NOVA SCOTIA COURT OF APPEAL
Citation: *Donner v. Donner*, 2021 NSCA 30

Date: 20210323
Docket: CA 495573
Registry: Halifax

Between:

Donald Lewis Donner

Appellant

v.

Betty Ann Donner

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	January 22, 2021, in Halifax, Nova Scotia
Legislation:	*Divorce Act*, R.S.C. 1985, c. 3, s. 17; *Federal Child Support Guidelines*, Can. Reg. 97-175; *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 16
Cases Considered:	*Laframboise v. Millington*, 2019 NSCA 43; *MacLennan v. MacLennan*, 2003 NSCA 9; *Volcko v. Volcko*, 2020 NSCA 68; *Pullin v. Ryan*, 2017 NSSC 20; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62; *Ayangma v. French School Board*, 2011 PECA 3; *Lantin (Litigation Guardian for) v. Sokolies*, 2019 MBCA 115; *Ivey v. Ivey*, 2014 NSSC 108; *West v. West*, [2001] O.J. No. 2149; *Stephens v. Stephens*, 2016 ONSC 367; *Darlington v. Moore*, 2017 NSCA 67; *MacVicar Estate v. MacDonald*, 2019 NSCA 90
Subject:	Application; Application to amend Corollary Relief Judgment; Corollary Relief Judgment; *Civil Procedure Rule* 78.08; *Civil Procedure Rule* 82.22(1); Costs; Divorce; Divorce—division of property; Divorce—variation; Family—business asset; Matrimonial Property—valuation

Summary: The Appellant sought to overturn a hearing judge's application decision that:

(1) rejected his request for an amendment to an earlier issued Corollary Relief Judgment, to reflect later revealed information concerning the value of an asset ordered divided equally between the parties.

(2) awarded costs in excess of $41,000 to the Respondent on the divorce trial.

Issues: (1) Was there a miscarriage of justice in the hearing judge's decision to decline to change the parties' Corollary Relief Order?

(2) Did the judge err in misapprehending the Appellant's evidence on the application?

(3) Did the judge err in the award of trial costs?

Result: The hearing judge did not have statutory authority to vary the Order. The judge was not persuaded there was sufficient evidence to support invoking either *Civil Procedure Rule* 78.08 (the "slip rule") or common law authority to amend the Corollary Relief Judgment. The judge's conclusions, grounded in findings of fact and determinations of credibility, did not amount to any error.

There was no error in the judge's apprehension of the evidence.

The judge's costs decision was one within her discretion.

The appeal is dismissed with costs of $4,000 in favour of the Respondent.

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Respondent

Judges:	Van den Eynden, Scanlan and Beaton JJ.A.
Appeal Heard:	January 22, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Beaton J.A.; Van den Eynden and Scanlan JJ.A. concurring
Counsel:	Nicole MacIsaac, for the appellant Jessica Chapman, for the respondent

Reasons for judgment:

Introduction

[1] The parties were divorced following a trial in October 2017. In relation to one aspect of the corollary relief matters in issue, Justice Cindy G. Cormier ("the judge") agreed with Ms. Donner that a shareholder's loan ("the loan") of D.L. Donner Holdings Limited ("the company") owed to Mr. Donner was a matrimonial asset.

[2] The judge ordered the parties to share equally in that asset, to be effected by Mr. Donner arranging for the company to transfer to Ms. Donner the sum of $27,833.50, being one-half the balance of the loan of $55,667. The corollary relief order ("the CRO") reflecting the October 2017 decision was issued on May 8, 2018.

[3] Although submissions on costs were filed several weeks after trial, the costs decision was not rendered for approximately fourteen months. It was incorporated in the decision now under appeal concerning an Application to Vary ("the application") filed by Mr. Donner on December 4, 2018 and heard by the judge on June 6, 2019.

[4] In his application, Mr. Donner sought to make changes to the CRO, based upon what he maintained was an incorrect figure that had been used to quantify the loan. Ms. Donner opposed the application. The judge's December 31, 2019 decision ("the decision") refused Mr. Donner's request to amend the loan amount as originally expressed in the CRO. The judge also awarded Ms. Donner over $42,000 in trial costs.

[5] Mr. Donner now asks this Court to set aside the order arising from the decision and to: (i) substitute a figure representing what he asserts is the correct amount of the loan available for division; and (ii) substitute an order of no costs or a lesser amount of costs than awarded by the judge.

[6] For the reasons that follow, I would dismiss the appeal and order costs in favour of Ms. Donner.

Background

[7] Mr. Donner's 2018 application focused on what he asserted was an error contained in the evidence provided at the 2017 trial regarding the balance of the loan. Relying on later acquired information, Mr. Donner maintained the correct amount to be transferred to Ms. Donner, representing her one-half interest, was $2,700, not the $27,833.50 identified in the CRO. Mr. Donner took the position his previous accountant, who had testified at the divorce trial, had made an error and the total amount of the loan available for division was in fact $5,400 rather than $55,667.

[8] At the trial, Mr. Donner's position had been that the balance of the loan was the figure found in his then accountant's evidence, which referenced a draft 2017 company financial statement, containing a column showing comparable draft figures for the year 2016.

[9] In order to provide an accurate picture of the company's finances to the other party and the court, Mr. Donner put only that draft statement into evidence at the divorce trial. He did not provide any 2016 corporate financial statements, nor any personal or corporate tax returns.

[10] Before this Court, Mr. Donner relies on a document he put before the judge on the application. That document, a copy of an on-line "View Return" generated by Canada Revenue Agency, established the company's 2016 income tax return had been filed. It identified the value of the shareholder's loan (line 3260) at $5,400. It also contained key dates. It listed the "current status" as "Assessed" and a Status Date of March 21, 2018. The last page of the document showed a "Date modified" of May 16, 2016, and listed the company year-end as June 30, 2016. Notably, the 2018 status date was months before Mr. Donner filed his application, and the 2016 dates were months before the divorce trial.

