

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT

FAMILY DIVISION  
2012/FAM/div/00614

BETWEEN

AW

Petitioner

AND

FW

Respondent

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Donald Saunders for the Petitioner  
Ms. Dwana Davis for the Respondent

Ruling Date: 9<sup>th</sup> September, 2022

**RULING**

1. By Summonses filed 6<sup>th</sup> October 2020 and 2<sup>nd</sup> December 2020, the Respondent seeks to appeal the oral and subsequent written ruling of the Deputy Registrar, Carol D. Misiewicz made Tuesday, 29<sup>th</sup> September 2020 and 24<sup>th</sup> November 2020 respectively (**the “Deputy Registrar’s Ruling”**), pursuant to Rule 56 of the Matrimonial Causes Rules (**the “MCR”**).
2. The Deputy Registrar’s Ruling stemmed from an application seeking certain relief from an order of the Hon. Justice Stephen Isaacs, as he then was, made 5<sup>th</sup> April 2017 and filed 16<sup>th</sup> June 2017 (**the “Order”**) perfecting a judgment delivered by Justice Stephen Isaacs (The Judgment) on the Petitioner’s application for property adjustment.
3. The property adjustment application was made with respect to the sole matrimonial property, two town-houses turned into a home situate on Lot #26, Star Estates Subdivision (**the Property**) whereby the Petitioner had sought the sum of \$150,000.00 as the value of her interest in the Property. The Respondent had opposed the application being of the view that the Petitioner was not entitled to any interest in the Property.
4. Paragraph 62 of the Judgment provided:-  
“In all circumstances the following orders are made:
  - i. The property is to be appraised on or before 15<sup>th</sup> June 2017 by an expert to be agreed by the parties.
  - ii. The cost of the appraisal is to be shared by the parties.
  - iii. The wife is to receive one third (1/3) of the appraised value of the property.

- iv. Should either party fail or refuse to comply with this order, the property is to be appraised by an expert appointed by the Registrar and one of the units to be sold to satisfy this order.
  - v. Each party is to bear their own costs of this application.”
5. Simultaneously, by an Amended Summons filed 15<sup>th</sup> January 2021, the Petitioner seeks an order pursuant to Order 32 Rule 12 of the Rules of the Supreme Court (“RSC”) and/or the inherent jurisdiction of the Court for the sale of the Property, or in the alternative directions on how to give effect to its sale.
6. The Deputy Registrar’s Ruling stated and held inter alia:-

“Misiewicz, C., Deputy Registrar

1. This is my decision on the two applications before me, one each by the Petitioner and Respondent respectively, regarding the valuation and sale of the former matrimonial home, to satisfy the property adjustment order made in these proceedings.
4. On 28 November 2019, I granted the application and made an order in the following terms:  
“That further to the Order of the Honourable Justice Stephen Isaacs dated the 5<sup>th</sup> April 2017, Carla Sweeting of Morley Reality (sic) be appointed the Appraiser and do carry out the appraisal of the subject property. (ii) That in the event that the aforementioned Carla Sweeting is unable to carry out the said appraisal, Osbourne Stuart of Adler Realty, be hereby appointed to do the same...”  
I will call this the Appraisal Order.
5. Subsequent to the Appraisal Order, Osbourne Stuart of Adler Realty was engaged, and he produced a report on 22 January 2020 which he delivered to the Respondent, valuing the subject property at \$372,000.
6. That appraisal (“the Adler Report”) having been done since January 2020, the Petitioner now seeks an order for sale so that she can finally realize and receive her one-third share of the value of the property that was awarded to her. In fact, the Petitioner took out another Summons, this time filed on 9 July 2020, seeking  
“[an Order for] the sale of one of the units of the subject property referred to and as per the Order of the Honourable Justice Stephen Isaacs dated the 5<sup>th</sup> day of April 2017 and filed herein on 16<sup>th</sup> June 2017.”

Respondent’s Application

7. The Respondent is resisting the Petitioner’s application for sale of the property, and has filed his own summons, seeking a number of reliefs designed to counteract the Appraisal Order and the Property Adjustment Order. The Respondent’s Summons filed 10 March 2020 contains five prayers for relief:
  - 1) An order to “correct” the Order of Isaacs, J., under the slip rule, on the basis that it contains a mistake;
  - 2) An order to vary paragraph 4 of Justice Isaac’s property adjustment order on the grounds that it is incongruous to the determinations made by the court, section 29 of the Matrimonial Causes Act and ultimately unfair to the interests of the Respondent;
  - 3) An order to correct paragraph iv of the Appraisal Order (relating to the costs of that application);

- 4) An order rejecting the appraisal report of Adler Realty dated 22 January 2020; and
  - 5) For the costs of the Respondent's Summons to be borne by the Petitioner.
14. The letter from Braynen Symonette dated 14 June 2017 made no complaint about ambiguity as to 'which order' of Isaacs J was being referred to. Similarly, no complaint was made by the Respondent to the Petitioner's application by Summons filed 6 February 2019 that there was lack of clarity or ambiguity that the Petitioner was not entitled in the circumstances to make the application for appointment of an appraiser. The clarity is easily demonstrated inter alia, as both parties acted on it through making and submitting to respectively, the application for the Court to appoint an appraiser. The Respondent cannot approbate and reprobate. You cannot support the application, and then, when get an appraisal you do not like, complain that it is not clear what the judge meant.
  15. While I have considerable doubt as to whether this purported application to 'correct' the Order of Justice Isaacs is even properly made before me, in any event in my humble view I do not see any ambiguity in the substantive order and the consequential orders that his Lordship made. Accordingly, I reject the argument of counsel for the Respondent that paragraph 62 of Justice Isaacs' Ruling is unclear.
  16. Nevertheless, any purported application to correct an order by a justice of the Supreme Court must necessarily be made to another justice of the Supreme Court and not to a registrar. On this ground alone the application before me is entirely misconceived and must be dismissed.
  19. This apportionment of costs for the court-appointed appraiser reflect the view I expressed at the time, that since there had been a failure to agree, the cost of the court-appointed appraiser should correspond with the Property Adjustment Order, that is, divided as to one-third (1/3) to the Petitioner, and to two-thirds (2/3) to the Respondent.
  20. To the extent that a 70-30 split is not mathematically the same as a 1/3<sup>rd</sup> to 2/3<sup>rds</sup> split, paragraph iv of the Appraisal Order (filed on 4 December 2019) should be corrected to reflect this.
  28. Having had the appraisal report since 22 January 2020, the Respondent failed to apply for a review or reconsideration of that report. He also failed to make a demand for the Petitioner to pay her share of the appraisal fee, and instead chose to bring it up during the course of the hearing before me in September. Furthermore, although the Respondent complained about the Petitioner's failure to pay her share, no evidence of his payment to Mr. Stuart has been tendered into evidence, nor has he produced proof of any demand made to the Petitioner or her counsel to be reimbursed, save a viva voce demand at the hearing.
  32. The Petitioner has taken all of the necessary and appropriate steps so far: the Property Adjustment Application was heard and adjudicated upon; then the application for the appointment of an expert to conduct an independent valuation of the property was heard and determined, and an appraiser was appointed and has submitted his valuation.
  33. This approach was taken by the Petitioner to this matter of the appointment of an appraiser is far from and in fact completely opposite to the allegation by the Respondent's counsel that the Petitioner has been manipulating these proceedings for her own benefit". The Petitioner does not assert that the parties were unable to agree one. The facts recited above bear this out. There is no basis to assume manipulation or bad faith against the Petitioner merely

