THE HIGH COURT

[2016 No. 357 Sp.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

GERALD KELLEHER AND ANN KELLEHER

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 1st day of February, 2019

1. The plaintiff's claim on these proceedings is for a declaration that a judgment mortgage which it registered on 30th June, 2014 stands well charged on the defendants' interest in the lands comprised in two folios; and for an order for sale in default of payment.

2. In July, 2013 the defendants borrowed €25,000 from the plaintiff which was to have been repaid, with interest, by a single payment on 7th July, 2004. The repayment date was extended to December, 2004 but the money was not repaid.

3. In 2009 the plaintiff instituted proceedings in the Circuit Court in Cork against the defendants. The Circuit Court judge gave judgment for the amount claimed and costs. The defendants appealed. The appeal was heard by the High Court on Circuit (McGovern J.) in Cork on 1st and 2nd February, 2012 and on 3rd February, 2012 judgment was pronounced in favour of the plaintiff for €40,000. McGovern J. set aside the order for costs which had been made in favour of the plaintiff in the Circuit Court and made no order as to the costs of the appeal. McGovern J. put a stay on the order for eighteen months to the 5th August, 2013.

4. The defendants did not pay anything on foot of the judgment.

5. The plaintiff established that the defendants were jointly registered as the owners of the lands in folio 15720F Co. Kilkenny and that the second defendant was registered as the owner of the lands in folio 8244, Co. Kilkenny.

6. In June, 2014 the plaintiff applied to the Property Registration Authority to have the judgment registered against the defendants' interest in each of the folios. The application was in the form prescribed by the Land Registry Rules. The affidavit of Sarah McLaughlin, secretary of the plaintiff, was confirmed by the certificate of a nominated signatory on behalf of the Cork County Registrar that the judgment had been obtained in an action in the High Court on Circuit.

7. These proceedings were commenced by special summons issued on 30th August, 2016 and were grounded on a short affidavit of Ian Smith filed on 9th January, 2017.

8. In a replying affidavit of the second defendant filed on 14th June, 2017 the defendants protested at the plaintiff's delay in filing and serving the grounding affidavit and sought to defend the proceedings on the number of grounds.

9. The loan, described by the second plaintiff as the loan "*which gave rise to the judgment of 3rd February, 2012*", was said to have been made to provide funding for legal costs and disbursements in litigation arising from the defective construction of the defendants' family home. The defendants sought to make the case that the plaintiff's recourse on foot of the loan was limited to the expected damages from the litigation and/or that the loan agreement was "*illegal under the rules of champerty and maintenance in Irish Law and voids the judgment which the plaintiff's seek to have enforced".*

10. It was also alleged that the loan agreement was in some unspecified way contrary to the Criminal Justice (Theft and Fraud) Offences Act, 2001.

11. The second defendant's affidavit alleged that the proceedings in which "*the judgment herein arises*" contained a counterclaim which was not heard. It was suggested that the judgment in favour of the plaintiff did not preclude the hearing of the defendants' counterclaim which, it was said "*would have exposed the offences under the Criminal Justice Act, 2001".*

12. It was asserted that the court in giving the judgment it gave on 3rd February, 2012 *"erred in law and in fact and acted ultra vires when it enforced the funding agreement."*

13. On behalf of the plaintiff, a supplemental affidavit of Ian Smith was filed on 8th November, 2017. The plaintiff's position was that the defendants were bound by the principles of *res judicata* and the rule in *Henderson v. Henderson*. Any argument based on maintenance and champtery, it was said, should have been raised in the debt proceedings and, in any event, the loan was not, as the defendants alleged, a third party professional funding agreement.

14. I agree that the replying affidavit of the second defendant does not disclose a defence but not for the reasons advanced by the bank, rather because the defendants are seeking to launch an oblique attack on a High Court order. I accept the submission on behalf of the bank that the defendants are not, in later proceedings, entitled to re-litigate issues already determined or raise issues which could have been raised in earlier proceedings. More fundamentally, however, the defendants are not entitled to attempt to reopen a final judgment, save in truly exceptionally circumstances which do not arise in this case.

