SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL No. 4 OF 2007

BETWEEN:

SAINT CHRISTOPHER CLUB LTD.

Respondent/Appellant

and

[1] SAINT CHRISTOPHER CLUB CONDOMINIUMS
[2] BORIS JURISIC
[3] DR. DEBBAS AND DR. AZER
[4] JOHN C. LOWE
[5] ALEX CIAPUTA
[6] REGINALD WARD
[7] AURIELIA TRESTRAIL
[8] ALBERTO FRANCONERI
[9] ALGHANIM

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances on written submissions:

Mr. Glenford Hamilton for the Applicants/2nd to 9th Respondents
Mr. Sylvester Anthony for the Respondent/Appellant
Mr. Fitzroy Eddy for the 1st Respondent

2007: October 19;
2008: January 14, 15.

Civil Procedure – application to vary order under the slip rule or the inherent jurisdiction of the court – whether errors contained in the order were errors of substance or genuine slips – rule 42.10 of the Civil Procedure Rules 2000 (CPR 2000)

The respondents, the claimants in the substantive claim, stated in the claim that they are the owners of condominium property registered pursuant to the Condominium Act 1976. The appellant, the defendant in the claim, is the registered proprietor and developer of the condominium property. The respondents sought an order terminating the government of the property on the ground that they suffered loss and damage as a result of the appellant's mismanagement. The appellant did not file a defence and default judgment was entered against it. The respondents successfully applied for an injunction restraining the appellant from, among other things, entering upon the property. The appellant appealed against the order granting the injunction and applied for an order staying the operation of the injunction until the appeal had been determined. The High Court later discharged the injunction, which event rendered the application for stay redundant. The appellant accordingly withdrew the appeal and the stay application when the application for stay came up for hearing before a single judge of the Court of Appeal on 30th May 2007. The court however ordered costs to the appellant on the ground that the respondents had not complied with case management directions to file written submissions in preparation for the hearing of the stay application.

The applicants, the 2nd to 9th respondents, applied to the court to vary the order of 30th May, 2007 under rule 42.10 of the CPR 2000 (the slip rule) to reflect that contrary to what appeared in a citation to the order the 2nd to 9th respondents were not represented by the same firm of solicitors that represented the 1st respondent. The 2nd to 9th respondents also presented proof that showed that their solicitors had in fact filed submissions on their behalf, before the hearing on 30th May 2007, in compliance with the case management directions. They therefore also prayed that the relevant recital in the order be amended to reflect this, and, consequentially, that the order should also be amended to state that the costs order was not made against them. When the parties came to court on 14th January 2008, they informed the court that solicitors for the 1st respondent had also filed submissions in compliance with the case management directions.

Held, allowing the application, varying the order and awarding costs to the applicants:-

(1) After an order is perfected or an appeal against that order is filed, the slip rule may only be used to correct genuine clerical errors or accidental slips or omissions in the order.

McKnight v McKnight (1983) 44 WIR 349, Markos v Goodfellow No. 2 [2002] EWCA Civ 1542 and Smithkline Beecham Plc. v Apotex Europe Ltd. [2005] EWHC 1655 applied.

(2) Since the errors contained in the order of 30th May, 2007 were errors of substance rather than genuine slips the court cannot vary or amend that order under rule 42.10 of CPR 2000.

(3) However, the errors are so clear on the face of the order that the court will, in its inherent jurisdiction, amend the order in the interest of justice.

JUDGMENT

[1] RAWLINS, J.A.: After a hearing by teleconference on 30th May 2007, this Court issued an order in the following terms:

> "UPON READING the Notice of Application herein and the Directions issued on the 24th day of April, 2007 under Part 62.14 of the Civil Procedure Rules 2006 by Her Ladyship, the Hon. Ola Mae Edwards Justice of Appeal [Ag.].
> AND UPON NOTING that written submissions were filed by solicitors for the Appellant/Applicant on 22nd May 2007 in compliance with the Directions issued on 24th April 2007, but no submissions have been filed on behalf of the Respondents;
> AND UPON HEARING Mr. Anthony Sylvester, Counsel for the Appellant/Applicant and Mr. Fitzroy Eddy, counsel for the Respondents;
> IT IS ORDERED THAT:
>
> > The appeal is withdrawn and therefore dismissed and the application for stay of execution is accordingly dismissed with costs to the Appellant to be assessed, if not agreed."