from a circumstance that the judge made provision for, i.e. the inability of the parties to reach agreement on a point, and in fact, I find no such evidence exists.

**Conclusion**

34. The application for the Court to reject the Appraisal Report of Adler Realty is refused. The result is that all of the applications made in the Respondent's Summons are refused, save the correction to paragraph iv of the Appraisal Order made in clause 3 of the Summons, in the terms stated at paragraph 20 above.
35. Regarding the Petitioner's application for an order for sale of the property, I had expressed some reservation about this during the hearings, because his Lordship's order refers to sale of 'one of the units', but there is a single title, and the evidence is that the building has been converted to a single family dwelling. Therefore application will have to be made to a judge for directions on how to give effect to that part of the Order.
36. I award costs of the Respondent's Summons to the Petitioner, to be taxed if not agreed. I make no order as to costs of the Petitioner's Summons filed 9 July 2020.

7. The Respondent had filed an appeal of the Judgment which was dismissed by the Court of Appeal on the 28<sup>th</sup> February 2018 for want of prosecution. A subsequent application for leave to appeal out of time was rejected by the Court of Appeal on the 14<sup>th</sup> May 2019.
8. Both parties have filed affidavits and have had third parties file affidavits in support of their respective positions. These include the following:-

**AFFIDAVIT OF AW FILLED JANUARY 14<sup>TH</sup> 2021**

9. In this affidavit, the Petitioner sets out her version of the facts leading up to the ruling of the Deputy Registrar. She also indicated in her affidavit that the units were subsequently combined and that there was only a single title to the same.

**AFFIDAVIT OF AW FILED 19<sup>TH</sup> FEBRUARY 2021**

10. The Petitioner opposed the Respondent's appeal of the Deputy Registrar's Ruling as she saw no grounds for it to be overturned or corrected and she set out her reasons of why she believes the ruling should not be overturned or corrected. She averred that after the making of the Order, the parties were unable to agree on an appraiser who was needed to verify the value of the Star Estates Property. This resulted in her making an application to the Deputy Registrar to appoint an appraiser and order the sale of one of the units of the Star Estates Property in compliance with the Order.
11. She further avers that the use of the "slip rule" is not a justifiable means to appeal the Deputy Registrars ruling as that there was no ambiguity in the order made by Justice Isaacs.

## AFFIDAVIT OF FW FILED 4<sup>TH</sup> AUGUST 2020

12. The Respondent averred inter alia why he believes the Order should be corrected and the Decision of the Deputy Registrar appealed. These averments included alleged past behavior of both the Petitioner and the Respondent during the life of the marriage.
13. Further details regarding salary expenditure and items necessary for the consideration by the court when making a property adjustment order were also averred to.
14. The Petitioner contributed a mere total of \$814.42 per month towards the marriage. She had more disposable income than he did and had the benefit to amass significant savings as a result of her limited contributions. It was therefore a mistake for His Lordship to determine the value of the Petitioner's interest at 33 1/3% of the appraised value of the Yamacraw Property and not the equity, whereas his interest was based on the equity he acquired through payment of the mortgage debt.
15. The discrepancy was also noted and considered during the appellate court's hearing of the appeal. In the circumstances he wished for the Court to correct paragraph 62 (ii) of the Judgment to reflect that the Petitioner is instead entitled to 1/3<sup>rd</sup> of the equity in the Yamacraw Property. It was also unfair for His Lordship to order that if either party had even failed to obtain an appraisal of the Yamacraw Property one of the units was to be sold.
16. The Respondent also prayed that paragraph 62 (iv) of the Judgment be omitted in its entirety and that the Court should refuse to grant the order as prayed in the Petitioner's Application for Sale. In relation to the Appraisal Order made by the Deputy Registrar she had ordered that the costs associated with the appraisal were to be borne by the Petitioner at the rate of 30% and himself at the rate of 70%, but the Judgment itself ordered them both to share the cost equally.
17. Evidence was further averred as to the obtaining of the Adler appraisal of the matrimonial property and the issues arising thereafter.
18. In May 2019, he had requested TR Associates Limited, professional appraisers, to conduct an appraisal of the Property and prepare a valuation report. This was done in contemplation of settlement discussions as his then attorney had informed him that Mr. Saunders had expressed an interest in negotiating a sum.
19. Based on the TR Associates Report, the value of the Yamacraw Property was \$255,000.00 which is \$117,000.00 less than the value in the Adler Report. The difference in the two valuations was significant which led him to enquire into any possible explanation for the chasm in the valuations.
20. Mr. Jason Wong was contacted to review the reports without any explanation why his review was being prepared. Mr. Wong advised that the appraisal contained in the Adler Report was incorrect and contained inconsistencies in the data used by Mr. Stuart. He also advised that he would prepare a report comprising his findings and how they would

affect the overall valuation. In the circumstances, he requested that the TR Associates Report be accepted and not the Adler Report.