15. In a further affidavit of the second defendant filed on 9th March, 2018, and in argument on the hearing of the summons before me, the defendants sought to make the same arguments as were made in the second defendant's replying affidavit and a number of technical points.

16. It was said that the special indorsement of claim on the special summons fails to comply with O. 4, r. 4 of the Rules of the Superior Courts, which requires that it should state: *"specifically with all necessary particulars the relief claimed and the grounds thereof"*. It is said that the indorsement of claim does not disclose the jurisdiction being invoked. I cannot accept this argument. While the special indorsement of claim does not spell out that one of the folios is jointly owned and the other by the second defendant only, it is, in my view, sufficiently clear. The plaintiff claims to have recovered a judgment for a specified sum on a specified date which it claims to have registered, on a specific date, as a judgment mortgage over two specified folios. The plaintiff

claims to have the judgment mortgage well charged and to have the lands sold if the money is not paid. The defendants are and were in no doubt as to the nature of the relief claimed or the basis on which it was claimed.

17. It is suggested that the indorsement of claim does not give all necessary particulars and disclose the full facts. Specifically, it is said that the property in folio 15720F Co. Kilkenny, on which there is a large two storey dwelling house, is falsely described as "*land*". I reject that argument. The house is built on land and it is the land that is comprised in the folio. The use of the word "*land*" does not mis-describe the property. Still less does it amount to a deliberate concealment of the existence of the house.

18. It is suggested that the judgment mortgage has been registered on the defendants' properties in the absence of an essential proof, namely a perfected and certified copy of the judgment and that the copy order exhibited in the grounding affidavit filed on behalf of the plaintiff is *"a false instrument".*

19. I do not believe that this argument has been made out. It is not an essential proof that an application for registration of a judgment mortgage be accompanied by a perfected and certified copy of the judgment. Rather, what is required by rule 110 of the Land Registry Rules is that the prescribed form, LR Form 60, should include a certificate in the prescribed form, signed by the proper officer of the court in which the judgment was obtained.

20. The application lodged by the plaintiff was in the correct form and carried a certificate in the correct form, signed by a nominated signatory on behalf of the County Registrar for Cork.

21. By O. 61, r. 11 of the Rules of the Superior Courts every judgment or order of the High Court on Circuit is to be drawn up by the County Registrar. Accordingly, the County Registrar is the proper officer of the court in which the judgment was obtained.

22. This explains why there is no record of the judgment in the Central Office of the High Court and why the order of the High Court on Circuit carries the same record number as was assigned to the Civil Bill.

23. By O. 4 of the Circuit Court Rules (as substituted by the Circuit Court Rules (Court Seal) 2006 (S.I. No. 409)) every document requiring authentication other than a document required to be authenticated under the seal of the court, may be authenticated by the signature of a person nominated for that purpose by the County Registrar. Accordingly, the certificate on the plaintiff's form LR Form 60 was a correct certificate and it was signed by the proper officer of the court in which the judgment was obtained.

24. The defendants rely on an alleged failure on the part of the plaintiff to comply with the requirements of O. 41, r. 6 of the Rules of the Superior Courts. That rule requires that particulars of every judgment or order of the High Court shall be entered in proper books to be kept for that purpose and the judgment or order shall be filed in the Central Office. That reliance is misplaced. As I have said, the relevant rule is O. 61, r. 11 which requires that every judgment or order of the High Court on Circuit shall be drawn up and signed by the Country Registrar, and every judgment or order of the High Court sitting in Dublin shall be drawn up and signed by the registrar of such court, who shall transmit a copy thereof to the County Registrar of the appropriate county. The rules do not require that particulars of judgments or orders of the High Court on Circuit should be entered in the Central Office, or that or copies of judgments or orders drawn and signed up by County Registrars be forwarded to the Central Office.

