[2019] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 53/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

BETWEEN	**MYRNA DOUGLAS**	**1ST APPELLANT**
AND	**JACQUELINE BROWN**	**2ND APPELLANT**
AND	**EASTON DOUGLAS**	**RESPONDENT**

Mrs Georgia Gibson-Henlin QC and Miss Stephanie Williams instructed by Henlin Gibson Henlin for the appellant

Miss Carol Davis for the respondent

9, 10 April 2018 and 10 May 2019

MORRISON P

[1] I have read in draft the judgment of Phillips JA. I agree with her reasoning and conclusion. There is nothing I wish to add.

PHILLIPS JA

[2] This appeal relates to the settlement of certain interest in properties owned by the parties, which were the subject of a fixed date claim form, filed by the 1st appellant on 28 April 2005. The lands, all initially the subject of the dispute, were:

(a) land part of Mountain Spring registered at Volume 1081 Folio 86 (Mountain Spring);

(b) 14A Carvalho Drive registered a Volume 1303 Folio 984 (14A Carvalho Drive); and

(c) land part of Maryland called Windsor Castle in the parish of Saint Andrew registered at Volume 1238 Folio 593 (the Maryland property).

[3] Campbell J made certain orders on 8 July 2015. The fixed date claim form that was before him was not before us, but essentially he decided that Mountain Spring, which was the former matrimonial home, was to be divided equally among the parties; 14A Carvalho Drive was to be divided between the 2nd appellant and the respondent; and the Maryland property among the parties equally. The order also gave directions as to the sale of the properties.

[4] Substantively, there was no challenge to Campbell J's decision in respect of the parties' interests in the respective properties. Indeed, the Mountain Spring and 14A Carvalho Drive properties were sold subsequent to his orders. The real question which has arisen, and which is the subject of this appeal, is with particular reference to the Maryland property, and whether the orders made on 8 July 2015 were clear and without ambiguity.

[5] Subsequent to the orders made by Campbell J, the parties endeavoured to deal with the property in Maryland, allegedly pursuant to those orders made by the court on

8 July 2015, but unfortunately they were not in agreement as to their import. As a consequence, the 1st appellant returned to court, asking Campbell J to clarify his order. He declined to do so indicating that the orders that he had made did not require any such clarification.

[6] I shall, therefore, set out below the orders, made by Campbell J, the process undertaken by the parties through their respective counsel to endeavour to abide by the orders of the court, and the resulting impasse which brought them before this court. The appeal before us relates to whether the learned judge erred in deciding that his judgment required no clarification in the manner requested, and therefore in declining to give any clarification of the same. It is ultimately for this court to indicate what the intention of the court was in the orders stated.

Orders made by Campbell J

[7] The following are Campbell J's orders declaring the interest of the parties in the said properties, and directions as to how they were to be sold:

> "1. Application for declaration that [the respondent] has no interest in Maryland refused.
>
> 2. Application for declaration of half (1/2) interest in Maryland to the [1st appellant] refused
>
> 3. Application that [the respondent] has no interest in Carvalho Drive refused
>
> 4. [The 1st appellant's] application for one-third (1/2) share interest in Carvalho Drive refused.
>
> 5. Application for declaration that [the respondent] has no interest in Mountain Spring is refused.

6. Application that [the respondent] has not got [sic] half (1/2) interest in Mountain Spring refused.

The Orders sought on the [respondent's] counterclaim, (except in relation to 39 Mountain Spring), are refused.

The Court further makes consequential orders as per the Notice of Application for Court Orders, filed 1st October, 2013 as follows:

i. That there be valuations by Allison Pitter & Company, (or such other reputable valuator as may be agreed by the parties) of each of the properties at Mountain Spring, Maryland and Carvalho Drive aforesaid, the cost of the said valuations to be borne by the parties. In the absence of agreement, the Registrar of the Supreme Court is to appoint a valuator.

ii. That the properties at 14A Carvalho Drive, Mountain Spring Drive and Maryland aforesaid be sold.

iii. That the [respondent's] Attorney-at-Law has carriage of sale of the said properties.

iv. That the properties at Mountain Spring, Maryland and 14A Carvalho Drive be listed for sale with real estate dealers as agreed by the parties (or same to be appointed by the Registrar of the Supreme Court from lists of 2 submitted by the [1st appellant] and the Defendant to the Counterclaim and by the [respondent]) for a period of 3 months from the date hereof.

v. That in the event that each of the properties at Mountain Spring, Maryland and Carvalho Drive are not sold within 3 months of the date hereof, then the parties are to accept the highest offer made by a potential purchaser (other than the parties) and accepted by any one party.

vi. That the [respondent] be permitted to purchase the interest of the [appellant] the Defendant to the Counterclaim in the property located at 14A Carvalho Drive aforesaid. The [respondent] is to

make an offer for purchase for half of the sum stated in the valuation prepared pursuant to these Orders, within 21 days of receipt of the said valuation for Carvalho Drive. In the event that the [respondent] makes no offer to purchase as aforesaid, the property located at Carvalho Drive shall be sold on the open market in accordance with the orders herein.

vii. That the Registrar of the Supreme Court be empowered to take all necessary accounts with respect to the sale of the properties at 14A Carvalho Drive, Mountain Spring and Maryland respectively.

viii. That the Registrar of the Supreme Court be empowered to execute any document or documents with regard to the sale and/or transfer of the property and/or shares in the event that either party refuses to sign same (a party being deemed to have refused to sign if they refuse and/or neglect to sign a document within 14 days of being requested so to do.

ix. Myrna Douglas, Jacqueline Douglas Brown and Easton Douglas and/or their servants or agents etc., to quit and deliver up possession of the respective premises (except where either of them is the purchaser thereof under the terms of this order) on the letter of commitment being issued or within 45 days of the agreement of sale being signed in the event it is a cash sale."

