THE HIGH COURT

[2014 No. 28 COS]

IN THE MATTER OF KELLY TRUCKS LIMITED

(IN VOLUNTARY LIQUIDATION)

BETWEEN

COSTELLO TRANSPORT LTD

APPLICANT

AND

NEHAAL SINGH

RESPONDENT

No. 2

JUDGMENT of Ms. Justice Baker delivered on the 7th day of March, 2019

1. Kelly Trucks Ltd ("the Company") entered a creditors' voluntary liquidation on 22 December 2013, on the grounds of an inability to pay its debts as they fell due. Nehaal Singh was appointed liquidator at a creditors' meeting of 3 January 2014 with the support of the Company's directors, Mr James and Mrs Anne Kelly.

2. At the time of Mr Singh's appointment, Costello Transport Ltd was a creditor of the Company. It objected to the appointment of Mr Singh due to concerns as to his independence, competence and experience and brought an application for his removal and that he be replaced as liquidator by Gerard Murphy. The application was brought by way of notice of motion dated 16 January 2014 and was heard before me on 17 February 2014.

3. On that day, I made an order removing Mr Singh as liquidator of the Company and replacing him with Mr Murphy ("the 2014 Order").

4. Mr Murphy, as liquidator of the Company, thereafter brought applications for recovery of assets and disqualification of directors which are the subject matter of the judgment and orders of Murphy J. of 15 January 2019, *In re Kelly Trucks Ltd (In Voluntary Liquidation)* [2019] IEHC 6 by which she dealt with:

> (i) proceedings bearing Record No. 2014/333 COS brought by Mr Murphy by originating notice of motion dated 2 July 2014, seeking, *inter alia*, orders pursuant to s. 297(a) of the Companies Acts 1963, as amended that Mr and Mrs Kelly be held personally responsible, without any limitation of liability, for the debts of the Company;
>
> (ii) proceedings bearing Record No. 2014/484 COS brought by Mr Murphy by notice of motion dated 30 October 2014 seeking the disqualification of Mr and Mrs Kelly pursuant to s. 160 of the Companies Acts 1963 or, in the alternative, an order under s. 150 of the Companies Acts 1963 for their restriction.

5. By notice of motion issued on 20 January 2015, Mr Murphy sought to amend his originating notice of motion and that application was adjourned to 2 March 2015 to give Mrs Kelly an opportunity to deliver a reply to the grounding affidavit. On that day, Mrs Kelly for the first time took issue with the validity of the 2014 Order, and issued a motion seeking declaratory orders. When that motion came on before Cregan J., and in the light of the submission made by Mr Murphy that the 2014 Order as perfected contained an error, he gave Mr Murphy liberty to issue a notice of motion to amend the 2014 Order under O. 28, r. 11 of the Rules of the Superior Courts ("RSC"), the so-called "Slip Rule". Cregan J., on 9 March 2015, Mrs Kelly being present in court, clarified that the application under the "Slip Rule" should be brought under the proceedings initiated by Costello Transport Ltd No. 2014/28 COS, the present proceedings.

6. On 12 March 2015, Messrs. James Riordan & Partners Solicitors issued a motion on behalf of Costello Transport Ltd and Mr Murphy for an order pursuant to O. 28, r. 11 RSC, the "Slip Rule", and/or the inherent jurisdiction of the Court amending the errors in the 2014 Order.

7. On 13 April 2015, I made an order pursuant to the "Slip Rule" and/or pursuant to the inherent jurisdiction of the High Court ("the 2015 Order") by which I, *inter alia*, corrected the reference to s. 228 of the Companies Act 1963 in the 2014 Order, and by which I substituted s. 277 of the Companies Act 1963 so as to ensure the correctness of the 2014 Order. The reasons for the making of the 2015 Order were set out in my *ex tempore* judgment of 13 April 2015 ("the 2015 judgment") of which a full written transcript is available as the judgment was dictated in the course of its delivery and it was also quoted in full by Murphy J. in her judgment in *In re Kelly Trucks Ltd (In Voluntary Liquidation).*

8. Murphy J. delivered judgment *In re Kelly Trucks Ltd (In Voluntary Liquidation)* on 15 January 2019, approximately one week before Mrs Kelly issued her motion the subject matter of the present judgment. Murphy J. acceded to Mr Murphy's applications and made *inter alia*, orders against Mr and Mrs Kelly.