25. The defendants object that the order drawn up in this case recites that what came before the High Court on Circuit was an appeal by the plaintiffs. This, it seems to me, was an obvious mistake which mislead no one and does not invalidate the order.

26. Similarly, the order drawn up was not dated as it should have been. This did not invalidate the order either.

27. Mr. Ian Smith, in his affidavit sworn on 4th January, 2017 grounding the special summons, exhibited a copy of what was said to be the judgment obtained by the plaintiff. This bears the signature of the County Registrar but is not marked as having been sealed.

28. In an affidavit sworn on 9th March, 2018 the second defendant suggested that this copy order was "*a false instrument*" which had been falsified by the addition of para. 4 which, as she said could be verified by the transcript of the DAR, did not form part of the order of the court.

29. Paragraph 4 of the version of the order exhibited by Mr. Smith and marked "*B*" reads: *"4. That Mr. Andrew Dillon Solicitor costs for 2 days attendance in the High Court form part of the costs of this action."* The second defendant, in her affidavit sworn on 9th March, 2018 exhibited marked "*A*" what she referred to as *"another perfected order of the same judgment*". That version carries the signature of the County Registrar and is marked as having been sealed. Paragraph 4 of Mrs. Kelleher's exhibit *"A"* reads*: "4. That Mr. Andrew Dillon Solicitor do recover from the defendants his costs for 2 days attendance in the High Court said costs to be taxed in default of agreement."*

30. Mr. Dillon was the defendants' solicitor at the time they borrowed the €25,000 from the plaintiff. He had given evidence at the hearing of the defendants' appeal before McGovern J. There was and is no explanation as to how this paragraph 4 came to be included in the order which was drawn up. It was unquestionably not part of the judgment pronounced by the judge. The parties were agreed on this and (as Mrs. Kelleher said it would) the transcript of the DAR confirmed it.

31. In her affidavit filed on 9th March, 2018 the second defendant suggested that both orders had been falsified.

32. By notice of motion dated 22nd May, 2018 the defendants applied for an order pursuant to O. 19, r. 28 and/or the inherent jurisdiction of the court, dismissing the proceedings. In an affidavit sworn on 21st May, 2018 in support of that application (and which the defendants also relied upon in answer to the substantive case), the defendants sought to make the case that the copy order exhibited by Mr. Smith was "*manifestly not a perfected order*" but rather was a copy of a draft order: one, it was said, of a few drafts which had been circulated. The second defendant then exhibited a copy of the order previously exhibited by her and marked *"A"* and a further copy order signed by an officer nominated by the County Registrar in which (immediately after para. 3, which reads that there be and is no order as to costs of the appeal in the High Court) says: *"4. That Mr. Andrew Dillon solicitor costs for 2 days attendance in the High Court form part of the costs of this action".*

33. In reply to that affidavit, Mr. Paul Lynch, solicitor, swore a further affidavit on 29th May, 2018 in which deposed that when, in 2014, the bank was trying to register a judgment mortgage, his firm had applied to the Circuit Court office for a copy order and was provided with the order exhibited by Mr. Smith marked "*B*". Mr Lynch noted the difference between that and the version exhibited by the second defendant but pointed out that para. 1 on which the bank relied, was precisely the same in every version. Mr. Lynch deposed that he had made further enquiry with the Circuit Court office and he then exhibited marked *"PL1"* what had come back. What Mr. Lynch had obtained from the Circuit Court office was an order in terms identical to Mrs. Kelleher's exhibit *"A".* It carried the

signature (in manuscript) of the County Registrar and showed that it had been sealed. That version also bore the certificate dated 19th April, 2018 of a nominated signatory on behalf of the County Registrar, that it was a true copy of the original.

34. The affidavit of Mr. Lynch prompted a further affidavit of the second defendant, sworn on 15th June, 2018. The second defendant referred to all of the versions of the Circuit Court order as drafts. In this affidavit it emerged that the defendants were alive to the error in the orders as long ago as 9th March, 2012.