The correspondence

[8] Subsequent to Campbell J's order above, the attorney's-at-law for the appellants, Henlin Gibson Henlin, wrote a letter dated 15 February 2016 to Miss Carol Davis, attorney-at-law representing the respondent. That letter referred to: (i) an earlier letter from Miss Davis; (ii) certain outstanding matters relating to the production of the

certificates of title; (iii) the settling of certain amounts payable by and to the parties; and (iv) the payment of outstanding funds in respect of tax obligations with regard to the said properties, the subject of the order of Campbell J. In the penultimate paragraph of the letter, the appellants' attorneys-at-law made an offer on behalf of the appellants to purchase the respondent's one-third share in the Maryland property for the sum of $3,800,000.00. It was suggested that the purchase price, plus costs attendant with the appellants' purchase of the respondent's one-third share in the Maryland property, be deducted from the balance to be paid by the respondent to the appellants in respect of the completion of the sale of 14A Carvalho Drive.

[9] Miss Davis responded in a letter dated 19 February 2016. Counsel for the appellants wrote a letter in response dated 29 February 2016, wherein further discussions and requests relating to the property at 14A Carvalho Drive were set out, but which, as indicated, have no relevance to this appeal. Of note, however, the agreement of sale, in relation to the Maryland property, was requested. The appellants indicated that they had no problem with the Mountain Spring property being listed with real estate dealers, particularly, "Coldwell Banker's and Realtors International Ltd".

[10] On 9 March 2016, Miss Davis wrote to Henlin Gibson Henlin indicating that the transfer in relation to 14A Carvalho Drive had been cross-stamped and was with the Registrar of Titles for registration. She also informed counsel that real estate dealers, Breakenridge & Associates (Breakenridge), had received an offer of $4,700,000.00 in respect of the Maryland property. She indicated that her instructions were to "wait to see if this bears fruit".

[11] The communiqué from Breakenridge to Miss Davis was produced. It was dated 7 March 2016, and indicated that the offer had been made by Mr Kevin Hendrickson. The offer was a cash purchase in the sum of $4,700,000.00, but Mr Hendrickson wished to obtain further information on the right of way to the property. He had asked if a survey diagram, which clearly defined the land, existed. He had also indicated that the offer was non-binding at the time as he wished to do "due diligence" before naming his attorney, and before making a binding offer.

[12] On 14 March 2016, the appellants' counsel wrote to Breakenridge indicating that the appellants had offered to purchase the respondent's one-third interest in the Maryland property, which offer was based on the valuation of an independent valuator agreed by the parties. Counsel stated that it was her understanding that acceptance of her clients' offer had been delayed by a conditional offer which had been made by Mr Hendrickson. Counsel for Henlin Gibson Henlin, Miss Stephanie Williams, asked Breakenridge to:

> "...kindly advise us on whose instructions [Breakenridge] are continuing to solicit offers from potential purchasers of the captioned property."

She also requested a copy of the conditional offer made by Mr Hendrickson and, in addition, proof of his ability to pay.

[13] This position was repeated in a letter to Miss Davis of even date which stated that the purchase of the Maryland property by the appellants had been ongoing for an extended period, and that it was the contention of both the appellants and their

attorneys that all efforts should be undertaken to deal with all the properties expeditiously. Information was requested on the conditional offer made by Mr Hendrickson which counsel said was being used to delay the sale of the property to the appellants. The appellants' offer had been based on a valuation report dated 18 November 2015, which had accorded the property the value of $3,500,000.00-$3,750,000.00.

[14] The valuation report of the Maryland property by Allison Pitter & Co, chartered (valuation) surveyors, was submitted. The property was described as a vacant residential lot. The date of inspection by the valuators was 11 August 2015. The property was stated to be approximately 1.96 acres or 0.79 Hectares.

[15] On 21 March 2016, Miss Davis wrote to Henlin Gibson Henlin indicating that the offer from Mr Hendrickson was being pursued as it was the highest offer which had been received. She requested the duplicate certificates of title in respect of the Maryland property and the land in Mountain Spring, as, she stated, being the attorney having carriage of sale, she required the same to properly perform her functions. On 24 March 2016, she sent a cheque to Henlin Gibson Henlin in the sum of $9,288.649.50 in settlement of the interest of the 2nd appellant in 14A Carvalho Drive.

[16] On 4 April 2016, the attorneys for the appellants reminded Miss Davis that the agreement for sale in respect of the Maryland property had not been submitted. Additionally, they noted that Miss Davis had not deducted the purchase price of her client's one-third interest in the said property from the balance due to the 2nd appellant

in respect of the sale of 14A Carvalho Drive, which she had been instructed to do in previous letters. It was the appellants' contention that their offer was "the highest offer" as the Hendrickson offer was "a non binding conditional offer" and could not be considered preferable to the appellants' offer of a cash sale. So they sent an agreement of sale in respect of the Maryland property to Miss Davis requesting that the respondent sign and return the same, so that the long outstanding matter could be finally resolved. They, however, informed that the certificate of title, in respect of the Maryland property, appeared to have been lost, and that they had been instructed to make an application in respect of the lost certificate of title. That was the explanation being given for the appellants' failure to provide and/or submit to Miss Davis previously, the certificate of title in respect of the Maryland property.

