Neutral Citation Number: [2010] IEHC 419

THE HIGH COURT

2008 571 SP

BETWEEN

BANK OF SCOTLAND (IRELAND) LIMITED

PLAINTIFF

AND

TOM (OTHERWISE THOMAS) MANNION AND CORRINE MANNINON

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 18th day of November, 2010.

1. The proceedings

1.1 In these proceedings, which were initiated by special summons which issued on 9th July, 2008, the plaintiff, as mortgagee, sought an order for possession of certain properties set out in the schedule thereto, which included premises at Doughiska, Merlin Park, Galway, being all the property comprised in Folio 32638F of the Register of Freeholders County Galway. On 19th August, 2008 an appearance was entered on behalf of the defendants by Bruen Glynn & Co. (the defendants' former solicitors), who remained on record for the defendants until January 2010 when notice of change of solicitor was filed and the defendants' current solicitors came on record. No affidavit responding to the plaintiff's claim was filed on behalf of the defendants. However, there was correspondence between the defendants' former solicitors and the plaintiff's solicitors, as a result of which a supplemental affidavit sworn by Patrick Walzer on 16th April, 2009 clarified the properties in respect of which the plaintiff was seeking an order for possession with a view to eliminating duplication in the schedule to the special summons, which arose from the fact that some of the properties, including the lands registered on Folio 32638F, County Galway, were comprised in separate mortgages executed by the defendants in 2002 and 2005 in favour of the plaintiff.

1.2 By order of this Court made on 29th April, 2009 by MacMenamin J. it was ordered that the defendants forthwith upon service of the order upon them deliver up to the plaintiff possession of the properties described in the schedule to the special summons, including the lands registered on Folio 32638F, County Galway. The order recited that it was made on the application of counsel for the plaintiff by consent of the parties.

2. The application

2.1 On this application the defendants seek an order setting aside the portion of the order of 29th April, 2009 insofar as it relates to the defendants' family home at Doughiska, being a portion of the property comprised in Folio 32638F, County Galway (the disputed premises). The basis on which the defendants seek to have the disputed premises excluded from the order is that they contend that they did not consent to an order for possession in relation to those premises. The chain of events on which the defendants rely as in support of that proposition is as follows:

> (a) The defendants appointed Mr. Finbarr Jones who has described himself as "mediator" in the affidavit sworn by him on this application, a family friend, as a mediator in discussions with the plaintiff "arising out of their defaulted mortgages … and the sale of the properties which were mortgaged". In that capacity, Mr. Jones attended a meeting with the defendants at the plaintiff's offices in Dublin on 2nd April, 2009. There is a factual dispute between Mr. Jones and Jean Desmond, a manager with the plaintiff, as to whether there was a discussion at that meeting about excluding the family home from the disposal of the assets comprised in the mortgages held by the plaintiff from the defendants. Ms. Desmond has averred that she has no recollection of such a request by the defendants.
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> (b) In any event, by letter dated 22nd April 2009 directly to the plaintiff's office in Galway, the defendants' former solicitors referred to a letter dated 17th April, 2007 from the plaintiff's solicitors "wherein it is stated that the property at Doughiska be split to exclude the family home". The defendants' former solicitors suggested that an amendment of the summons could be applied for when the matter would be before the Court on the following Monday "whereby the family home at Doughiska could be excluded from the list of properties on the Summons".
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> (c) On 23rd April, 2009 the defendants' former solicitors wrote to the plaintiff's solicitors stating that they still awaited hearing from the plaintiff "in relation to the family home at Doughiska as to whether same is to be excluded from the Order for Possession being sought next Monday". They referred to the letter of 17th April, 2007. They also enclosed their proposed "Consent to the Order". The consent was in letter form and was addressed to the plaintiff's solicitors. In it, the defendants' former solicitors consented to an order for possession of all the property set out in the schedule to the special summons as amended by Mr. Walzer's affidavit sworn on 16th April, 2009 "EXCEPTING AND EXCLUDING therefrom the family home situate at Doughiska … being part of Folio 32638F, County Galway as outlined on the map attached hereto".
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> (d) The response of the plaintiff's solicitors in their letter of 24th April, 2009 was that under no circumstances would the plaintiff agree to the exclusion of any part of Folio 32638F, County Galway for the orders for possession being sought on the following Monday. It was stated that the consent furnished was not acceptable on the basis of the exclusion. The defendants' former solicitors were invited to furnish a consent to the making of all of the orders. It was stated that the plaintiff would be proceeding to seek orders for possession on all of the properties on the following Monday.
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> (e) By letter dated 24th April, 2009 to the plaintiff's solicitors the defendants' former solicitors, in that capacity, consented to an order for possession of all of the properties set out in the schedule to the special summons as amended by Mr. Walzer's affidavit of 16th April, 2009. It was on foot of that letter that counsel for the plaintiff sought the consent order which was made on 29th April, 2009.