The present motion

9. The present judgment is given in regard to an application brought by Mrs Kelly by notice of motion entitled "Order 28 Rule 11, Correction of Errors" dated 22 February 2019, by which she seeks various reliefs arising from the 2015 judgment.

10. The motion was returnable on 1 March 2019 on notice to Messrs. James Riordan & Partners Solicitors. The motion is grounded on the affidavit of Mrs Kelly and while counsel appeared for the respondent, no replying affidavit was served.

11. Mrs Kelly argues that by availing of the "Slip Rule" to make the amendments made by the 2015 Order, there was impermissibly added or substituted an order which was never part of the original judgement or order made in February 2014.

12. The notice of motion seeks unusual relief and I propose setting out in general terms the jurisdiction purported to be relied upon by Mrs Kelly before dealing with the specific reliefs sought.

The general jurisdiction to amend or correct

13. Order 28, r. 11 RSC, commonly referred to as the as the "Slip Rule", provides for the correction of "clerical mistakes in judgements

or orders" where the error arises from an "accidental slip or omission". The Order provides for corrections which may be made "without an appeal", and, in its terms, envisages that there may be occasions when the use of the "Slip Rule" is not appropriate and an appeal is the only remedy available to a disaffected litigant.

14. Hilary Biehler, Declan McGrath, and Emily Egan McGrath in their authoritative text *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018), at para. 25.80, describe the jurisdiction as "limited in nature", and one that may not be invoked to "alter the effect of a judgement with the benefit of hindsight." By this, they make the distinction between matters which more properly are to be canvassed by way of appeal and those amenable to an application under the "Slip Rule".

Inherent jurisdiction
15. In addition to the jurisdiction conferred by O. 28, r. 11 RSC, there exists a wider and inherent jurisdiction to amend an order. As will be noted, the 2015 Order was also made in the exercise of that inherent jurisdiction. This is apparent from para. 14 of the 2015 judgment and indeed from the nature of the motion on foot of which the order was made. At para. 14 of the 2015 judgment I said as follows:

> "Accordingly, I make an order in terms of the notice of motion relying also on the old judgment of *McCaughey v. Stringer* [1914] 1 I.R. 73, where exactly the same set of circumstances arose, namely where the error was an error induced by the form of the notice of motion which got carried on when the registrar came to draw up the order. I note in this particular case the error was also induced by the form of the motion and I also rely on the statement of the Supreme Court in the leading judgment on the "Slip Rule" and on the inherent jurisdiction of the court, which is the case of *McMullen v. Clancy* [2002] IESC 61, a judgment of the Supreme Court given on 31st July, 2002, that not only do I have jurisdiction under the "Slip Rule", but I also have a requirement when called upon to do so to correct an order when it does not correctly state what I actually decided and what I actually intended. It seems to me that fairness and justice dictates that I would make this order. It seems to me that the matter has been properly brought before me by notice of motion and that Mrs. Kelly was given ample opportunity to address me on the legal position. Again I say I remember making this order and I remember that the application was in the context of a voluntary and not official liquidation."

16. Mrs Kelly relies on the judgement of the Supreme Court in *Belville Holdings Ltd v. Revenue Commissioners* [1994] 1 ILRM 29, where Finlay C.J. quoted with approval the principles applicable to the exercise of the inherent jurisdiction set out by Romer J. in *Ainsworth v. Wilding* [1896] 1 Ch 673.

17. Mrs Kelly also relies upon the case law referred to at para. 25.85 et seq. of *Delany and McGrath on Civil Procedure* including *In re Swire* (1885) 30 Ch D 239, *Ainsworth v. Wilding*, and *In re Greendale Developments Ltd (No.3)* [2000] 2 IR 514. The legal argument she makes is, broadly speaking, correct, namely that a court may make an order to reflect the true intent of a judgment or ruling if that is not reflected in the order as perfected.