[17] On the said date, Breakenridge sent a further offer to Miss Davis, and Miss Davis forwarded that offer to Henlin Gibson Henlin. The purchaser was stated to be 'Baking Enterprises (1988) Limited & or Nominee'. The purchase price was $4,700,000.00. This offer was not conditional. It was a cash purchase. Miss Davis indicated that she would be proceeding to prepare an agreement for sale in the terms as stated.

The application for clarification

[18] With this developing impasse, on 6 April 2016, the appellants filed a notice of application for liberty to apply to clarify the order made on 8 July 2015 by Campbell J. The application was later amended and filed on 11 April 2016, and was supported by the affidavits of Coleasia Edmondson, sworn to on 6 April 2016, and Stephanie Williams, sworn to on 12 April 2016, both attorneys in the offices of Henlin Gibson Henlin. There

were many reliefs claimed, viz nine, and even more grounds were outlined in support of the application, namely 16. The orders sought and the grounds on which they were based are set out below.

> "1. That Order (v) of the Honourable Justice Lennox Campbell dated 31st January 2011, 1st and 3rd February 2011, 20th September 2013 and 8th July 2015 is interpreted to mean that 'offer' does not include a conditional, non-binding offer;
>
> 2. That Order (v) does not exclude an offer from the [appellants];
>
> 3. Further and/or in the alternative an extension of time to the 15th February 2016 within which to exercise their right to purchase the Respondent's one-third interest in Maryland under Order (v);
>
> 4. The right conferred by Order (v) was properly exercised on the 15th February 2016;
>
> 5. The Respondent is ordered to accept the cash offer made by the [appellants] for the purchase of his one-third interest in property located at Maryland called Windsor Castle and registered at Volume 1238 Folio 938 of the Register Book of Titles;
>
> 6. The Registrar sign and endorse the Agreement for Sale of the Respondent's interest to the [appellants] in property located [at] Maryland called Windsor Castle and registered at Volume 1238 Folio 938 of the Register Book of Titles without further reference to the Respondent;
>
> 7. Further and/or in the alternative, the sale of Maryland be stayed until such time as the court directs.
>
> 8. Time is abridged for the service of this application;
>
> 9. Costs to the [appellants] to be taxed if not agreed.
>
> **The grounds on which the applicants are seeking the orders are as follows:**

a. Pursuant to Rule 26.1(2)(c) a court may extend or shorten time for compliance with an order of the court even if the application for extension of time is made after the time for compliance has passed;

b. The [appellants] failed to comply with the order of the court because they were awaiting the completion of the sale of the 2nd [appellant's] interest in Carvalho to the Respondent;

c. The Carvalho sale was delayed because of a dispute between the parties as the Respondent refused to share the cost of transfer tax a stipulated under the law;

d. The Respondent will not suffer any prejudice or injustice by the proposed extension as they have been aware since the 15th February 2016 of the [appellants'] intention to purchase the Respondent's one-third interest; All [sic] of the facts being relied on are therefore known to him;

e. The [appellants] have a real chance of success in the Application;

f. All orders of the court provide persons having an interest under the judgment with the inherent liberty to apply to the court to clarify any ambiguities or to seek clarification of the order without again setting the case down;

g. The Honourable Mr Justice Lennox Campbell delivered judgment on the 31st January 2011, 1st and 3rd February 2011, 20th September 2013 and 8th July 2015;

h. Order **v.** of the said judgment is unclear and ambiguous and requires further clarification;

i. Order **v.** states that in the event that each of the properties at Mountain Spring, Maryland and Carvalho Drive are not sold within 3 months of the date hereof, then the parties are to accept the highest offer made by a potential purchaser (other than the parties) and accepted by any one party;

j. Order **v.** does not exclude an offer by the [appellants];

k. On the 4th February 2016 the [appellants] received correspondence that there was an offer to purchase property at Maryland from Dwayne Walker for three Million Seven Hundred and Fifty Thousand Dollars ($3,750,000.00);

l. On the 15th February 2016, the [appellants] refused the offer of Dwayne Walker and counter-offered to purchase the Respondent's –third interest in the property located at Maryland for $1,266,666.50 (One Million Two Hundred and Sixty-Six Thousand Six Hundred and Sixty-Six Dollars and Fifty Cents) by a cash sale;

m. On the 9th March 2016, the Respondent's Attorney-at-Law informed the Attorneys for the [appellants] that they have received a conditional, non-binding offer for Four Million Seven Hundred Thousand Dollars ($4,700,000.00) from a Mr Kevin Hendrickson;

n. The Respondent is using the conditional, non-binding offer of Mr Kevin Hendrickson to avoid the purchase of his one-third share in the property at Maryland by the [appellants];

o. Three months from the date of the judgment of the Honourable Lennox Campbell has expired;

p. The highest offer is that of the [appellants] as the purported conditional, non-binding offer by Mr Hendrickson is not effective to override a firm cash sale;

q. The Respondent is deliberately frustrating the sale of his one-third interest to the [appellants] even though it is the highest offer to date;

r. Pursuant to Order (vii) of the Honourable Mr Justice Lennox Campbell the Registrar of the Supreme Court is empowered to execute any document or documents with regards to the sale and/or transfer of the property and/or shares in the event that neither party refuses to sign same (a party being deemed to

have refused to sign if they refuse and/or neglect to sign a document within 14 days of being requested so to do);

s. Pursuant to Rule 26.1(2)(e) the court may stay the whole or part of any proceedings generally or until a specified date or event;

t. Where a stay is not granted, the [appellants] will be severely prejudiced as the Respondent has continued to solicit and accept offers from third parties for the sale of Maryland without reference to the [appellants] and notwithstanding their instructions that the Respondent sell his one-third interest to the [appellants] pursuant to Order (v) of the Court;

u. It is in the interest of justice that the orders sought herein are granted." (Underlined as in original)