[11] During the application, Mr. Donner requested the judge "correct" what he maintained was an erroneous amount representing the loan balance. He called evidence from his new accountant Mr. Yuill to identify through the View Return what Mr. Donner maintained was the accurate, revised loan amount available for division. Mr. Donner invited the judge to change her earlier trial decision so as to rectify the "error".

[12] The judge considered her authority to make a change to the CRO and whether an error had been made and, if so, whether it had been discernable with reasonable diligence, such that the relief should be granted.

[13] In an unreported written decision the judge dismissed Mr. Donner's application and declined to change the CRO. I am unable to discern why the determination of trial costs was delayed to that same decision. In any event, the judge awarded trial costs in favour of Ms. Donner in the amount of $41,313, plus costs on the dismissed application in the amount of $1,000.

[14] Mr. Donner's grounds of appeal relate to both decisions reached by the judge. The four grounds advanced can be captured in these three questions:

1. Did the judge's decision to decline changing the CRO constitute a miscarriage of justice?
2. Did the judge err in misapprehending Mr. Donner's application evidence?
3. Did the judge err in the award of trial costs?

[15] The grounds of appeal advanced relate to questions of fact or mixed fact and law. In *Laframboise v. Millington*, 2019 NSCA 43, Saunders J.A. explained the standards to be applied:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[16] The applicable standard of review here is palpable and overriding error. (See also *MacLennan v. MacLennan*, 2003 NSCA 9 at para. 8). The Court owes deference to the judge's findings of fact. Absent an unmistakeable error in the fact-finding process, or a clear error of law, the Court must not interfere with her conclusions.

[17] With respect to the judge's discretion to award costs, so too we must defer, absent an error in law or an injustice (*Volcko v. Volcko*, 2020 NSCA 68 at para. 24).

Issue No. 1—Was there a miscarriage of justice?

[18] Mr. Donner argues the judge's refusal to vary, correct or amend the amount of the loan constituted a miscarriage of justice. I will address these as alleged errors of fact or law. Mr. Donner asks this Court to rectify an unfairness in permitting Ms. Donner to realize what he says would be a windfall at his expense.

Variation of the Order—statutory authority; Rule 82.22(1)

[19] As noted earlier, Mr. Donner commenced the proceeding by filing an Application to Vary. In the context of divorce proceedings and resultant corollary relief orders, s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 provides the mechanism for varying, rescinding or suspending a child or spousal support order. The aspect of corollary relief with which Mr. Donner was concerned in his application related to division of property, not matters of spousal or child support. Therefore, s. 17 of that *Act* had no application.

[20] The issue at the heart of the Donners' divorce trial related specifically to their disagreement about the characterization of the loan. Ms. Donner maintained it was a matrimonial asset, available for division despite being held inside a company. The judge's authority to determine the nature of the asset rested in s. 16(1)(b) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275:

> 16(1) Either spouse may apply to the court for the determination of any question between the spouses as to
>
> (a) the ownership or right to possession of any particular property;
>
> (b) whether property is a matrimonial asset or a business asset,
>
> except where an application has been made and not determined or an order has been made respecting the property under this Act.

[21] Nowhere in that *Act* is there authority for a judge to later consider a variation of the division of property. In his factum, Mr. Donner suggested the judge could have varied the CRO "to allow for a redistribution of matrimonial assets," and relied on *Pullin v. Ryan*, 2017 NSSC 20, as authority to do so. That decision is easily distinguishable from this matter. There, the court commented on a variation application as the only mechanism by which to put back before the court a dispute regarding a previous child support order:

> [6] … When parties disagree about what those calculations should be there is no formalized procedure for the interpretation to be applied to previous orders except by way of Variation Applications. In this case because the parties did not define the costs that were to be included and because there is a real interpretive challenge about the meaning of "existing sources of funding" a court may decide the Order, or part of the Order cannot be enforced because the terms of the Order lack specificity.

[22] Not only are these parties not concerned with any ambiguity in, or disagreement about, interpretation of an order, they are not concerned with a support order. The judge had no jurisdiction to "vary" the portion of the CRO that addressed division of matrimonial property.

[23] At para. 27 of her decision the judge posed this question:

> [27] Did a change of circumstance occur when Mr. Donner allegedly learned from Mr. Yuill that Mr. White's draft financial statements were incorrect? Mr. Donner argues that "if the information was available at the time of trial the effect would have been an entirely different order regarding the shareholder's loan".

And later, she found:

> [31] Even if Mr. Donner is correct about the error, was his error discoverable with reasonable diligence? <u>The Court cannot vary a property matter unless the Court is satisfied the error was not discoverable with reasonable diligence. I am not satisfied Mr. Donner exercised reasonable diligence.</u> It is not clear to me whether Mr. Donner has in fact filed his 2016 tax documents. [Emphasis added]

[24] The above-noted passage suggests either: (i) the judge mis-spoke, referring to the test on a variation application instead of the test to be considered in determining whether to employ the slip rule (to be discussed later); or, (ii) the judge was adverting to *Civil Procedure Rule* 82.22(1), which provides:

> (1) A party to a proceeding concluded by final order may make a motion to vary the order only in one of the following circumstances:
>
> (a) an error is to be corrected, or time extended, under Rule 78 - Order;
>
> (b) legislation permits the order to be varied;
>
> (c) the text of the order would have it apply in circumstances in which it is not intended to apply.

