

THE HIGH COURT

2009 No. 1367 SP

BETWEEN

CARLISLE MORTGAGES LIMITED

PLAINTIFF

AND
CORNELIUS HEAGNEY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 1 March 2019

INTRODUCTION

1. This judgment concerns an application for an order of inspection pursuant to Order 50, rule 4 of the Rules of the Superior Courts. The application is made in the context of proceedings which seek *inter alia* the possession of unregistered lands. The inspection is sought by the Plaintiff in support of an argument that the mortgage deed, upon which the application for possession is grounded, sufficiently identifies which lands are the subject of the mortgage. The perceived necessity to do this arises in circumstances where one of the principal grounds of defence is that the mortgage is deficient in this regard.

2. For the reasons set out in detail below, I think that the application for inspection is well made. The inspection sought relates to the central issue which is in dispute in the proceedings. Insofar as the Defendant's objection based on the grounds of delay is concerned, I think that if such an objection is to be pursued, then the appropriate course would be for the Defendant to bring an application to strike out the proceedings for inexcusable and inordinate delay. The issue of delay is not something which can properly be dealt with in the context of an application for inspection.

FACTUAL BACKGROUND

3. The within proceedings were instituted by way of Special Summons on 29 October 2009. The principal relief sought is an order of possession in respect of certain lands described in the schedule to the summons. The title to some of these lands is registered, and the title to the balance is unregistered.

4. The application for possession is grounded upon a deed of mortgage dated 4 November 2002 made between the Plaintiff and the Defendant ("the Mortgage"). The Mortgage identifies three parcels of land. These are defined as "the property" for the purposes of the Mortgage.

5. The dispute in the present proceedings centres largely on whether the second parcel of lands is adequately identified. It is necessary, therefore, to set out the relevant provision of the Mortgage in full as follows.

"WHEREAS the said terms and conditions include a security to be granted by the Borrower over:-

(a) ALL THAT AND THOSE all of the lands comprised in Folio 37054 of the Register, County Galway and

(b) ALL THAT AND THOSE part of the lands of the townland of Tully containing acres or thereabouts statute measure together with part of the lands of Reaskmore containing 47 acres and 0 roods and 25 perches or thereabouts statute measure, and

(c) ALL THAT AND THOSE part of the lands of the townland of Budellagh (known as the lands of Lisanacody) containing 29 areas 2 roods 35 perches or thereabouts statute measure

all of which lands are delineated on the map attached hereto and thereon surrounded by a red verge line (which said lands and premises are hereinafter called 'the property');

6. The description of the second parcel of lands, at subparagraph (b), appears to be missing a figure for the acreage of the lands.

7. The description of the second parcel of lands as per the schedule to the Special Summons is slightly different. Insofar as relevant, the schedule reads as follows.

"SCHEDULE

[...]

ALL THAT AND THOSE part of the lands of the townland of Tully containing 107.682 acres or thereabouts statute (sic) measure together with part of the land of Reaskmore containing 47 acres and 0 roods and 25 perches or thereabouts statute measure and

[...]

all of which lands are delineated on the map attached to the Mortgage dated the 4th day of November 2002."

8. As appears, the lands are now described as containing an area of 107.682 acres. No such figure appears in the Mortgage.

9. This discrepancy has been relied upon by the Defendant to make an argument that the security over the lands at Tully is unenforceable. See, in particular, the Defendant's affidavit of 30 June 2010, paragraphs 28 to 31.

10. Following an exchange of affidavits, the High Court (Dunne J.) made an order on 4 April 2011 directing that the proceedings stand adjourned for plenary hearing as if the proceedings had been commenced by plenary summons. The order further directed the Plaintiff to deliver a Statement of Claim within three weeks, and the Defendant to deliver a Defence within three weeks from the delivery of the Statement of Claim.

11. The Plaintiff duly delivered its Statement of Claim on 29 June 2012. The position in relation to the lands of the town land of Tully is elaborated upon as follows.

(i) The reference to "part of the lands of the town land of Tully containing acres or thereabout statute measure" in the Mortgage meant and was intended to mean and to refer to a parcel of 67 acres which came to be held by the Defendant.