[19] The affidavit of Coleasia Edmonson set out the chronology of events as previously stated herein and attached as exhibits to the said affidavit, all the correspondence already referred to in paragraphs [8]-[16] herein. The further affidavit filed by Miss Stephanie Williams pointed out that the valuation report by Allison Pitter & Co in respect of the Maryland property, also referred to previously, was only received in their offices on 25 November 2015. The letter from Allison Pitter & Co dated 18 November 2015, sending them the report, was exhibited to her affidavit. She also referred to the letter sent to her from Miss Davis indicating that she had received an offer to purchase the Maryland property and that she was proceeding to prepare the agreement of sale accordingly, also previously referred to herein. Miss Williams deponed that the offer enclosed from Baking Enterprises (1988) Limited was a different offer from the one previously communicated to the appellants on 9 March 2016. She

stated that this offer had been received approximately seven weeks after the appellants' offer had been tendered, and was being used to frustrate the sale of the property to the appellants, who were two of the three registered proprietors and also family members. She, therefore, asked the court to exercise its discretion and grant the orders as prayed for in the notice of application filed in the matter.

[20] On 9 May 2016, Campbell J heard the application and refused it. He granted leave to appeal, and a stay of execution for a period of two weeks from that date during which time an appeal, if any, was to have been filed.

The appeal

[21] The notice of appeal was dated 24 May 2016, but the amended notice of appeal in our record and core bundle shows that it was filed on 7 July 2016. The appellants are relying on five grounds of appeal as stated in the notice of appeal and which are set out below.

> "2a. The learned judge erred as a matter of fact and/or law in determining that there were no ambiguities in his order of the 8th July 2015 and thereby finding that it was a matter of straight forward construction that did not require clarification.
>
> b. The learned Judge erred as a matter of fact and/or law and/or wrongfully exercised his discretion in finding and/or construing the words 'other than the parties' in order (v) as excluding all or any of the parties from making an offer to purchase the property at any time particularly by reference to order (iv).
>
> c. The learned Judge erred in not finding and/or failed to consider that by the terms of his order the Appellants had a right to make an offer to purchase

of the property up to three months after the date of the valuation;

d. The Learned Judge erred in not finding and/or failed to consider that a valuation report had to be completed and the actual market value of the property ascertained before time started to run in relation to the Order and the Appellant's offer.

e. The Learned Judge erred in not finding and/or failed to consider that the offer made by Appellants on the 16th February 2016 was properly made and was within time of the three months given in paragraph iv of his order." (Underlined as in original)

[22] The appellants sought the following orders:

"a. That the ambiguity in the order of the Honourable Mr. Justice Campbell of the 8th July 2015 has produced an inconsistency with this Court's intention be clarified to explain that the exclusion of the parties in Order (v) did not curtail the effect of Order (iv) such as to prevent the Appellants from offering to purchase the property such offer is exercisable within three months of the date of the receipt of the valuation report in Order (i);

i. The offer and payment tendered for the Respondent's one-third share in Maryland is within the scope of the order and was properly made on the 16th February 2016.

ii. That the Registrar of the Supreme Court is empowered to sign any and all documents necessary to effect a registrable Transfer if either of the parties herein is unable or unwilling to do so.

iii. Such further and/or other relief as this Honourable Court deems just." (Underlined as in original)

[23] In essence, the appellants contended that Campbell J had failed to recognise that there was ambiguity in the orders made on 8 July 2015, and, in particular, orders (iv) and (v), which had produced an inconsistency relative to *inter alia*, who could make offers to purchase the Maryland property, and the time frame within which persons entitled to do so could act.

[24] The appellants filed an affidavit of urgency of Coleasia Edmondson, allegedly, in support of an application to stay proceedings. I have not had sight of that application. Suffice it to say, the appellants claimed that they would be severely prejudiced if the respondent continued to solicit offers from third parties for the purchase of the Maryland property, notwithstanding their offer, and if the respondent concluded a sale, they would have lost the opportunity to "maintain ownership of the property, which [was] of great sentimental value to them". Miss Edmondson claimed, on the appellants' behalf, that they had a real prospect of success on appeal and outlined the same. She stated that it was necessary to preserve the subject matter of the appeal, and if the stay was not granted, the appeal would be rendered nugatory. The application, it was said, was being made as soon as reasonably practicable in the circumstances, and that in the furtherance of the overriding objective and the efficient administration of justice, this court ought to make an order in terms of the application.

[25] In response, the respondent averred that the appellants' interpretation of Campbell J's orders was flawed and set out his own understanding of the orders. He maintained that the orders required no clarification and so the appellants had no chance of success. He claimed that they were only pursuing the appeal in order to

frustrate the purchaser of the Maryland property from whom the highest offer had been received on the open market.

[26] Miss Edmondson, in reply, denied the contentions of the respondent and put forward, yet again, her understanding of the orders. The several items of correspondence and a copy of the duplicate certificate of title was submitted to the court with a copy of the agreement for sale to Baking Enterprises (1988) Limited.

[27] On 6 June 2016, the application was refused. However, that order was reviewed by the full court on 22 July 2016, and the order of the single judge of appeal was discharged, and a stay of execution of the sale of the Maryland property was ordered pending the determination of the appeal, with costs in the appeal. So, at the hearing of the appeal, the stay of execution having been ordered, the court was in a position to direct the implementation of the orders of Campbell J, without restriction.

