[2026] JMSC Civ 63

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 00368 OF 2013

BETWEEN	**UNITED PETROLEUM (JA) LIMITED**	**CLAIMANT**
AND	**LUTHER WILLIAMS**	**1ST DEFENDANT**
AND	**PANSY WILLIAMS**	**2ND DEFENDANT**

IN CHAMBERS

Miss Amanda Montague instructed by Myers Fletcher and Gordon for the claimant/respondent.

Miss Zara Lewis instructed by Zara Lewis and Co for the applicant/defendant.

Dates heard: December 3, 2025, and May 19, 2026

Civil Procedure - Application for extension of time to appeal – Application for permission to appeal – Application for stay of execution.

PETTIGREW COLLINS J

THE APPLICATIION

[1] Before me is the applicant's/ judgment debtor's Notice of Application for Court Orders filed March 21, 2025. The following orders are being sought:

1. That permission be granted for the applicant to appeal the decision of the Hon. Justice Hart-Hines made on the 8th of November 2024,

2. The time within which to apply for permission to appeal be extended to the date of filing this application.

3. The execution of the order of the Hon. Justice Hart-Hines made on the 8th day of November 2024, be stayed until determination of the appeal.

4. That the defendant be granted relief from sanctions to apply for permission to appeal out of time.

4. Costs to be costs in the claim.

6. Such other orders as this honourable court deems necessary and just.

[2] The orders of Hart Hines J that the applicants are seeking leave to appeal are as follows:

a) Judgment debtors' notice of application for court orders filed 7 May 2024 is refused.

b) Order granted in terms of paragraph 2 of the judgment creditor's amended notice of application filed on October 7, 2024;

c) Order of Carr J. dated 11 January 2024 is set aside.

d) The judgment creditors' notice of application for court orders filed December 1, 2022, is now spent. The judgment creditor filed a fresh notice of application for enforcement order.

e) No order as to cost.

BACKGROUND

[3] On December 1, 2022, the claimant/judgment creditor filed a notice of application for the enforcement of a committal order made on June 16, 2022, against the defendants/judgment debtors.

[4] On January 11, 2024, the Honourable Mrs Justice T. Carr made an order for the judgment debtors to pay: principal of $8,632,914.37, interest of $834,436.22 and cost of $5,500,324.09 on or before January `17, 2024. Failure to comply would result in them being committed to prison. That application pursuant to which the order was made, was supported by the affidavit of one Sharol Mason, an employer of the judgment creditor's attorney at law.

[5] The judgment debtor subsequently made payments in the sum of $15,067,674.68 which sum included $100,000 for cost of the day on which the order was made. The sums paid was intended to be in full and final satisfaction of their obligation pursuant to the court order.

[6] The judgment creditor on January 29, 2024, alerted the judgment debtors through their attorney that the sum of $7,804,639.05 was still outstanding. The judgment debtor on May 7, 2024, filed a notice of application supported by affidavit in which they sought the following orders:

1. The committal order made on 29 April 2021 be set aside

2. An order that amount remaining outstanding on the judgment debt is $124,881.61 which sum is the interest accrued on the principal of the judgment debt from October 23, 2023, to January 19, 2024.

3. An order that upon the payment by the judgment debtor to the judgment creditor of interests in the sum of $124,881.61 the claimant files and serves a notice of Satisfaction of Judgment Debt within five business days of the payment of the sum.

[7] On October 11, 2024, the claimants filed a notice of application for court orders seeking to amend the formal order of the Hon. Mrs. Justice Carr which is dated January 29, 2024. The application was made pursuant to rule 42.10 of the Civil Procedure Rules (CPR). It is common ground that the application was subsequently amended to rely on the inherent jurisdiction of the court instead. The orders that the applicants'/judgment debtors seek to appeal were made based on that amended application.