[25] If it were a case of the judge mis-speaking, her choice of words, characterizing the matter as a variation hearing as opposed to a motion to consider the slip rule, was not fatal given the judge was ultimately not satisfied Mr. Donner had acted with diligence, a finding that played a key role in her analysis of the applicability of the slip rule. If it were a case of the judge referencing *Rule* 82.22(1), none of the three triggers set out in that Rule applied to this matter.

Correction of the Order—the slip rule

[26] Mr. Donner asserts the judge erred in not applying the so-called slip rule to correct the error in the figures representing the value of the loan. Ms. Donner maintains the circumstances of this case extend beyond the purpose for and proper application of the slip rule.

[27] Commonly referred to as the slip rule, *Civil Procedure Rule* 78.08 is intended to address "errors", "mistakes", "amendments" or "extensions of time":

> 78.08 Errors and extensions of time
>
> A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated on;
>
> (c) extend the time for doing something required to be done by an order that provides a deadline;
>
> (d) set a deadline for complying with an order that does not set a deadline.

[28] The rule has its genesis in the common law principle of *functus officio*, designed to provide finality in judgments. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 the Supreme Court of Canada discussed the function of procedural rules usually designed to express the common law principle:

79 It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal. Applying that aspect of the *functus* doctrine to s. 23(1), we face the question of whether the ordering of progress reports denied the respondents a stable basis from which to appeal.

…

81 In any case, the rules of practice in Nova Scotia and other provinces allow courts to vary or add to their orders so as to carry them into operation or even to provide other or further relief than originally granted (Nova Scotia *Civil Procedure Rules*, Rule 15.08(d) and (e); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2)(c) and (d); *Alberta Rules of Court*, Alta. Reg. 390/68, Rule 390(1)). This shows that the practice of providing further direction on remedies in support of a decision is known to our courts, and does not undermine the availability of appeal. Moreover, the possibility of such proceedings may facilitate the process of putting orders into operation without requiring resort to contempt proceedings.

…

113 Canadian doctrinal and judicial writing on *functus officio* is sparse, even though the rule itself derives from an old case of the English Court of Appeal (*In re St. Nazaire Co.* (1879), 12 Ch. D. 88). Essentially, the rule is that the court has no jurisdiction to reopen or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been error in expressing the manifest intention of the court (see *In re Swire* (1885), 30 Ch. D. 239 (C.A.); *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186). …

…

115 If a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding, or, as G. Pépin and Y. Ouellette have perceptively termed it, the providing of [TRANSLATION] "legal security" for the parties (*Principes de contentieux administratif* (2nd ed. 1982), at p. 221). This concern for finality is evident in the definition of *functus officio*:

> [TRANSLATION] Qualifies a court or tribunal, a public body or an official that is no longer seized of a matter because it or he or she has discharged the office. E.g. A judge who has pronounced a final judgment is *functus officio*.
>
> (H. Reid, Dictionnaire de droit québécois et canadien (2001), at p. 253)

> The principle ensures that subject to an appeal, parties are secure in their reliance on the finality of superior court decisions.
>
> 116 This common law rule is further reflected in modern rules of civil procedure (see, e.g., Nova Scotia *Civil Procedure Rules*, Rule 15.07) and the interpretation of criminal appeal provisions (see *R. v. H. (E.F.)* (1997), 115 C.C.C. (3d) 89 (Ont. C.A.), considering s. 675 of the *Criminal Code*). Whether in its common law or statutory form, the doctrine of *functus officio* provides that only in strictly limited circumstances can a court revisit an order or judgment (see Nova Scotia *Civil Procedure Rules*, Rule 15.08). If it were otherwise, there would be, to paraphrase Charron J.A. in *H. (E.F.)*, *supra*, at p. 101, the recurring danger of the trial process becoming or appearing to become a "never closing revolving door" through which litigants could come and go as they pleased.[1]

[29] More recently, this Court returned to the doctrine in *Volcko*, *supra*:

> [52] The doctrine of *functus officio* generally prohibits a court from revisiting its order, subject to two well-defined exceptions. In *Capital District Health Authority v. Nova Scotia Government and General Employees Union*, 2006 NSCA 85, Cromwell J.A. (as he then was) explained:
>
> > [36] *Functus officio* is a rule about finality: once a tribunal has completed its job, it has no further power to deal with the matter. In relation to court proceedings, the principle means that, in general, once a court has issued and entered its final judgment, the matter may only be reopened by means of appeal. To this general rule, however, there are at least two exceptions: the court may correct slips and, as well, address errors in expressing its manifest intent: **Paper Machinery Ltd. v. J.O. Ross Engineering Corp.**, [1934] S.C.R. 186; see also *Civil Procedure Rule* 15.07.
> >
> > [37] These principles developed in the context of court decisions which are subject to full rights of appeal. The existence of these full rights of appeal fostered the view that an appeal, rather than a reopening of the case before the initial decision-maker, was generally the preferred way to address errors in the initial decision.

[30] While the slip rule has its origins in common law, its codification in rules of court procedure is hardly a recent construct. In *Ayangma v. French School Board*, 2011 PECA 3, Jenkins C.J.P.E.I. examined some of the history of the development of the rule:

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[1] These comments are found in the dissenting judgment. However, there was no disagreement as to the principle of *functus officio* between the dissent and majority, rather its application to the matter at hand.

12 … The function of a judge or a court is taken to be exhausted when the judgment is drawn up and entered: ***Paper Machinery Ltd. v. J.D. Ross Engineering Corp***, [1934] S.C.R. 186.