The application to adduce fresh evidence

[28] On 28 October 2016, the appellants filed an application for permission to adduce fresh evidence, which was supported by an affidavit of Stephanie Williams sworn to on even date. The fresh evidence sought to be adduced was a letter dated 22 July 2016 from Henlin Gibson Henlin to Miss Carol Davis. The grounds of the application was that the letter would have an important influence on the appeal as it showed that the appellants had offered to compensate the respondent for his perceived monetary loss if he were to sell his interest in the Maryland property to the appellants. Additionally, the evidence was credible, it would not unfairly prejudice the respondent, and as the appeal

was by way of a rehearing, it was important that all matters that were likely to influence the exercise of the court's discretion, should be placed before it. Finally, it was stated, that it would be fair and just in the circumstances to allow the evidence to be utilised in the appeal.

[29] The content of the letter of relevance to the application, was that the appellants' attorneys-at-law were indicating their willingness to pay the amount of $300.000.00 to the respondent, representing the difference between the amount offered by Baking Enterprises (1988) Limited and the appellants for his one-third interest in the property.

[30] The respondent filed an affidavit wherein he contended that the letter was not relevant to the appeal, as the matter on appeal related to whether the judge had wrongly refused the application for clarification. He referred to and attached a letter of response from his attorney Miss Davis. In that letter, she indicated that her client did not accept the belated offer of the appellants as it was not in keeping with the order of the court. She reconfirmed that her client had accepted the offer from Baker Enterprises (1988) Limited, and that the sale to that company had not been completed as the appellants had obtained a stay of execution of the judgment which had had that effect. She indicated, however, that the purchaser was ready and willing to purchase the property and her client was duty bound to proceed with the sale as he was a person of honour, and his word was his bond.

[31] Submissions were made to the court. The application for permission to adduce fresh evidence on the appeal was refused. The court, indicated, *inter alia* that the

application did not conform with the principles and criteria laid down in **Ladd v Marshall** [1954] 3 All ER 745.

Submissions

On behalf of the appellants

[32] Mrs Gibson Henlin QC submitted that the appellants desired to purchase the Maryland property and offered to do so, so that they could keep the land, bearing in mind its uniqueness and their attachment to it. Their attachment to the property, she claimed, is supported by the duplicate certificate of title for the property which shows that the title was originally in the name of the appellants, but on 11 September 1991, the respondent was registered thereto on transfer by way of gift.

[33] It was also Queen's Counsel's contention that the appellants are entitled to two-thirds interest in the Maryland property, they had complied with all the orders of Campbell J, and should therefore be given the benefit of their interest. The order, she submitted, required clarification to give the appellants an opportunity to obtain the respondent's one-third interest. She argued, in reliance on the dictum of Somervell J in **Cristel v Cristel** [1951] 2 All ER 574, that that could be achieved by implying the words "liberty to apply" into the court's order for the necessary working out of that order. Additionally, in reliance on **Dalfel Weir v Beverly Tree** [2016] JMCA App 6, Queen's Counsel posited that an application could also be made to the court, since a court has a general power to clarify its order to give effect to its intention.

[34] Queen's Counsel urged this court to take particular note of the decision in **Weir v Tree** where this court found that there was an ambiguity in the original order as entered, as the updated valuation report which the court had ordered, had to be a precondition to the exercise of the applicant's first option to purchase the respondent's half share in the matrimonial property. Based on the reasoning in **Weir v Tree**, Queen's Counsel argued that the valuation of the Maryland property was a precondition of any offer being made by any of the parties. Three months from the date of Campbell J's order, would have been 8 September 2015, and at that date, the valuation from Allison Pitter & Co had not been completed or received. As a consequence, Queen's Counsel posited, neither the appellants nor any third parties could have made an offer to purchase the property as the price was not known.

[35] She asserted that time in respect of the three month period referred to in Campbell J's order could only begin to run when the valuation had been obtained. As the valuation was received on 25 November 2015, three months would have expired on 24 February 2016. The appellants made their offer on 15 February 2016, which was the highest offer made within the three months. Additionally, the attorney having carriage of sale for the Maryland property, was also the respondent's attorney, namely, Miss Davis, and she had the entire amounts due for sale in hand for the appellants, and had been instructed to deduct the amount due to the respondent from those funds.

[36] In further submissions, Queen's Counsel posited that the terms of order (iv) of the order of Campbell J were not restricted by the terms of order (v), within the 90 day period. There were, therefore, two periods within which an offer could be made,

namely within 90 days of the order, and the second period was after the 90 days had expired. Queen's Counsel stated that the respondent had construed the two paragraphs to mean that the exclusion of the parties in the "second period" also applied to their ability to make an offer in the "first period". She submitted that this interpretation was incorrect as there were no words of limitation in the first period, whereas there were such words of limitation in relation to the second period. The first period therefore includes the appellants as well as any other third parties. This is also supported, Queen's Counsel submitted, by paragraph (ix) of the orders as they would not be required to give up possession if they purchased the property. The second period, she asserted, included any other purchaser but excluded the parties.

[37] Queen's Counsel submitted that the respondent had averred that he had received another offer, namely, from Baking Enterprises (1988) Limited, and that as the appellants offer had been made "belatedly", they were prohibited from making the offer by the court's order, and that the offer they had made was less than the amount that had been offered on the open market. In response, Queen's Counsel said that the offer from Baking Enterprises (1988) Limited, had been made 48 days after the offer made by the appellants, which had been made within the terms of the court's order. Moreover, the appellants' offer was $50,000.00 more than the valuation price, and there was no competing offer of a higher amount at the time that they made their offer. In any event, the loss to the respondent was only $300,000.00 gross, and that loss must be considered against the fact that the Maryland property was held by family members; arose out of a family claim; and it was special and held particular interest to

the appellants. She argued that the loss to the appellants was therefore greater, as the respondent's loss could be readily measured in money.