APPLICANTS' SUBMISSIONS

[8] It was the applicants' submission that this court has power pursuant to Rule 1.8(9) of the Court of Appeal Rules to grant permission to appeal as well as to extend the time within which to appeal. Counsel acknowledged that such permission should only be granted where the applicant has a real chance of success on appeal. She also relied on the case of **Rose-Anne Sirjue vs. Michael Sirjue and others** [2005] JMCA 29 for the proposition that the application for extension of time may be made after the time for compliance has passed, but there must be sufficient material before the court, usually in the form of affidavit evidence to support the exercise of that discretion.

[9] She further submitted in reliance on **R v Cripps, Ex parte Muldoon and Others** [1984] 3WLR 53, that once a formal order has been perfected, the trial judge is functus officio and in that capacity as trial judge, possess no further power to reconsider or vary the order or decision whether under the slip rule or otherwise. Further, that the slip rule is one of the powers of the court exercisable by the trial judge or other judge. She also relied on **Lyndel Laing and Dawn Lllewlyn McNeil v Lucille Rodney and Sandi Sand Beach Hotel** [2013] JMCA Civ 27 to ground her submission that the rule is designed to correct a clerical mistake or an error resulting from an accidental slip or omission and that the rule is intended to bring the judgment or order in harmony with what the judge intended to pronounce.

[10] She also submitted that the order was entered by the consent of the judgment debtor and judgment creditor and is therefore in law, a consent order. Further, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons. For this latter proposition she relied on **Purcell v FC Trigwell** [1967] P1 70.

[11] Counsel stated that the amendment sought could not be made by virtue of the slip rule pursuant to Rule 42.10(1). She urged the court to say that the judgment creditor provided affidavit evidence which formed the basis on which Kerr K made her orders. She contended that the formal order accurately expressed the intention of the learned judge after she considered the sworn evidence of Sharol Mason. She stated that Ms. Mason's affidavit provided a credible figure and the total amount to be paid so that there was no mere slip, accident or omission made by the judge in arriving at her decision. It would be incomprehensible she urged, to suggest that the learned judge was misled or that the order does not reflect the judge's true intention. She relied on the case of **Lyndel Laing** and submitted that that case is similar to the matter at hand and so this case should be treated accordingly. She urged further that given the substantial difference in the sums of money, it cannot be treated as a clerical error. She said that to alter the formal order would result in prejudice to the defendants who have already complied with the order but the claimant, given its financial means would suffer no prejudice.

[12] It was her further submission that the consent order should not have been set aside because it has been perfected. She relied on **Causwell v Clacken**. The judgment debtor sought to show in some detail that the consent order was a valid contract. Thus it was said that the defendants accepted the offer to pay the combined sums of principal of $8,632,914.37, interest of $834,436.22 and cost of $5,500,324.09 on or before January 17, 2024. The defendant accepted that offer and the consideration was the payment of the debt. She stated further that the claimant cannot assert that they did not intend to make an offer on that basis. She relied on **Storer v Manchester City Council** to say that the test is an objective one.

[13] She relied on the case of **Continental Petroleum Products v Scotia DBG Investments Limited** [2016] JMSC Civ 21 where K Anderson J. cited an excerpt from the text book **The Law of Recission** by Dominic O'Sullivan, Stephen Elliott and Rafal Zakizewski at paragraph 7.07 to the effect that a mere unilateral mistake is not sufficient to vitiate a contract.

[14] She also relied on an excerpt from Halsbury's Laws of England Volume 47, 2020 paragraph 308, that one cannot avoid a contract on the pretext that he did not intend to contract, if by his words he has done so. The intention is to be found in the outward expression of those words (**Storer v Manchester City Counsel** [1974] 1 WLR 1403 per Lord Denning). She submitted that in order to vitiate a contract, it must be shown that an operative mistake was made, the other party knew of the mistake and there was sharp practice or other unconscionable conduct in connection with the mistake.

