

THE HIGH COURT

RECORD NO. 2010/ 985 SP

BETWEEN

DANSKE BANK AS TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

SEAMUS McLAUGHLIN AND ANNE McLAUGHLIN

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered on the 7th day of November 2012

The plaintiff in these proceedings is seeking to have a judgment mortgage declared well charged in respect of "ALL THAT AND THOSE that part of the townland on Ballymunterhiggin situate in the parish of Innismacsaint Barony of Tyrhugh in the County of Donegal and more particularly delineated and described on the map attached to the Deed of Conveyance made on the 20th day of January, 2002, and made between Bernadette Laughlin of the one part and Anne McLaughlin of the other part".

The special summons herein was issued on the 16th December, 2010, and was grounded on an affidavit of Brian McGuinness. It was recited in the Special Endorsement of Claim that "on or about the 3rd November, 2009, the plaintiff in compliance with the requirements of the Land and Conveyancing Reform Act 2009, duly registered the said judgment and the judgment mortgage on the first named defendant's interest in the lands and premises...". Mr. McGuinness in his grounding affidavit averred at para. 5 as follows:-

"I say that in or about the 3rd November, 2009, the plaintiff in compliance with the requirements of the Land and Conveyancing Reform Act 2009 duly registered the said judgment as a judgment mortgage on the defendants interests in the lands and premises as set out in the schedule to the summons herein."

The Land and Conveyancing Law Reform Act 2009, (the 2009 Act) came into force on the 1st December, 2009, save for one section which is not of relevance in these proceedings.

A supplemental affidavit was sworn by Brian McGuinness on the 20th July, 2012. In that affidavit he said that reference is made to the registering of a judgment mortgage on the 3rd November, 2009, in the Special Summons and in para. 5 of the grounding affidavit and he stated that that was in error. He pointed out that the affidavit to register the judgment mortgage was exhibited in the affidavit previously sworn by Mr. McGuinness and that affidavit was apparently sworn on the 7th October, 2009. The affidavit bears a stamp indicating that it was filed in the Central Office of the High Court on the 3rd November, 2009. He continued by saying that the correct judgment mortgage affidavit was in fact sworn on the 22nd January, 2010 and subsequently filed against the defendant's lands and premises. He then exhibited a copy of that affidavit. Also exhibited by Mr. McGuinness is a letter from the Property Registration Authority dated the 5th May, 2010, confirming that the application for registration of a judgment mortgage was completed on the 5th May, 2010. That exhibit makes clear that the instrument involved in registering the judgment as a judgment mortgage was an affidavit of the 22nd January, 2010.

A replying affidavit was sworn herein by Mr. McLaughlin the first named defendant. He noted that it was stated in the Special Summons that the judgment was registered as a judgment mortgage on the 3rd November, 2009, and he also referred to the supplemental affidavit of Mr. McGuinness in which it is stated that the date of the 3rd November, 2009, as the date of registration of the judgment mortgage is an error and that the correct date is the 22nd January, 2010. He noted that there had been no amendment to the Special Summons. He pointed out that the Act did not come into operation until the 1st December, 2009. On that basis he contended that the court had no jurisdiction to grant the relief sought as the Special Summons indicated that the judgment mortgage was registered in compliance with a law that was not in operation at the time indicated. On that basis, he argued that there was no jurisdiction to grant the relief sought by the plaintiff.

This matter came before me for hearing on the 5th November, 2012, and counsel on behalf of the plaintiff sought to have the Special Summons amended to reflect the fact that the affidavit relied on to register the judgment mortgage was sworn on the 22nd January, 2010. It was submitted that the affidavit prepared in respect of the procedure prior to the commencement of the 2009 Act, while registered in the Central Office, had no effect. It was also argued that there was nothing to indicate any prejudice on the part of the defendants as a result of the error which had been made clear in the second affidavit of Mr. McGuinness.

Counsel on behalf of the defendants made a submission in line with the affidavit sworn on behalf of the defendants by Mr. McLaughlin, the first named defendant. Essentially the point was made that as things stood there was no jurisdiction to make an order having regard to the commencement of the 2009 Act.

This case give rise to two issues - the first is the question of the jurisdiction of the court to amend pleadings and the second relates to the jurisdiction of the court to make any order on foot of the special summons herein, if the special summons is not amended.

Order 28, r. 1 of the Rules of the Superior Courts (RSC) provides as follows:

"The court may at any stage of the proceedings allow either party to alter or amend the endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

I think it is clear from the above that the jurisdiction of the court to amend pleadings is considerable. It is noteworthy that an amendment can be made at any stage of the proceedings. The purpose of such amendment is to determine the real questions in controversy between the parties and I think it is significant that the wording of O. 28, r. 1 mandates the court to make such amendments as may be necessary for that purpose.

In Delaney and McGrath's *Civil Procedures of the Superior Courts* (2nd Ed.) at para. 5-120, having referred to O 28, r. 1 of the RSC it is stated:-

"This rule, which as stated by Geoghegan J. in *Croke v. Waterford Crystal Limited*, 'is intended to be a liberal rule', is based on the proposition that the interests of justice are best served if the real issues in controversy between the parties are before and can be determined by the court. Thus, the traditional approach of the courts was that a party should not be punished for any error in pleading and should be permitted and indeed was entitled to make such amendments to the pleadings as were necessary to insure that the real questions in controversy between the parties were before the court unless that amendment would prejudice the opposing party."

A number of other cases are cited in support of that proposition by the authors..

In the present case there is no evidence of any prejudice to the defendants in permitting an amendment of the pleadings. The difficulty arising in this case by virtue of the reference to the affidavit of the 3rd November, 2009, is one that was flagged by the plaintiffs themselves in the second affidavit of Mr. McGuinness. The court is not, as is clear, involved in punishing a party for an error and is concerned to determine the real controversy in issue between the parties. If one considers the question of what would happen if the court were to conclude that the amendment should not be permitted and that the court as a consequence did not have jurisdiction in the matter, all that would occur is that the plaintiff would be obliged to issue new proceedings. What would be achieved, as a result, is the expenditure of further monies in trying to recover monies due on foot of a judgment which was originally obtained on the 7th November, 2005.

I am satisfied that it is appropriate on the facts of this case to permit the amendment of the Special Summons to make reference to the affidavit to register the judgment mortgage of the 22nd January 2010 which was, it has to be noted, the affidavit used to register the judgment mortgage. Consequently, it is not necessary for me to consider the other issue as to the jurisdiction of the court in the event that an amendment had not been permitted. Accordingly I will direct the amendment of the Special Summons herein.