13 In the ***Paper Machinery*** case, the Supreme Court of Canada dealt with the finality of judgments and the power of a court to amend a judgment. Rinfret J. stated:

> The question really is therefore whether there is power in the court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think, -- and we see no reason why it should not also be the rule followed by this Court -- that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the court (***In re Swire*** [(1885), 30 Ch. D. 239.]; ***Preston Banking Company v. Allsup & Sons***, [1895] 1 Ch. 141.]; ***Ainsworth v. Wilding*** [[1896] 1 Ch. 673.]. In a very recent case (***MacCarthy v. Agard*** [[1933] 1 K.B. 417.]), the authorities were all reviewed and the principle was re-asserted. In that case, although, indeed, all the judges expressed the view that the circumstances were particularly favourable to the applicant, but because neither of the conditions mentioned were present, the Court of Appeal came to the conclusion that it had no power to interfere. (The rule as stated was approved by the Privy Council in ***Firm of R.M.K. R.M v. Firm of M.R.M. V.L.*** [[1926] A.C. 761 at 771-772.]).
>
> The respondents' application does not come under the so-called slip rule. Nor is it apparent that some matter which should have been dealt with in the reasons has been overlooked; and, in our view, the minutes as settled accord with the judgment pronounced by the Court. [*sic*] any doubt which might have subsisted on those points must have been made clear by the discussion before their Lordships of the Privy Council and the order made upon the petition for special leave to appeal.

14 This explanation of the general rule and exceptions was discussed and reaffirmed by Sopinka J. in the Supreme Court of Canada decision in ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848 … .

15 The court's inherent jurisdiction, and the source of the codifying rules of court, was explored by Green J.A. in ***Beanland v. Beanland*** (1997), 151 Nfld. and P.E.I.R. 51 (Nfld. C.A.). He stated at para. 41:

> [41] The court has inherent jurisdiction, as well as power under Rules 49.10 and 15.07 to amend or vary a previous order which has been drawn up and entered. The circumstances under which this may be done are, however, limited. The "general rule" as stated by Cameron, J.A., in this court in ***McLean et al. v. Carr Estate et al.***, (1996), 142 Nfld. & P.E.I.R. 25; 445 A.P.R. 25; 138 D.L.R. (4th) 541, is that a final decision of a court

> cannot be reopened. This is especially so where the order is made on consent because in such circumstances it is based upon the contract of the parties. See ***Wright, Re,*** [1949] O.W.N. 113 (H.C.) at p. 115. Exceptions to this rule, however, include circumstances where there has been a slip in drawing up the order or where there has been error in expressing the manifest intention of the court. See ***Paper Machinery Ltd. et al. v. Ross (J.O.) Engineering Corporation et al.***, 1934 CanLII 1 (S.C.C.), [1934] S.C.R. 186 per Rinfret, J., at p. 188; ***McLean et al. v. Carr Estate et al.*** at p. 544. Additional grounds would include fraud and, in the case of a consent order, circumstances that would enable the court to set aside the agreement upon which the consent order was based. See ***Wright, Re.*** Further, Rule 15.07 also allows an amendment 'to provide for any matter which should have but was not adjudicated upon', i.e., where the law requires the court to consider something which should have been but was not brought to the attention of the court: ***McLean et al. v. Carr Estate et al.*** Of course, there is also an inherent jurisdiction in the court to correct or set aside, 'ex debito justitiae', a decision, the fundamental basis for which is found to be lacking, as for example where an appeal has not been heard on its merits but struck out for non-appearance of the appellant when, in fact, the appellant was not properly served. See ***Marlay Construction Ltd. v. Mount Pearl (City)***, (1996), 147 Nfld. & P.E.I.R. 191; 459 A.P.R. 191 (Nfld. C.A.).
>
> [42] Absent any of the recognized exceptions, however, any purported variation or amendment of an order already drawn up and entered will be beyond the jurisdiction of the court to make.

16 The general rule that a final decision of a court cannot be reopened, subject to the exceptions to correct a slip in drawing it up, **or** where there was an error in expressing the manifest intention of the court, is not meant to provide an avenue to deal with arguments that could have been advanced, but were not. This can be done on appeal. The rule providing for exceptions is meant to allow consideration of matters that must be dealt with in the sense that, had they been brought to the judge's or court's attention at the time of the hearing, the judge or court would have been obliged to take the matter into account. Examples of application of the rule include a court having made an order that exceeded the amount permitted by a regulation that was not brought to the attention of the court; or an order having been made that did not take into account a deposit that it had already been paid: ***McLean v. Carr Estate***, [1996] N.J. No. 181 (NLSC-Ct. of Ap.), at para. 8-11; referring with approval to ***Yen and Yen v. Dapas and Torbay Investors Ltd.*** (1978), 6 B.C.L.R. 264 (B.C.S.C.). [Emphasis added]

[31] The earlier cases referenced illustrate a theme; in each case where the rule was applied, subsequent change to an order was undertaken to properly give effect to the original intention of the court.

[32] The Manitoba Court of Appeal considered the slip rule in *Lantin (Litigation Guardian for) v. Sokolies*, 2019 MBCA 115. There, the trial judge had amended an award of damages by adding to her decision, after it was rendered, a previously unmentioned aspect of non-pecuniary damages that had been raised in a post-decision submission made by the plaintiff. The trial judge invoked the court's slip rule as a mechanism by which to add additional relief after her decision had been made. However, she did so only after the Court of Appeal had already entered a judgment in relation to her original decision, which appeal decision impacted other aspects of the trial award.

[33] On a second appeal of the decision, this time in relation to the trial judge's decision to invoke the slip rule, it was concluded she had lost jurisdiction to make any decision to apply the slip rule once the appellate court had exercised its jurisdiction the first time around in substituting its own judgment for that of the trial judge.