[15] She stated that in the event the court takes the view that the consent order is a mistake, the defendant accepts that it would be a material mistake. She submitted, however, that the defendants were not aware of the error that the claimant alleges and complied with the claimant in good faith and the claimant would be hard-pressed to provide salient evidence that the defendant acted otherwise. She further submitted that the judgment creditor is also estopped from setting aside the contract on the basis of estoppel by representation of fact. The judgment creditor's representative provided a representation of fact to the defendants when she outlined the total sums owed. The judgment debtors acted to their detriment by obtaining a loan which detrimentally altered their position, and so the judgment creditor ought not now to be able to state that the figures provided to the judgment debtor was incorrect. She also pointed out that the judgment creditors had ample time to make the relevant amendments and "*waited long after the judgment debt was due allowing the defendants to continually rely on the said mistake*".

[16] She further submitted that to commit the judgment debtors for failing to comply with order 2(i) of the formal order would be wrong because they did not have the

mens rea to fail to comply with the order. To let the committal order stand would be prejudicial to the judgment debtors as the purpose of the committal order has been given effect. The committal order should be set aside, and the debt be treated as satisfied.

RESPONDENT'S SUBMISSIONS

[17] The respondent through counsel, submitted that the application was filed some three months out of time. Miss Montique cited the case of **City Printing and The Gleaner Company**. She like the applicant, submitted that in order for the court to extend time, there must be material upon which the court can exercise its discretion. She said that the only material put forward by the applicants is paragraph 21 of their affidavit and the reason provided therein does not form a sufficient basis for extending time because the applicant's need for funds to file their appeal would not have prevented them from filing the application for leave. She stated that in fact, the appropriate time to seek leave to appeal was at the time Hart-Hines J. gave her reasons. Counsel stated that, the fact that Hart-Hines J. did not provide her reasons in writing did not prevent the applicants from giving notice of appeal, since they knew the basis upon which the orders were made. She noted that Counsel was present at the time the orders were given.

[18] Miss Montique submitted that if the court is minded to consider the merits of the appeal, then the proposed appeal has no real prospect of success. It is trite law she insisted, that where a party files an application for leave to appeal, the proposed grounds of appeal ought to be set out in that application. The applicant she observed, did no such thing. She said that in the event the proposed ground is that the learned judge should not have varied the order, that ground is bound to fail. She pointed out that the judgment debtor owed the debt since 2015 but failed and/or refused to pay. She noted that V. Smith J ordered the defendants to pay the sums by a specified date and they failed to do so. When the matter came before Pettigrew-Collins J. she ordered the judgment debtor committed for failure

to honour the order of V Smith J. The judgment debtors also failed to honour the orders of Pettigrew Collins J. and it was on that basis that the order for committal was sought.

[19] She pointed out that the error appeared on the face of the affidavit of Sharol Mason. She asked the court to have regard to paragraph 3 where interest in the correct amount was stated. She further pointed out that the statement of account setting out the figures was also exhibited to the affidavit. She pointed out that it was the interest for a particular period that was represented in the affidavit instead of the total interest. She noted that the correct figure in relation to the interest was included in the statement of account but the claimant's attorney failed to realize that there was an error and simply took the figure from the face of the affidavit and it is that figure that was embodied in the order of Carr J

[20] . She accepted that the judgment creditor cannot say that the judgment debtor was aware of the error. She also accepted that the order was made by consent. She observed that in a few weeks subsequent to the order being made, the judgment debtor paid a sum. She continued that it was when the judgment creditor did a reconciliation that the judgment creditor became aware that the sum embodied in the order was incorrect. She said that the judgment creditor indicated to counsel that the order contained an error. The judgment debtor filed an application, the effect of which was to rely on the error. She continued that a consent order can be varied where there is a common mistake because the court will not allow a party to rely on a common error

