the 22nd August, 2002. At that time an Order "by Consent" was made which varied paragraph 2 of the May Consent Order by extending the time period of ninety (90) days for the completion of the valuation of the petitioners' shares by a further period

of thirty one (31) days from the 22nd August, 2002 to the 23rd September, 2002. The August 22 Order also gave the attorneys of the parties until September 17, 2002 to agree on the adjustment of the other dates contained in the May Consent Order, failing which the matter of the adjustment of the dates and the issue of costs were to be set down for hearing during the week of the 23rd September, 2002. Further, by the August 22 Order the Causwells were to "cause to be paid over to KPMG Peat Marwick" a cheque in the amount of $425,000 plus GCT of $63,750.00 by the 26th day of August, 2002.

The Second Application Under Liberty to Apply

The valuation of the shares was not done during the extended period under the August 22 Order. Undoubtedly, this was to the great detriment of the respondents. Consequently, they filed another Summons pursuant to "Liberty to Apply" seeking to amend the May Consent Order. This summons was heard by Anderson J on the 15th October 2002. On the 20th November, 2002 Anderson J made the following Order:

> 1. The Valuer is directed to value the Petitioners' shares in the said Company by the 31st day of January, 2003, or such other date as the Court thinks fit, by reference to the market value of all the assets owned by the Company inclusive of fixed and personal property on a net assets value basis as a going concern and shares at market value in Windshield Centre Limited and Rodeo Holdings Limited, goodwill and receivables of the Company as at the 31st day of December, 2001 without any discount for the fact that the Petitioners' shareholding is a

minority shareholding. The Valuer shall take into account any assets or funds of the Company which have been diverted, utilised or paid by or to any of the shareholders and/or any of the following companies including but not limited to Ranchero Investments Limited, Startech Services limited, Econocar Rentals Limited and Auto Auctions Limited and/or paid by the Company and/or its subsidiaries, and for this purpose the Valuer is authorized to make such enquiries and examine such records, books and documentation including, but not limited to the Affidavits and documentation filed in these proceedings as are necessary to ascertain the value of the said assets or the amount of the said funds or any amount of which the Company is entitled to demand repayment from the shareholder concerned and that any such assets, funds and/or amounts shall be brought into account for purposes of the valuation aforesaid and shall attract interest being the Government of Jamaica treasury bill rates as published by the Bank of Jamaica. The valuer may use in house figures for the financial year ending the 31st day of December, 2001 in the absence of Audited Financial Statement for the said year. In the event of any dispute relative to the aforesaid valuation of the assets the valuer's decision in that regard shall be final.

2. In order to ensure completion by that date, the Respondents shall deliver and/or cause to be delivered by the Company's auditor's, not later than January 15, 2003, all such information as shall be required by KPMG Peat Marwick in order to complete the exercise by the said date.

3. Failing the completion by January 31, 2003, the valuers shall be authorized to use the last available audited accounts of the company, being those for the period ending not earlier than December 31, 2000, in order to arrive at

an appropriate valuation for the purposes of the purchase of the shares of the Petitioners by the Respondents. (If there is any evidence that there is any willful obstruction or frustration of the efforts of the valuer to complete its job by the date herein, the Court will require such persons to show cause why they should not be cited for contempt).

4. A deposit of 22% of the value of the Petitioners' shares, as determined by paragraph 1 or 3 of this order, is to be paid to the Petitioners or their Attorneys-at-law, not later than the 28th of February, 2003.

5. Counsel for both the Petitioners and the Respondents are to make written submissions to be delivered no later than the 28th of February, 2003 supported by appropriate affidavits as to a reasonable time, in total not being more than 210 days, nor less than 120 days, after January 31, 2003, by which all monies are to be paid, and the time period for the balance.

6. On a date to be agreed with the Registrar, not being later than 14 days after the date in 4 above, the matter is to be set down for a maximum of two (2) hours, for counsel to attend at my chambers to explain their affidavits and answer any questions the Court may have in order to make its final decision as to the time to be fixed for payment of the outstanding balance.

7. Interest shall accrue on the balance purchase price at the Government of Jamaica treasury bill rates as published by the Bank of Jamaica from the date the deposit becomes payable, February 28, 2003, until payment and such interest shall be computed monthly and payable within five (5) days of the end of each month until the balance purchase price is paid.

