

THE HIGH COURT

[2009 No. 11432 P]

BETWEEN

LARRY MCDONALD AND BERNARD MCDONALD

PLAINTIFFS

AND

TOM O'DRISCOLL AND SEAMUS DUNNE

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 13th day of March 2015.

1. This matter comes before the court by way of motion on notice whereby the defendants seek a stay on the execution of the judgment and order of the President made on the 17th of July, 2012 and for an order joining these proceedings to other proceedings involving the parties Rec. No. [2012 No. 111215P] and in which these defendants are plaintiffs and where the plaintiffs herein are the first and third named defendants.

2. This motion came before the court with two other motions issued in those other proceedings, one being a motion for judgment in default of defence and the other being a motion to have those proceedings struck out on the grounds of being frivolous vexatious and an abuse of the process of the court.

3. It was agreed between the parties that the motion to dismiss would be dealt with first and that thereafter the other two motions would be heard.

4. On the 11th of February, 2015 I delivered a reserved judgment on the motion to dismiss the proceedings and on foot of which the application to dismiss was refused. Consequent upon that decision, the defendants in those proceedings sought and obtained an extension of time on the plaintiff's motion for judgment in default to deliver their defence, leaving this motion for determination by the court.

5. The President gave judgment in this case on the 17th July 2012 for the plaintiffs on their claim and made an order that the defendants pay the defendants €320,000 together with costs. That was a final and conclusive judgement and order of the court and from which the defendants did not appeal. Instead, the defendants issued separate proceedings to which reference has already been made in which they seek damages in respect of a number of claims most of which were pleaded in the defendants counterclaims in these proceedings but which in the event were not determined by the President for the reasons set out in my judgment on the motion to dismiss and delivered in the new proceedings on the 11th February, 2015.

6. The defendants submitted that their claims in the new proceedings are, in essence, cross claims in respect of the plaintiff's claim in these proceedings and that having regard to the judgment of the court given in these proceedings, notwithstanding that the judgment of the President was a final and conclusive judgment, the court should now, exercise its inherent jurisdiction, and amend the judgment and order by granting a stay on its execution.

16. The plaintiffs submit that the court is *functus officio* and has no jurisdiction to grant the relief sought. The defendant's submit that the court has an inherent jurisdiction to grant a stay in circumstances where, as in this case, the defendant's new proceedings constitute cross claims to these proceedings and that the stay on execution should be granted pending the determination of their proceedings.

The Law.

17. The court has both an inherent jurisdiction, as well as a jurisdiction conferred on it by statute and under the Rules of the Superior Courts, to grant a stay on entry and execution of a judgment.

18. The plaintiff's claim in these proceedings was to recover a sum of money by way of a debt and found to be due by the defendants.

19. Section 21 (1) of the Enforcement of Court Orders Act 1926 provides

"(1) Whenever judgment shall be given by any court for payment of any sum of money by way of debt or damages by any person (in this section referred to as the debtor) and the court shall be satisfied at the time of giving of such judgment—

a) that the debtor is unable to discharge by an immediate payment in full the said sum of money, and all costs payable by him under the said judgment; and

(b) that such inability is not occasioned by the debtor's own conduct, act or default; and

(c) that there is reasonable ground for granting to the debtor an extension of time in which to pay the said sum of money and costs,

the court may stay the execution of the judgment for such time and upon such conditions as shall appear to the court to be reasonable."

20. It is patently clear from the wording in the section that the power of the court to grant a stay on the execution of such a judgment is to be exercised "... at the time of giving of such judgment". There is no provision which would warrant the court doing so

afterwards save as provided for by the rules to correct a clerical error or slip or where at the time the order was made the judgment and order fails to disclose the intention of the court .

21. Where there are clerical mistakes in judgments or orders or errors arising from an accidental slip or omission, the court is entitled on motion, without appeal, to revisit the judgment and order but only for the limited purpose of correcting the slip or error so as to reflect the judgment and order of the court actually pronounced. This power is vested in the court by virtue of the provisions of O.28 r.11 of the Rules of the Superior Courts. The jurisdiction under those provisions may be exercised "at any time" by the court on motion.

22. Order 42 rule 28 of the Rules of the Superior Courts provides that any party against whom judgment has been given may apply to the court for a stay of execution or other relief against such judgment upon the ground of facts which have arisen too late to be pleaded and the court may give such relief and upon such terms as may be justified.