[2] The 3rd recital of the order indicates that Mr. Hamilton, learned counsel for the 2nd to 9th respondents, was not present. After the order was brought to his attention,

he applied to vary the order on behalf of these respondents. The application stated as follows:

> "The applicants, Boris Jurisic, Drs. Ellie Debbas and Azer, John C Lowe, Alex Ciaputa, Reginald Ward, Auriela Trestrail and Katayba Alghanim all of Frigate Bay, St. Kitts hereby apply to the Court of Appeal pursuant to Parts 42.10 of the Civil Procedure Rules 2000 and/or the inherent jurisdiction of the Court for:
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> 1. An order correcting or modifying the order of His Lordship, the Hon. Hugh Rawlins, Justice of Appeal given via teleconference on the 30th day of May 2007 to reflect that submissions had in fact been filed on behalf of the respondents.
> 2. An order that the applicants were and had always been represented by Glenford Hamilton and not Fitzroy Eddy as is reflected in the order and that the representation in the said order that Fitzroy Eddy acted as Counsel for the Respondents is incorrect.
> 3. An order deleting that portion of the order which reads "with costs to the appellant to be assessed, if not agreed."

[3] The grounds of the application were stated as follows:

1. The applicants named in this application have interests which are separate and distinct from that of the 1st Respondent.

2. The applicants filed or caused to be filed an affidavit in opposition to the application and submissions within the time prescribed by an order of Her Ladyship, the Hon. Ola Mae Edwards, Justice of Appeal on 24th day of April 2007.

3. Both the affidavit in opposition and the submissions were served on the Appellant/Applicant within the time prescribed in the said order.

4. Arrangements were made with Counsel for the Applicants herein for his participation in the teleconference to deal with the Appellant's application.

5. Counsel for the above-named respondents/applicants was never permitted to participate in the schedule teleconference and there is no

indication from the order that the presiding judge knew or was made aware that Counsel for the Respondents/Applicants was required to participate or that it was brought to his attention that submissions were filed and served on the other side.

6. The Applicants' case was not properly put to or heard by the Court.

7. As a consequence decisions were taken and orders made to the detriment of the Applicants without representation and the Applicants are prejudiced thereby.

[4] A brief procedural history of the case should present a helpful background for the determination of this application.

Procedural history

[5] The substantive claim was filed on 29th November 2006 by Mr. Hamilton as solicitor for all of the present respondents, who were the claimants. The first claimant, who is the first respondent in the present proceeding, is a corporation created pursuant to the terms of the Condominium Act 1976 (hereinafter "the Act"). The corporation was established upon the registration of a declaration and description of a condominium property pursuant to the Act. The respondents asserted in the claim that they were the owners of the condominium property pursuant to the said Act. The appellant, who is the defendant in the substantive claim, was the declarant under the said Act and the registered proprietor and developer of the condominium property. The respondents asserted in the claim that the appellant so mismanaged the property that the unit owners suffered damage and loss as a result. They sought an order terminating the government of the property by the appellant pursuant to the provisions of the Act, and costs.

[6] The appellant did not file a defence. The respondents therefore applied to have default judgment entered against the appellant. This application was granted by a

High Court judge on 9th February 2007. That default judgment terminated the government of the condominium property by the appellant. The appellant was ordered to pay $1,230.00 costs and the parties were granted leave to file such applications as were necessary to ensure the smooth execution of the legal process in relation to the property.

[7] On 20th February 2007, the respondents applied for an injunction to restrain the appellant from entering upon the condominium property and erecting any structures upon it, and to restrain the appellant from alienating any part of the property. On 21st February 2007, the appellant applied for an order vacating the default judgment. A judge of the High Court heard both applications. On 27th February 2007, the judge granted the injunction against the appellant. The judge also dismissed the appellant's application to vacate the default judgment.

[8] On 23rd March 2007, the judge consolidated the substantive claim herein with another claim which the 1st respondent had instituted against the appellant in 2004. The judge stayed the consolidated matters.

[9] On 21st March 2007, the appellant appealed the order which the judge made on 27th February 2007. The details of the order appealed indicate that the appeal related only to that aspect of the order by which the judge granted the injunction against the appellant. It states:

> "2. Details of the Order Appealed:
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> a. The Defendant/Respondent Company, St. Christopher Club Limited, its officers or its agents or its servants or any of them or otherwise be restrained by injunction from coming onto the premises formerly the common property of St. Christopher Club Condominiums and now the property of the unit owners as tenants in common and building or erecting, or continuing to build or erect, modifying or dealing in any way with any structure or structures which prior to Friday 9th February, 2007 was deemed to be the common property of St. Christopher Club Condominiums.
> b. The Defendant/Respondent Company, St. Christopher Club Limited, its officers or its agents or its servants or any of them or

otherwise be restrained by injunction from selling, alienating, or in any way disposing or dealing with or in the property that is the former common property of the St. Christopher Club Condominiums.

c. The Applicant undertakes to pay any damages incurred by the Respondent arising from this order.
d. Costs of this application."