8. The failure to meet any date in this order, shall, in and of itself, be a sufficient ground for an Order, that the Company be and is hereby wound up pursuant to the provisions of the Companies Act and a Chartered Accountant to be agreed upon by the parties and if not agreed to be appointed by the Court, to be appointed Liquidator for the purposes of winding up the company which shall take effect, immediately on the making of such Order.

9. No order made with respect to the paragraph 4 of the Summons for an Order that Lynne Clacken is not to be excluded from director's meetings.

10. The application in paragraph 5 of the Summons for various items of information is denied.

11. On the signing of this Consent Order, the Petitioners shall execute and deliver to their legal representatives, Instruments of Transfer of the said shares to be held by the said legal representatives on their undertaking to send it to the Respondents' Attorneys-at-law on payment and receipt of the purchase price.

12. Pending completion of the said purchase in the aforesaid manner and time the Petitioners shall continue to exercise all rights and privileges as shareholders.

13. Pending completion of the said valuation and purchase of shares and/or winding up of the Company as the case may be the Respondents, Michael and Richard Causwell are hereby restrained whether by themselves, their servants and/or agents or otherwise howsoever from removing, dissipating and/or otherwise disposing of the assets of the Company except in the ordinary course of business and from excluding the Petitioners from directors and/or Shareholders meetings.

14. The Petitioners shall not for a period of Eighteen (18) months from the date hereof use any confidential information obtained in their capacity as Directors of the Company and shall not solicit clients of the company for the said period of twelve (12) months.

15. Each party is to bear their own legal costs of transfer of the shares.

16. Costs of the valuation be borne by the Company.

17. Costs of this Summons to the Petitioners to be agreed and if not, taxed.

18. Liberty to Apply".

Paragraphs 5, 6, 7, 10 and 11 of the May Consent Order were not affected. Paragraph 8 was amended by para. 14 of the November Order in that the period of 18 months during which clients should not be solicited was altered to a period of 12 months.

The appellants in their Notice of Appeal are asking that "the conditions under the Consent Order dated the 29th May, 2002 be reinstated".

Before us Mr. Vassell QC argued three grounds:

(1) The Learned Trial Judge erred and/or misdirected himself in holding that the Court had jurisdiction to vary the Consent Order dated the 29th May, 2002.

(2) The Learned Trial Judge erred and/or misdirected himself in making orders that fundamentally altered the conditions agreed

to by the parties when signing the Consent Order dated the 29th May, 2002.

(3) That the Learned Trial Judge erred and/or misdirected himself in awarding costs to the applicant, in circumstances where he made no findings as to the responsibilities of the delay and held it was inappropriate for him to do so.

The issue raised by grounds 1 and 2 is whether or not Anderson J had the jurisdiction to vary the May Consent Order as he did.

The Submissions in Outline

Grounds 1 and 2

Mr. Vassell for the appellants made the following submissions:

(i) The Consent Order made on the 20th May, 2002 was an order which embodied a real contract between the parties governing their respective rights and entitlements in relation to the Company and was the final order on a Petition to Wind Up the Company determining those rights and entitlements.

(ii) Accordingly, the learned trial judge had no jurisdiction to vary the Consent Order as he did on the 20th November 2002 since the effect of the November Order particularly at paragraph 4 was to vary the agreed terms of the contract.

(iii) Furthermore, the Order to wind up the Company which is contained in the original Consent Order (paragraph 4) was

substantially varied without the consent of the parties by the November Order (paragraph 8) and amounted therefore to a substantial variation of the contract embodied in the Consent Order.

(iv) The words "Liberty to Apply" refer to the working out of the actual terms of the Order. In the instant case the orders made by the judge in November, 2002 did not constitute orders for the working out of the Consent Order of 29th May, 2002. Thus, the judge had no jurisdiction to make them under the Liberty to apply provisions.

For these submissions counsel for the appellants relied on ***Seibe Gorman & Co. Ltd. v Pneupac Ltd.*** [1982] 1 All ER 377; ***Channel Ltd. v F.W. Woolworth & Co. Ltd.*** [1981] 1All ER 745; Halsbury's Laws of England 4th edn. Vol. 26 para 554; ***Cristel v Cristel*** [1951] 2 KB 725; ***Potts v Potts*** [1976] 6 Family Law 217; ***Poisson and Woods v Robertson et al*** [1901-2] The Weekly Reporter 260; ***Huddersfield Banking Co. v Lister*** [1895] L.R. 2 Ch 273; ***Purcell v Trigell Ltd.*** [1970] 3 All ER 671.