18. The cases on which Mrs Kelly relies were referred to in my 2015 judgment.

19. The authors of *Delany and McGrath on Civil Procedure*, at para. 25.89, describe the principles in *Belville Holdings v. Revenue Commissioners* as now "well established". However, they quote the limiting factors explained by the Supreme Court in *Belville Holdings v. Revenue Commissioners*, at paras. 30, that "the jurisdiction of the courts to alter a final order is limited to amending it as to give true and final effect to what the court had actually decided".

Discussion
20. Mrs Kelly seeks to revoke the provisions of O. 28 r. 11 RSC and/or the inherent jurisdiction of the Court in order that I correct the 2015 Order and, in my view, she is not entitled to do so. This is for the following reasons.

21. The jurisdiction to correct is one that must be sparingly used. It may, in limited circumstances, be used to amend an order after it is drawn up. The power to revisit the contents of a judgment in the context of the general jurisdiction of the court are set out in the judgment of Clarke J. in *In re McInerney Homes Ltd* [2011] IEHC 25 where, at para. 3.12, he held that the power to revisit can arise when there was "a simple error on the part of the judge concerned in the judgment". That jurisdiction is now well established (see, *e.g.,* O'Malley J. in *Nee v. An Bord Pleanála* [2013] IEHC 584).

22. The jurisdiction under the Rules and/or the inherent jurisdiction of the court to correct clerical errors in a written judgement can, of its nature, be used to correct an order. There are circumstances, however, when the relief is no longer apposite, either because of the passage of time which, as stated by Murray J. in *McMullen v. Clancy*, is not, in itself, an absolute bar to relief, but more importantly, if the application is made on an assertion that the correction first made was wrong as a matter of law or made in excess of jurisdiction. It is Mrs Kelly's contention that the orders made by me following the delivery of the 2015 judgment were wrong in law and made without jurisdiction. For the reasons I now discuss, her remedy is to appeal the making of the 2015 Order on that ground.

23. Mrs Kelly argues that there was an error made in the exercise of the "Slip Rule" or inherent jurisdiction of the Court when, in 2015, the 2014 Order was corrected. She points to a single sentence in the digital audio recording ("DAR") of the hearing on 17 February 2014 in support of her proposition. She pleads that the 2015 Order was made wrongly, that there was a legally inappropriate reliance on the "Slip Rule", and that the exercise of the jurisdiction invoked on 13 April 2015 was "unsupported and unsubstantiated" (para. 5 of her grounding affidavit), that the order was made unlawfully and is what she describes as a "spurious Order" (para. 10 of her grounding affidavit).

24. The arguments on which Mrs Kelly relies are arguments relating to the jurisdiction exercised by me on 13 April 2015 and, in essence, Mrs Kelly's argument is that the jurisdiction was wrongly exercised for improper purposes and without any legal or factual basis. She alleges that there exists an error in the 2015 Order, but not an error of the type envisaged by O. 28, r. 11 RSC or by the authorities which identify the inherent jurisdiction of the Court to correct errors. The errors she alleges are not ones deriving from an accidental slip or omission, or arising by reason of an oversight. Indeed, the opposite proposition is more apt, and she rather points to an error in my characterisation of the omission, accidental slip or mistake in the 2014 Order which she now asserts were not genuine mistakes, or omissions of an accidental type, or errors which arose by way of oversight.

25. What is sought is precisely what the authors of *Delany and McGrath on Civil Procedure* say is impermissible, in that Mrs Kelly is now seeking, instead of appealing the 2015 Order, to have it altered or rectified not to reflect the original intention of the Court, but to reflect the answer for which she contended, namely that the liquidator not be replaced or substituted.

26. McCracken J. in *Concorde Engineering Company Ltd v. Bus Átha Cliath* [1995] 3 IR 212 explained the purpose of the "Slip Rule" and its limitations:

> "[T]he wording of the rule, referring as it does to "any accidental slip or omission" must be construed as encompassing only matters which were omitted from the judgment or order by reason of a slip or omission. That seems to me to connote that, were it not for the slip or omission, the amendment requested would of necessity have been in the original order. This is the principle which applies in relation to the inherent jurisdiction of the court to amend a judgment or order, which was confirmed in *Belville Holdings v. Revenue Commissioners* [1994] 1 I.L.R.M. 29."