#### **SECOND AFFIDAVIT OF FW FILED 14<sup>TH</sup> SEPTEMBER 2020**

21. This Affidavit was filed in support of the applications heard before the Deputy Registrar. It sets out the Respondent's version of the facts leading up to the applications.

#### **THIRD AFFIDAVIT OF FW FILED 29<sup>TH</sup> SEPTEMBER 2020**

22. This affidavit sets out the Respondent's chronology of events leading to the dismissal of the appeal and the application to appeal out of time.

#### **FOURTH AFFIDAVIT OF FW FILED 12<sup>TH</sup> FEBRUARY 2021**

23. The Respondent averred that after reading the Deputy Registrar's Ruling, it was apparent that the nature and substance of his claim was entirely lost and improperly represented. He now seeks to rely on documents which were not in his possession, custody or control prior to the hearings before the Deputy Registrar.
24. A copy of the Appraisal Application was provided to him with the hearing date inserted and which was heard by the Deputy Registrar on the same date but his then counsel was absent as she had a conflicting matter before the Court of Appeal.
25. He then proceeds to set out in his affidavit those findings of the Deputy Registrar that he takes issue with and the reasons for doing so. These issues relate primarily to the appraisal report from Alder Realty.
26. There were two hearings with the first hearing lasting one and a half hours and the second hearing lasting fifteen to thirty minutes during which the Deputy Registrar advised that she had reconsidered the order made at the first hearing and would give her reasons in writing. The Deputy Registrar advised that she had his Skeleton Arguments and the evidence filed which she would rely on with regard to the other relief sought.
27. He averred that the Deputy Registrar did not consider all of his evidence as he had filed a fourth affidavit which wasn't referred to.
28. The Respondent further set out the reasons for his disagreement with the various findings of the Deputy Registrar in her ruling.
29. The Respondent then sought to clarify any uncertainty in his earlier affidavits and set out a chronology of events.

30. The Deputy Registrar's Ruling ultimately held that his application was entirely misconceived and dismissed it on the grounds that a "purported application" to correct an order by a judge under the slip rule must be made to another judge and not a Registrar, without providing any judicial support for this finding.
31. In the Deputy Registrar's notes of the appraisal hearing, she explained the basis of the apportionment of the responsibility of the parties regarding the cost of the appraisal when she wrote,
- "The cost of the appraisal is to be borne 70% by the Respondent and 30% by the Petitioner, in keeping with the Order of the Court that said that the Petitioner is to receive one third (1/3) of the appraised value of the property."**
32. The Deputy Registrar further adjusted the responsibility for the costs on her own volition without any apparent submissions or request made by the Petitioner.
33. The Respondent denies challenging the appointment of an appraiser and also takes issue with an inferred delay on his part in the appointment of an appraiser and the execution of the appraisal order. He set out his reasons in support of why he believed the request was not late and why there was no fishing expedition.
34. Finally he maintained that the Deputy Registrar made many ill-founded negative inferences against him, and the statements made at the second hearing and her ruling are stark in comparison to the statements made in the first hearing, without any reason for the change.

#### **SUPPLEMENTAL AFFIDAVIT FILED OF FW FEBRUARY 12<sup>TH</sup>, 2021**

35. This affidavit simply summarized the purpose of his appeal which was to correct the clerical error contained in paragraph 3 of the Order and to vary paragraph 4 of the Order to enable a valuation and purchase thereafter of the Petitioner's interest within six months or to condominiumize the Property to enable one unit to be sold to allow the Petitioner to receive her 1/3 interest.

#### **ISSUES**

36. The issues to be determined are:
1. Whether paragraph 3 of the Order contains a mistake which should be corrected under the 'slip rule' or the inherent jurisdiction of the court.
  2. Whether paragraph 4 of the Order should be varied or discharged pursuant to section 35(1) of the MCA.
  3. Whether the Appraisal Order contains a mistake which should be corrected under the 'slip rule' or the inherent jurisdiction of the court.
  4. Whether the court ought to reject the Adler Report.
  5. Whether the cost of this application ought to be borne by the Petitioner.

37. The Court further requested submissions on:-

6. The effect of delay in making this application
7. The effect of the Court of Appeal's ruling in **Shaun Miller v Premier Importers Ltd.**

## ISSUE ONE

### RESPONDENT'S SUBMISSIONS

38. The Court (Isaacs) neglected to make a property adjustment order or financial provision order in the form as contemplated by sections 25(1), 27 and 28 of the MCA. Although Paragraph 62(iii) purports to be a property adjustment order or a financial provision order, the ambiguity in the order as to whether it is either of the 2 orders diminishes the intended effect of paragraph 62(iv) of the Judgment.

39. Paragraph 62(iv) of the Judgment ought to be varied or discharged on the grounds that

- i. Although paragraph 62 enumerates 5 separate orders, the order at paragraph 62(iv) does not specify which event activates any party's reliance on the same.
- ii. As an enforcement provision it is oppressive and unfair and has the effect of bringing hardship on the Respondent because it becomes operative despite any attempts by the Respondent to comply with the court's orders.
- iii. Although, by the language of paragraph 62(iv) of the Judgment, a breach of paragraph 62(iii) is likely to trigger the 'order to sell the property' under paragraph 62(iv), His Lordship provided no date by which the act required by the paragraph ought to have been performed by the Respondent.
- iv. Because, by the language of paragraph 62(iv), even a breach of paragraph 62(v) of the Judgment may also trigger the 'order to sell the property' under paragraph 62(iv), the ambiguous intention and likely unintended effect of the paragraph 62(iv) is best demonstrated.

40. Paragraph 62(iii) of the Judgment does not expressly exclude the time-honored principle that each party is only entitled to a share in the equity unless there is reason in the prevailing circumstances for the court to depart from the application of such principle. No such reason being provided by the court, or arising on the facts, this principle should be read into the interpretation of the paragraph or the paragraph should be amended under the 'slip rule' to make pellucid the court's intention.

41. Apart from the issues arising on the Judgment, the Respondent also sought relief for the following other issues which arose in the proceedings:

2. The Deputy Registrar 'varied' the Property Adjustment Order on her own motion by amending paragraph 2 of the Property Adjustment Order, at the detriment of the Respondent alone.
3. The valuation in the Adler Report appeared to have been based on miscalculation.