[34] Mainella J.A. discussed the use of the slip rule:

> [22] Formal entry of an order or judgment is a watershed moment in litigation. Once an order or judgment is drawn up and formally entered, the court or judge who pronounced it has no jurisdiction to amend it absent a recognised power to do so (see The Hon Mr [*sic*] Justice KR Handley, *Spencer Bower and Handley: Res Judicata*, 4th ed by Andrew Grubb (London, UK: LexisNexis, 2009) at para 5.03). As a general rule, formal entry of an order or judgment triggers the common law doctrine of *functus officio* [Citations omitted].
>
> …
>
> [24] <u>While accidental slips and oversights may be corrected under the slip rule, deliberate decisions and afterthoughts cannot be corrected under that rule.</u> The slip rule is not an alternative procedure to correct substantive errors in fact or law; the proper remedy is an appeal (see *Abromovich v Snow Lake (Town)*, 1996 CarswellMan 558 at para 4 (CA); and *Wong v Grant Mitchell Law Corp et al*, 2016 MBCA 65 at paras 4-5, leave to appeal to SCC refused, 37227 (9 February 2017)).
>
> [25] The ambit of the slip rule is defined by a court's inherent jurisdiction, the rules of court and legislation. Courts have inherent jurisdiction to amend a formally entered order or judgment "[w]here there has been a slip in drawing it up, or . . . [w]here there has been error in expressing the manifest intention of the court" (*Paper Machinery Ltd* at p 188; see also *Prevost v Bedard* (1915), 1915 CanLII 54 (SCC), 51 SCR 629 at 635). Rule 59.06(1) (and r 70.34(1) for family proceedings) of the *QBR* broaden the ambit of the slip rule further than the

> Court's inherent jurisdiction. Legislation may allow for amendment in a particular context (which is not the situation here). [Emphasis added]

[35] Clearly the theme referenced earlier (at para. 25 herein) has continued. *Lantin*, *supra*, reiterates the use of the slip rule does not extend to permitting alterations to previous orders on the basis of "after thoughts".

[36] Mr. Donner maintains the error in the figure representing the loan justifies the application of the slip rule in this case as an "exceptional circumstance". He relies on the discussion in in *Ivey v. Ivey*, 2014 NSSC 108:

> [30] The recent Ontario case of **Millwright Regional Counsel of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.**, 2013 ONSC 1502, provides an excellent summary of the appropriate application of the slip rule. Perell J. reviews the parameters of the rule at paras. 30 to 33, wherein it is stated as follows:
>
> > 30 Rule 59.06 (1) is designed to amend judgments containing a slip or error, errors which are clerical, mathematical or due to misadventure or oversight. The rule is designed to amend judgments containing a slip, not to set aside judgments resulting from a slip in judicial reasoning: **Central Canada Travel Services v. Bank of Montreal,** [1986] O.J. No. 1249 (Ont. H.C.) at para. 21; **Dhaliwal v. Plantus**, [2007] O.J. No. 5450 (Ont. S.C.J.) at para. 4. Rule 59.06 (1) is not designed to be a disguised means to review errors in the making of the Reasons for Decision; rather, it is designed to correct errors in memorializing the Reasons into a formal order or judgment.31 Generally speaking the court's inherent and statutory jurisdiction to amend an order or judgment is limited to: (1) cases of fraud; (2) where there has been a slip in drawing up the order; and (3) where there has been an error in the order expressing the manifest intention of the court from its reasons for decision**: Paper Machinery Ltd. v. J.O. Ross Engineering Corp**., [1934] S.C.R. 186 (S.C.C.); **Wright, Re**, [1949] O.J. No. 3 (Ont. H.C.); **Millard v. North George Capital Management** Ltd., [1999] O.J. No. 3957 (Ont. S.C.J. [Commercial List]). The rule is only operative in exceptional circumstances given the public interest in the principle of finality to the litigation process: **Shaw Satellite G.P. v. Pieckenhagen**, 2011 ONSC 5968 (Ont. S.C.J.) at para. 20.32 Under rule 59.06(1), the Court has the power to amend an order where there has been an error in expressing the manifest intention of the Court: **Paper Machinery Ltd. v. J.O. Ross Engineering Corp**., [1934] S.C.R. 186 (S.C.C.); **Millard v. North George Capital Management Ltd.**, [1999] O.J. No. 3957 (Ont. S.C.J. [Commercial List]); **Convay v. Marsulex Inc**., [2004] O.J. No. 3645 (Ont. S.C.J.).33 The rule permits amendments where the order obviously or indubitably does not reflect what the court intended to do, either by error or oversight: **Johnston v.**

Johnston, [2002] O.J. No. 1570 (Ont. Div. Ct.); **Saikely v. 519579 Ontario Ltd.**, [2002] O.J. No. 2863 (Ont. S.C.J.); **Kerr v. Danier Leather Inc**. (2005), 76 O.R. (3d) 354 (Ont. S.C.J.).