(ii) These 67 acres had formed part of certain lands which were, prior to 2002, held by the Defendant and his brother as tenants in common. The Defendant represented at the time of the loan application that he had reached an agreement with his brother to partition the lands, and produced an (unstamped) deed of conveyance and transfer under which he was to obtain some 67 of the 107.682 acres. It was a term of the loan agreement that the Defendant complete, stamp and impress the deed of conveyance between himself and his brother.

(iii) The Defendant became entitled to 67 acres of the lands in the town land of Tully by virtue of a deed dated 30 October 2002 and a deed of rectification dated 20 February 2004.

12. The Statement of Claim seeks the following relief in respect of these lands.

"An order for possession of ALL THAT AND THOSE part of the lands of the townland of Tully Barony of Longford in the County Galway containing 67 acres or thereabouts statute measure as more particularly identified in a map attached to this Statement of Claim and thereon surrounded with a red verge line and hatched orange."

13. The Defendant delivered his Defence on 20 September 2012. The Defendant maintains the position that the lands are not properly described. See in particular, 9, 10 and 14 of the Defence.

"9. It is admitted that the Defendant became entitled to 67 acres of lands in the townland of Tully by virtue of a Deed of Partition and Conveyance dated 30th October 2002 and a Deed of Rectification dated 20 February 2004. No other admissions are made in respect of paragraph 8 of the Statement of Claim.

10. The Defendant makes no admissions in respect of paragraph 9 of the Statement of Claim and the execution of any Deed of Mortgage/Charge. The Plaintiff is placed on strict proof. It is denied that the lands were identified with adequate or sufficient particularity by way of map attached to the Deed of Mortgage.

[...]

14. It is denied that 'the reference to part of the lands of the townland of Tully containing acres' constituted a sufficiently accurate description of land to create a security interest over same. It is denied it meant and/or was intended to mean the lands described at paragraph 8 of the Statement of Claim."

14. The next step in the proceedings was the service of a Notice of Intention to Proceed on 6 February 2015, and the case was set down for trial on 7 May 2015. A further period of delay then ensued, and a second Notice of Intention to Proceed was served on 4 May 2018.

15. By Notice of Motion dated 12 December 2018, the Plaintiff sought an order pursuant to the provisions of Order 50, rule 4 granting the Plaintiff and/or the Plaintiff's nominated expert inspection of the lands securitised by the Plaintiff and set out in the schedule to the Special Summons dated 29 October 2009.

16. The application for inspection is grounded on the affidavit of Dermot McClean, Solicitor, of Lavelle Solicitors. The motion had been preceded by an exchange of correspondence. The Plaintiff's solicitor had written on 9 May 2018 and 21 May 2018 seeking rights of inspection. The Defendant's solicitors replied as follows on 26 June 2018.

"We acknowledge receipt of your letters of the 9th May and 21st June. Our client will not facilitate any inspection of this property by your clients. Liability is denied."

17. The replying affidavit sworn on behalf of the Defendant by Michael Collins, Solicitor, puts forward two principal arguments against inspection. First, it is suggested that the Mortgage had been prepared by the Plaintiff's previous solicitors, that the Plaintiff is bound by the contents of same, and that the description of the lands cannot be enhanced, expanded upon or improved in anyway by expert inspection. The point is also made that the Mortgage itself does not contain a power of inspection. The second point is in relation to delay. It is suggested that the Plaintiff should have promptly, in 2010 or 2011, considered the expert inspection which is now sought.

ORDER 50 / ORDERS FOR INSPECTION

18. The jurisdiction to make an order for the inspection of lands is provided for under Order 50, rule 4 of the Rules of the Superior Courts as follows.

"4. The Court, upon the application of any party to a cause or matter, and upon such terms as may be just, may make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building in the possession of any party to such cause or matter and for all or any of the purposes aforesaid may authorise any samples to be taken or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

19. Leading counsel for the Plaintiff, Mr Andrew Fitzpatrick, SC, helpfully referred me to the principal authorities on the exercise of this jurisdiction, including *Bula Ltd. (In Receivership) v. Bula Holdings* [1987] I.R. 85; *James Elliott Construction Ltd. v. Lagan* [2015] IEHC 631; and *Ballymore Residential Ltd. v. Roadstone Ltd.* [2017] IEHC 539.