23. The jurisdiction to grant a stay on execution and entry at the time of the making of the order is also recognised by Section 116 (3) (b) (i) of the Land Conveyancing Law Reform Act 2009 which provides

"(3) For the avoidance of doubt it is and always has been the case that—

(b) a judgment mortgage may be registered—

(i) notwithstanding that the judgment debtor has obtained an order of the court granting a stay of execution, unless the court orders otherwise"

24. This provision is declaratory of the existing law at the time when the Act was passed and from which it is clear that the jurisdiction of the court to grant a stay on entry and execution is to be exercised at the time when the judgment is given and the final order made and not otherwise in relation to such matters.

25. Quite apart from a jurisdiction conferred by statute or the rules, the court is possessed of an inherent jurisdiction to control its own procedures *See Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 P.475, to stay proceedings see *McGrory v. ESB*, [2003] 3 I.R.407 at 415, and that this jurisdiction extends to granting a stay on execution of a judgment is well settled law. *see Earl of Desart v. Townsend* 22 I.r.L.T. R.; *Prendergast v. Biddle* (S.C.) (unreported) 31.7.1950, *Moohan v. S. & R. Motors (Donegal)* (2008) 3 I.R. 650 , *Danske Bank v. McFadden* [2010] IEHC 119 and *Stapleford Finance Ltd v. Courtney* (H.C.) (unreported) 14th October 2014. This jurisdiction also extends to granting a stay of execution to permit the prosecution of proceedings against a third party see *ACC Bank Plc v. Stephens* [2013]IEHC 264.

26. However, the question which falls to be considered here is not whether the court has an inherent jurisdiction to grant a stay on a judgment in the absence of a statutory provision or the rules at the time of the making of the final order of the court but whether it has any jurisdiction to so after the making of such order.

27. Whilst proven fraud will always enable the court to set aside a judgment and order, *see Kelly v. National University of Ireland and others* [2009]4 I.R 163, the inherent jurisdiction of the court to amend an order which has previously been made even though the order is in the form of a final order and has been perfected is limited in the extreme. This question was specifically considered by the Supreme Court in *Belville Holdings v. Revenue Commissioners* [1994] ILRM 29 P 36 where Finlay C.J. stated ;

"There is, however, I am satisfied, a wider and more fundamental jurisdiction in the court to amend an order which it has previously made, even though that order is in the form of a final order and has been perfected. We have not been referred to nor have I been able to discover, any decision of this court or of the Irish courts dealing with this question.

The position and principles appear, however, to be accurately stated in the judgment of Romer J. in Ainsworth v. Wilding [1896] 1 Ch 673, where at p. 677 he stated as follows

"So far as I am aware the only case in which the court can interfere after the passing and entering of the judgment are these

(1) Where there has been an accidental slip when the judgment is drawn up, in which case the court has power to rectify it under O.28 r.11;

(2) When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended."

28. As to the exercise of this jurisdiction he went on to state that

"I would emphasise, however, that it is only in special or unusual circumstances that an amendment of an order passed and perfected, where the order is of a final nature, should be made by the court. The finality of proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not likely be breached."

29. An application for a stay must be made at the time when the judgment and order of the court is being pronounced or, at least, at any rate before the court has parted with seisin of the case since once there is a final judgment and order of the court it is said to be *functus officio* and has no jurisdiction to intervene for the purposes of amending the order otherwise than for the purposes of rectification within the meaning of O.28 r.11 of the Rules of the Superior Courts or, in the exercise of the court's inherent jurisdiction in special or unusual circumstances such as where a court finds that the judgment as drawn up does not correctly state what the court actually intended and decided.

Decision

30. It is accepted by the defendants in these proceedings that no application was made by them at the time when the judgment and order of the President was made; the judgment and order was final. It is also clear that the President, having regard to the existence of the counterclaims in these proceedings and which he considered the defendants might decide to pursue by way of cross claims ,

did not grant a stay on his own motion. Accordingly, there being no mistake or clerical error or special or unusual circumstances in this case, the court has, in my view, no jurisdiction to amend the order of the President by granting the defendants a stay on execution of the judgment which they seek. Accordingly, the application is refused and the court will so order.