[31] In **Golden Forest Holdings Ltd. v. Bank of Nova Scotia**, [1990] N.S.J. No. 230 (C.A.), Hallett, J.A. held that consent orders can be amended based upon the test for the rectification of contracts. Hallett, J.A. states at paras. 10 and 11 as follows:

> 10 However, unlike the vast majority of actions for foreclosure and sale, this action was defended. Subsequently, the action was settled upon terms which included the unusual provision for 12 newspaper advertisements of the sale rather than the customary three. The consent order was presented to Madam Justice Roscoe, incorporating the advertising requirements agreed to by the parties. The fact that it was a consent order following a settlement is a very material fact that has led me to conclude that Mr. Justice Tidman did not have the power under the Court's inherent jurisdiction to vary the order of Roscoe J., as it gave effect to a settlement reached by the parties. The appellant was entitled to have the advertising agreed upon for the sale of this somewhat unique property. The Court does not have the power to vary a consent order that gives effect to a settlement unless the settlement agreement itself could be varied. This point was dealt with by the Ontario Court of Appeal in **Monarch Construction Ltd. v. Buildevco Ltd.** (1988), 26 C.P.C. (2d) 164. The Court stated at pp. 165-166:
>
> > A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the Local Judge on which she was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms.
>
> 11 In **Chitel v. Rothbart** (1987), 19 C.P.C. (2d) 48 (Ont. Master), additional reasons at (1987), 19 C.P.C. (2d) 48 at 54 (Ont. Master), aff'd (1988), 28 C.P.C. (2d) 5 (Ont. Div. Ct.), a similar statement was made at p. 52 [of 19 C.P.C.]:
>
> > A consent order may only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract. None of these grounds are present in the within case.

> [32] The slip rule has been applied in the family law context. In **Andrews v. Andrews**, 2007 NSSC 35 (S.C.), Dellapinna, J. utilized the slip rule to equally divide the employment pension of the wife, where the division of the wife's pension had inadvertently been omitted in the court's earlier decision. Similarly, in **Wood v. Wood**, 1982 NSJ No. 31, (N.S.S.C.T.D.), Grant, J. applied the slip rule to correct an error in a consent court order, by amending the order to include a term which had inadvertently been omitted, which term had formed part of the prior settlement.
>
> [33] An opposite result was reached in **McDonald v. Trenchard**, 2011 NSSC 105 (S.C.). O'Neil, A.C.J. stated that the slip rule should not be applied where there was "nothing inherently erroneous or obviously deficient" about the contested clause: para. 40. Further, the slip rule was "not designed to be a back door to re-negotiating an agreement ...": para.40

[37] Mr. Donner says there are exceptional circumstances here, found in "… the public interest in finality to the litigation process," and argues the judge had the option of relying on the slip rule to amend her order. With respect, I cannot agree. All parties to litigation have an interest in finality, and likely never more so than in the family law context. As to the option available to the judge, her reasons set out the factors that caused her to reject that option, and why.

[38] Ms. Donner argues the slip rule is not available here because in the application there was no "error" presented for the judge to fix. Rather, says Ms. Donner, there was an attempt to put before the application judge different evidence than that which had been presented by Mr. Donner at the divorce trial. I agree with this characterization. This was not a situation in which the parties or Mr. Donner were, by virtue of the application, engaged in trying to redress a prior common intention. The parties' dispute as to whether the loan constituted matrimonial property was at the heart of their trial. The value assigned to the loan was to a significant degree informed by evidence within the sole control of Mr. Donner.

[39] In her written and oral arguments Ms. Donner maintains different evidence could have been made available both during the trial and the application, had Mr. Donner: (i) properly met his disclosure obligations; and (ii) acted promptly and diligently once the later information about the value of the loan came to light. The record reflects that on the application, the judge was persuaded he had done neither in that second proceeding.

[40] Before us, there is no disagreement between the parties that the issue of the sufficiency of disclosure was a matter raised prior to and during the hearing of the divorce. Mr. Donner's trial disclosure was less than ideal. The figure generated at

trial to reflect the value of the loan was rooted in a *draft* 2017 company financial statement. Mr. Donner did not file any completed corporate financial statements or assessed income tax returns, as contemplated in *Civil Procedure Rules* 59.19, 59.21–24 and 59.42. Furthermore, because spousal support was an issue in play up until very close to or the day of trial, the requirements for filing of corporate financial information set out in sections 15–18 of the *Federal Child Support Guidelines*, Can. Reg. 97-175 would also have required Mr. Donner to file corporate income tax returns. These were not filed in the divorce trial, nor in the application.

[41] Ms. Donner suggests, and it is not challenged, that the company's year-end would have been in the month of June. This illustrates Mr. Donner could have had the final year-end numbers, rather than draft numbers, ready in time for the late October divorce trial. Had Mr. Donner properly and fully disclosed the company's then current and accurate position at trial, perhaps none of his subsequent efforts to remedy his perceived injustice would have been required.

[42] As noted by Ms. Donner, in family litigation trial judges are unfortunately often faced with making decisions without the benefit of adequate information. While this can undoubtedly be frustrating for the opposing party, insufficient disclosure leaves trial judges to do justice as best they can with the limited information provided. There comes a point in a case where both the opposing party and the judge should end efforts to secure more or better disclosure, and instead forge a way to a hearing and decision. If not, already burdened trial dockets would risk becoming even more congested, and the resolution opposing parties seek further delayed. The consequences to the party who falls short of meeting disclosure obligations can be addressed by such "tools" as, for example, adverse inferences the judge might draw, credibility findings and evidentiary conclusions the judge might reach, and potential cost consequences that might be imposed on a non-disclosing party.

[43] Mr. Donner asserts it would be unjust for this Court's decision to leave him to endure the effect of the use of a "fictional number" representing the value of the loan. He refers us to the re-direct evidence of his then-accountant Mr. White, who testified at the divorce trial. Mr. Donner argues that evidence establishes the 2017 financial materials put before the judge were draft numbers only, and therefore had potential to change at the end of 2017, after the trial was heard. However, that does not explain why Mr. Donner filed only draft 2017 material at trial instead of final numbers, nor why he waited until the last month of 2018 to file his

application seeking to adjust the loan figure. This argument also begs the question as to when the court might have expected to receive something more concrete than draft figures. The implication is the judge should have: (i) waited for some indeterminate period for Mr. Donner to file "better" information, and (ii) allowed Mr. Donner to re-visit the matter at a later date before making a decision. I disagree. Mr. Donner had a trial date known well in advance, and every opportunity to file the most accurate material possible in support of his position.