20. The objective of providing for a power of inspection is explained as follows in *Bula Ltd.* at page 93 of the report.

"It seems to me that the rights of litigants to seek and the power of the courts to grant relief or assistance of a procedural nature must be viewed in the context of litigation and the administration of justice as a whole. It is the right of citizens under the Constitution to have access to the courts for the resolution of justiciable controversies. Apart from particular provisions which enable the courts to stay or dismiss proceedings which are vexatious or an abuse of the process of the court there is not in general any obligation imposed on a litigant to verify his cause of action or produce

evidence in support thereof as a condition of instituting proceedings. Undoubtedly this valuable right of access to the courts may impose serious burdens on the chosen defendant. Inevitably the litigation will involve the defendant in costs which he may or may not recover from the plaintiff and depending upon the nature of the proceedings the very fact of the litigation may be a cause of considerable embarrassment to the alleged wrongdoer. In a proper case, however, this embarrassment should be short lived. Hopefully an educated public would suspend judgment until the trial of the action and it must be assumed that the hearing and the order made thereon will vindicate the innocent party."

21. The principles governing an application for an inspection have been stated as follows by Costello J. in *James Elliott Construction Ltd.*, at [12].

"(1) The Court may order that a party may take samples of the property of another party to proceedings which may be necessary or expedient for the purpose of obtaining full information or evidence.

(2) The power must be viewed in the context of a party's constitutional right of access to the courts.

(3) The Court must ensure that the litigant will have facilities to present his case to the Court. This includes all the advices and information which the litigant wishes to present to the courts, either in support of his own case, or to undermine that of his opponent.

(4) The right to an order for inspection or the taking of samples is not dependant upon the strength of the case of the party seeking the order.

(5) Inspection, or the ordering of the taking of samples, should be facilitated if it can be achieved while at the same time protecting the interests of the opposing party. The interests of an opposing party that a court takes into account are those relating to that party's rights as an owner or occupier of property.

(6) The proposed inspection or taking of samples must be shown to be necessary or expedient by reference to the issues in the case.

(7) The inspection or sampling ordered should be limited to that which the party seeking the order has shown to be necessary or expedient to his own case or his defence of his opponent's case."

SUBMISSIONS OF THE PARTIES

22. Counsel on behalf of the Defendant, Martin Mannion, BL, advances his client's objection to an order for inspection as follows. First, it is said that inspection is unnecessary to any issue in the proceedings. Counsel observes that no plea of rectification has been made on behalf of the Plaintiff. If the Plaintiff maintains that the description of the property under the Mortgage does not reflect what was agreed at the time, then the Plaintiff would have to seek rectification. Counsel points out that the Mortgage was drafted by the Plaintiff's own solicitor.

23. Secondly, it is said that the Plaintiff is guilty of excessive delay. The proceedings were issued some ten years ago, and during that period the Plaintiff has sought unsuccessfully to obtain judgment. The Statement of Claim was served in June 2012, and this was followed by a long period of non-engagement. The application for inspection was not brought until December 2018. This application was brought after the proceedings had been first set down for trial in 2015.

24. On behalf of the Plaintiff, Mr Fitzpatrick SC, says that his client's case is that the mortgaged property is accurately identified by the Mortgage when read in conjunction with the map. It is clear from the pleadings that one of the issues at the trial will be what lands are identified in the map attached to the Mortgage, and whether this coincides with the lands in respect of which the Defendant is in actual possession. The resolution of this issue will require evidence by an expert who has had an opportunity to inspect the lands.

25. Mr Fitzpatrick SC cites the judgment in *Bula Ltd. (In Receivership) v. Tara Mines* as authority for the proposition that the strength or weakness of the moving party's case is not a relevant consideration on an application for an order of inspection. Counsel also relies on this judgment as authority for the proposition that any alleged delay in the prosecution of proceedings is similarly not a relevant consideration. If the Defendant wishes to pursue an objection on the grounds of delay, then it would have—in principle at least—been open to him to bring a separate application to strike out the proceedings. (No concession is made that there has been unreasonable delay).