42. The Appeal is made pursuant to Rule 56 of the MCR and on the understanding that the appeal shall be “dealt with by way of an actual rehearing of the application which led to the [decision] under appeal”; Per Charles J in the Supreme Court case of **Peet v Baptiste [2019] 1 BHS J. No. 28**.
43. Rule 68 of the MCR incorporates the rights available under the Rules of the Supreme Court where the matrimonial rules are silent.
44. Rule 68 therefore enables the Respondent to invoke the Registrar’s powers under Order 20 rule 10 of the RSC (also known as the ‘slip rule’) to correct what the Respondent believes , is a clerical mistake accidental slip or omission which offends the intention of His Lordship.
45. An application under the slip rule can be made at any time, and one of the reasons for the absence of a time constraint is to ensure that a court order is accurate: per Knowles J in **IC v RC [2020] EWHC 2997 (Fam)**.
46. There is also an inherent jurisdiction which vests the Registrar with power to correct an order to give effect to what is intended by the court.
47. The Respondent relies on **Darville v Treco and others [2008] 1 BHS J No. 3** which upheld that accidental mistakes can be corrected and that the lapse of time has nothing to do with the question provided nothing has intervened in the interim which would make it inequitable to correct the mistake.
48. In **Swart and others v Metaxides [2014] 1 BHS J. No.93** Justice of Appeal Allen set out useful guidance on the ambit and use of the ‘slip rule’ and the courts inherent jurisdiction which he relies on.
49. The Respondent then proceeds to set out what he considers to be the “mistake” and the facts which support this finding that there is a mistake; namely that there is a mortgage on the Property which was paid by the Respondent and which facts were confirmed by the Petitioner. The interest of the Petitioner in all fairness could only be calculated in the equity owned by him as at June 2017.
50. He refers to paragraph 59 of the Judgment and submits that the Court held:-
- b. **“In the instant case Section 29 of the Act governs what matters must be taken into consideration on a property adjustment application. When all of the circumstances as laid out above, are taken into account, there is only one way to put the parties in the financial position, so far as it is practicable, that they would have been in had the marriage not broken down, and that is to exercise the discretion of the Court to award the Petitioner a percentage of the value of the property. (See Jupp v Jupp.) (Emphasis added)**
51. The Respondent has only a beneficial interest in the Property, he can only share with the Petitioner in that beneficial interest.

52. By ordering an appraisal of the Property, the Court intended to deduct from the ascertained appraised value, the debt owing on the mortgage which had in fact existed.

53. Section 29(1) of the Matrimonial Causes Act ("MCA"), provides that in exercising any powers under the Act regarding the rights of the parties, the court shall

**"...exercise those powers as to place the parties, so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other. (Emphasis added)**

One of the Respondent's major financial obligations was the mortgage and therefore such obligation must be taken into consideration when making orders."

54. It is commonplace for a court to calculate an interest as in percentage of the party's equity. **Flowers v Flowers (2002) BHS J. No 120. Dean v Dean (1991) BHS J No. 164** which would guarantee the fair distribution of the asset.

55. He further relies on the discussions held by the justices of the Court of Appeal during the application hearings as supportive of his submissions that there was a mistake made by Justice Isaacs.

56. Further reliance is placed in support of the evidence of the mistake on the affidavit of the Petitioner herself in support of an appraisal in order to **"assist the court in determining a fair and just assessment of our respective equities in the matrimonial home."**

57. The Petitioner also admitted that an affidavit was required because she was unaware of the outstanding balance on the mortgage or of the current market value of the property.

58. The mortgage's interest in the mortgaged property is indivisible from his debt.

59. The Respondent further submits that if Justice Isaacs had intended to confer 1/3 interest in the appraised value to the Petitioner, he would have given reasons in his judgment to justify a departure from the usual principle and relied on **Blyden v Blyden [2015] 1 BHS J No. 8** and **Jupp v Jupp** where the Court of Appeal stressed the importance of giving reasons.:-

**"President of the Court of Appeal, Allen, P. in Missick v Missick SCCivApp No. 27 of 2011 (dated 13 December 2012, over 3 years before the date of the Judgment) expressed the fundamental importance of judges explaining how the Court arrives at a decision to distribute matrimonial property in divorce matters."**

60. The reasons provided in Paragraph 60 of the Judgment do not warrant a departure from the usual principles and supports the fact that an error was made.

61. The Petitioner in perfecting the order failed to alert the court to the difference in the parties understanding of paragraph 3 of the Order. She should have brought the same to the Courts which would have given the Court an opportunity to confirm his intention.

62. By failing to apprise the Court of the difference in the order, the Respondent submits that the order did not reflect the courts intention and did not apprise the Court of the Petitioner's awareness that the wording of the relevant paragraphs of the judgment and order was a mistake and that the Petitioner intended to keep the court in the dark.

## ISSUE TWO

63. The Respondent relies on section 25 (3) of the MCA which states:

**"Where the court makes under section 27 or 28 a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale in which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion."**

64. The Respondent submits that this order fails to meet the standard of orders contemplated by the MCA and the standard required in the circumstances of this case. While Justice Isaacs did direct what would trigger the sale, he failed to specify which event was in fact the triggering event. He maintains that this particular order is not sufficiently defined and that subparagraph 4 failed to indicate the specified time or event as required by the section and therefore it is void for uncertainty.

65. The only date referred to in the orders of Justice Isaacs was the June 15, 2017 date which was the date required for the appraisal and hence that is the only date to which an obligation is attached. An ambiguity therefore arises and the order is therefore rendered nugatory.

66. Section 35 [1] of the MCA provides:

**"Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended."**

67. The Respondent submits that the paragraph should be varied to include a reasonable date by which the Respondent is required to pay the Petitioner a certain sum.

## ISSUE THREE

68. The Respondent submits that the costs of the Appraisal Order made by the Deputy Registrar should be varied to reflect what was ordered by Justice Isaacs. The Deputy Registrar had ordered 70% of the costs borne by the Respondent and 30% by the Petitioner where Justice Isaacs had ordered that the costs of the appraisal be shared equally. The Respondent maintains that 30% is not equivalent to one third of the whole and therefore the court has the power under its inherent jurisdiction to correct the error in

the Appraisal order.

