

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Side

Cle/gen/01820/2009

SCOTIABANK (BAHAMAS) LIMITED

Plaintiff

AND

RICARDO N. GIBSON

1st Defendant

AND

BEVERLEY B. GIBSON

2nd Defendant

Before: The Honourable Mr. Justice Gregory Hilton

**Appearances: Michaella Barnett - Ellis for the Plaintiff
Kenneth Wallace Whitfield for the Defendant**

**Hearing Date: 5th November 2015; 3rd December 2015,
23rd February 2016 and 16th June 2016**

RULING

1. The Plaintiff filed a summons on 5th March 2015 applying to the court to correct what it says is a clerical mistake in the Order dated 17th May 2010 granted by The Hon. Mr. Justice Bernard Turner.
2. The Plaintiff's Summons is supported by the Affidavit of Allan Butler filed 1st April 2015 and the Affidavit of Donald Saunders filed 2nd February 2016.
3. The Defendants have objected to the application of the Plaintiff and has filed an Affidavit dated 2nd November 2015.
4. The Plaintiff's summons is made in pursuance of Order 20 rule 10 which provides:

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

FACTS

5. The Plaintiff, as mortgagee, entered into a mortgage arrangement with the Defendant's, as mortgagors on 15th February A.D. 2005.
6. The Defendants subsequently fell into repayment arrears and on 18th November 2009 the Plaintiff filed an Originating Summons which claimed the following:
 - (1) Payment of all monies due and owing to the Plaintiff by the Defendants under the said Mortgage.
 - (2) Delivery by the Defendants of possession to Scotiabank (Bahamas) limited of the property situate at Lot No. 17 in a subdivision called and known as “Westridge Estates First

Addition” situate in the Western District of the Island of New Providence one of the Islands in the Commonwealth of The Bahamas, as mortgaged by the Defendants to the Plaintiff to secure the advances therein mentioned.

(3) Further and other relief; and

(4) Costs.

7. A Memorandum and Notice of Appearance was filed on 10th December 2009 on behalf of the Defendants by Munroe and Associates.
8. On 17th May 2010 the matter was heard before Turner, J. with Donald Saunders appearing for the Plaintiff but no appearance was made by the Defendants or their counsel even though they had appropriate notice of the hearing date.
9. At the conclusion of the hearing Turner, J.s notes states: “Ordered as Prayed”.
10. The Plaintiff’s counsel subsequently drew up an Order to be perfected by the Judge which was initialled by the Judge on 2nd June 2010 and filed in the Registry of the Supreme Court on 7th June 2010. The perfected order was in the following terms:

“IT IS HEREBY ORDERED:

1. That the Defendants do give and deliver – up to the plaintiff vacant possession of the property comprising in a Mortgage dated the 15th day February A.D., 2005 between Ricardo and Beverly Gibson and Scotiabank (Bahamas) Limited and now of record in the said Registry of Records in City of Nassau of the Island of New Providence in Volume

9156 pages 119 to 135 and known as Lot No. Seventeen (17) and situate in a Subdivision called and known as "Westridge Estate First Addition" in the Western District of the Island of New Providence one of Island in the Commonwealth of The Bahamas within forty-fifty (45) days of the date thereof.

2. **AND THAT** the costs of the action be and is hereby granted to the Plaintiff in any event to be taxed if not agreed.
11. The perfected Order was served on the Defendants on 19th July 2010, and on 27th January 2011 the property was advertised for sale with an Appraised value of \$953,000.00. (It should be noted here that in August 2009 counsel for the Plaintiff's had written a final demand letter to the Defendants indicating the intention of the Plaintiff's to sell the property for \$630,000.00; And that the total amount outstanding inclusive of interest and miscellaneous add on expenses was at the time \$571,586.09).
12. On 7th May 2013 the property was sold for the sum of \$500,000.00 and \$413,378.00 was applied to the Defendant's mortgage Loan.
13. By letter dated 31st January 2014 the Plaintiff's Attorneys wrote to the Defendants stating that the Defendants were still indebted to the Plaintiff under the Mortgage Loan and demanded payment of the Principal sum of \$57,230.62 together with Accrued Interest of \$252,358.86 and miscellaneous Add-On charges of \$43,434.39.
14. The Plaintiff subsequently filed the Summons dated 5th March 2015 seeking to have this court "correct" a clerical mistake in the Order perfected by Turner, J. on 2nd June 2010; and to have the corrected order include an Order for 'All monies due and owing to the plaintiff by the Defendants under the said Mortgage.'