2.2 The position of the defendants is that the defendants' former solicitors did not have authority from them to consent to an order

for possession over the disputed premises. All the Court knows of the defendants' former solicitors' version of events is what is stated in two letters from the defendants' former solicitors to the defendants, which have been exhibited in the affidavit of the second defendant sworn on 18th April, 2010 grounding this application. The earlier letter was dated 4th November, 2009. In that letter, the member of the firm dealing with the matter stated that when she received the letter of 24th April, 2009 from the plaintiff's solicitors stating that the plaintiff would not agree to the exclusion of the disputed premises, she got in touch with Mr. Jones and it was agreed that she should send the plaintiff's solicitors the full consent and she did so. She also stated that she understood from talking to Mr. Jones that he had an agreement with the plaintiff that it would not enforce the order immediately and that there would be a certain amount of time given to the defendants to try and sell the properties. As counsel for the defendants pointed out, the later letter, which was dated 7th January, 2010, is inconsistent with the letter of 4th November, 2009. In the later letter, having referred to the response of the plaintiff's solicitors in their letter dated 24th April, 2009, it is stated by the writer that she then got in touch with Mr. Jones and with the defendants and after consultation with the defendants and Mr. Jones she was instructed to send them, meaning the plaintiff's solicitors, "the full consent" and she did so on 24th April, 2009 and sent a copy to Ms. Desmond. The inconsistency is that there was no reference in the earlier letter to contact with the defendants in relation to the attitude of the plaintiff as disclosed in its solicitors' letter of 24th April, 2009.

2.3 In his affidavit Mr. Jones has averred that he "never put forward any form of consent for possession of" the disputed property, contrary to what is indicated in the letters of 4th November, 2009 and 7th January, 2010. The second defendant has averred in her grounding affidavit on this application that the letter of consent dated 24th April, 2009 was given "despite [the defendants'] wishes".

2.4 There is a conflict on the evidence put before the Court by the defendants as to whether the defendants' former solicitors had authority to consent to an order for possession in relation to the disputed premises. It is a conflict which, as counsel for the defendants acknowledged, the Court cannot resolve on this application. From the perspective of the plaintiff, the defendants' former solicitors were their agents, being the solicitors on record for them in these proceedings, and in that capacity they gave a clear and unequivocal letter of consent to an order for possession being made in relation to all of the property set out in the schedule to the special summons, including the disputed premises. In my view, the plaintiff is entitled to maintain that position.

2.5 The objective of the defendants in seeking to have the disputed premises excluded from the order of 29th April, 2010 is so that they will have an opportunity to defend the plaintiff's claim for possession in relation to that property on the ground that the plaintiff does not have security over it. Counsel for the defendants expressed confidence in being able to demonstrate that the plaintiff does not have security over the disputed premises. The plaintiff, on the other hand, contends that it does have security. The resolution of that contest does not arise on this application.