[38] Queen's Counsel concluded her submissions by asking this court to grant the orders sought in the notice of appeal.

On behalf of the respondent

[39] Miss Davis, for the respondent referred to dicta of this court in **Weir v Tree**, **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16, which referred to the House of Lords case of **Hatton v Harris** [1892] AC 547, and **Sans Souci Ltd v VRL Services Ltd** [2012] UKPC 6, for guidance as to how the court should treat with cases where there is an ambiguity in a court order. She indicated that any order made ought to reflect the court's intention. In her view, Campbell J's order was not ambiguous or in need of clarification, since it properly reflected his intention.

[40] Counsel responded specifically to the grounds of appeal. With regard to grounds of appeal (a) and (b), she stated that the there was no need for clarification, as there was no ambiguity in the order which accurately reflected the intention of the court. Counsel submitted that there were several matters in respect of which the appellants had claimed allegedly required clarification. She dealt with each allegation sequentially:

1. The initial challenge to the "non-binding offer" became otiose as an unconditional offer had been

received by the respondent from Baking Enterprises (1988) Limited.

2. The allegation that the order did not exclude an offer from the appellants was incorrect as the order was demonstrably clear that all parties were excluded in the words "other than the parties".

3. The allegation that the order stated that the valuations were to be prepared but did not state a date for their production was inapplicable. This was so as the reference to days in the order for the production of a valuation, only referred to a valuation relating to 14A Carvalho Drive, as the respondent had sought this order pursuant to his intention to purchase the 2nd appellant's interest therein.

4. The properties were directed to be listed for sale with real estate dealers, and they had been so listed as directed in the order. However, none was sold. For sales on the open market, counsel submitted, there was no requirement for a valuation to be provided before a sale could be achieved. Indeed, counsel emphasized, that potential purchasers had no right to be provided with a valuation from a vendor. The

valuation obtained by a vendor was only so that the vendor could be satisfied as to the amount being obtained from the purchaser. So, if the vendor was satisfied that the offer was adequate, the sale could be completed without a valuation having been obtained.

5. Once no sale had been forthcoming after three months (which expired 7 October 2015), then the parties were to accept the highest offer (other than from the parties) which could be accepted by one of the parties. The offer of Baking Enterprises (1988) Limited was the highest offer and had been accepted by one of the parties, namely the respondent, pursuant to order (v), and he was entitled to accept it.

6. The offer in respect of 14A Carvalho Drive was set out differently because the respondent had made a specific request to purchase the 2nd appellant's interest in the same. But, counsel argued, it was included in order (v), so if the respondent had not made the offer as provided in order (vi), then he too would have been excluded from making any offer

with respect to any of the three properties. The appellants, counsel maintained, were excluded as they had not expressed any desire to make such an offer before the order was made, and had not made any such offer within the three months specified in the order.

7. The appellants' proposition that they were entitled to wait on receipt of the valuations in order to make their offer, could only have been effectual if they had expressed such a desire, and then it would have been set out in the order. But, counsel continued, the order itself did not contemplate the appellants making any offers for any of the properties. There was, as a consequence, no stipulation that they could wait for any valuation in order to make their offer. The only order which required a party to wait on a valuation was order (vi) which permitted the respondent to purchase the interest of the 2nd appellant in 14A Carvalho Drive. That order has been fully complied with, and the sale has been completed.

8. In the application for clarification before Campbell J at ground (b) the appellants had then indicated that

they had failed to make their offer as they were "awaiting the completion of the sale of the 2nd [appellant's] interest in [14A Carvalho Drive] to the respondent," which counsel submitted, was of significance when compared to the posture they were adopting in the appeal.

9. Of significance also, was, the fact that the appellants were asking that in the alternative, the court should grant them an extension of time to exercise their alleged right to purchase the respondent's interest in the Maryland property.

[41] Counsel submitted further that the appellants were well aware that they were outside the time frame permitted in the court's order for them to make an offer, when they made their offer on 15 February 2016. The application before the court was not for variation of the court's order, but for clarification of the same, on the basis that the actions of the appellants in the making of their offer had been contemplated in the original order of the court. This, it was submitted, was not so, as the appellants' offer to purchase the Maryland property or any of the properties was not included in the order, and any efforts by the appellants to make that contention by way of an application for clarification was wrong, and the judge had correctly refused the same. Campbell J, counsel insisted, as the learned judge who had heard the applications, was best suited to interpret his own order and decide whether it was ambiguous or not, and he had

refused clarification of it. He had thus decided that it was not ambiguous, and therefore required no clarification. That was a discretionary order, counsel said, made on good grounds without any misunderstanding of the law, and the appellate court should not disturb any of the orders made by the learned trial judge.

[42] Counsel then dealt with ground of appeal (c) relating to the right of the appellants to make the offer three months after the valuation had been obtained. Counsel submitted that based on the terms of the order, the appellants had no right to make an offer to purchase any of the properties. The only party that had the right to do so was the respondent in respect of 14A Carvalho Drive, as previously indicated, and he had been given 21 days after receipt of the valuation in the order to make his offer. As also indicated, he had fully complied with order (vi). Counsel submitted that receipt of the valuation did not affect the rights of the appellants, as they had no rights in the order to make any such offer. If they had made an offer, which was the highest offer, then the respondent would have been required to consider the same. But the offer made by the appellants was not the highest offer and the respondent was entitled to accept the highest offer, which he did.

