[2020] **JMSC Civ.165**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. 2009HCV02462

BETWEEN	**GLORIA HENRY**	**CLAIMANT**
AND	**GRACE STYLE**	**1ST DEFENDANT**
AND	**GRACE STYLE (and/or the Personal representative on behalf of the Estate of Charles Style**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Carol Davis for the 1st Defendant/Applicant

Ms. Annishka Biggs instructed by Balli & Associates for the 1st Claimant/Respondent

HEARD: July 9, 2020 & July 30, 2020

CONSENT ORDER- APPLICATION TO SET ASIDE CONSENT ORDER – PART 23 OF THE CIVIL PROCEDURE RULES – SECTION 2 OF THE MENTAL HEALTH ACT

WOLFE-REECE, J

INTRODUCTION

[1] By way of Notice of Application for Court Orders filed on the March 15, 2016, Miss Darcia Dennis, the daughter of the 1st Defendant, is seeking to have the Court set

aside a Final Order of Assessment dated the 23rd July, 2013, Default Cost Certificate and an Order for Seizure and Sale of Goods.

BACKGROUND

[2] The Claimant, Miss Gloria Henry is the owner of unregistered land situate at Mount Airy in the parish of Saint Andrew and comprised in survey diagram being examination number 247438 dated January 31, 2016. Miss Henry accused her immediate neighbour Miss Grace Style and her family of trespassing on her property by way of an encroachment on the said property.

[3] Miss Henry filed a claim in this Honourable Court on May 8, 2009 wherein she alleged that the boundary dispute between herself and Miss Grace Style (also known as Hyacinth Style) commenced in 2003 when she erected a fence along the boundary between her land and that of Miss Style. She contends that she erected the fence in accordance with the aforementioned survey diagram no. 247438.

[4] According the Claimant, Miss Style and other members of her family acted with blatant disregard for her property rights when they demolished the said fence and later commenced digging and excavating work on her land, which had the consequential effect of the Claimant losing sections of her land due to landslides.

[5] Miss Henry argued that in March, 2009 Miss Style and her family started building along the said boundary despite requests from the Claimant to desist. She surmised that these acts amounted to a trespass by the Defendant which led her to seek the following orders:

i. Recovery of Possession of the said property;

ii. Damages for trespass;

iii. An injunction restraining the Defendants, their servants and/or agents from entering into or continuing in possession of her land at Mount Airy in the parish of Saint Andrew comprised in Survey Diagram bearing Examination no. 247438 dated

January 31, 1996 and further from carrying out any construction or other work on the said property;

iv. An order for rectification of the boundaries of the said property; cost and such other relief as this Honourable Court deem just.

[6] Miss Style initially sought to challenge the claim against her and her late father's estate when she filed an affidavit on the 29th September, 2009 in response to the affidavits of Miss Henry. At the time of responding to the claim Miss Style was represented Miss Chandra Soares.

[7] In her affidavit, Miss Style denied any allegation of an encroachment on the Claimant's land. Instead, she argued that she is the owner of the land that she now occupies. According to her, her father was the previous owner of the land and by way of conveyance dated April 5, 1985 the said land was left to her. At paragraph 13 of her affidavit she expressed the following:

13. "That I maintain that based on the Conveyance I have and what my father told me where the boundaries are, I deny that I am encroaching on her land. Further I do not have to dig up her land to have access to the flash wall.