35. Shortly after McGovern J. made his order on 3rd February, 2012 the defendants' then solicitors took it up and sent a copy to the defendants. That copy carried the signature of the County Registrar and showed that the seal of the court had been applied to it. Paragraph 4, read: *"4. That Mr. Andrew Dillion Solicitor do recover from defendants his costs for 2 days attendance in the High Court to be taxed in default of agreement".* In a joint letter to their solicitors dated 13th March, 2012 the defendant pointed out that McGovern J. had not made such an order and suggested that the solicitors get it corrected. They wrote: "*The matter of Mr. Dillon's expenses is closed and we have no intention of affording him an opportunity to reopen it by way of a motion to the court."*

36. On 15th March, 2012 the defendants' solicitors wrote to them that they had written to the County Registrar and that in the absence of a satisfactory response, would apply to the High Court to "*speak to the order*". In a manuscript addendum to the letter the solicitor wrote "*since spoke to Co. Reg.; mistake accepted & new order to issue*". Under cover of a letter of 21st March, 2012 the defendants' solicitors sent them a "*copy amended order received from the County Registrar properly dealing with the position concerning Mr. Dillon"*. This version was signed by a nominated officer and was in the same terms as Mr. Smith's exhibit "*B*". Paragraph 4 read: "*4. That Mr. Andrew Dillon Solicitor costs for 2 days attendance in the High Court form part of the costs of this action*". The defendants replied on 27th March, 2012 when they said that they were happy that the County Registrar had issued a fresh order "*wherein it is no longer wrongly stated that Mr. Dillon's witness fees are to be recovered from us … It is for the plaintiffs to question it now if they see fit. We expect that they have already indicated they won't".*

37. It is unsatisfactory that there should be different versions of a court order in circulation. The defendants suggest that the different versions can be accounted for by O. 115, r. 3 of the Rules of the Superior Courts which allows a registrar to submit a draft of any order proposed to be issued to the parties to the proceedings and invite comment on the form of order before it is issued. I do not accept that that is what happened in this case. In the first place, the registrar referred to in O. 115, r. 3 is a High Court registrar. No less to the point, the rule relied upon by the defendants was first introduced on 9th October, 2014 by S.I. No. 485 of 2014, long after the different versions of the order in this case.

38. The defendants referred me to the decision of the High Court in England in *Vringo Infrastructure Inc. v ZTE (UK) Ltd*. [2015] EWHC 214 (Pat) in which Birss J. considered the power of a judge to reverse his or her decision before the order was drawn up and sealed and the decision, and the decision of McCracken J. in *Concorde Engineering Co. Ltd. V. Bus Átha Cliath* [1995] 3 I.R. 212 which deals with the jurisdiction, or rather the absence of jurisdiction, to re-open an issue after a final order has been made. Neither is authority for the proposition that the order takes effect from the date of perfection.

39. It seems to me that what I have in this case are two versions of an order. Both show, correctly, the McGovern J. gave judgment to the plaintiff for €40,000, without costs in either court. Both versions incorrectly refer to Mr. Dillon's costs or expenses, in respect of which the parties are agreed and the demonstrable objective fact is, that no order was made.

40. In my view, the order of the High Court on Circuit is that first drawn up: which suggests that Mr. Andrew Dillon solicitor do recover from the defendants his costs for two days' attendance in the High Court, said costs to be taxed in default of agreement. That paragraph was not part of the order made and the written order should have been corrected, if not by consent then on an application to McGovern J. to speak to the minutes of the order. The correction that ought to have been made was to remove para. 4 entirely. The correction that was purportedly made effectively nullified the provision for Mr. Dillon's costs but the paragraph should have been deleted in its entirety. Mrs. Kelleher's exhibit "*A*" (which is the first version that emerged from the Circuit Court office) and Mr. Lynch's exhibit "*PL1*" (which is the last) are in identical terms. For good measure, the form exhibited by Mr. Lynch is certified to be a true copy of the original.