[21] Counsel noted that in granting the orders she did, Hart-Hines J. varied the order of Carr J. pursuant to the inherent jurisdiction of the court and not pursuant to the slip rule. She said that part of Hart-Hines J reasoning was that because she had varied the order, the order could no longer be a consent order. She also submitted that the defendant's reliance on an error to say that they satisfied the judgment debt amounts to an abuse of the court's process and an act of bad faith. She noted that in order for the judgment creditor to enforce the outstanding balance, the judge

directed that a new application for a committal order needed to be filed. She concluded that the judgment debtors are relying on bad faith and that is unsustainable. She says that the prejudice will be to the judgment creditor to whom a debt has been owed since 2015 and not the judgment debtors who have found every reason not to pay. The only purpose an appeal will serve she posited, is to increase the costs of the judgment creditor in relation to a judgment debt which has been admitted but remains outstanding in part.

WHETHER AN EXTENSION OF TIME SHOULD BE GRANTED TO SEEK PERMISSION TO APPEAL

[22] The court retains the power to grant an extension of time to seek permission to appeal even if the application is made after the time for compliance has passed. This is so by virtue of Rule 1.7(b) of the Court of Appeal Rules 2002.

[23] The relevant principles to be considered when an application for extension of time within which to seek permission to appeal, is made, are set out in the cases of **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered December 6,1999 and **Garbage Disposal & Sanitations Systems Ltd v Noel Green and others** [2017] JMCA App 2. In **Leymon Strachan**, Panton JA (as he then was), at page 20, explained the issues for consideration: He observed that

> *(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.*
>
> *(2) Where there has been a non-compliance with a timetable the Court has a discretion to extend time.*
>
> *(3) In exercising its discretion the court will consider –*
>
> *i. the length of the delay;*
>
> *ii. the reasons for the delay;*
>
> *iii. whether there is an arguable case for an appeal and;*

> *iv. the degree of prejudice to the other parties if time is extended.*
>
> *(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as the overriding principle is that justice has to be done."*

[24] In this instance, the length of the delay is some three months. The only explanation offered by the applicant is that which appears at paragraph 21 of his affidavit in support of the application which is to the effect that the lateness is due to the difficulty in sourcing the funds for the appeal. While the delay is substantial, I am not of the view that it was inordinate. The reason offered for the delay is not in my view a good one.

[25] Miss Montique submitted that the judgment creditor will be prejudiced if permission to appeal were to be granted because the debt has been long outstanding and the pursuit of an appeal will only serve to increase costs to the judgment creditor in circumstances where the judgment debtors have found every reason not to pay a judgment debt which has been admitted.

[26] The judgment credit also complained that the judgment debtor has not set out the proposed grounds of appeal. Rule 1.8 addresses the question of how to obtain permission to appeal. 1.8(3) states that *"An application to the court below may be made orally but otherwise the application for permission to appeal must be made in and set out concisely the grounds of the proposed appeal*." It means that the applicant ought properly to have set out the proposed grounds of appeal. So far as I can discern, no sanction is prescribed for non-compliance with this particular rule. I am not of the view that that failure should be fatal to the application in circumstances where the main ground of appeal may readily be ascertained from the circumstances. The ground of appeal, however it might be formulated, must be premised on the applicant's view that the learned judge was wrong to have granted the application to vary or set aside the order because the order, having been made by consent could not be set aside or varied on the basis put forward by the judgment creditor.

WHETHER THE APPLICANT HAS A REAL CHANCE OF SUCCESS ON APPEAL.