14. That I honestly believe that I was building on land owned by me. "

[8] The Court ordered that a surveyor's report be produced to assist in settling the dispute. A report was prepared by Llewelyn Allen & Associates wherein Mr. Llewelyn made the following observation: *"The Building under construction by Hyacinth Styles breaches the boundary with Gloria Henry as depicted in the pre-checked plan."*

[9] On September 30, 2009, the Honourable Mr. Justice F Williams (Ag) (as he then was) heard Miss Balli for the Claimant and Miss Soares who appeared for the 1st Defendant and he thereafter made a consent order in the following terms:

1. *The 1st Defendant shall compensate the Claimant for the encroachment area of land as delineated on the Surveyor's Report of Llewelyn Allen dated June 24, 2009 at price to be agreed between the parties failing which the parties shall agree a valuator to carry to a valuation to determine the value.*

2. *The parties shall share the costs to erect a retaining wall at the area pf the land slippage in the ratio of 65% to the 1st Defendant and 35% to the Claimant.*

3. *…*

[10] With the passage of two years since F. Williams, J (Ag) made to orders outlined above, the parties continued to be at odds in relation to the said property. On December 2, 2011 Miss Henry filed a Notice of Application for Court Orders seeking an order directing the hearing of the Assessment of Damages to determine the quantum of damages to be awarded to the Claimant for the encroachment to her land. Additionally, the Claimant alleged that the Defendants had resumed construction on the premises in breach of the order of the Court and in face of her objections. The Claimant also sought an injunction to restrain the Defendants from continuing with the construction.

[11] The Assessment of Damages was heard before Edwards, J (as she then was) on July 23, 2013. Miss Style was present but counsel was absent at the trial. On the conclusion of the assessment of damages the Learned Judge making the following orders:

1. *Damages are awarded to the Claimant in the sum of $1,900,000.00 which represents $90,000.00 for the value of the property and the valuator fees and $1,890,000.00 for the erection of the retaining wall along the boundary between the parties to be apportioned 35% to the Claimant and 65% to the Defendant.*

2. *Costs to be agreed or taxed.*

[12] The 1st Defendant failed to comply with the orders of the Court which led the Claimant to obtain an order for Seizure and Sale of Goods dated 26th August, 2015.

1ST DEFENDANT/APPLICANT'S SUBMISSION

[13] On the 15th March, 2016 a Notice of Application for Court Orders was filed on behalf of the 1st Defendant, seeking amongst other things, that the judgment against her be set aside and similarly that the order for Seizure and Sale be set aside. The application was filed by Miss Carol Davis who is now the attorney-at-law for the 1st Defendant. The orders sought by the 1st Defendant are as follows:

1. *That the judgment (if any) against the 1st Defendant be set aside.*
2. *In the alternative that the Claimant be granted relief from sanctions*
3. *That the Order for Seizure and Sale herein dated 26th august, 2015 be set aside.*
4. *In the alternative, that there be a stay of execution of the judgment and/or the order for Seizure and Sale Pending the hearing and determination of the Application herein*
5. *Further or other relief*
6. *Costs to the 1st Defendant*

[14] At the time of making the application on March 15, 2016, Learned Counsel, Miss Carol Davis listed the following as the grounds of the application.

> *"The Claimant and the Defendant reached agreement as to the matter herein which was incorporated into an order filed on 28th February, 2014.*
>
> *The Defendant is willing to carry out the said Order.*
>
> *That the Attorney-at-law for the Defendant has been disbarred.*
>
> *That since the making of the said Order the Defendant has not been contacted either by the Claimant and/or by the said Attorney and was entirely unaware of further proceedings with respect to the matter herein."*

[15] An Amended Application was filed on behalf of the applicant on the 30th June, 2020 wherein the following orders were sought:

"That Ms. Darcia Dennis be appointed Next Friend to conduct proceedings on behalf of the 1st Defendant

That the 1st Defendant be determined to be a patient pursuant to the Mental Health Act and Part 23 of the CPR

That all proceedings made by way of compromise of the Claim herein including Court Orders made on 30th September 2009, 14 February, 2013 be set aside.

That all orders made herein including judgment (if any), Final Order of Assessment dated 29th July, 2013, default cost certificate, order for seizure and sale of goods be set aside.