Mr. Batts for the respondents submitted:

(1) That it was a well established practice for a Court, on a Petition to Wind Up, to order the sale of shares rather than to wind up a viable company or to stay the Petition pending completion of the sale of shares.

(2) That this is not a settlement agreement evidenced by an Order/Judgment of the Court. It is rather a Judgment of the Court to which the parties consent. The judge was well aware of the meaning and intentions of the judgment which provided for "Liberty to Apply to either party generally". The judge is entitled to make further Orders to facilitate the carrying out of the judgment. He relied on ***Page v Skelt*** [1940] 2 All ER 419; ***Hinde v Hinde*** [1953] 1 All ER 171; ***Noel v Becker and another*** [1971]2All ER 1186 among others.

(3) The judgment being a judgment on Petition to Wind Up, the court, of necessity, had to consider the matter. In this regard the court can determine whether in the working out of the Order further Orders are necessary. The principles relied on by the appellants relate to settlements in common law matters and do not apply to Judgments on petition to wind up. He relied on the following authorities inter alia: **Halsbury's Laws of England** 4th edn. Vol. 37 paras. 382 and 384; **Re a Company** [1981] 2 All ER 1007; **The Law and Practice of Compromise – David Foskett; Green v Rozen and Others** [1955] 2 Q.B.D. 797.

(4) That even if this Court disagrees with the above submissions and assuming that common law principles apply, on the facts of this case the learned trial judge did not err because:

(a) The Consent Order provides for "Liberty to Apply to either party generally". Those words mean that either party can apply in relation to any aspect of the matter. The words allow, what is in any event implied, a power in the Court to extend or abridge time periods in the Order.

(b) The Court may vary a Consent Order where there has been a change of circumstances, or where the Order of the Court is being frustrated by the conduct of a party, or where it is equitable so to do, or where the order requires working out and a determination by the court is necessary.

He referred to the following cases among others: ***Page v Skelt*** (supra), ***Cristel v Cristel*** (supra); ***Seiba Gorman & Company Ltd.*** (supra) ***Poison and Woods v Robertson*** (supra); ***Abbot v Abbot*** [1931] P.26; ***Chandless – Chandless v Nicholson*** [1942] 2 All ER 315; Rule 225 of the Companies (Winding Up) rules 1949; CPR 26.1(2)(c). Apart from their written submissions, counsel for the parties made oral submissions spanning some eight days and sought to reinforce their submissions with extensive references to decided cases.

Scope of the Court's Jurisdiction to Vary a Consent Order

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. 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 17A –24.

It has been said that when an order is expressed to be "by consent" it is ambiguous: see ***Seibe Gorman v Pneupac*** (supra) per Lord Denning M.R. at p. 380 (b&c). In ***Chandless- Chandless v Nicholson***(supra) at p. 317 Lord Greene M.R. said:

> "There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression."

Thus, where an order is expressed to be made by consent, the Court must determine whether there was a true binding contract created between

the parties to which is superadded the command of the judge and which bears his imprimatur, or whether it is a mere order of the Court to which the parties agreed or to which they did not object. If the latter is the case the jurisdiction of the court to extend or abridge the period within which a person is required to do an act under Rule 26.1(2)(c) of the Civil Procedure Rules or Rule 225 of the Companies (Winding Up) Rules 1949, is not ousted – see ***Seibe Gorman & Co. Ltd. v Pneupac Ltd.*** (supra).

In the case of a final order which embodies or evidences a real contract, as said before, the court will not normally 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.

In the instant case the May Consent Order was expressed to be "by and with the consent of the parties." It is not disputed that it embodied or evidenced the conclusion of negotiations between the parties. Indeed, Anderson J described its terms as evidencing "the

extensive nature of the discussions which informed the agreement" and although it bears the command and imprimatur of the judge it is no less a contract between the parties and subject to the incidents of a contract. It provides for "liberty to apply to either party generally." These words, I think, must be understood in the context of the particular case. They seem to give each party the right to apply to the court for further directions in relation to any part of the order in so far as the working out of the order is concerned. They certainly do not give the court the jurisdiction to alter the terms of the agreement, although they allow the court to extend or abridge the time periods with a view to facilitating the working out of the order. The critical question for this court, therefore, is whether the order made by Anderson J on the 20th November, 2002 was for the working out of the May Consent Order which was varied with the consent of the parties by the August 22 Order. To answer this question one must examine closely the nature and extent of the variations that the November Order seeks to effect on the May Consent Order.