27. I adopt that statement of the law and, in my view, the matters raised by Mrs Kelly are quintessentially matters for an appellate court. This Court is *functus officio*, and I have no jurisdiction to set aside or vary the order made.

28. In that regard, two judgements are of importance: The judgement of Hogan J. in *M. A. U. v. The Minister for Justice, Equality and Law Reform (No. 2)* [2011] IEHC 95, [2011] 1 IR 749, at para. 12, in which he commented in relation to an amendment of pleadings sought subsequent to the delivery of the judgment in the substantive matter:

> "[…] I have no jurisdiction to permit an amendment at this juncture which would bear on the validity of the deportation order given that I am *functus officio* on that very issue. It is true that, in the event that the appropriate certificate for leave to appeal was given and there was an appeal to the Supreme Court, that court would have a jurisdiction to amend the pleadings, but this power would derive from O. 58, r. 2 and not from O. 28, r. 1 [RSC]."

29. I also rely on the judgement of the Court of Appeal in *Danske Bank v. Macken* [2017] IECA 117, at para. 11:

> "There is a clear public interest in the finality of a judicial determination, subject only to an appeal. It is, moreover, generally understood and accepted that where a High Court judge has pronounced judgment in a given matter, that judgment is final and the only remedy open to the disappointed litigant is to appeal. This point is so firmly embedded in our system of civil procedure that it is actually difficult to find direct authority on the point."

Delay in applying to avail of the "Slip Rule"

30. The relevance of delay in applying to amend an order pursuant to the "Slip Rule" was considered by the Supreme Court in *McMullen v. Clancy* [2002] 3 IR 493. Murray J. noted the delay in itself is not a ground for refusing the order.

31. McCracken J., in *Concorde Engineering Company Ltd v. Bus Átha Cliath* at 214, pointed out that the application was made almost 9 months after the perfection of the order and that that would, in effect, have allowed the plaintiff a head of damages which had not been referred to at all at the hearing of the action. He went on as follows, at p 215:

> "Even if the rule can be read as permitting such a claim to be made at that stage, I must have regard to the right of a defendant to know at the time of the perfection of an order the exact extent of its liability".

32. In the present case, I am satisfied that even without the jurisdictional arguments already considered above, the delay in bringing the application has been such that it would not merely be inequitable, but wholly wrong, to accede to the application made by Mrs Kelly having regard to the number of steps that have occurred in this litigation since the time the order was made in April 2015 and, in particular, having regard to the reliance on that judgement by Murphy J. in her judgement in *In re Kelly Trucks Ltd (In Voluntary Liquidation)*.

33. Against the background of these legal principles, I propose dealing with each of the reliefs sought in sequence rather than first listing them here.

The first relief

34. Mrs Kelly seeks what is described as an "order in the interests of justice" that the "authenticity and accuracy of the Court DAR of 17 February 2014 be made" and an ancillary order that the Court "does not dispute or contest" the contents of the DAR from that day.

35. In support of this application, Mrs Kelly has exhibited a transcript of one page of the DAR of 17 February 2014 which is an extract from the *ex tempore* ruling given on that date by which I replaced Mr Singh as liquidator of the Company and replaced him by Mr Murphy for the reasons therein previously outlined. A reading of the transcript shows that the order was made or purported to be made pursuant to s. 228 of the Companies Act 1963.

36. The record of the DAR speaks for itself, and I do not propose to make any order confirming its "authenticity or accuracy" as sought by Mrs Kelly. There is no need for such order, the DAR is the transcript of the hearing the order made, the basis of making that order and the section of the Companies Act 1963 under which it was purported to be made.

37. As will appear later in this judgment, the provisions of s. 228 of the Companies Act 1963 were not correctly identified as the basis of the jurisdiction under which the 2014 Order was made.

The second relief

38. This relief seeks an order that I, as judge who heard the matter on 17 February 2014 "[accept] that [I remember] the matter quite well" and that the relief made under s. 228 of the Companies Act 1963 was "not legally available" and made in error.