That time be extended to permit the Next Friend to file Defence on behalf of the 1st Defendant

Further or other relief "

[16] The application was supported by the affidavit evidence of Miss Darcia Dennis. Miss Dennis noted that her mother suffers from dementia. According to Miss Dennis there are moments when her mother would appear lucid however for the most part her mother could not function on her own because "*her mind was going."* She explained that she conveyed this information to Miss Chandra Soares who formerly acted as Counsel for her mother. She claimed that Miss Soares failed to advise her of the option to make an application on behalf of her mother.

[17] Learned Counsel also advanced that the applicant ought to be given leave to file a defence. Miss Davis argued that the applicant had a clear defence as the previous owner had acquiesced to what she considered to be the actual boundary of the land. She noted that the building that her mother was constructing on the property fell within the boundary delineation that was agreed between the previous owners.

RESPONDENT'S SUBMISSIONS

[18] Learned Counsel, Ms. Biggs, argued that in order for the 1st Defendant to succeed on her application the following conditions must have been satisfied:

a. The application the set aside must have been made promptly;

b. If the application was not made promptly there was a good reason for the delay; and

c. The balance of justice must lie in favour of the applicant.

[19] Miss Biggs submitted that the application was not made promptly as it was made 3 years after the hearing of the assessment of damages and 7 months after the order for seizure and sale was issued by the Court. Counsel submitted that the Applicant has not provided any good reason for the delay. She also submitted that the balance of justice lied in favour of the Claimant.

[20] Learned Counsel argued that the proper administration of justice requires that court orders, rules and directions be complied with and that litigants not waste the court's time. She touched on the issue of the undue delay in making the application to set aside the orders, she noted that such a long period of delay continues to prejudice the Claimant who is being deprived of the fruits of her judgment even 10 years after the order was made.

LAW AND ANALYSIS

[21] The sole premise on which the applicant is seeking to set aside the relevant orders of the Court is that at the time of the relevant proceedings the applicant was of unsound mind and therefore lacked the mental capacity to enter into a compromise of the claim. In determining the matter before the Court recourse must be had to Part 23 of the Civil Procedure Rules (CPR) which govern how proceedings involving minors and patients should be handled.

[22] The first question to be answered is whether Miss Grace Style is a *'Patient'* within the meaning of the CPR and the Mental Health Act. CPR 2.4 defines the term *'Patient'* in the following terms:

> *"patient" means a person who by reason of mental disorder within the meaning of the Mental Health Act is incapable of managing his or her own affairs.*

[23] Section 2 of the Mental Health Act defines a patient as a person who is suffering from or is suspected to be suffering from a mental disorder. Within the same section the term '*Mental disorder'* is defined as follows:

> *"mental disorder" means-*
>
> *(a) a substantial disorder of thought; perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or*
>
> *(b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behaviour,*

[24] The definition of mental disorder as provided above specify that the disorder must be of such a gravity as to grossly impair thoughts and behaviour. To my mind, it is therefore not sufficient to simply say that a particular person is suffering from an abnormality of the mind, the condition must be of such a nature that the thought pattern and behaviour of the person has been grossly impaired thereby preventing them from meeting the demands of everyday life.

[25] It is a point simpliciter that *he who asserts must prove*. It therefore goes without saying that the applicant has a duty to satisfy this court that Miss Style is suffering or is suspected of suffering from a mental disorder within the meaning of the Mental Health Act. Miss Darcia Dennis has exhibited two letters from the Stony Hill Medical Centre wherein it is stated that Miss Style is a patient of the medical centre. In one of the letters from the Stony Hill Medical Centre, which was dated June 6, 2020, it was stated that Miss Style was being seen by the facility since 2007 and has been noted to suffer from dementia, anxiety and depression.