#### **ISSUE NUMBER FOUR**

69. The Respondent at the hearing advised the Court that he is withdrawing this ground of appeal.

#### **ISSUE FIVE**

70. The Respondent maintains that the Petitioner should be condemned in costs for the application for her failure to bring to the Court's attention his objection to the Property Adjustment Order and further that she had failed to advise the court that he had provided reasons in the affidavit of Mr. P Jason Wong which led to the correction of the valuation of the Property.

#### **ISSUE SIX**

71. The Respondent maintains that under Order 20 Rule 10 of the Rules of the Supreme Court clerical errors or mistakes in judgments may be at any time corrected by the Registrar. The Court must consider the importance of ensuring that its orders are accurate and must also consider the impact of a delay in making the application, and whether any prejudice would be suffered as a result of such delay.
72. In **Scotia bank (Bahamas) Limited v Ricardo and Beverly Gibson** Justice Hilton held that the delay by the Bank in applying to correct the order which had failed to include payment of the sums owed to the Bank in the circumstances of that particular case was a relevant consideration in that it justified the court's refusal to exercise the discretion in favor of the slip rule. Justice Hilton considered that the Defendants were significantly prejudiced by the delay in making the application because the effect of the application would significantly alter the Defendants' financial position to their detriment, as the Defendants believed that the matter was at an end and had moved on with their lives and that the Plaintiff had given no reason for the delay in making the application.
73. The Respondent submits that he has provided reasons for his delay and the Petitioner has not claimed any prejudice and therefore maintains that none exists because any order made under the slip rule takes effect from the date of the judgment and therefore the rights of the Petitioner have not been altered. He maintains that there is more prejudice to him should the application be refused.
74. The Respondent also referred to **Hanave PTY Limited v LFOP PTY Limited** where although the court overturned a decision to allow an amendment under the slip rule the Respondent maintains that the court considered the importance of a party providing reasons for the delay and criticized the failure of the parties to comply with this requirement.

75. Further the court in **Hanave** acknowledged the principle that if no injustice would be done if the application is made, the Court should exercise the power to allow the correction.

76. The Respondent maintained that his reliance on the slip rule is no different from the initial objections made by his counsel in 2017 and the basis of his appeal to the Court of Appeal, and further that he is not resurrecting any issue which the Petitioner can reasonably suggest had been abandoned. Further he maintains the Petitioner is relying on her Counsel's breach of the relevant practice direction by failing to bring the issues arising on the property adjustment order to the attention of the court. The interest of justice requires a proper examination of and respect for Justice Isaacs' intention in his ruling.

## **ISSUE SEVEN**

### **THE EFFECT OF THE COURT OF APPEAL RULING IN SHAWN MILLER V PREMIER IMPORTERS LTD.**

77. The Respondent maintains that the Miller case is distinguishable from his case in that he is not suggesting that the legal basis for the decision of the Court is flawed or that it contained an error. He has identified the relevant mistakes and original issues arising in the judgment having regard to the manifest intention of the Court and that he has invoked the inherent jurisdiction of the Court regarding the issues arising from Justice Isaacs ruling.

## **PETITIONER'S SUBMISSIONS**

78. The Petitioner maintains that the allegations of the Respondent as to the failure of the Deputy Registrar to chronicle the events leading up to the Appraisal Order is immaterial to the overall finding of the Deputy Registrar as the issues were raised during the hearing.

79. The Petitioner accepts the background as set out in the ruling of the Deputy Registrar.

80. The Deputy Registrar was correct in her ruling with respect to the issue of the slip rule and the jurisdiction of the court.

81. Order 20 Rule 10 only applies when the court has made an error or omission expressing how the subject order reflects the manifest intention of the court. The court cannot correct a mistake of its own in law or otherwise even though it is apparent on the face of the order **Bright v Sellar [1904] 1 Kings Bench 6**.

82. If the order was drawn incorrectly in expressing the intention of the Court or ruling, it cannot be corrected under the slip rule.

83. The Petitioner distinguishes **Darville v Treco** by submitting that the court can refuse to allow a correction under its inherent jurisdiction if it would be inequitable to do so.

84. In **Darville** Justice Adderley held:-

“It is trite that the court has no jurisdiction to review or alter an order or judgment once entered except on appeal unless it contains an express or implied liberty to apply or is an order on judgment that requires rectification under the slip rule to correctly record the intention of the Court. This applies even if the order was obtained by fraud or misrepresentation. In *McCarthy v Agard* [1933] ALL ER 260 Romer, J approved Lord Halsbury’s statement in *Preston Banking Co. v Allsup & Sons* [1895] 1Ch. 141 at paragraph 9 which reads:

“....Even when an order has been obtained by fraud, it has been held that the court has no jurisdiction to re-hear it. If such a jurisdiction existed it would be most mischievous. The fact that in the present case the application to re-hear is made to the particular judge who made the order is immaterial; for if one judge can re-hear it another can”

85. The court should not exercise its inherent jurisdiction to allow any correction as it would be inequitable to the Petitioner and because of the lateness of the request based on the history of this matter.

86. It is apparent from the ruling of Justice Isaacs that he did consider the principle that each party is only entitled to a share in the equity unless there was a reason to depart from such a principle and he in fact decided to depart from that principle. She maintains that this principle was also considered by the Court of Appeal and referred to the transcript thereon. The Court of Appeal considered paragraph 62 of the Judge’s ruling and found that there was no ambiguity with subparagraph 3 of Justice Isaacs ruling.

## **ISSUE TWO**

87. The Petitioner relies on her previous submissions for Issue One and further submits that there were no deficiencies in paragraph 3 of the Property Adjustment Order and that paragraph 4 expressly provided that the matrimonial home be appraised by an expert appointed by the Registrar and one of the units be sold to satisfy the said Order.

88. As the parties were unable to agree an appraiser within the time specified in paragraph one that became the triggering event for paragraph 4 and the reason why the Deputy Registrar granted the Appraisal Order which was in compliance with paragraph 4 of Justice Isaacs ruling and as such should not be varied or discharged.

## **ISSUE THREE**

89. Justice Isaacs clearly ordered that the property be appraised by an appraiser agreed by both parties and for the costs of the appraisal to be equally shared.

90. The application made by the Petitioner was to give effect to this order. The reasoning of the Deputy Registrar in ordering that the costs be split 1/3 to 2/3 was to take into

consideration that as the parties did not agree, the Registrar had to be approached. The split was to recognize the financial distribution that the order contemplated.