3. The law

3.1 The law on the jurisdiction of the courts to amend or set aside judgments and orders is outlined in Delany and McGrath on *Civil Procedure in the Superior Courts* (2nd Ed.) at paragraphs 22-17 to 22-38, where a number of circumstances in which the jurisdiction has been recognised are identified. Understandably, the Court's jurisdiction under Order 28, rule 11 of the Rules of the Superior Courts 1986, the so called "slip rule", is not invoked by the defendants. It is the Court's inherent jurisdiction to amend or vary an order which the defendants have invoked and they rely, in particular, on the decision of the Supreme Court in *Belville Holdings Ltd. v. Revenue Commissioners* [1994] 1 ILRM 29.

3.2 In delivering judgment in the *Belville Holdings Ltd*. case, Finlay C.J. undoubtedly recognised that there exists a fundamental jurisdiction in a court to amend an order which it has previously made, even though the order is in the form of a final order and has been perfected. While the Supreme Court was unable to identify any Irish authority in point, Finlay C.J. stated that the position and principles appeared to be accurately stated in the judgment of Romer J. in *Ainsworth v. Wilding* [1896] 1 Ch. 673, quoting the following passage at p. 677:

> "So far as I am aware, the only cases in which the court can interfere after the passing and entering of the judgment are these:
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> (1) Where there has been an accidental slip in the judgment as drawn up, in which case the court has power to rectify it under O.28, r. 11;
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> (2) When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended."

Finlay C.J. also quoted the following passages from the judgments in *In re Swire* 30 Ch. D 239, which were quoted by Romer J. at p. 678:

> "Cotton L.J. says: 'It is only in special circumstances that the court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the court in fact has never adjudicated upon, then, in my opinion it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced'.
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> Lindley L.J. says: 'If it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not'.
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> And Bowen L.J. says: 'An order, as it seems to me, even when passed and entered, may be amended by the court so as to carry out the intention and express the meaning of the court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice'."

Finlay C.J. went on to state:

> "I am satisfied that these expressions of opinion validly represent what the true common law principle is concerning this question. 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 be lightly breached."

3.3 While the context of the decision in the *Belville Holdings Ltd*. case was very different to the context here, it does illustrate the application of the principle and its limited nature. It concerned a case stated from an Appeal Commissioner to the High Court under

the Income Tax Act 1967. In the High Court, on the question of law raised in the case stated – whether the Appeal Commissioner was correct in holding that notional fees attributable to services afforded by the appellant company to its subsidiaries should be taken into account in computing the tax profits or losses of the parent company for the tax period in question – it was held that, while it was correct that notional fees should be taken into account, the actual notional fees fixed by the Appeal Commissioner were not justified. However, the question posed in the case stated was answered in the negative. The issue which was before the Supreme Court was whether an order, which was made by the High Court three years after the initial order, directing that the initial order should be amended by the addition of a direction that the appeal should be re-entered before the Appeal Commissioner so that it could be determined having regard to the previous finding of the Court, was made without jurisdiction, as the appellant company contended. The Supreme Court held that the later order did not come within the common law principle which Finlay C.J. had outlined and set aside that order as having been made in error and deleted the variation which had been made to the initial order.

3.4 Delany and McGrath (at paragraph 22-29 *et seq*.) address another category of special or unusual circumstances in which a court will set aside a final order to protect constitutional rights and they quote the following passage from the judgment of Denham J. (at p. 544) in *In re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514 as a useful summary of the circumstances in which this jurisdiction may be exercised:

> "The Supreme Court has a jurisdiction to protect constitutional rights and justice. This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order. A very heavy onus rests on a person seeking to have such jurisdiction exercised. It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."

3.5 In *L.P. v. M. P. (Appeal)* [2002] 1 I.R. 219, Murray J., as he then was, explored the jurisdiction recognised in the *Greendale Developments Ltd*. case and addressed the position of a final order of the High Court in the following passage (at p. 231):

> "While the judgments of this court in *In re Greendale Developments Ltd. (No. 3)* … specifically recognised, in the light of Article 34.4.6º, the inherent jurisdiction of this court to afford a remedy in respect of its own orders to which the exceptional circumstances referred to apply, I think it must follow that there is an inherent jurisdiction in the High Court to provide a similar remedy at first instance in the same circumstances in respect of a final and unappealable order of the High Court. Of course these considerations do not apply to decisions of the High Court which are subject to appeal in the ordinary way. There, appeal is the remedy …."