[10] On 12th April 2007, the appellant applied for an order staying the operation of the injunction pending the determination of the appeal. The grounds of the application stated that the injunction was made in terms which effectively made it a permanent injunction, which caused the appellant to encounter severe financial and other difficulties. According to the application, the injunction had halted further development of the condominium project for which the appellant had incurred very burdensome financial obligations, and, additionally, the interests of third parties, including financial institutions, as well as the interest of prospective unit owners were adversely affected by the injunction.

[11] On 20th April 2007, the judge discharged the injunction. That decision was not appealed. However, on 24th April 2007, solicitors for the 2nd to 9th respondents filed an application in the High Court, which prayed, *inter alia,* that the order by which the injunction was discharged be vacated. The application was made on the ground that the decision was made *per incuriam*. The judge dismissed the application and that decision was not appealed.

[12] Once the judge discharged the injunction, the subject matter of the appeal fell away because the injunction was the subject of the appeal. The consequence was that the application for a stay pending that appeal was rendered redundant. However, the fact that the judge discharged the injunction was not communicated to this court. When therefore the application for the stay that was filed on 12th April 2007 came before this court for case management on 24th April 2007, this court issued directions which required solicitors for the parties to file written submissions by 22nd May 2007 on which submissions the application was to be determined.

[13] When the application for stay was heard by this court by teleconference on 30th May 2007, Mr. Anthony, learned counsel for the appellant, drew the court's attention to that aspect of his written submissions which indicated that the application for stay was rendered moot because the injunction was discharged. He thereupon withdrew the appeal and the stay application. This court ordered costs to the appellant because of the view which the court took of what appeared to have been non-compliance by the respondents with the directions to file written submissions. Mr. Hamilton has now provided proof that he had in fact filed written submissions within the time required by the directions. The submissions were filed in the St. Kitts court office on 18th May 2007 and served on 22nd May 2007. They were not on the file which was before this court on 30th May 2007.

The application to vary the order

[14] Mr. Hamilton's application to vary the order of 30th May 2007 was heard by teleconference on 19th October 2007. Mr. Hamilton took particular issue with that aspect of the order that awarded costs to the appellant. He informed the court that his firm initially represented all of the claimants who are the respondents in the appeal proceedings. He further pointed out that Mr. Eddy became the legal practitioner only for the 1st respondent and that he (Mr. Hamilton) continued to represent all of the other respondents. Mr. Hamilton stated that the errors which he sought leave to rectify are those which referred to Mr. Eddy as Counsel for the respondents, as well as that aspect of the order which stated that "no submissions have been filed on behalf of the respondents". Mr. Hamilton insisted that this statement, coupled with the fact that he was not included in the teleconference meant that the court was unaware that he represented all except the 1st respondent. The result, he submitted, was that his clients were not heard, and, more critically, they could be adversely affected by the order that awarded costs to the appellant. Mr. Hamilton therefore prayed for the variation of the order to reflect that Mr. Eddy acted only for the 1st respondent and also to reflect that submissions were filed on behalf of the other respondents. He also prayed for a variation of the

costs order to reflect that it was not made against his clients.

[15] At the 19th October 2007 hearing I voiced reservations as to whether the variations which Mr. Hamilton sought could properly be made under rule 42.10 of CPR 2000 under which the application to vary was brought. This rule, which is usually referred to as "the slip rule" states:

> "The Court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order, from any accidental slip or omission."

[16] Mr. Hamilton insisted that the errors in the judgment, which he seeks to correct, arose from an accidental omission within the meaning of rule 42.10 of CPR 2000. This, he said, was particularly because by accident, this court did not recognize that submissions had been filed on behalf of the 2nd to 9th respondents, and, consequently in error, made the costs order in terms that could affect his clients.

[17] I reiterate that the costs order was made against the respondents because there were no submissions on the file that was before the court on their behalf at the time of the hearing on 30th May 2007. However, I questioned whether it could correctly be said that the cost order was a result of an accidental slip or omission, which could be remedied under the slip rule, or whether it was an error of substance, which may only be remedied on an appeal. I gave Mr. Hamilton time to provide authority that this court could amend the order under the slip rule.