#### ISSUE FOUR

91. The Issue has been withdrawn by the Respondent.

#### ISSUE FIVE

92. The Petitioner denies failing to advise the Court of the Respondent's objection to the forum of the Property Adjustment Order and denies failing to advise the Court of the Respondent's proposal of appraisers which had been made since June 2017. The issue was that there was no agreement on an Appraiser and no objection was made at the hearing of the appointment of the appraiser selected by the Court.

93. The error contained in the Adler Report does not justify penalizing the Petitioner in costs.

94. The Court of Appeal had on the Respondent's second attempt before that Court commented that there was "double non-compliance" with the Order of Justice Isaacs.

95. The Petitioner relies on the holding and dicta in **Shawn Miller v Premier Importers Ltd. SC Civ App No. 9 of 2019** as it relates to the slip rule, and further relies on the **Scotiabank (Bahamas) Ltd. v Ricardo and Beverly Gibson and Hanave PTY Limited v LFOP PTY Limited** as they relate to the slip rule.

96. (1) The ruling of Justice Isaacs was given in April of 2017. The delay in bringing the application was due solely to the failed actions of the Respondent alone and which have genuinely prejudiced the Petitioner.

(2) There were two appeal applications, the first in February 2018 which was dismissed for want of prosecution, and the second for leave to appeal out of time which was dismissed by the Court of Appeal.

(3) The application before the Deputy Registrar to appoint the appraiser was made in February 2019 and the order granted in November 2019.

(4) The Petitioner applied for an order for sale in July of 2020.

97. No objection was made during any of the aforementioned hearings to the failure to adhere to the Practice Direction. It was only after the application for an order for sale did the "slip rule" argument emerge.

98. The application is in essence a "third bite at the apple"

99. The Respondent at the appellate level had accepted the manifested intention of Justice Isaacs when he argued that the Judge had erred in law in making the order, but now argues that the order is ambiguous and contains a clerical error.

100. The Petitioner is prejudiced as this application is an attempt to deprive her of her benefit as ordered by the Isaacs judgment and upheld by the Court of Appeal.

101. Reliance is placed on **Brennen v Prior et al** where Snowden J stated:

“....there is a clear distinction between (on the one hand) amending an order of the court so as to give true effect to the court’s first thoughts or intentions; and (on the other hand) a court having second thoughts about the case and seeking “as a natural form of self-exculpation” to suggest that there was an “accidental” mistake in the order which should be corrected. The former is capable of being dealt with under the slip rule: the latter is not, and can only be corrected (if at all) by an appellate court.”

102. The Order is clearly a verbatim adoption of the language of the Judgment of Justice Isaacs which was in fact signed by the Judge. The Deputy Registrar rightfully concluded that there was no ambiguity in the Judgment and the Order was consistent with Justice Isaacs’ intent.

103. There was nothing to prevent her from departing from the usual 50/50 split to grant 1/3 to the Petitioner of the appraised value.

## ISSUE SIX

104. The appellate decision of **Shawn Miller v Premier Importers Ltd.** mirrors this case. There the Court of Appeal held that the slip rule can only apply in instances where the perfected order holds a clerical or accidental slip or fails to express the manifest intention of the Court and that the Order in Miller was unambiguous and clear.

105. Even if one may argue that the perfected order may run counter to principles of law relating to property adjustments, as there was no argument that the Judge was bound by the rule of percentages of “equitable” vs appraised value, there could not be any error or accidental slip in the perfected order.

## DECISION

106. An appeal from a decision of the Registrar to a Judge in chambers is enabled by Order 58 of the Rules of the Supreme Court. Any appeal made under this rule does not operate as a stay of the decision being appealed. As this is a matrimonial matter Rule 68 of the MCR enables the Rules of the Supreme Court to apply to matrimonial matters in the absence of any expressed relevant rules in the MCR

107. Such an appeal is treated as a rehearing of the application of the matter being appealed. The Court is also allowed to hear additional evidence and in fact did do so. The Court has considered the ruling of the Deputy Registrar made on the 29th September 2020 and has considered all of the evidence filed and submissions made by both parties in this appeal.



108. The application before the Deputy Registrar was set out in a summons filed on March 10th, 2020 which sought:-

1. An order to correct the Order of His Lordship the late Honourable Mr. Justice Stephen Isaacs, as he then was, dated 5 April 2017 (and filed 16 June 2017) (the "Property Adjustment Order"), pursuant to Order 20 Rule 10 of the Rules of the Supreme Court and/or the inherent jurisdiction of the court, on the grounds that:
  - a. His Lordship, although acknowledging that the matrimonial home was encumbered by a mortgage and although relying on the Judgement of the Court of Appeal in *Jupp v Jupp SCCRApp No 27* of 2011, awarded the Petitioner a share of the encumbered value of the said home and not a share in the equity of the home, at the material time;
  - b. The basis(es) of His Lordship's decision to award the Petitioner the right to share in the value of the matrimonial property, which was not owned by any of the parties at the material time, is ambiguous, anomalous, inconclusive and unknown and ought therefore to be reconsidered and adequately addressed so as to conclusively determine the rights of the parties herein; and
  - c. There were no reasons provided by His Lordship to explain His Lordship's departure from the usual principles governing the division of matrimonial property, if intended by His Lordship.
2. An order to vary paragraph 4 of the Property Adjustment Order pursuant to the terms of the Judgment (which, by implication, gave liberty to apply) and/or the inherent jurisdiction of the Court, on the grounds that the basis of the order is incongruous to the determinations made by the court, section 29 of the Matrimonial Causes Act and ultimately unfair to the interests of the Respondent.
3. An order to correct paragraph iv of the Order of Deputy Registrar Carol D. Misiewicz which was filed herein on 4 December 2019, pursuant to Order 20 Rule 10 of the Rules of the Supreme Court and/or the inherent jurisdiction of the Court, whereby the Deputy Registrar, ordered that the Respondent be responsible for 70% of the cost of the appraisal notwithstanding that pursuant to paragraph 2 of the Property Adjustment Order, both parties were ordered to each pay 50% of such cost.
4. That the court rejects the Appraisal Report of Adler Realty dated 22 January 2020 on the grounds that the assessment made therein of the fair market value of the subject property is erroneous and ought not to be used or relied on by this honourable court as a basis of determining either party's interest in the property.