[27] Rule 1.8(9) of the Court of Appeal Rules provides that:

> *The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success.*

[28] The concept of realistic prospect of success was explained in the case of **Swain v Hillman** [2001] 1 All ER 9, and reiterated and applied in **Garbage Disposal v Noel Green et al** [2017] JMCA App 2. In the latter case, the Court of Appeal in considering an application for leave to appeal, explained at paragraphs 28 and 29 that:

> *The terms "real" and "realistic" were defined in **Swain v Hillman and another** 2001 1 All ER 9 per Lord Woolf at page 92, where he addressed the meaning of the phrase 'no real prospect' in the context of an application for a summary judgment. He opined that:*
>
> > *"The words no real prospect of succeeding" do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success. They direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success.*
>
> *Morrison, JA, (as he then was) in Duke St John Paul Foot V University of Technology, Jamaica UTECH and Wallace observed at paragraph [21] of that judgment that this court has long accepted that the words real chance of success in Rule 1.8 (9) of this CAR were synonymous with the words "realistic prospect of success" used by Lord Woolf in the case of Swain v Hillman and so Lord woolf's formulation was therefore applicable to the said Rule 1.8 (9).*

[29] As garnered from **Kurt Dunkley v Dwight Levy**, claim no HCV 00368 of 2013, the case of **Gordon Stewart et al v Merrick Samuels**, SCCA no 2/2005, provides guidance as to the application of the real prospect of success test. It was there stated that:

> *The prime test, being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect, not*

a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action, as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning.

[30] This court must therefore consider whether the applicants have a real chance of success on appeal. If there is no real chance of success, then the application for permission to appeal should not be granted.

[31] At paragraph 12 of the case of **Lyndel Laing, Dawn Llwelyn McNeil v Lucille Rodney, (Executor of the Estate of Sandra McLeod, deceased) and Sandy Sand Beach Hotel Limited,** Harris, J. enunciated the following:

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

> *Once the order has been perfected, the trial judge is functus officio and in his capacity as the trial judge, has no further power to reconsider or vary decisions, whether under the authority of the slip rule or otherwise. The slip rule power is not a power granted to the trial judge. As such, it is one of the powers of the court exercisable by a judge of the court who may or may not be the judge who was in fact the trial judge ...*

[32] She continued at paragraph 13,

> *However, a judge may, at any time prior to the perfection of an order, reconsider and vary his decision. See in Re Suffield and Watts Ex parte. Brown 1888 20 QBD 693. It is only permissible for the judge to correct a mistake or an error in a perfected judgment or an order in circumstances where Rule 42.10 of the CPR applies, this rule reads:*
>
> > *The court may at any time without an appeal, correct a mistake in a judgment or order or an error arising in a judgment or order from any accidental slip or omission.*
> >
> > *A party may apply for a correction without notice.*

[33] In **Leslie Dacosta Williams v Teleith Evelyn Williams [2022] JMCA 30,** the following are among the principles extracted from the numerous cases considered in that appeal.

i. *Where a court makes an order in the exercise of its own discretion, that order may only be varied or set aside by a judge of coordinate jurisdiction if the judge who made it was misled, material and relevant facts were not disclosed or where there has been a material change of circumstances since the order was made**: Mair v Mitchell; Harley v Harley; Lloyds Investments Limited v Christen Ager –Hanssen** and the line of cases on which they rely.*

ii. *Where parties to a claim enter into a compromise agreement, that agreement supersedes the claim. Where there is a failure to comply with the terms of the compromise agreement, the injured party must seek his remedy by bringing a fresh action to vary or set aside the compromise agreement: **Green v Rozen and others** [1955] 2 ALL E R 797.*

iii. *Where parties to a claim arrive at a settlement agreement which is in the nature of a contract and that agreement is made the subject of a consent order made by the court, that order is enforceable by application for enforcement of the order without resort to a fresh action on the agreement: Patrick Allen v Theresa Allen. Such an order will not be interfered with by the court, unless on grounds which would vitiate a contract and a fresh action will have to be brought to set it aside on those grounds: **Purcell v Trigell; Siebe Gorman and Co Ltd v Pneupac Ltd.***