[44] With respect, it is disingenuous for a party falling short in their disclosure obligations to maintain post-decision that the court has erred in its determinations made on the basis of the evidence provided. Here, there has been no explanation why Mr. Donner did not provide adequate disclosure, both at trial or on the subsequent application.

[45] Mr. Donner's position is he acted appropriately in his application in drawing to the judge's attention more recent information about the loan figure. However, that does not explain the gap in time between the March 2018 date on the View Return document and the December 2018 filing of his application. On its face, the delay between the two events does not suggest Mr. Donner acted with haste. The record does not reveal any explanation for that delay was put to the judge during the application, further compounded by Mr. Donner not filing documentation prescribed in the *Rules* and the *Guidelines*, *supra*. Once again, he did not provide sufficient or full disclosure to assist Ms. Donner or the court. It is difficult to ignore Ms. Donner's observation that permitting Mr. Donner to now re-visit the value of the loan would be akin to rewarding him for not having provided complete disclosure in both the divorce trial and the application.

Amendment—common law authority

[46] Mr. Donner argues that separate and apart from the slip rule, the judge had inherent jurisdiction to set aside or change the order to protect fairness. He maintains the judge committed an error of law in her failure to amend the CRO to prevent both a wrong to him and an unwarranted benefit to Ms. Donner.

[47] Relying on *West v. West*, [2001] O.J. No. 2149 Mr. Donner posits this case fits within the criteria recited therein under which a court can exercise its inherent jurisdiction:

> [23] The jurisdiction to set aside or change an order to prevent a miscarriage of justice is ancient. It goes back to the old common law writ of *audita querela:* see

> *Holmested and Gale on the Judicature Act of Ontario and Rules of Practice,* r. 529 § 2; Blackstone, William, *Commentaries on the Law of England* (1765), vol. 3, pp. 405-6. It forms part of the inherent jurisdiction of the court. The cases have laid down a fairly stringent test before it will be exercised: see cases digested in *Holmested and Gale,* r. 529 § 10, and *Holmested and Watson Ontario Civil Procedure,* r. 59 § 10 [5]. The evidence presented on the motion must be clear and credible; it must be of such a nature that the original order would have been different if the evidence had been available; it must not have been in existence at the time the order was made or not discoverable by diligent effort by the party asking the court to change the order; the party must have acted with diligence once the information came to light; and the evidence must establish that action is needed to prevent a miscarriage of justice. [Emphasis added]

[48] Mr. Donner asserts he met the common law test on his application, through the evidence of Mr. Yuill regarding the loan. He maintains the judge erred in declining to rely on that evidence. His position ignores that the judge made discrete factual findings about: the clarity of the evidence, credibility, the timing of the discoverability of the evidence, diligence, and the significance of the evidence. None of those findings favoured Mr. Donner's position. That said, the correct test was applied by the judge, and it is not for this Court to disturb her factual findings absent palpable and overriding error, of which I am satisfied there was none.

[49] The test in *West*, *supra*, was applied in *Stephens v. Stephens*, 2016 ONSC 367 also relied upon by Mr. Donner. There, the court adjusted the value attributed to a pension plan that was to be divided equally, pursuant to a corollary relief order adopting Minutes of Settlement reached by the parties. Corrected information about the value of the plan was generated by the third party pension plan administrator after the imposition of the order. The court's decision to exercise its common law jurisdiction to change the order was rooted in its conclusion the test had been met:

> [39] … the criteria for the invocation of my common law jurisdiction have been met as:
>
> 1. The evidence presented at trial was clear and cogent. It explained what transpired, when and why in sufficient particularity;
>
> 2. The evidence of the correct value of the Respondent's pension is material to the determination of equalization and, if known at the time, would likely have resulted in a different order;
>
> 3. The evidence was not discoverable by the parties with reasonable diligence at the time. They were entitled to rely upon the statement

> provided by the plan administrator. There was no obligation to go beyond that statement to verify its accuracy. By then, it was common practice to obtain pension valuation statements from a plan administrator and to rely upon same for the purpose of negotiating a resolution of family law disputes and related court proceedings;
>
> 4. The moving party acted promptly and diligently once the new information from the plan administrator came to light in 2015; and,
>
> 5. Absent an amendment to Justice Nolan's order, the Respondent will gain an unintended and unexpected windfall at the expense of and to the prejudice of his wife. This would result in a substantial miscarriage of justice.
>
> …
>
> [41] Therefore, whether one applies the approach taken by Justice McDermot in *Henderson v. Henderson, supra*, or applies Rule 59.06(2) by analogy or invokes the inherent jurisdiction of the court at common law, the result is the same. Under any of these approaches, it is appropriate and necessary that the Order of Justice Nolan be amended to remedy a mutual mistake made by the parties through no fault of their own to achieve a result consistent with their mutual intentions at the time.

[50] Here, the judge was not persuaded in relation to the criteria concerning the timing of the existence of the information relative to its production, nor the timing of the steps taken by Mr. Donner to rectify his concern. The judge found Mr. Donner had not "… exercised reasonable diligence." She stated:

> [37] I find the evidence regarding the amount and where the money came from was in existence at the time the order was made in October 2017 but was not properly put before the Court, at trial in October 2017 or properly put before the Court at the motion hearing in June 2019.
>
> [38] I find that Mr. Donner did not act with diligence before the trial, and he did not act with diligence once Mr. Yuill suggested a possible error. The evidence establishes that Mr. Donner failed to provide disclosure in a timely and forthright manner, and on a balance of probabilities I find his actions, or more likely his inaction may have resulted in inaccurate information being filed with and considered by the Court.