That the costs of this application be borne by the Petitioner; such costs to be taxed, if not agreed.

90. By a first summons filed on October 6<sup>th</sup>, 2020 before this Court, the Respondent as Appellant sought an order that :

1. The decision of the Deputy Registrar to reject paragraph 1 of the Respondent's Summons be set aside or reversed.

2. Paragraph 3 of the property adjustment order of His Lordship the late Honourable Mr. Justice Stephen Isaacs (as he then was) filed 16 June 2017 be corrected pursuant to Order 20 Rule 10 of the Rules of the Supreme Court and/or the inherent jurisdiction of the court, on the grounds that:
  - a. His Lordship, although acknowledging that the matrimonial home was encumbered by a mortgage and although relying on the Judgement of the Court of Appeal in *Jupp v Jupp* SCCrApp No 27 of 2011, awarded the Petitioner a share of the encumbered value of the said home and not a share in the equity of the home, at the material time;
  - b. The basis(es) of His Lordship's decision to award the Petitioner the right to share in the value of the matrimonial property, which was not owned by any of the parties at the material time, is ambiguous, anomalous, inconclusive and unknown and ought therefore to be reconsidered and adequately addressed so as to conclusively determine the rights of the parties herein; and
  - c. There were no reasons provided by His Lordship to explain His Lordship's departure from the usual principles governing the division of matrimonial property, if intended by His Lordship.
3. That the costs of this appeal be borne by the Petitioner; such costs to be taxed, if not agreed.

TAKE NOTICE THAT the grounds of the appeal are as follows:

1. The learned Deputy Registrar erred in fact and in law by making a determination that "...there is not (SIC) slip that can be corrected" notwithstanding the facts arising in this matter and the scope of the jurisdiction provided for under Order 20 rule 10 of the Rules of the Supreme Court and the inherent jurisdiction of the court.
2. The learned Deputy Registrar having (i) departed from the said decision made at the First Hearing, (ii) failed to provide reasons for the same, and (iii) denied the Respondent the opportunity to make submissions on any issues arising for the court, erred in law by denying the Respondent an opportunity to be heard on matters which may have assisted the court in making a final determination generally and on the issue of "*Whether there can be a time when one can choose*".

TAKE FURTHER NOTICE THAT because the learned Deputy Registrar made no determination on the Remaining Orders and have not, to date, provided the reasons for the Deputy Registrar's decision on the order made on Tuesday, 29 October 2020 or on the Remaining Orders, the orders sought on this appeal and the grounds of the appeal may be amended by the Respondent following the Respondent's receipt of the Ruling of the learned Deputy Registrar on the Remaining Orders and the reasons provided in the said Ruling.

91. By the second summons filed December 2<sup>nd</sup>, 2020, the Respondent expanded his appeal for an order that:-

1. The decision of the Deputy Registrar to reject paragraph 1 of the Respondent's Summons be set aside or reversed.
2. The decisions and/or findings of the Deputy Registrar as stated in paragraphs 15, 16, 19, 20, 28, 33, 34, 35 and 36 be set aside or reversed.
3. Paragraph 3 of the Property Adjustment Order of His Lordship the late Honourable Mr. Justice Stephen Isaacs (as he then was) filed 16 June 2017 be corrected pursuant to Order 20 Rule 10 of the Rules of the Supreme Court and/or the inherent jurisdiction of the court, on the grounds that:
  - a. His Lordship, although acknowledging that the matrimonial home was encumbered by a mortgage and although relying on the Judgement of the Court of Appeal in Jupp v Jupp SCCrApp No 27 of 2011, awarded the Petitioner a share of the encumbered value of the said home and not a share in the equity of the home, at the material time;
  - b. The basis(es) of His Lordship's decision to award the Petitioner the right to share in the value of the matrimonial property, which was not owned by any of the parties at the material time, is ambiguous, anomalous, inconclusive and unknown and ought therefore to be reconsidered and adequately addressed so as to conclusively determine the rights of the parties herein; and
  - c. There were no reasons provided by His Lordship to explain His Lordship's departure from the usual principles governing the division of matrimonial property, if intended by His Lordship.
4. Paragraph 4 of the Property Adjustment Order be varied pursuant to the terms of the Judgment (which, by implication, gave liberty to apply) and/or the inherent jurisdiction of the Court and/or section 35(1) of the Matrimonial Causes Act , on the grounds that (i) the terms of the paragraph is inconsistent with the powers conferred by, and intention of section 23(3) of the Matrimonial Causes Act (ii) the basis of the order is (a) incongruous to the determinations made by the court in His Lordship's Ruling, (b) incongruous to the protections provided under section 29 of the Matrimonial Causes Act and (c) ultimately unfair to the interests of the Respondent.
5. An order to correct paragraph iv of the Order of Deputy Registrar Carol D. Misiewicz which was filed herein on 4 December 2019, pursuant to Order 20 Rule 10 of the Rules of the Supreme Court and/or the inherent jurisdiction of the Court, whereby the Deputy Registrar, ordered that the Respondent be responsible for 70% of the cost of the appraisal notwithstanding that pursuant to paragraph 2 of the Property Adjustment Order, both parties were ordered to each pay 50% of such cost.

**6. That the costs of this appeal and below be borne by the Petitioner; such costs to be taxed, if not agreed.**

109. The Appellant further provided expanded grounds for his appeal.

110. The issues as agreed between the parties are set out at Paragraphs 36 and 37 of this decision.

111. The primary issue is whether Paragraph 3 of the Order of Justice Isaacs contained a mistake which could be corrected by the Registrar under the slip rule.

112. Order 20 Rule 10 provides:-

**“10. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Registrar”.**

113. In order to invoke the discretionary power of the Registrar, as the jurisprudence has amply explored, the error must be an error in expressing the manifest intention of the Court. As the Notes to the English Rules of the Supreme Court provided:

**“The Court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order.....”**

114. The order in question was not made by this Court and Justice Isaacs is now of precious memory, and so the Applicant cannot invoke the inherent jurisdiction of this Court to vary or correct an order it did not make in order to carry out the deceased Judge’s intention and to make its meaning plain. This Court is limited to the jurisdiction of Order 20 Rule 10.