[43] In dealing with ground of appeal (d), which stated that the valuation had to be completed and the actual market value known and ascertained before time started to run in the order in relation to the appellants' offer, counsel reiterated, that there was no provision in the order for any offer to be made by the appellants. Additionally, there was no requirement for the valuation to be completed before time started to run in relation to the offer to be made by the appellants. Order (iv) provided that the property

was to be listed from the time the order was made (for a period of three months from the date hereof). Counsel reminded the court, as previously submitted, that valuations were not required, and are not usually provided to purchasers on the open market. So, non-receipt of the valuation could not delay the offer being made on the open market. The only provision made in the order, where the valuation was to be provided before time started to run, was in the case of the purchase by the respondent of the interest of the 2nd appellant in 14A Carvalho Drive. The order made provision that the respondent's offer be made within 21 days of the receipt of the valuation report. Counsel submitted "there was no provision for anyone to wait 3 months after valuation to make an offer".

[44] Counsel submitted on ground of appeal (e), that the appellants' contention that their offer made on 15 February 2016 had been properly made and was within the time stated in order (iv), was incorrect. The three month period, stated in the order, was for the properties to be listed with real estate agents. It did not give any time for the making of an offer by the appellants. And in any event, the offer made on 15 February 2016, was outside the time frame of three months from the order made on 8 July 2015. The offer in fact, counsel argued, was well beyond that date.

[45] Counsel submitted on all those bases the appeal ought to be dismissed.

Discussion and analysis

[46] In my view, the real issue in this appeal is:

Did the learned judge err when he exercised his discretion to refuse the application for clarification of his order made on 8 July 2015?

In coming to a conclusion on that issue one must consider:

(a) What was the true and proper interpretation to be given to the order of the court?

(b) Was there any ambiguity in its terms?

(c) What was the intent of the court as expressed in:

(i) order (i) with regard to the valuations to be obtained;

(ii) order (ii) that the properties be sold;

(iii) order (iv), that the properties be listed with real estate dealers "for a period of 3 months from the date hereof";

(iv) order (v) with regard to how the properties should be treated if not sold within three months of the order;

(v) order (vi) particularly with regard to the production of the valuation report and the purchase of the one-half interest in 14A Carvalho Drive, by the respondent, from

the 2nd appellant within 21 days of receipt of the same; and

(vi) order (ix) particularly with regard to delivery up of possession of the property except if one of the parties was the purchaser under the terms of the order.

[47] I readily accept that the law is that even if the words "liberty to apply" are not written in the order of the court they are implied in order to work out the court's order (see **Cristel v Cristel**). This application before the court, however, was not one under that rubric, but one that sought "clarification" of the order of the court. There are authorities out of this court which address the issue of omission from, and or ambiguity of the order of the court and how the court has dealt with it.

[48] In **Weir v Tree**, Morrison P at paragraph [17] made it clear that:

> "...This 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. 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."

[49] Morrison JA (as he then was) in **American Jewellery** expressed the court's need for caution when deciding whether to clarify its orders as follows:

> "... [D]espite the inherent jurisdiction of this court to correct or vary its own orders, so as to make the meaning and intention of the court clear and to give effect to that intention, it is a jurisdiction to be exercised mindful of the limitation that, by this means, the court is not enabled to have second or additional thoughts about the previous decision..."

[50] Of course, as is well accepted, each case must be dealt with on its own peculiar facts. In **American Jewellery**, the issue was whether there was an inconsistency between judgments delivered by members of the court and the court's orders as drawn. The various passages in judgments from members of the court proposed orders that Mrs Jennifer Messado was obliged by her undertaking to pay $575,000.00 to American Jewellery. However, the actual order of the court stated that there should be 'no award' for payment of it, and that Mrs Messado should pay only the interest referable to it. Morrison JA, in delivering the judgment of the court, found that was a clear inconsistency. He indicated that the clear intention of the court, contrary to what the order drawn up stated, was that Mrs Messado should pay $575,000.00 to American Jewellery for breach of her professional undertaking. The court therefore granted the application and substituted the previous orders made to reflect that intention.

[51] In **Weir v Tree**, the Court of Appeal had set aside an order that gave Mr Dalfel Weir one-half interest in a dwelling house but not the land on which that house was built. This court ordered that Mr Weir was entitled to one-half share of the family home (in which he still resided), comprising the dwelling house together with the land on which it was situate. Orders were also made that the property should be valued and Mr Weir was given first option to purchase Ms Beverly Tree's one-half share in the said property within three months of the order for sale, failing which that option would lapse, and the property would be sold by private treaty or public auction, with the proceeds being divided equally.

[52] It is clear, therefore, that this court in **Weir v Tree** intended in its judgment to give Mr Weir the first option to purchase Ms Tree's one-half interest in the property based on a valuation which first had to be obtained. The production of timing of the valuation report was unclear and so the order required clarification to clearly reflect that intent. In the instant case, only one party, it seems, was interested at the time of the hearing before the learned trial judge, to purchase the interest of one of the parties in one of the properties. That is what was reflected in the court's order and what the court obviously meant.

[53] I intend therefore to set out what in my opinion the court by its order intended to convey in respect of the issues on this appeal. It is the obligation of this court to ensure that the intention of the court is protected. The application before Campbell J was not an opportunity for a disgruntled applicant to try to persuade the court to grant

an order that it did not initially receive but subsequently wished to obtain. So, in my view, the following is clear:

(i) The court meant and ordered that there should be valuations of all three properties, the costs in respect of which should be paid equally by the parties. If there was failure to agree a valuator, a valuator could be appointed by the Registrar of the Supreme Court.