iv. *Where a consent order embodies a contract between the parties, and as drawn up, it requires clarification or interference by the court for the proper working out of the existing terms of the order, the court may intervene under the "liberty to apply" provision expressed or implied in the agreement. Possibly, only in exceptional circumstances or an unforeseen change in circumstances, will a court be justified in using the "liberty to apply" provisions to vary or alter the terms of the order: **Causwell v Clacken; Cristel v Cristel**.*

v. *Consent orders which embody a real contract between the parties will, generally, not be interfered with but under the "liberty to apply" provisions, terms may be implied in the contract or it may be varied only where it is necessary to provide a mechanism for the proper working out of the consent order: **Causwell v Clacken**.*

vi. *Consent orders may be interfered with under the wide powers given to the court under the CPR to extend time, but possibly only where it does not embody a real contract between the parties, or rarely, where there is a real contract between the parties, and it is appropriate to do so. This, however, will only be for the purpose of imposing or extending time where the provisions of the order can accommodate it: Ropac; **Chaggar v Chaggar** ; Pannone and Safin.*

vii. *Consent orders made in family law matters for financial provisions and distribution of property, may be set aside on appeal if there has been a failure to disclose material and relevant facts, changes in*

*circumstances or supervening events which occurred within a relatively short time of the order being made and the application to appeal out of time against the order is made promptly****: Barder v Barder; B v B; Jenkins v Livesey; WA v Executors of the Estate of HA (Deceased) and others.***

viii. In the instant case, the question arises as to whether the learned judge, hearing this application under the "liberty to apply" provision implied in the order, was correct to refuse to vary the consent order, as prayed, bearing in mind those principles. The CPR does not specifically speak to the legal effect of a consent order or to what are the circumstances in which the court may vary or otherwise interfere with it. However, as to the variations of orders generally, rule 42.10(1) permits the court to "correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission". Also, pursuant to the court's general case management powers under rule 26.1(7), a judge may revoke or vary an order of the court. The rules provide for no exceptions (that is, it does not provide that consent orders are exempt from the rule), and gives no basis upon which a judge should vary or revoke an order. The case law does, suggest, however, that the power to revoke and vary an order under the CPR does not unqualifiedly apply to consent orders which embody a contract between the parties. The power to vary such orders is limited to exceptional circumstances occurring within a short time of the order being made or, where it is wholly necessary, to work out the mechanics for the enforcement of the consent order.

[34] It is important to note that a consent order may arise in two ways: by way of an agreement between the parties which have the force of a contract (that is a true consent order), or in circumstances where the parties simply did not object to the order being made. **Siede Gorman & Company Limited v Pneupac Limited**, [1982] 1 WLR 185. Further, an order made with the true consent of the parties has contractual effect and is binding and may only be set aside in fresh proceedings. See the case of **Frank Phipps and Pearl Phipps V Harold Morrison**. Supreme Court civil appeal number 86/08.

[35] A court may exercise jurisdiction to set aside a consent order or judgment prior to its perfection if it is brought to the court's attention that there is some circumstance to vitiate it. See **Phipps v Morrison**, citing, Holt V Jesse. 18763 C HD-177.

[36] A consent order with contractual force will only be set aside if the consent was obtained by fraud, misrepresentation, mistake, non-disclosure of material facts, or

on any other ground which will vitiate a contract. See **Glenford Christian et al, v Westar International Limited, and others,** as well as **Dorett Maude Richardson v Ernest Beresford Richardson** [2012] JMSC Civ 12. Further, the court must not and will not seek to vary or restructure the terms of a consent order, but a consent order may be varied if there is a material change in the circumstances or position of one of the parties. See **Thwaites v Thwaites** [1982] Fam 1.

[37] I do not have the benefit of the reasons for the learned judge's decision. The parties are however agreed that the learned judge did not grant the order amending the order of Carr J by virtue of the slip rule, but pursuant to the court's inherent jurisdiction. Also, it is agreed that the order of Carr J was a consent order.

[38] The question now becomes whether there is an arguable case with a real chance of success that the learned judge could not properly have varied or set aside the consent order after it was perfected.