[51] The judge's findings are entitled to deference and must not be lightly disturbed. The judge was clearly not satisfied the *West* or the *Stephens* criteria had been met, such that the court needed to make a change to the CRO to reflect subsequent events outside of the control of either party.

[52] I am satisfied, based on the record, the judge properly applied the applicable test and conducted the appropriate analysis as to whether Mr. Donner's application met the criteria under which it would have been suitable to delve back into the CRO after-the-fact. There is no basis upon which to now disturb her findings.

[53] Mr. Donner did not equip the court with the information to support what he wanted to achieve; on that basis, his application failed. That result did not constitute what he has labelled a miscarriage of justice.

[54] These reasons should not be interpreted as foreclosing the ability of a court to correct true errors brought to its attention in a timely way, and in a manner that would permit a conclusion the information could not have been available at the time the order was made.

Issue No. 2—Misapprehension of Evidence

[55] Mr. Donner points to the judge's observation that it was not clear to her whether Mr. Donner had filed his 2016 tax documents as proof of her misapprehension of evidence. If there was any error, it was benign. Clearly Mr. Donner had filed his 2016 tax documents, because he was able to put before the judge the View Return document referenced earlier herein. Nonetheless, the judge's key findings were that Mr. Donner had not acted with diligence either prior to trial or once his accountant suggested the existence of a discrepancy, nor in bringing the matter of the adjusted number before the court. Those findings were at the heart of the judge's conclusion to dismiss the application, regardless of whether a tax return had been filed.

[56] Simply put, the judge's decision makes clear she was not persuaded a change in the figures identifying the value of the loan was needed. The judge noted "the original order would have been different" had she been provided with "clear and credible evidence" (para. 36). The judge was not persuaded by the information put forward by Mr. Donner, undoubtedly due to her conclusion Mr. Donner was lacking in credibility. The judge said:

> [32] The evidence presented on the motion must be clear and credible. The evidence presented by Mr. Donner was not clear or credible.
>
> [33] Under cross examination Mr. Yuill, Mr. Donner's new accountant, stated that he had **not** stated the following to Mr. Donner as Mr. Donner claimed per paragraph 18 of his Affidavit, sworn November 27, 2018, and filed December 4, 2018:

> Mr. Yuill explains that the 2016 shareholders' loan in the amount of $55,667.00 per paragraph 13 of the Corollary Relief Order, was in fact a fictional number taken from draft financial statements for 2016, as the 2016 year-end final statements and T2 corporate tax return had not yet been filed with the Canada Revenue Agency.
>
> [34] Mr. Yuill stated he did not file the 2016 tax returns for Mr. Donner as per paragraph 19, and Exhibit D of Mr. Donner's Affidavit sworn November 27, 2018 and filed December 4, 2018;
>
> Mr. Yuill prepared and filed the T2 corporate tax return for D.L. Donner Holdings Ltd. Attached hereto as Exhibit "D" is a copy of the 2016 corporate tax return.
>
> [35] Mr. Donner stated he was not sure whether his 2016 financial information had been filed with the Canada Revenue Agency.
>
> [36] I find that if there had been clear and credible evidence regarding the amount in question and where it came from, the original order would have been different.

[57] I am not persuaded there was a misapprehension of evidence by the judge.

Issue No. 3—The costs award

[58] The judge awarded costs in the divorce trial in favour of Ms. Donner, totalling $41,313. Mr. Donner argues the judge erred in directing what he characterizes as "almost total indemnity" of Ms. Donner's legal fees. He questions how the judge could have reached such an excessive award given the parties' settlement efforts had narrowed the issues for trial to only two—the classification and division of the loan account and spousal support. Mr. Donner argues it is significant that Ms. Donner agreed that if her argument on the loan was accepted, she would not pursue her claim for spousal support. Mr. Donner says this means he was the successful party on the spousal support issue, and Ms. Donner was the successful party on the loan issue, representing overall divided success as between the two parties.

[59] Ms. Donner disputes the suggestion the costs award represents close to total indemnity to her, and points the significance of her costs submission to the judge, which revealed Ms. Donner had made a pre-trial offer to settle in which Mr. Donner would have fared better than he did in the judge's trial decision.

[60] Costs are a matter in the discretion of the judge. This Court will not interfere with that discretion "… unless wrong principles of law have been applied,

or the decision is so clearly wrong as to amount to a manifest injustice …": *Darlington v. Moore*, 2017 NSCA 67 at para. 100. (See also *MacVicar Estate v. MacDonald*, 2019 NSCA 90 at para. 22).

[61] The record reflects the judge considered the provisions of Rule 77, and the associated tariff. She also articulated several caselaw principles that informed the matter before her.

[62] It is not appropriate for this panel to, in effect, substitute its own decision on costs simply because we might take a different view on quantum. Whether we would have or not is immaterial. Absent error by the judge, of which I discern none, there is no basis upon which to interfere with her exercise of discretion.

Conclusion

[63] There was no jurisdiction under the *Divorce Act*, *supra*, or the *Matrimonial Property Act*, *supra*, for the judge to determine a variation of the CRO was required. As to the use of the slip rule, the judge properly concluded it was not applicable in the circumstances put before her. Similarly, the judge was not prepared to invoke her common law authority to alter the CRO given her conclusions about credibility, which acted as the lynch pin of her decision. The record does not reveal any errors committed by the judge in that respect, nor in exercising her discretion to award trial costs.

[64] I would dismiss the appeal and award costs of $4,000 in favour of Ms. Donner.

Beaton J.A.

Concurred in:

Van den Eynden J.A.

Scanlan J.A.