The Variations As They Affect the May Consent Order

Paragraph 1 of the May Consent Order has not been altered. This is a fundamental aspect of the agreement and could not be altered without consent.

Paragraph 2 of the May Consent Order was varied by the Consent Order of August 22 to extend the time of 90 days given for the completion of the

valuation of the shares by a further 31 days, that is from August 22 to September 23, 2002. The November Order (paragraph 1) further extended the time to the 31st January, 2003. There was, and could be, no complaint in respect of this variation.

Paragraph 3 of the May Consent Order provides for the terms on which the purchase price, when determined, should be paid. Mr. Vassell Q.C., for the appellant, was very critical of the trial judge's variations of part (a) of this paragraph. He complained that the judge had no jurisdiction to shorten the period for the payment of the first deposit (see paragraph 4 of the November Order). I will return to this paragraph when dealing with the variations effected by the November Order.

Paragraph 4. The order contained in this paragraph directs the winding up of the Company if the respondents fail to pay the deposit. Mr. Vassell complains that the November Order (para.8) has substantially varied this order without the consent of the parties. This, he said, the court had no jurisdiction to do.

As I have earlier stated, paragraphs 5-11 were repeated in the November Order. It will be seen that the gravamen of Mr. Vassell's complaint is the variation of paragraphs 3 and 4.

Examination and Analysis of the November Order

I will now briefly examine the November Order.

Paragraph 1:

There is no objection to this paragraph which is the same as paragraph 2 of the May Consent Order save for the one permissible variation to which reference has already been made.

Paragraph 2:

This is new. There was no serious challenge to this insertion. This was obviously for the purpose of working out the Order.

Paragraph 3:

This is also new. It makes provision for the eventuality of a failure to complete the valuation of the shares within the given time. Mr. Vassell contends that this innovation indicates the wrong approach. It does not reflect, he argues, what the parties agreed. It is important to note that by the May Consent Order, the valuer was directed to value the respondents' shares within 90 days of the date of the Order. This was not achieved. By virtue of the August 22 Consent Order this period was extended by 31 days. In November, 2002 the valuation was yet to be done. The previous Orders made no provision as to what should be the consequences of such a failure. Is it that the time for valuation should be extended on each failure **ad infinitum**? Anderson J was firmly of the view that the provision of "Liberty to apply... generally" gave him the jurisdiction to insert paragraph 3.

At page 14 of his judgment (page 149 of the record) he said:

> "The fact is that the extension granted by August 22nd Order has now passed. All the other dates which are consequential upon that date are now moot. There are without doubt 'significant changes in circumstances'. What then is to be done? Is the court to sit idly by and await the conclusion of the valuation whenever this may be done, or ought the court to countenance an application of the re-configuration of the times it had in mind when it first made its order? I think that the answer is obvious..."

We agree entirely with the view expressed by the learned trial judge and are of the opinion that paragraph 3 of the November Order does not fundamentally alter the agreement of the parties. On the contrary, it is intended to, and will, no doubt, ensure that the agreement is executed in a timely manner. The learned trial judge was entitled, pursuant to the "Liberty to apply.. generally" clause to make such an adjustment.

Paragraph 4

This paragraph modifies paragraph 3(a) of the May Consent Order. The latter had provided that the deposit should be paid within 90 days after the valuation was delivered to the Causwells or their attorneys. The November Order provided that the deposit should be paid not later than the 28th of February, 2003. Mr. Vassell's contention is that the learned trial judge had drastically shortened the time frame for payment. This, he complains, is an attempt to reform the agreement and is not permissible under the "liberty to apply" clause.

When one looks at the May Consent Order in the light of the August Order, it would be difficult to argue that the parties did not intend to empower the judge to extend or abridge the time periods within which certain things should be done. The Consent Order of August 22nd directed the parties to advise the judge by the 17th September whether they had agreed on the adjustment of the other time periods in the May Consent Order. The parties consented therein that if no agreement was reached then the matter should be set down for hearing during the week of the 23rd September for the judge to deal with the adjustment of the time periods inter alia. It is in our view quite clear that by their agreement the parties contemplated that, if necessary, the court should have, and exercise, the power to amend the time frames set out in the May Consent Order so as not to render that Order meaningless or unfair. We, therefore, are in agreement with the submission of Mr. Batts that in the circumstances of this case, far from ousting the jurisdiction of the court, the agreement giving liberty to apply to either party generally invites the supervisory jurisdiction of the court over the working out of the May Consent Order. The May Consent Order provided for many things to be done – a valuation, payment of a deposit, payment of the balance purchase price and in default of payment for the company to be wound up. There are many time periods to be worked out. One aspect will impact on the other. The judge's direction in paragraph 4 does not affect

the substance of the agreement but was designed to facilitate the working out of the May Consent Order in a manner that is fair to all. It is, in my view, not correct to say that by the November Order, the learned judge shortened the time frame for payment.