[39] There is uncertainty as to whether in this case the order in question may be regarded as one made in circumstances where the parties simply did not object to the order being made, or whether it is a true consent order in the sense that it was arrived at through some form of consensus. From the records it is apparent that a larger sum was owed and the judgment debtors had made some payments over time. Mr. Williams deponed in his affidavit in support of his application seeking permission to appeal that he relied upon the affidavit evidence of Miss Mason as to the balance that was owed and secured a loan based upon that evidence. Kerr J's order was also premised upon that evidence provided in the affidavit as to the sums owed, and she made the order accordingly. There is therefore nothing to indicate that the order was a true consent order. It does not appear, for example that there was a negotiated settlement or a settlement arrived at by way of compromise at least, in so far as the sum owed was concerned. On the face of it, the order is said to be by consent. I would lean towards saying that the order was one to which the judgment debtors did not object.

[40] If that is so, then the basis of the power to vary would not be the same as in circumstances which permit the variation of a consent order having the force of a contract.

[41] It cannot be said that the order made did not reflect the decision of the judge. This is not a case where the judge made an error in making the order stating the amount that the judgment debtors were required to pay. She subsequently perfected that order to which the judgment debtor agreed. The learned judge in this case made an order in respect of that which, on the face of it, appeared to be what the judgment creditor was requesting. The applicant / judgment debtor has placed reliance on the case of **Lyndel Laing and Dawn Lllewlyn McNeil v Lucille Rodney and Sandi Sand Beach Hotel**. I am of the view that that case is distinguishable because based on the evidence, the error was contained in the minute of order and not in the formal order which was perfected, although there were other grounds on which the amount of the order could properly have been impugned. The formal order perfected by the learned judge reflected the sums as per the affidavit evidence and not the amount that the respondent had stated in the notice of application.

[42] In Claim No. CV 2015-03713 **Kisundaya Soogrim v Indar Singh,** a matter heard before the Honourable Mr. Justice V. Kokaram in the High Court of Justice of Trinidad and Tobago, (judgment delivered 23rd February 2017), the learned judge made the observation that where a defendant is represented by counsel it would be difficult to assert that the negligence of one's own attorney can give rise to setting aside a consent order. He observed that

> *Thomas LJ made express reference to such an argument and referred to the instructive decision of Ward LJ in Harris v Manahan [1997] 1 FLR 205, CA on the issue that bad legal advice could not justify setting aside a consent order:*

[43] Kookaram J went on to state that he found it very difficult to envisage a cause of action in which the negligence of one's own solicitor justifies the setting aside of an agreement made with a third party. We are not here concerned with bad legal

advice but the difficulty arose in this case because of the error whether inadvertently or negligently made on the part of the servant/employee of the judgment creditor's attorney at law in her affidavit filed Oct 25, 2023. If the mistake/negligence of the attorney cannot justify the setting aside of the decision a fortiori, that of the servant/agent of the party cannot justify the setting aside of the order.

[44] It is possible that an argument could be made that this was a case of common mistake if it were to be determined that this is a true consent order. In Halsbury's Laws of England, Volume 77, at para. 17, The following appears:

> *"Where parties enter into a contract under a common mistake as to the existence of the subject matter or of some fact or facts forming an integral element of the subject matter, it is a question of construction as to whether either or both of them is or are relieved of liability to perform. In most such cases, both parties are relieved of liability, because the consideration for which each party contracted has failed and, deprived of any effective content, the contract has the appearance of having been void ab initio. … In modern times the position has been stated thus: for common mistake to avoid a contract there must be a common assumption as to the existence of a state of affairs as to which there must be no warranty that that state exists, and nor must it be attributable to the fault of either party, but it must render performance of the contract impossible. It has also been said that the mistake must render the subject matter of the contract radically different from the subject matter which the parties believed to exist."*

[45] Common mistake would arise however, only if the terms of the order had the force of a contractual agreement.