26. Finally, counsel says that it is irrelevant to an application for court-ordered inspection as to whether or not the Mortgage contains a contractual power of inspection.

DISCUSSION AND DECISION

27. As explained by the High Court (Murphy J) in *Bula Ltd. (In Receivership) v. Tara Mines Ltd.* [1987] I.R. 85 (at 93), the power of a court to order inspection of lands must be seen in the context of litigation and the administration of justice as a whole. A litigant must be entitled to present his or her case properly.

28. A right of inspection might thus be regarded as a necessary incident of the constitutional rights of access to the courts. Of course, this right must be balanced against any competing rights of the other parties to the litigation and of any affected third parties. A court should be careful not to order inspection in circumstances where it would be disproportionate to do so. In balancing the rights of the parties, the nature of the inspection sought may be relevant. A court may be more reluctant to order inspection which involves invasive works on lands, such as, for example, the drilling of boreholes, than to authorise a survey of lands. It may also be appropriate to attach conditions to an order for inspection so as to respect any commercially sensitive information.

29. I propose to address the application for inspection in this case in two stages. First, I will consider whether the inspection sought is necessary; and, secondly, I will then consider whether the order is proportionate and whether any conditions should be attached to the order.

30. I am satisfied that an order allowing for the inspection of the lands is necessary to ensure that the issues in dispute between the parties can be resolved by the trial judge. The inspection is directly relevant to an issue in dispute between the parties, and in circumstances where the Plaintiff cannot enter onto the lands without the benefit of an order, court-ordered inspection is necessary

to ensure the Plaintiff can properly present its case.

31. The central issue in dispute between the parties is whether the lands in respect of which the order for possession is sought are captured by the Mortgage. The resolution of this issue will require a careful consideration of the terms of the Mortgage and of the map attached thereto. As the extracts from the pleadings set out at page 3 et seq. above indicate, the conveyancing history of the lands will also be relevant. In particular, the trial judge will require evidence as to whether or not the lands in the map attached to the Mortgage coincide with the lands which have come into the possession of the Defendant as a result of the various conveyancing transactions set out in the pleadings.

32. The Plaintiff does not have a contractual right of inspection under the Mortgage, and, accordingly, it is necessary for the Plaintiff to invoke the jurisdiction of the court pursuant to Order 50. If the Plaintiff were to be denied an opportunity to inspect the lands, it would be disadvantaged in the presentation of its case at the hearing of the action.

33. Having determined that inspection of the lands is necessary, I must next consider whether an order for inspection would be proportionate. The inspection sought in this case is not invasive. As I understand matters, all that is required is for the Plaintiff's experts to survey the lands, taking measurements and photographs. The Plaintiff is not seeking to take physical samples from the lands, and does not, accordingly, require the carrying out of invasive works such as the drilling of boreholes. There will be no damage done to the lands. I am satisfied therefore that an order for inspection is proportionate.

34. Insofar as the other principal objection to inspection is concerned, namely the allegation that the Plaintiff has delayed in the prosecution of the proceedings, it is clear from the case law that delay is not a relevant consideration to an application for an order for inspection. See, in particular, *Bula Ltd (In Receivership) v. Tara Mines Ltd*. [1987] I.R. 85 (at 93) and *James Elliott Construction Ltd*. at [12].

35. Similarly, subject to a possible exception in a case of proceedings which are frivolous or vexatious, the relative strength or weakness of the moving party's case is not a relevant consideration.

36. (For the avoidance of any doubt, I should record that I am satisfied on the basis of the pleadings to date that the Plaintiff's argument is, at the very least, stateable. It is certainly not frivolous or vexatious).

PROPOSED ORDER

37. Accordingly, I propose to make an order directing the Defendant to allow the Plaintiff and/or his nominated expert to enter upon the lands identified in the Notice of Motion and to be permitted to carry out an inspection and survey thereof. I will hear counsel as to the precise form of the order and, in particular, as to whether any conditions in terms of the time and date of inspection should be attached.

38. I will also hear counsel on the issue of costs, and as to whether this is a case where costs of the application for inspection should be made costs in the cause.