Paragraph 5 This paragraph takes the place of paragraph 3(b) of the May Consent Order. Counsel for the appellant complains that there is a significant variation in so far as the boundaries are concerned. By the May Consent Order, the parties contemplated that the valuation would have been completed by the end of August, 2002 (para. 2); that a deposit of 22% of the purchase price would have been made by the end of November, 2002 (para. 3[a]); and that the balance of the purchase price would have been paid within 270 days of the payment of the deposit (para.3[b]), that is by the end of April, 2003.

By November, 2002 it had become clear that the agreement would not be completed within one year. Commenting on this situation the learned trial judge said "...At this point in time, I would venture to suggest there are no applicable periods, since the basic date for the completion of the valuation by which all other periods are to be defined, has now passed". We agree with counsel for the respondents that in these circumstances the trial judge was entitled, pursuant to the "liberty to apply... generally" clause, to adjust the time periods as he did.

Paragraph 6 is consequent on paragraph 5 (supra).

Paragraph 7 is the same as paragraph 3 (c) of the May Consent Order save for the insertion of the date February 28, 2003.

Paragraph 8

This paragraph takes the place of paragraph 4 of the original May Consent Order. It provides for the winding up of the Company in the event of a failure to meet any date in the Order. There is, in my view, merit in Mr. Vassell's complaint that this is a fundamental variation from the original May Consent Order in that it opens the possibility of winding up being available on grounds other than a failure to pay the deposit and/or the balance of the purchase price with interest within the stipulated time periods. It cannot be said that such a substantial variation was designed to facilitate the working out of that Consent Order. Mr. Batts' submission that a special jurisdiction exists because the May Consent Order arose on a winding up petition cannot be accepted. We agree with Mr. Vassell that the variation under paragraph 8 of the November Order cannot be justified by the Liberty to apply... generally' provision, or by reference to any equitable jurisdiction. The court cannot in exercise of such jurisdiction interfere with a Consent Order which embodies a contract simply because the court may think that one side might be having some difficulty. The court may only do what is necessary to carry the agreement into effect.

It follows therefore, that paragraph 4 of the original May Consent Order should be restored. Paragraphs 9 and 10 are objects of the respondents' cross - appeal. The other paragraphs of the November Order are unobjectionable.

The Cross -Appeal

The respondents in their cross-appeal seek to have the decision of Anderson J dated 20th November, 2002 varied in several respects. Some of the variations sought are in respect of time periods stipulated for the execution of certain matters. These time periods have now expired and, in consequence, Mr. Batts has urged this court to make the necessary adjustments. I propose to consider only the issues argued before the court by Mr. Batts in the cross-appeal. The first is that the judge having found that the periods stipulated in the May Consent Order and subsequent Order made on the 22nd day of August, 2002, had expired, ought to have fixed the time period for the payment of the balance purchase price. In the November Order (paragraph 5) the judge directed the parties to submit written submissions supported by appropriate affidavits within a specified time with a view to assisting the court in arriving at a reasonable time period within which the balance purchase price should be paid. In paragraph 6 the learned judge gave

directions for counsel for the parties to explain their affidavits in order to assist the court in making a final decision as to the time to be fixed for payment of the outstanding balance. In coming to this position the learned judge said (p.16 of judgment):

> "... this court cannot stand idly by while time passes on a matter such as this, the resolution of which, has crucial implication for the livelihood of the petitioners and maybe of the respondents. At the same time the court cannot get ahead of itself by assuming the nature of the evidence which may be available to determine the reasonableness or otherwise of the periods sought in the application."

In our view the approach of the learned judge was correct. Indeed, paragraphs 5 and 6 of the November Order are in keeping with the parties' Consent Order of August.