[26] Neither letter can be said to be an expert report within the meaning of Part 32 of the Civil Procedure Rules (see **Bergan v Evans** [2019] UKPC 33 which deals with similar provisions under the Eastern Caribbean Civil Procedure Rules). CPR 32.13 which is headed '*Contents of report'* specify that an expert report must contain the following:

> *(1) An expert witness's report must –*
> *(a) give details of the expert witness's qualifications;*
> *(b) give details of any literature or other material which the expert witness has used in making the report;*
> *(c) say who carried out any test or experiment which the expert witness has used for the report;*
> *(d) give details of the qualifications of the person who carried out any such test or experiment;*
> *(e) where there is a range of opinion on the matters dealt within in the report*
> *(i) summarise the range of opinion; and*
> *(ii) give reasons for his or her opinion, and*
> *(f) contain a summary of the conclusions reached.*
> *(2) At the end of an expert witness's report there must be a statement that the expert witness-*
> *(a) understands his or her duty to the court as set out in rules 32.3 and 32.4;*
> *(b) has complied with that duty;*
> *(c) has included all matters within the expert witness's knowledge and area of expertise relevant to the issue on which the expert evidence is given; and*
> *(d) has given details in the report of any matters which to his or her knowledge might affect the validity of the report.*

[27] The letters from the Stony Hill Medical Centre does not meet the standard specified above in that the letters were not addressed to the Court, they do not speak to the doctor's qualifications nor do they express that the doctor understands his duty to the court. The court is therefore faced with determining the weight to give to the letters.

[28] Guidance can be taken from the reasoning of Phillips JA in the case of ***Sharon Pottinger v Keith Anderson*****,** [2013] JMCA App 35. The brief facts of the case are that Mr. Anderson brought a claim against the applicant's mother, Sonia Pottinger, and a company, Push Music Publishing Co ('Push Music'), for breach of copyright,

among other things. On the 2 May 2007 Mr. Anderson commenced proceedings in the Supreme Court to enforce his intellectual property rights. He noted that between 2003 -2006 he and his representatives were in dialog with Miss Sonia Pottinger with a view to settling the matter. By Mr. Anderson's own admission, he was advised by the applicant, Miss Sophia Pottinger in 2007 that she would be handling affairs on behalf of her mother due to her mother's failing health. Mr. Anderson obtained a default judgment against Miss Sonia Pottinger and Push Music on the basis that they failed to Acknowledge Service or file a defence. Sharon Pottinger made an application on behalf of her mother to have the default judgment set aside on the basis that Sonia Pottinger was a patient and default judgment was entered in breach of the requirements of the CPR which required the respondent to apply to the court for the appointment of a next friend.

[29] Similar to the facts presented in the case at bar, the applicant in the **Sharon Pottinger** case exhibited two letters from two medical practitioners which spoke to the fact that Miss Sonia Pottinger was suffering from Alzheimer's Disease. The evidence as presented by the court was that there was a *"letter dated 17 December 2012 from Dr Vincent Chin indicating that Sonia Pottinger had been under his care for "Alzheimer's Disease with Memory Disorder" since 2 July 2003, and letter dated 27 December 2012 from Dr Maldonado Medina stating that Sonia Pottinger was "an established patient since 10/30/03 to 06/15/2010" and had been under her care for "severe Alzheimer's disease"."*

[30] It was argued on behalf of Mr. Anderson that there was no evidence or sufficient evidence to say that Miss Pottinger was a '*patient'* within the meaning of the CPR. It was submitted that the letters of the doctors should have been in the correct form, that is, in the form of an affidavit. Also, it was submitted that the letters did not go into detail about the severity of the condition. Lawrence-Beswick Ja (Ag) (as she then was) agreed with the Respondent on this point when she expressed at paragraphs [66] - [67] of her dissenting judgment as follows:

> *"[66] However, two letters were exhibited, to the affidavit of Mr Powell which were purportedly written by doctors. One dated 17 December 2012, was purportedly from Vincent C Chin MD, FAAFP, family practitioner, whose address was in Florida. It indicated that Ms Pottinger was under his care for Alzheimer's disease with memory disorder since 2 July 2003 and that she was taking prescribed medications for the condition. The second letter dated 27 December 2012, purported to be from Anabelle Maldonado-Medina, MD, also from Florida. This letterhead stated that she was "board certified in Neurology". In the letter is the information that Ms Pottinger was an "established patient since 10/30/03 to 06/15/2010" and that she was under her care for severe Alzheimer's disease, but it does not state if she had the disease from "10/30/03" or if not, from when.*
>
> *[67] There was no verification of the authorship of the letters or acceptable certification/confirmation that these letters did in fact issue from medical doctors qualified to render an opinion about mental disorders. Further, there was no evidence that the doctors understood that the letters were to be used in court proceedings and that they had a duty to help the court impartially (CPR rule 32.3(1)). Neither was there evidence as to the doctors' opinions as to whether the severity of any disease from which Ms Sonia Pottinger may have been suffering, was such as would classify her as a patient under the Mental Health Act. There is no evidence of the basis for the doctors' opinions as expressed in the letters. Indeed, there was no evidence that the person who they had treated was the erstwhile claimant in this matter."*

[31] Phillips JA with whom Harris JA agreed, took a different view in her assessment of the evidence. She found that there were two circumstances in which one could be classified as a patient within the meaning of the Mental Health Act. On the one hand the act speaks to persons who are suffering from a mental disorder, this category she explained would require medical proof that he/she is suffering from such an abnormality of the mind so as to bring them within the scope of the act. The second category relates to persons who are suspected of being of unsound mind. The Learned Justice of Appeal surmised that the threshold to establish that a person is suspected of having a mental disorder is lower than the first and may not require expert evidence to confirm same. Her Ladyship expressed at paragraphs [42] - [43] of the judgement as follows:

> *"…From the section, it may be said that in making the determination of whether a person is a patient and for the purpose of litigation, one who is in need of a next friend to protect his/her interest, it is not sufficient that there is suspected or found to be a disorder of thought or perception, orientation or memory: the nature of this disorder must be so substantial as to grossly impair the behavior, judgment and capacity to recognize as to render the relevant person as being of an unsound mind. Such a condition is one that affects the mental health of a person and it may follow that any argument that a particular health issue or condition falls within that description would invite some medical evidence upon which such an assessment can be made. In this case, there were medical certificates in respect of Alzheimer's disease and so, on appeal, it would have to be considered what weight should be given to the information contained therein, particularly in circumstances where there appears to be conflicting evidence as to the mental capacity of Sonia Pottinger and the respondent is contending that there are varying stages of the disease which affect the extent of the mental capacity of the person suffering from the disease. And so, it may well be that there could be a finding that the information establishes the existence of Alzheimer's disease, but that it does not provide a sufficient basis upon which to conclude that Sonia Pottinger was of unsound mind for the purposes of part 23.*
>
> *[43] It is significant that the section also provides that a person may be regarded as a patient where he is suspected to be suffering from a mental disorder that renders him to be of unsound mind. This, it would seem to me, raises questions as to the nature of the evidence that is required for there to be an assessment as to whether a person is suspected of suffering such a mental disorder. It is arguable that the evidence would be at a lower threshold than where it is to be concluded that the person is suffering from a mental disorder which renders him to be of unsound mind. Would this assessment admit evidence from persons who are not medical practitioners? Must their assessment have its basis on medical evidence? Was the evidence upon which the applicant relied sufficient to meet this threshold of being suspected of being of unsound mind. In my view, a court could well find that there was sufficient evidence that Sonia Pottinger was suspected to be of unsound mind and therefore that the judgment could only have been entered with permission..."*

[32] The question now is whether there is sufficient evidence before this Court for the conclusion to be drawn that at the time of making the judgment Miss Style was a '*patient'* within the meaning of the CPR and by extension the Mental Health Act. Unlike in the **Sharon Pottinger** case where the mental health of Sonia Pottinger

was brought to the attention of the Respondent prior to him obtaining default judgment against her, in the current case the issue of Miss Style's mental health was raised for the first time on March 15, 2016, after the Claimant obtained an Order for Seizure and Sale against the applicant.