[46] It is also to be noted that the affidavit in support of the application at paragraph 12, speaks to the duplication of costs in the amount of $5,500,324.09. It is not clear to me whether that issue was raised when the application was heard before Hart Hines J.

[47] An arguable ground of appeal arises to my mind on the question of the procedure adopted by the judgment creditor to correct the perceived error in the body of the affidavit of Miss Mason and whether the learned judge was entitled to grant the orders based on the application before her. I make the observation that it may well be that if it turns out that the judgment creditor had adopted an incorrect procedure

and the learned judge was wrong to have granted the orders on the application, it would still be open to the judgment creditor to adopt the correct procedure and any advantage or victory gained by the judgment debtors, might be a temporary and pyrrhic victory.

[48] In all the circumstances, I grant leave to the applicants to appeal the orders of Hart Hines J.

STAY OF EXECUTION OF THE ORDER

[49] At paragraphs 59 and 60 of **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44, the governing rules and the bases on which a stay of execution may be granted pending an appeal are very helpfully set out.

> *Rule 2.14 of CAR provides that:*
>
> > *"Except so far as the court below or the court or a single judge may otherwise direct-*
> >
> > *(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and*
> >
> > *(b) no intermediate act or proceeding is invalidated by an appeal."*
>
> *Rule 2.15 of CAR states:*
>
> > *"In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition –*
> >
> > *(a) all the powers and duties of the Supreme Court, including in particular the powers set out in CPR Part 26; and*
> >
> > *(b) power to - ----*

(c) make any incidental decision pending the determination of an appeal or an application for permission to appeal; and

(d) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal. …"

Rule 26.1(2)(e) of the CPR provides that:

26.1 (2) Except where these Rules provide otherwise, the court may-
…

(e) stay the whole or part of any proceedings generally or until a specified date or event; ..."

[50] In deciding whether to stay the execution of a judgment pending appeal. regard must be had to the principles enunciated in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 which has been cited with approval in a number of cases before this court such as **Caribbean Cement Company Ltd v Freight Management Limited** [2013] JMCA App 29, **Scotiabank Jamaica Trust and Merchant Bank Limited v National Commercial Bank Jamaica Limited and Anor** [2013] JMCA App 5 and most recently in **Dennis Atkinson v Development Bank of Jamaica Limited** [2015] JMCA App 40. It is now settled that in deciding whether or not to grant a stay the applicant must show two things' that: (i) the appeal has a real prospect of success and (ii) there is a minimal risk of injustice to one or both parties recovering or enforcing the judgment…"

[51] The question of whether there is a real prospect of success on appeal has already been addressed.

[52] As regards the second question, this court considers that it would remain open to the respondent to recover the sums said to be owed if it is ultimately determined that the sums are to be paid by the applicants. The history of the matter suggests that the applicants may be of limited financial means. If the applicants are forced to pay the sums which is a significant amount of money, at least from the

standpoint of an individual, and it turns out that the applicants are not liable to pay the sums, they would have suffered an injustice. The respondent is a company which from all indications, is a viable business entity. A company may be considered as generally better equipped to withstand delayed payment compared to individuals who could be occasioned severe financial hardship if forced to pay the sum in question and the appeal is ultimately determined in their favour.

[53] Having regard to the foregoing, the following orders are made:

1. Permission is granted for the applicant to appeal the decision of the Hon. Mrs Justice Hart-Hines made on the 8th of November 2024,

2. The time within which to apply for permission to appeal is extended to the date of filing this application.

3. The execution of the order of the Hon. Mrs Justice Hart-Hines made on the 8th day of November 2024, stayed until determination of the appeal.

4. Costs of this application to the respondent to be taxed if not agreed.

5. The applicants/judgment debtors' attorney at law is to prepare, file and serve this order.

…………………………

Andrea Pettigrew
Puisne Judge