39. The 2015 Order was made under the "Slip Rule" on account of the fact that the order made was not appropriate as the Company was not in official liquidation but had been wound up by creditors' petition. Section 228 of the Companies Act 1963 was therefore not the appropriate jurisdictional basis on which the order could be made. The incorrect section of the Act was mentioned at para. 1 of the notice of motion dated 16 January 2014 and found its way into the ruling and the perfected order.

40. In the 2015 judgment, I stated as follows, at para. 13:

> "This is not a court liquidation. This is a creditors' voluntary winding up and Mr. Singh was appointed by the creditors at the creditors' meeting. I could not have made an order under s. 228 of the Act of 1963. I accept that the order as drawn up suggests that I did but I could not have made that order. I had no jurisdiction to make that order and the only jurisdiction I could have had was jurisdiction under s. 277 of the Act of 1963."

41. As an error was made in the oral ruling given on 17 February 2014, it was corrected by the 2015 judgment and the 2014 Order was thereafter amended to reflect the amendment.

The third relief
42. The third relief sought is an order correcting what Mrs Kelly's grounding affidavit described as "untrue/false section" of the 2015 judgment, where I made reference to the grounding affidavit of Mr O'Regan which Mrs Kelly now says contained no averments in support of the ruling. At para. 13 of the 2015 judgment I said as follows:

> "The order recites that I made an order pursuant to s. 228 of the Companies Act 1963-2006. Counsel suggests to me, and it is stated in the grounding affidavit of Mr. O'Regan, that I could not have made an order under s. 228 of the Companies Act 1963 as such an order would have been relevant and possible only were this to be a court appointed liquidator i.e. an official liquidator appointed pursuant to an order where the court wound up this company. Again I accept what counsel says, and I accept the contents of the affidavit of Mr. O'Regan."

43. I have been furnished with the book of orders and papers in this matter and I note para. 12 of the affidavit of Mr O'Regan which grounded the application under the "Slip Rule" does, in fact, make reference to the fact that the 2014 Order drawn up following the hearing on 17 February 2014 contained an erroneous statutory reference, and the supposed reason why this had happened.

44. In the circumstances, I do not understand the basis on which this relief is sought.

45. I am of the view that it is not proper or jurisdictionally safe to remove or correct what Mrs Kelly describes as a "untrue/false" section of my ruling, as sought by Mrs Kelly.

46. Mrs Kelly's remedy in this regard is an appeal of the 2015 Order.

The fourth relief
47. The fourth relief that Mrs Kelly seeks is an order seeking that what she describes as "untrue/false" sections of the 2015 judgment be corrected. She recites part of that judgment and her argument is that it was given in error. She gives two reasons for her assertion: First, that an explanation as to why the 2014 Order was erroneously drawn up was not, in fact, contained in the documents before me; and second, that the explanation was "concocted" either by counsel or by myself.

48. The motion paper seeks to involve the registrar who sat with me on 17 February 2014 in an unnecessary and, in my view, scandalous manner.

49. Insofar as Mrs Kelly suggests that the transcript of the DAR on 17 February 2014 shows that the 2014 Order was indeed made under s. 228 of the Companies Act 1963 Mrs Kelly is correct, but for the reasons already set out in my 2015 judgment, that was an error, and was corrected. Mrs Kelly believes that the correction was either wrongly done or done in excess of jurisdiction.

50. Her remedy is to appeal the 2015 Order.

The fifth relief
51. The fifth relief seeks that I would confirm that "in [my] laborious efforts" in the 2015 judgment, that I acted in the absence of jurisdiction having regard to the extract from the transcript where I had made the comment that "I could not have made an order under s. 228 of the Act of 1963".

52. Mrs Kelly challenges the very jurisdiction relied on to make the 2015 Order and the appropriate remedy is an appeal of that order.

The sixth relief
53. The sixth relief sought is that I would make an order correcting what are described as "untrue/false" parts of the 2015 judgment on the stated assertion that the 2015 Order was made in excess of jurisdiction or, as Mrs Kelly puts it, in circumstances where "no lawful means" existed for the making of the order.

54. Again, insofar as there was an error of jurisdiction or an error in the making of the 2015 Order, the remedy available to Mrs Kelly is an appeal of the 2015 Order.