[33] In addition, in the **Sharon Pottinger** case the medical doctors spoke to the fact that they have been seeing Miss Pottinger for Alzheimer's disease since 2003. I find that the letters from Stony Hill medical centre were vague, while they spoke to the fact that Miss Style had been a patient at their facility since 2007 and that she suffers from a range of illnesses of which dementia is one, the court is left to assume the date of the onset of her dementia and the severity of the condition. I find that the letters from the medical facility at its highest does not assist the applicant's case.

[34] As it relates to the affidavit evidence of Miss Dennis, she notes at paragraph 4 of her Affidavit filed on the 30th June, 2020 as follows:

> *"At the time that my mother was served with the Claim in this matter it was clear that she was no longer able to function on her own as her mind was going. I was therefore the person that accompanied her to the lawyer and took any documents that I had with me. I explained to the lawyer what had happened. However, I was at no time until very recently advised that I could make application to act on my mother's behalf. My mother did have some periods when you [sic] would appear to be lucid, but from my experience she was not normal and certainly acted very differently from how she was when was well [sic]. I thought that once the lawyer was made aware of what had happened she would do all that was necessary to protect my mother and her interests".*

[35] When I assess the evidence of Miss Dennis, I am constrained to question her assertions. Prior to 2016 there was absolutely no mention made of Miss Dennis, nor was there any indication made to the Court that Miss Style was not well. Therefore, on a balance of probabilities, I find that there is not sufficient evidence to convince the Court that Miss Style was a patient at the relevant time.

[36] However, even if I found that Miss Style was a '*patient'* within the meaning of the CPR I find that such a conclusion would not change the result of this application. CPR 23.3(4) provides that any steps taken before a minor or patient has a next friend is of no effect unless the court otherwise orders. What this particular rule indicates is that a ruling or order of the court is voidable in such circumstances, the rule gives the court the discretion to determine the enforceability of an order that was made against a patient in the absence of next friend being pointed.

[37] This issue was discussed by Phillips JA in the **Sharon Pottinger** case when Phillips JA expressed that after determining that permission was required to make the order given that Miss Pottinger was a patient at the relevant time, it is then for the Court to determine what effect to give to that order. Her Ladyship expressed at paragraph [44] as follows:

> *"On the other hand, the court would also have to weigh any conclusion reached in relation to these issues against the fact that the language of rule 23.3(4) allows the court a discretion in relation to the effect of an order that has been obtained against a patient where the patient was not represented by a next friend. The rule provides that the order obtained in such circumstances has no effect, unless otherwise stated. In considering the exercise of a discretion under this rule, the court could possibly take into account the facts that the applicant: had been acting on her mother's behalf throughout the years, including the period after the filing of the claim; had been appointed next friend in another suit; had indicated in her affidavit that she had been acting as next friend in these proceedings and had no interest adverse to her mother's; had been appointed representative of her mother's estate in this suit (although after entry of default judgment); and, as submitted by counsel for the respondent, could have been appointed as next friend in the instant suit. Against this background, the pertinent questions would be whether the discretion allowed by this rule could be said to be improperly exercised where the default judgment is allowed to stand in these circumstances and further, whether the overriding objective and the interests of justice would be served by setting aside the judgment on this basis".*

[38] In determining what effect to give to the order I have taken into account the delay in making the application to set aside the consent order, the reasons advanced for

the delay and whether it would be in the interest of justice to set aside the consent order. There is no doubt that the application before this court was not made promptly, in fact, the application comes almost 7 years after the consent order was signed wherein Grace Style agreed to compensate the Claimant for encroaching on her land. Miss Dennis gave evidence that she is the one who accompanied her mother to the office of Miss Soares, what I found most compelling is her affidavit evidence filed on March 31, 2016 wherein Miss Dennis noted that she was fully aware of the order made against her mother to compensate the Claimant. At paragraph 7 of the said Affidavit she expressed as follows:

> *"Since being informed that we had to contribute to the construction of the wall, on behalf of my mother I purchased materials including sand, blocks and gravel, and I was waiting to be informed by my Attorney or the Claimant as to when they were ready to proceed with construction".*

[39] This leads me to examine the reasons advanced for the delay in making an application for the applicant to be declared as a patient and the reasons for the delay in setting aside the consent order. Miss Dennis' evidence is that she advised her attorney of her mother's condition but was not told that she make an application on her mother's behalf until recently. She also explained that she advised Miss Soares that there was an agreement between the formers owners of the land regarding the boundary which meant that her mother had a clear defence under the law of equity.