Secondly, counsel for the respondents argued that having regard to the circumstances of the case and the evidence, the learned judge ought to have made a finding that Lynne Clacken (the second respondent) is not to be excluded from directors' meetings. In paragraph 9 of the November Order the learned judge refused the respondents' application for such an order. The learned judge was right in so deciding since by paragraph 7 of the May Consent Order the Causwells were restrained from excluding the Clackens from directors' and/or shareholders' meetings. Paragraph 7 was specifically included in the November Order (para. 3). The respondents are entitled to enforce the

terms of the Consent Order by the usual court process if there has been a breach. In the light of paragraph 7 of the May Consent Order, which was reproduced in the November Order, it would be idle for the judge to make an order that Lynne Clacken is not to be excluded from directors' meetings.

Thirdly, the respondents complained that the learned judge wrongly exercised his discretion in refusing to order the Causwells to produce certain documents and reports to which the respondents as directors and shareholders are entitled. Counsel for the respondents submitted that the purpose for requesting the documents had nothing to do with the valuation of the shares. Rather it was to protect the respondents against a situation where the assets of the Company were depleted and if, at the end of the day, there having been no purchase of the shares they were left to wind up a shell. By this submission counsel was admitting that the purpose of the direction sought was not to enable or assist in the working out of the Consent Order. We agree with Mr. Vassell that whatever may be the merits of the respondents' claim to examine company documents in their capacities as directors of the Company, such a claim cannot be pursued under "liberty to apply... generally". The Consent Order provides for no such relief. The claim is a new one for substantive relief against the Company and appropriate independent proceedings would have to be

brought to resolve it. The judge was, therefore, correct in refusing this aspect of the respondents' application.

Finally, the respondents complained that the learned judge erred in holding that it might be inappropriate for the court to make a finding as to which of the parties was responsible for the delay in the valuation of the shares.

The learned judge in his judgment said:

> "I make no finding as to responsibility for the delay and indeed, it might be quite inappropriate for me to do so. However, it is not unreasonable to conclude that the longer the delay the more likely, it is that the petitioners would be at risk for their investment, since they are no longer intimately involved in the running of the company."

The judge was clearly of the view that for the court to make a finding of culpability would not be appropriate in proceedings brought under the "liberty to apply" provision and would not advance the execution of the agreement. Instead the judge gave directions(para.3 of the November Order) which were intended to ensure that the valuation would be carried out without any further unreasonable delay. In this paragraph the judge placed in parenthesis a warning that any wilful obstruction or frustration of the efforts of the valuer to meet the deadline would be met with contempt proceedings. The approach of the judge was commendable and can only facilitate the working out of the May

Consent Order in a manner that is fair to the parties. There is no reason to interfere with the exercise of his discretion.

Conclusion

For the reasons given, it is our opinion that, save for paragraph 8, the orders made by the learned judge in November, 2002 were necessary for the working out of the May Consent Order. Accordingly, the learned judge had jurisdiction to make such orders under the "liberty to apply...generally" provision of the May Consent Order even though that Order embodied a real contract between the parties.

We therefore order that paragraph 8 of the November Order be struck out and that paragraph 4 of the May Consent Order be restored with the necessary adjustments as to the time periods therein. The dates for the completion of the valuation of the respondents' shares, for the payment of the 22% deposit and for the computation of the period within which the balance of the purchase price should be paid are all passed. Of necessity, there must be a rescheduling of these times among others. Counsel for the respondents has asked this court to fix the new periods. In our opinion it is more appropriate for this exercise to be done by the learned judge below, and we therefore remit the case to the learned judge for him to reschedule the times if, and where, it is necessary so to do. It may be that by now the shares have been valued and, at least, the deposit paid.

In sum this appeal is dismissed save as ordered above. The cross-appeal is also dismissed.

Costs

So far as costs below are concerned, that was a matter for the discretion of the judge. Although the learned judge made no finding as to the responsibility for the delay he was, nonetheless, entitled to award costs to the respondents because of the Causwells' strong resistance to the application for directions. There is no reason to interfere with the exercise of the judge's discretion in that regard. In respect of the costs in this Court, justice will be done if no costs are given to either side, and it is so ordered.

ORDER:

BINGHAM, JA:

Save as ordered at (1) hereunder appeal dismissed:

(1) Order No. 8 of Order made by Anderson J on November 20, 2002 struck out.

(2) Order made by Anderson J on November 20, 2002 otherwise affirmed together with Order No. 4 of Consent Order dated May 29, 2002 which is restored.

(3) The matter is hereby remitted to the court below:

(i) to fix, if necessary, the dates:

(a) for completion of the valuation of the respondents' shares;

(b) for the payment of the 22% deposit;

(ii) for computation of the period within which the balance of the purchase price is to be paid.

The cross appeal is dismissed. No order as to costs.