115. In **Mutual Shipping Corp. of New York v Bayshore Shipping Co. of Monrovia [1985] 1 AER 520** LJ Goff recounted the history of the slip rule and reviewed its operation in decided cases. Further, this very issue has been examined by our own Court of Appeal in **Shaun Miller v Premier Importers Ltd. SC CW App. No. 9 of 2015** where the Court held that the jurisdiction under the slip rule only arises where it is shown that the perfected order contains a clerical mistake or that an accidental slip or omission has occurred such that the order failed to express the manifest intention of the Court at the time the order was made. Further the Court of Appeal held:-

**“23. In short, despite the exhortations of the counsel for the Respondent, Mr. McKay, to the contrary, and notwithstanding that the award set out in the perfected order may have run counter to principles of law set out in Jefford v Gee, we were satisfied that there was no clerical error or accidental slip or mistake in the perfected order of 31 October, 2016 which could be said to be contrary to the manifest intention of the Registrar. Nor again was there any clerical error or accidental slip or omission in the drawing up the perfected order which in our view, was obviously consistent with the award which the Registrar had made on 16 December, 2015.**

**24. The authorities governing the operation of Order 20 Rule 10 clearly establish that the court’s jurisdiction under the slip rule cannot be exercised in a manner**

which would enable a court to effectively reconsider a final and regular decision which has been perfected, even though an error of law may be very obvious on the face of the order. As we see it, if the Registrar's award of interest disclosed an error of law which was apparent on the face of the order, the Respondent's proper recourse was to appeal the Registrar's order, not to seek to have it corrected under the slip rule."

116. Accordingly in order to determine whether the Registrar can rightfully invoke the slip rule the Court must only look at the decision of Justice Isaacs and the order perfecting that decision.

117. The order lifts Paragraph 3 verbatim from the ruling of Justice Isaacs. There is no obvious or apparent clerical error or accidental slip. Further as such it reflects the Judge's manifest intention and as determined in **Miller v Premier Importers Ltd**, there is no remedy available to the Respondent to invoke Order 20 Rule 10. If there was an error, the error would have originated in the Judgment and that can only be corrected by an appeal to the Court of Appeal.

118. Despite the submissions made by the Respondent as to what the law is with regard to property adjustment in cases where the property is mortgaged there is evidence that Justice Isaacs considered those principles but ruled differently. If the Respondent considered that there was an error, which he initially felt, the proper course of action was to appeal. Order 20 Rule 10 is not available to him.

## ISSUE TWO

119. Paragraph 4 of the Order states:-

**"Should either party fail or refuse to comply with this order, the property is to be appraised by an expert appointed by the Registrar and one of the units is to be sold to satisfy this order"**

120. Section 35 (1) of the M.C.A. enables the Court to vary or discharge an order or to suspend temporarily a provision of the order and to revive the provision which has been suspended temporarily.

121. The Respondent has submitted that the order should be varied to provide for a fixed date by which he is required to pay the Petitioner a certain fee.

122. While on its appearance this is not unreasonable and the order could easily be varied to fix a date, the issue for the Respondent is the matter of delay. The order was made in 2017 and this application was not made before the Registrar until 2020. The Judge ordered that if there was non-compliance with the order certain directions were to ensue leading up to the sale of one of the units to satisfy its order.

123. The order referred to in Paragraph 4 does not specifically refer to any of the discrete orders made but the latter part of paragraph 4 explains which order is being referred to, that is the order where the Petitioner is to receive one third of the appraised value of the

property. There has been non-compliance with this order by the Respondent for some time. No stay has been granted for the enforcement of this order. The Petitioner has been out of pocket of her interest as ordered. Nevertheless I am prepared to fix a period of thirty days from the date hereof to allow the Respondent to pay the value of the Petitioner's interest as determined in the Adler Report, along with interest of 2.0% from June 2017 to the date of payment to compensate the Petitioner for the delay, failing which I direct that the property be separated as it was formerly two units at the time the order was made but subsequently combined by the Respondent without paying the Petitioner and that one of the units be sold to satisfy her interest.

124. The Deputy Registrar's ruling on the costs of the appraisal in my opinion arose as a result of the failure of the parties to agree on an appraiser. Had the parties agreed on an appraisal without the intervention of the Court, then the provisions of the Isaac order would have applied. However, as there was a distinct application made, the Deputy Registrar in her discretion made an order for the costs of the appraisal. I am aware that there was no provision in the Isaacs order for the costs of the appraiser if appointed by the Registrar. I am also fully aware that Justice Isaacs had intended that the costs be shared equally, and I am satisfied that the Petitioner was awarded the costs of the Respondent's application to vary the appraisal order. Accordingly I will order that the costs of the appraisal ordered by the Deputy Registrar be varied to comply with the Isaacs Judgment and to be shared equally.

#### **ISSUE FIVE**

125. I am not persuaded at all for the reasons submitted by the Respondent that the Petitioner should be condemned in costs for this application. In my decision on this issue I will also address Issue Six. The order of Justice Isaacs was made in 2017. There has been non-compliance from then. There has been no stay. There has been no appellate decision reversing the order of Justice Isaacs. There is no jurisdiction to invoke the slip rule. The Petitioner has been without her benefit from 2017 and has had to defend applications made by the Respondent at her expense. The delay in this action has been to the prejudice of the Petitioner and at the hand of the Respondent. I accordingly award her the costs of this application to be taxed if not agreed.

#### **ISSUE SIX**

126. I have addressed the effect of the appellate decision in Shaun Miller v Premier Importers Ltd. previously and confirm that that decision binds this Court and is directly on point with this case. It confirms that the slip rule is not available to the Respondent.

#### **CONCLUSION**

127.(1) The Slip Rule is not available to the Respondent.

- (2) Paragraph 4 is varied to allow the Respondent thirty days from the date hereof to pay the Petitioner the value as fixed by the Adler Report along with interest at 2.0% from June 2017 to payment date; failing which the property which has been combined shall be divided at the Respondent's expense and one unit sold to pay the Petitioner her monies due.
- (3) The Costs of the appraisal order shall be shared equally.
- (4) The costs of this application shall be borne by the Respondent and paid to the Petitioner to be taxed if not agreed.

Dated this 9 day of September 2022



Hon. Madam Justice G. Diane Stewart