41. The inclusion in the order of any para. 4 was a mistake but that mistake does not invalidate the order. Still less does it mean that the plaintiff did not recover a judgment in the sum of €38,000 with a stay for a period of eighteen months until 5th August, 2013.

42. There is no question that the order now sought by the plaintiff will give rise to any entitlement on the part of Mr. Dillon to recover any money from the defendants.

43. The defendants' argument that all legal entitlements in respect of the order take effect from the date of perfection of the order is misconceived. The order takes effect on and from the date it is pronounced. The date of perfection is relevant to the calculation of the time for an appeal, which does not arise in this case.

44. The defendants further argue that interest should not apply to the judgment debt during the period of the stay. That argument, also, is misconceived. Interest accrued on the amount of the judgment from the time it was made and was not suspended or postponed while execution was stayed.

45. The defendants point to a discrepancy between the averment of Mr. Smith at para. 7 of the grounding affidavit that the total due on foot of the judgment as of 15th August, 2016 was €50,920.96 and a letter of demand written by the plaintiff's solicitors on 15th August, 2016 which asserted that the sum of €50,920.96 was the amount due as of 6th May, 2016. The defendants point to a further mistake in the grounding affidavit where Mr. Smith suggests that the judgment was for €38,000 together with interest "*plus costs*". Deponents and the solicitors who draft affidavits for them should take better care, but again the mistakes are obvious and the declaration claimed is for €38,000 and interest from the date of the judgment rather than any particular amount for interest.

46. I am satisfied that the plaintiff has made out its case that on 3rd February, 2012 it recovered judgment against the defendants for 40,000 and has registered that judgment as a judgment mortgage against the defendants' interests in the lands comprised in the two folios.

47. The summons claims an order for the sale of both properties. There is no evidence of the value of the properties but counsel for the plaintiff indicated that he would be content with an order for the sale of one of them. The copy folios exhibited describe the lands in Folio 8244 by reference to a Land Registry map rather than by area. The folio shows a prior charge to ACC Bank for present and future advances, registered on 9th July, 1997 and stamped to cover IR£73,000. That is the folio in Mrs. Kelleher's sole name. The lands in folio 15720F comprise 1.697 hectares. The defendants were registered as joint owners of those lands on 20th September, 1995 and there is no prior charge on the folio. It is on that property that Mr. and Mrs. Kelleher built their family home in 1996 and

1997 but I am told that the house in uninhabitable and that they have not lived in it for many years. In the course of the hearing I broached the subject with Mrs. Kelleher as to which of the properties, if it should come to it, she least wanted to see sold but she was not then in a position to contemplate the sale of either of them. I will allow the defendants a further opportunity to suggest (strictly without prejudice to any appeal they may make against this judgment) which of the properties should be sold. If they cannot choose, because the judgment debt is a joint and several debt, I will order the sale of the property that is jointly owned.

48. There will be:-

(a) A declaration that the judgment mortgage registered on 30th June, 2014 stands well charged on the defendants' interest in the lands comprised in Folio 15720F, County Kilkenny and on the second defendant's interest in the lands comprised in Folio 8244, County Kilkenny;

(b) A declaration that there is due and owing by the defendants to the plaintiff on foot of the said judgment mortgage the sum of €40,000, together with interest at the rate from time to time specified in the Debtors Ireland Act, 1840;

(c) An order that in default of payment within three months one of the properties be sold;

(d) An order for the usual account and enquiries;

(e) Liberty to apply.

49. I anticipate that the defendants will wish to appeal. If they do, I will be receptive to an application for a stay on the order for sale, but I will take a great deal of convincing that the accounts and enquiries should not proceed pending the hearing of any appeal.

50. These proceedings had a long and tortuous journey through the system. Although I have no evidence of the value or rateable valuation of the properties, I wonder whether the proceedings might have been brought in the Circuit Court. I will hear the parties on the question of costs.