[18] Mr. Hamilton submitted references to a number of cases including McKnight v McKnight[1] and Adam & Harvey Ltd. v International Maritime Supplies Co. Ltd. (Costs).[2] These are authorities which precede the civil procedure reform rules in England in 1999 and in the Eastern Caribbean in 2000. I shall therefore only put store in them to the extent that the principles which they state are similar to the statements that are made in cases determined on the new rules, in light of

[1] (1983) 44 WIR 349.
[2] [1967] 1 ALL ER 533.

the admonition of Lord Woolfe MR that the new rules should be construed by reference to their own terms and by reference to cases decided on them.

[19] It is noteworthy that the English CPR 40.12 is in similar terms to rule 42.10 of CPR 2000. CPR 40.12 states as follows:

> "40.12-(1) The Court may at any time correct an accidental slip or omission in a judgment or order. (2) A party may apply for a correction without notice."

[20] This rule does not state that the court may also correct "any error arising in a judgment or order" as rule 42.10 of CPR 2000 states. However, I do not think that these words add anything to permit the court to correct any error caused otherwise than by an accidental slip or omission. This is because they cannot be taken to empower a court to correct any error of substance in a judgment or order except on an appeal.

[21] Elucidating statements were made recently concerning the purview of English CPR 40.12 in leading civil practice texts. The Green Book 2005 states as follows:[3]

> "Only genuine slips or omissions in the wording of the sealed judgment or order made by accident may be corrected by this rule; for example, the misdescription of a party or the incorrect insertion of a date; any substantive mistake (such as a mistake of law by the judge) may only be corrected by way of appeal under CPR Pt 52 (but see CPR 40.3[1] where the order or judgment has not yet been sealed and the judge retains a power of review). The rule allows the court to amend the terms of a decision to give effect to its original intention but the rule does not enable the court to have second or additional thoughts: *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc* [2001] RPC 1."

[22] This statement is similar to the statements on the slip rule in McKnight v McKnight. According to those statements, a judge may review or vary a judgment or order before it is perfected or before an appeal is filed. An appeal terminates the jurisdiction of the court whose order or judgment is appealed even if the judgment or order has not been perfected. An amendment of an order or

[3] At page 774 of the 2005 Edition.

judgment under the slip rule may therefore only be done to correct clerical errors or accidental slips or omissions. That this is limited to genuine slips was confirmed in Markos v Goodfellow No. 2[4] and Smithkline Beecham Plc. v Apotex Europe Ltd.[5]

[23] It is not always easy, however, to determine what constitutes an accidental slip or omission as the present matter shows. Thus the commentary on the slip rule contained in the White Book 2007 states as follows:[6]

> "The so-called "slip rule" is one of the most widely known but misunderstood rules. The rule applies only to "an accidental slip or omission in a judgment or order". Essentially it is there to do no more than correct typographical errors (e.g. where the order says claimant when it means defendant; where it says 70 days instead of seven; where it says "January 2001" instead of "January 2002". Of course, such errors ought not to occur in important documents like a court order but they are regrettably common). … the rule is limited to genuine slips and cannot be used to correct an error of substance nor in an attempt to get the court to add to its original order (e.g. to add a money judgment where none was sought, and none was given at the trial). … The slip rule cannot be used to enable the court to have second thoughts or to add to its original order (see para.4.2.1 above). A judge does have the power to recall his order before it is issued but not afterwards. Once the order is drawn up, judicial mistakes have to be corrected by an appellate court. However, the court has an inherent jurisdiction to vary its own order to make the meaning and intention of the court clear and can use the slip rule to amend an order to give effect to the intention of the court. See *Bristol-Myers Squibb v Baker Norton Pharmaceuticals Inc* [2001] EWCA Civ 414; applied in *Foenander v Foenander* [2004] EWCA Civ 1675 (Wall L.J.) (correction of order referring to civil restraint order)."

[24] The recital to the May 2007 order shows, on the face of the order, that there was an error to the effect that Mr. Eddy was counsel for all of the respondents. In fact he was the legal practitioner on the record for the 1st respondent. That error might have arisen because Mr. Eddy and Mr. Anthony are the only practitioners involved in the 2004 claim, which was consolidated with the claim in the present

[4] [2002] EWCA Civ. 1542 (11th October 2002).
[5] [2005] EWHC 1655 (Ch.).
[6] At paragraph 40.12.1, page 1079.

proceedings. Apparently, this was the reason why, inadvertently, Mr. Hamilton was not informed of the hearing of 30th May 2007.