(ii) All three properties were ordered to be sold.

(iii) The respondent's attorney had carriage of sale in relation thereto.

(iv) The properties were to be listed with real estate agents agreed by the parties, or failing that with real estate dealers appointed by the Registrar of the Supreme Court from lists of two submitted by the parties, for a period of three months from the date of the order.

(v) If the properties had not been sold within three months of the date of the order of the court, then the parties are to accept the highest offer made by any party, not being one of them ("other than the parties"), and accepted by any one of them.

(vi) If the parties fail or refuse to act the Registrar of the Supreme Court will become empowered to act in lieu thereof.

(vii) The parties will have to quit and deliver up the premises, unless they are one of the purchasers of the properties under the terms of the order.

(viii) There is no provision that valuations must be obtained before any offer can be made in respect of any of the properties generally.

(ix) Offers must be made within three months of the date of the order of the court, so that the properties could be sold. Any person including all three parties are included as persons who could make offers in that period. There is no indication of any entitlement to do so, but they may do so, as there is no prohibition against any of the parties doing so either in this period.

(x) In the event that the parties make no offer to purchase any of the properties within the three months of the date of the order of the court, and the properties are not sold, then none of the parties can

do so thereafter, save as set out in paragraph (xi) below, which could be effected as applicable.

(xi) The respondent may make an offer within 21 days of receipt of the valuation in respect of 14A Carvalho Drive to purchase the 2nd respondent's one-half interest in the same. This could be done within the said three month period of the date of the order. If this is not done within the time frame specified, then the property can be sold on the open market.

[54] As a consequence of the above, in answer to the issue raised, my opinion is as follows.

[55] There is no ambiguity in the terms of the order. Order (iv), order (v) and order (vi) have great interplay. As indicated, as none of the parties made any offer for any of the properties within three months of the order, and as the properties were not sold within three months of the date of the order, then none of the parties could do so, save and except the respondent if he made his offer in respect of 14A Carvalho Drive within 21 days of receipt of the valuation in respect of 14A Carvalho Drive. If that property had been sold within the three months, the respondent would not have been able to exercise his option to purchase 14A Carvalho Drive, although that option could also have been exercised within the three month period, the valuation having been obtained.

[56] Indeed, the appellants could also have made an offer to purchase the respondent's one-third interest in the Maryland property had they done so within three months of the date of the order. Any offer by the appellants that was outside three months of the date of the order would have been ineffectual given the terms of order (v). The appellants (and the respondent) were thereafter specifically excluded.

[57] There was no provision affording any facility to await the production of valuations and or the completion of the sale of 14A Carvalho Drive before submitting an offer to purchase any of the properties, in this particular case, the Maryland property. The properties were to be listed right away from the date of the order to facilitate offers for purchase to be made. The intention was that all three properties were to be sold. If the appellants had made an offer which was the highest within three months from the date of the order, then they would have been described as the "purchaser" in order (ix) and would not have had to quit and deliver up the premises.

[58] However, as there was no offer made on 14A Carvalho Drive within three months of the order and the premises had not been sold, the respondent was entitled to act under order (vi) of the order, and make his offer within 21 days of receipt of the valuation, although, as indicated, that offer could have been made subsequent to the order, 21 days after the valuation was to hand. Equally, as no offer had been made within three months of the date of the order in respect of the Maryland Property, and the property had not been sold within the said three month period, then any party other than the parties could make an offer, and the parties would have to accept the highest offer made by any person other than any one of them, and accepted by any

one of them. The offer made by Baker Enterprises (1988) Limited was such an offer, and so the respondent could have accepted that offer under the terms of the order.

[59] I agree with Miss Davis' submissions summarised at paragraph [41] herein that it is the judge who heard the applications who is best suited to decide whether his own order is ambiguous. In **Jade Hollis v Gregory Duncan and Another** [2018] JMCA Civ 32, P Williams JA at paragraph [50] stated that when a judicial order is to be construed, the best person to do so is the judge who made it. This principle was adopted in **Weir v Tree** at paragraph [62], which cited with approval a decision from the New South Wales Supreme Court in **Mainteck Services Pty Limited v Stein SA and Stein Heurty Australia Pty Ltd** [2013] NSWC 1563. In the latter case, Sackar J endorsed the dictum of Rogers CJ in **Yore Contractors Pty Ltd v Holcon Pty Ltd** (NSWC, Rogers CJ, Comm Div, 17 July 1989, unreported, BC8901954) where he said, that if a judge acted under a mistaken impression, it was the said judge whose mind was afflicted by the mistake who ought to be the one to identify and correct it.

[60] It is therefore clear that the judge who made the order is the best person to decide whether he made a mistake or whether the order required clarification or correction. Campbell J was therefore the best person to state what he meant by the order. In refusing the application for clarification, he indicated that the order was not ambiguous and expressed what he had intended. Accordingly, there is no basis for this court to interfere with his decision to refuse clarification of his order.

[61] In my view, the learned judge was correct to decline any clarification of his order and to refuse the application filed by the appellants. As a consequence, I would dismiss the appeal with costs to the respondent to be taxed if not agreed.

McDONALD-BISHOP JA

[62] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion. I have nothing to add.

MORRISON P

ORDER

1. Appeal against the order of Campbell J made on 9 May 2016 dismissed.
2. Costs to the respondent to be taxed if not agreed.