15. Order 20 Rule 10 referred ante is commonly known as “The Slip Rule”. The rule speaks for itself and the only issue is whether it applies on the facts of this case.
16. I am of the view that Turner, J’s “Ordered as Prayed” can only properly and fairly be interpreted to mean “Ordered as Prayed in the originating Summons”. The subsequent Order which was drafted by counsel and initiated by the Judge omitted the 1st claim in the originating Summons and as such may be considered to be clerical mistake falling within the ambit of Order 20 rule 10.
17. The Court must also consider, however, whether it should exercise its discretion to correct the error or mistake.
18. In *Georgouras v. Bombardier Investments No. 2 Pty Ltd* (2013) NSWSC 1549 Stevenson J at paras: 10-13 alluded to what should be considered by the Court in determining whether to exercise its discretion as follows:
 - “10. In exercising its discretion the Court must give effect to the overriding purpose of the Civil Procedure Act 2005 and the Uniform Civil Procedure Rules, as set out in s 56 (1) of the Civil Procedure Act (see *Newmont* at [27]). It should also proceed on the basis that variation of an order of the Court after entry of Judgement is an exceptional course (see *Newmont* at [29]).
 11. In *Hanave Pty Ltd v LFOT Pty Ltd* [2004] FCAFC 180; (2004) 136 FCR 566, Wilcox and Allsop JJ held:

“The nature and extent of the desired variation of the judgement, the delay in bringing the variation forward,

the explanation going to the existence of the accidental slip or omission and for the delay are fundamental considerations... Once litigation is over people should generally consider themselves free from further agitation of an already quelled controversy. This is the policy of finality of litigation." (at [4]).

12. Also relevant to the exercise of discretion to cure a slip is the public interest in having the reasons of the Court, and the obvious intention of the Court, manifested in the orders made pursuant to those reasons.
13. Amendments made under the slip rule operate from the date of the original orders, so that the Court will not make an order for amendment where it would interfere with the rights of third parties or otherwise be inexpedient or inequitable: *Hatton v Harris* [1892] AC 547 at 558 per Lord Herschell and 560 per Lord Watson.
19. The Plaintiff's counsel has submitted that the correction of the mistake should be made to give effect to the intention of the court where an Order is drafted and perfected which did not specify the entire Order but only part of it.
20. The Defendants have submitted that the court should not order any correction because of the extensive delay in bringing the application (without explanation) and that to do so would cause prejudice to the Defendants.
21. I accept that the delay in bringing this application is inordinate and particularly so where the Plaintiffs have acted upon the Order of turner J, by taking possession of the property and selling the property.

22. It is apparent that, only after the sale of the property (below its appraised value) and, on recognising that the sale price did not cover the totality of the Defendant's debt the Plaintiff's sought to make this application.
23. The Plaintiff's must have been aware of the "mistake" in the order in July 2010 when they served it on the Defendants and took possession of the property on the basis of the Order.
24. The Defendants also submit that they are prejudiced by the delay as they have gone on with their lives for some 5 years under the belief that this matter was at the end.
25. The Plaintiffs have given no explanation for the delay and as was stated in the Hanave case ante "the explanation going to the existence of the slip or omission and for the delay are fundamental considerations".

DISPOSITION

26. While I find that the Order made by Turner J on 17th May 2010 contained a clerical mistake or omission which could be corrected pursuant to Order 20 Rule 10; I do not accept that I should exercise my discretion to order a correction due to the inordinate and unexplained delay in making the application which I find will cause prejudice to the Defendants if it is corrected which prejudice is outlined in paras: 17-21 of the Defendant's affidavit.
27. The Plaintiff's Summons is dismissed.

Dated this 27th December 2018.

The Hon. Justice Gregory Hilton