The seventh relief
55. The seventh relief sought is an order correcting what are described as the "untrue/false" parts of the 2015 judgment on the grounds that it is contrary to the contents of the transcript of 17 February 2014.

56. Again insofar as there is an assertion that the 2015 Order was made wrongly or in excess of jurisdiction, the remedy is an appeal of the 2015 Order.

The eight relief
57. The eight relief sought by Mrs Kelly relies on the "failure, refusal and sheer neglect" of the High Court to uphold her rights under the Constitution and under the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and an order that Ms Logan, or another suitable commissioner of the Irish Human Rights and Equality Commission ("IHREC"), be appointed as amicus curiae for the remainder of the process.

58. This is not an appropriate order. The relief that Mrs Kelly seeks is more properly brought by way of appeal of the 2015 Order, as this Court is *functus officio*, and the appointment of IHREC would serve no useful function.

The ninth relief
59. The ninth relief sought is an order that I would confirm that I "willingly and knowingly" or "negligently" made an order under O. 28 r. 11 RSC, and in circumstances where I knew that the jurisdiction to do so does not exist.

60. Again that is a matter for an appeal of the 2015 Order.

The tenth relief
61. The tenth relief sought is an order that, in giving the 2015 judgment, I "willingly and knowingly misled [my] own court" or in circumstances where I ought to have known that the factual matters relied on were untrue.

62. It is asserted that in making the 2015 Order I "brought false and unsubstantiated statements" into the judgment "so as to pervert the true facts and so as to facilitate the unlawful altering and perverting of a Final and perfected Order" of the Court.

63. Again, the complaint is one as to the correctness of the 2015 Order and the jurisdiction to make the order, and the appropriate remedy is an appeal of the 2015 Order.

The eleventh relief
64. The eleventh relief sought is an order that I would confirm that I "enjoyed no right and or ability whatsoever, legal or otherwise" to alter or amend the 2014 Order.

65. Again, that is a matter for an appeal of the 2015 Order, but by way of observation, I note that the 2015 Order was made in the context of a motion of 12 March 2015 which sought the rectification of the record under the "Slip Rule" or in the inherent jurisdiction of the Court.

The twelfth relief
66. The twelfth relief sought is an order that I would confirm that I acted "in contempt of [my] own court and in contempt of [my] own order" in making the 2015 Order.

67. For the reasons already outlined above, the matter is more properly one for an appellate court hearing an appeal of the 2015 Order.

The thirteenth relief
68. The thirteenth relief is for an order that the 2014 Order was not legally available and was wrong in law. This is, quintessentially, a matter for appeal and if the 2014 Order made on 17 February 2014 was indeed wrong, as is asserted, the remedy was an appeal of that order.

The fourteenth relief
69. The fourteenth relief sought is identical or broadly identical to the order sought at para. 13 and, for the same reason, is a matter in respect of which an appeal of the 2015 Order may lie.

The fifteenth relief
70. The fifteenth relief sought is an order that I would confirm that Mr Singh remains liquidator of the Company on account of the "failures" of my Court to act in accordance with the record of the DAR of 17 February 2014.

71. Again, this is a matter for appeal of the 2015 Order.

Conclusion
72. The matters that come before me now are matters which are quintessentially matters of appeal. I note that the Court of Appeal has given a judgment on 19 October 2015 in regard to certain aspects of this liquidation, and that the Supreme Court, in its determination on 8 March 2016 [2016] IESCDET 36 and judgment of 15 December 2016 (Unreported, Judgment of the Court) has also dealt with aspects of the matter. I already noted that, in her extensive judgment of 15 January 2019 in *In re Kelly Trucks Ltd (In Voluntary Liquidation)*, Murphy J., *inter alia*, considered the order made by me by which Mr Singh was replaced as liquidator. The matter has clearly proceeded some distance.

73. In essence, the reliefs sought by Mrs Kelly are not available and, of their very nature, challenge the jurisdiction of the Court and the correctness of orders made, and are matters in respect of which the correct remedy is an appeal.

74. This Court is *functus officio*.

75. For the reasons stated, I therefore propose to refuse all of the reliefs sought in the notice of motion.