[40] I find that the reasons advanced by Miss Dennis are wholly unacceptable. In September 2009 the order was made for Miss Style to compensate the Claimant and on the 23rd July, 2013 the Final Order of Assessment was made, which only determined the exact sum to be paid by the 1st Defendant. The 1st Defendant cannot simply cast blame on her former attorney by arguing that she said and waited almost 3 years for her to tell her how to fulfil her obligations under a judgment. The matter had come to an end and it was for the 1st Defendant to pay over the sums to the Claimant which both her and Miss Dennis who was fully apprised of the matter failed to fulfil.

[41] In addition, I find that Miss Dennis' act of placing the blame on Miss Soares bears little weight. The authorities have long established that the court will not exercise its discretion to set aside a consent order in the absence of fraud, mistake or misrepresentation. At paragraph [19] of the case of Frank Phipps and Pearl Phipps v Harold Morrison unreported Supreme Court Civil Appeal no. 86/08 delivered January 29, 2010 Harris JA expressed as follows:

> *"As a general rule, an order obtained by the consent of parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose - Kinch v. Walcott and Others [1929] A.C. 482. The bringing of fresh proceedings would normally be grounded on the obtaining of the consent order by fraud, mistake or misrepresentation".*

[42] It is an established principle of law that a consent order is akin to a contract, meaning that the parties have reached a formal agreement regarding the matter in dispute. It is also trite law that a contract may be rendered invalid where it is established that a party to the contact lacked the necessary mental capacity to enter into the agreement. The concern that I have regarding the matter before the court is that at all times up to the making of the consent order Miss Dennis was kept abreast of the proceedings and by her own evidence was fully involved in the affairs of her mother. It seems unreasonable that almost 11 years later she wishes to have another bite at the cherry by casting the blame on Miss Soares who was vested with ostensible authority to act on her mother's behalf. More importantly, by her own evidence she paid the retainer to Miss Soares and gave her the necessary instructions. The approach to be taken by the court on an application to set aside a consent order in circumstances where blame is being cast on the attorney was discussed in the case of Frank Phipps and Pearl Phipps v Harold Morrison unreported Supreme Court Civil Appeal no. 86/08 delivered January 29, 2010. I fully endorse and apply the dicta of Panton J as he expressed at paragraphs 3-4 of the judgment. His Lordship expressed as followed:

> 3. *It is well settled law that the court will not interfere with an order made by consent at a time after the order had been perfected: Marsden v Marsden [1972] 3 WLR 136 at 141C.*

This order had long been made, signed and filed before the appellants approached the court to set it aside. This was so in a situation where what Clough, Long & Co. did, was well within the sphere of authority that attorneys-at-law have.

4. *Finality in litigation is very important. It is not an exaggeration to say that if every litigant, disgruntled with the exercise of ostensible authority by his attorney, were to turn around and challenge such exercise, chaos would reign in the administration of justice. Furthermore, a challenge to a consent order that comes more than four years after the litigant is aware of the order, is not worthy of the Court's aid.*

[43] In closing, I find that the balance of justice lies in favour of the Claimant who has been deprived of the fruits of the consent order for long enough.

DISPOSITION

1. Orders sought in the Applicant/1st Defendant's Amended Notice of Application filed on July 1, 2020 are denied.

2. Cost to the Claimant/Respondent to be taxed if not agreed.

……..
Hon. S. Wolfe-Reece, J