[25] In the second place, the costs order was made in favour of the appellant. It does not state against which respondents that order was made. This would be taken to mean that it was made against all of the respondents because the statement in the recital indicates that they were represented by Mr. Eddy. The costs order was made in favour of the appellant because this court saw no submissions on behalf of the respondents at the time when the order was made. It is now known that Mr. Hamilton filed submissions on behalf of the 2nd to 9th respondents in compliance with the directions of 24th April 2007. When counsel for the parties came to court on 14th January 2008, they also revealed that Mr. Eddy had also filed written submissions on behalf of the 1st respondent in compliance with the case management directions. Those submissions were not on the court's file when the order of 30th May 2007 was made.

[26] In effect, then, the face of the order of 30th May 2007 shows 2 errors. One error was that Mr. Eddy represented "the respondents" when he represented the 1st respondent only. The other error was that no submissions were filed on behalf of the respondents when Mr. Eddy and Mr. Hamilton filed the submissions in a timely manner in compliance with the case management directions of the court. In my view, these were not genuine slips in drawing up the order that permit this court to amend the errors under the slip rule. These were errors of fact and therefore errors of substance. The costs order was made in favour of the appellant because of a conscious determination by this court, on information mistakenly conveyed by the file, that the respondents had all failed to comply with the court's directions to file written submissions.

[27] Since the errors complained of are errors of substance the application cannot succeed under part 42.10 of CPR 2000. In that regard it would have been more appropriate to challenge the order by way of an appeal rather than on an

application to vary or amend the order under the slip rule. It also appears to me that inasmuch as the proceedings before this court on 30th May 2007 disposed of an appeal an application may have been made under rule 62.22 of CPR 2000 to set aside the order on the ground that the 2nd to 9th respondents, through no fault of their own, were not present or represented at the appeal hearing. In the premises, I have no choice but to dismiss the application to vary the order to the extent that it is prayed under rule 42.10 of CPR 2000.

Inherent jurisdiction

[28] It will be recalled that, in the alternative, Mr. Hamilton sought to invoke the inherent jurisdiction of the court.[7] To this extent, I am minded to note a statement that was made by E. Patrick Hartt in a Paper entitled, "Inherent Powers of the Court".[8] The statement was made under the rubric, "Orders and Judgments." It stated as follows:[9]

> "As part of its inherent powers, the Superior Court has the power to control its own orders. Its order is never a nullity; but however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. Quite independently of any Rule, the Supreme Court of Ontario has an inherent jurisdiction to alter its formal judgments to make them conform to the true meaning of the judgment given by the Court. Since an order of a Superior Court Judge is an order of the Court, it would be a shocking thing if the Court was to be powerless to rectify the error of its own minister. It is also clear that, in order to avoid a grave injustice, a Superior Court has inherent power to set aside any of its judgments, even a final one, in a proper case.[10]" (Emphasis added).

[29] A proper case in which a court would set aside its own order or judgment would be an extremely rare thing. However, I think that the present case presents such a rare occasion because the errors that are complained of are so clear on the face of the order of 30th May 2007 that I could not permit it to stand. This is in the interest of justice. Accordingly, under the inherent jurisdiction of the court I shall

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[7] Refer to the prayer as reproduced at paragraph 2 of this judgment.
[8] The Paper was presented at a Canadian Judicial Conference in Halifax, Nova Scotia in August 1972.
[9] At pages 4 and 5.
[10] See Perfaniuk v Ladobruk and Canadian Home Assurance Co. (1961) 26 D.L.R. (2d) 122.

amend the relevant recitals in the order to reflect that Mr. Eddy represented the 1st respondent and not "the respondents"; that written submissions were filed and served by solicitors for the respondents in compliance with the directions of the court. Consequentially, I shall delete the costs order. In fact, at the hearing on 14th January 2008, learned counsel for the parties agreed with me that the parties should meet their own costs for the matter that was heard on 30th May 2007 and also on the present application.

[30] In summary then, the order that I made herein on 30th May 2007 is hereby amended under the inherent jurisdiction of the court as follows:

1. The second recital of the order of 30th May 2007 is hereby amended by deleting the word "Respondents" at the end of the recital and replacing it with the words "1st Respondent".

2. The fourth recital of the said order is hereby amended by deleting the word "Respondents" at the end of the recital and replacing it with the words "1st Respondent".

3. The order itself is amended by deleting the words on the last line, to wit, "costs to the appellant to be assessed, if not agreed" and inserting instead the words "no order as to costs".

By consent, the parties shall bear their own costs on this application.

Hugh A. Rawlins
Justice of Appeal