

IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 91
WRC 6/13

IN THE MATTER OF an application for rehearing and/or to vary
or rescind order

AND IN THE MATTER OF an application to correct a judgment

BETWEEN LYNNE FRANCES SNOWDON
Plaintiff

AND RADIO NEW ZEALAND LIMITED
Defendant

Hearing: (on the papers - memoranda dated 21 and 22 May 2013)

Counsel: Mr R L Fletcher, counsel for the plaintiff
Mr M Quigg, counsel for the defendant

Judgment: 27 May 2013

JUDGMENT OF JUDGE A D FORD

The issue

[1] The defendant has respectfully sought clarification “as regards the wording and intent of order 4(c)” of my interlocutory judgment¹ dated 20 May 2013 dealing with the issue of security for costs. I acknowledge at the outset that the wording in question is not as clear as it could have been. I would have issued an immediate correction but the plaintiff has taken issue with the form of correction suggested by the defendant and it is, therefore, necessary to deal with the matter on a formal basis.

¹ [2013] NZEmpC 84.

[2] Order 4(c) was part of the orders² giving effect to the judgment itself. Order 3 provided that security for costs in the sum of \$240,000 was to be provided on or before 2 September 2013. Order 4 then provided:

4. For the avoidance of doubt, the security provided must be one or other of the following:
 - a) by payment into Court in the sum of \$240,000;
 - b) by a bond from a bank in the sum of \$240,000;
 - c) by a registerable second mortgage over the Oriental Bay properties that would be subject only to a first mortgage not exceeding more than \$1.35 million.

[3] In his memorandum, counsel for the defendant, Mr Quigg made two points about the mortgage proposal referred to in subparagraph (c). First, he correctly pointed out that the reference should have been to “mortgages” rather than “mortgage” because there are two properties (two units in the same building but with separate titles) and the TSB Bank has a first mortgage over each; secondly, in addition to the table loan of approximately \$1.35 million, the first mortgages also secure a “revolving credit facility”. The current combined balance under the table loan amounts to \$1,343,365.34 and the current balance under the revolving credit facility is \$350,004.³

[4] To clarify the position, Mr Quigg suggested that the wording of 4(c) be amended to read:

- c) by registerable second mortgages over the Oriental Bay properties that would be subject only to first mortgages having a combined priority of no more than \$1.35 million.

[5] In the plaintiff’s memorandum in response, counsel stated:

2. The plaintiff is aware that TSB Bank is unlikely to agree to reduce the combined priority of its Oriental Bay mortgages simply to the \$1.35 million table mortgage advance. The Bank will want to ensure that in the event of mortgagee sale it will recover interest arrears and the costs of sale. It will require that these be included in its priority. This is not unreasonable. A priority so framed would not significantly diminish the substantial headroom that would remain for a second mortgage securing the Defendant’s costs.

² At [39].

³ At [23].

3. The Plaintiff consents to amendment of order 4(c) in the following terms:
 - (c) by registerable second mortgages over the Oriental Bay properties that would be subject only to first mortgages having a combined priority of no more than \$1.35 million plus one year's interest plus costs.

The law

[6] The principles applicable to the exercise of this Court's discretion to recall a judgment or to correct any slips or omissions were fully discussed in *Gilbert v Attorney-General*.⁴ Those principles were reaffirmed in the more recent decision of *Goodfellow v Building Connexion Ltd t/a ITM Building Centre*.⁵

[7] Regulation 6 of the Employment Court Regulations 2000 permits the Court to do things by analogy with the High Court Rules. Rule 11.10 of the High Court Rules relevantly states:

11.10 Correction of accidental slip or omission

- (1) A judgment or order may be corrected by the court or the Registrar who made it, if it –
 - (a) contains a clerical mistake or an error arising from an accidental slip or omission, whether or not made by an officer of the court; or
 - (b) is drawn up so that it does not express what was decided and intended. ...

[8] As the commentaries to the rule make clear, the court's power is discretionary and is to be sparingly exercised. While the power of correction is not available for the purpose of revisiting and exercising afresh a discretion originally considered in relation to a particular issue, the authorities appear to recognise that the "slip rule", as it is sometimes referred to, can be invoked to correct an ambiguity. Thus, in reference to the "slip rule" power contained in RSC Ord 20, r 11, Sir John Donaldson MR, delivering the judgment of the Court of Appeal of England and Wales in *R v Cripps, ex parte Muldoon*⁶ stated:

For our part we would accept that, if a court has reached a decision which is ambiguously expressed either in the reasoned judgment or in the formal

⁴ [2006] ERNZ 1.

⁵ [2011] NZEmpC 58.

⁶ [1984] 2 All ER 705 (EWCA) at 711.

order giving effect to the decision, the ambiguity of expression can be removed in the exercise of "slip rule" powers. But the exercise must be limited to correcting ambiguity in expression of an ambiguous decision. An ambiguous decision is no decision at all and any attempt to turn it into an unambiguous decision is at least a variation and probably a new decision. It would not, therefore, be necessarily fatal to counsel's submission on behalf of Mr Slade that he was seeking a clarification of the Commissioner's order, provided always that the Commissioner's decision had been unambiguous and the ambiguity lay in the order giving effect to that decision.

Discussion

[9] There is no doubt in my mind that the amendment to the order proposed by Mr Quigg properly encapsulates what the Court intended and what was actually decided in the interlocutory judgment. In [14] of the judgment, I record that on 1 May 2013 the plaintiff proposed security for costs in the form of a second mortgage over the Oriental Bay properties. That proposal was made on the basis of a combined rateable value of the properties of \$1.9 million and admitted borrowings from the TSB Bank under the first mortgages of \$1.35 million.

[10] What transpired subsequent to 1 May 2013 was the disclosure by the plaintiff that the first mortgages also secured a revolving credit facility of \$350,000. Upon learning about the revolving credit facility, Mr Quigg made it clear that unless the proposed second mortgages were to have priority over the credit facility then the security offered would not be acceptable. The Court concurred. That was clearly explained in the judgment between [24] and [33] and that is the position which the Court intended to convey under order 4(c). To the extent, therefore, that there is ambiguity in 4(c), as presently worded, the Court is prepared to clarify the position by adopting the wording suggested by Mr Quigg.

[11] The Court notes that the plaintiff's objection centres on the likely desire of the TSB Bank to have priority not only in respect of the \$1.35 million secured under the first mortgages but also in respect of one year's interest plus costs. While the bank's position is understandable, it was a matter taken into account and specifically rejected in the interlocutory judgment. The Court's concern was to ensure that it was satisfied with the form of security for costs to be provided by the plaintiff and the whole thrust of the judgment was that the second mortgages offered over the Oriental Bay properties would not be satisfactory security unless they had priority

over all other advances over and above the table loan under the first mortgages of \$1.35 million.

[12] For these reasons, I now make the following order:

1. Order 4(c) at [39] of the interlocutory judgment of 20 May 2013 is vacated and substituted with the following:
 - c) by registerable second mortgages over the Oriental Bay properties that would be subject only to first mortgages having a combined priority of no more than \$1.35 million.

[13] Costs are reserved.



A D Ford

Judge

Judgment signed at 9.30 am on 27 May 2013