3.6 Finally, Delany and McGrath (at paragraph 22-36 *et seq*.) recognise another category of circumstances in which a final order may be set aside by a court, that is to say, when it has been obtained by fraud. As Murphy J. stated in *Tassan Din v. Banco Ambrosiano S.P.A.* [1991] I.R. 569 at p. 580, in a passage which was referred to by Murray J. in *L.P. v. M. P.* (at p. 228):

> "The acceptance … that a decision of the Supreme Court can be set aside for fraud … does not truly represent an exception to this constitutional provision. An order obtained by fraud is a mere nullity."

The constitutional provision in question is Article 34.4.6º of the Constitution, which provides the decision of the Supreme Court shall in all cases be final and conclusive. As to what is meant by fraud in this context, Murphy J. referred to the speech of Lord Wilberforce in *The Ampthill Peerage* [1977] A.C. 547 where it is stated (at p. 571) that "[t]here must be conscious and deliberate dishonesty and the declaration must be obtained by it".

4. Application of the law to the facts

4.1 It is important to reiterate that even on the defendants' own evidence there is a conflict as to whether the defendants' former solicitors had authority to consent to an order for possession which included the disputed premises. It was suggested by counsel for the defendants that the Court should conduct an inquiry as to whether there was authority to give the consent embodied in the letter of 24th April, 2009 to encompass the disputed premises and that the process should accommodate the plaintiff in seeking discovery against the defendants and that the solicitor who wrote the letter of 24th April, 2009 should be called as a witness and the plaintiff should be afforded an opportunity to cross-examine. I am satisfied that the Court has no jurisdiction to embark on such a process.

4.2 As regards the application of the common law principle identified and applied in the *Belville Holdings Ltd*. case, it is not the case here that the order of 29th April, 2009 does not correctly state what the Court actually decided and intended. The contrary is the case. The order of the Court reflects the consent as to the making of the order which was furnished to the plaintiff's solicitors by the defendants' former solicitors.

4.3 This case is not within the category of most exceptional circumstances in which a court will set aside or vary its final judgment in order to protect constitutional rights and justice and to ensure that a breach of constitutional rights is not perpetrated. In this case, the High Court made a consent order at the request of the plaintiff, which was acting, as it was entitled to do, on the letter of consent from the defendants' former solicitors, who were on record for the defendants in the proceedings. This is not a case in which the defendants, through no fault of theirs, have been subject to a breach of constitutional rights. On the contrary, if it is the case that the defendants' former solicitors did not have authority to consent to an order for possession which encompassed the disputed premises, and at the risk of unnecessary repetition it must be pointed out that there is a conflict of evidence on this point, in the inter partes context with which the Court was concerned on 29th April, 2010, the fault of the agent of the defendants, the former solicitors on record for them, must be attributed to the defendants, as counsel for the plaintiff submitted. Accordingly, the jurisdiction which the Supreme Court recognised in *In re Greendale Developments (No. 3)* is not applicable in this case.

4.4 In requesting the Court to make the consent order, which included the disputed premises, counsel for the plaintiff acted on the letter of 24th April, 2009 from the solicitors on record for the defendants, that is to say, the defendants' former solicitors. It is beyond doubt that this is not a case in which there was a conscious and deliberate dishonesty in obtaining the Court order. The conduct of the plaintiff is unimpeachable, even if it is the case that the defendants' former solicitors did not have authority to consent to an order for possession in relation to the disputed premises.

4.5 In summary, the Court has no jurisdiction whatsoever to vary the order of 29th April, 2009 and this application is wholly misconceived. It would be inappropriate to address and I express no opinion on the submission made by counsel for the defendants that, were they to bring a separate action against the plaintiff to set aside the agreement underlying the order of 29th April, 2010, they would be met with a plea of *res judicata*, which, as was made clear by its counsel, the plaintiff would seek to rely on. That scenario is entirely hypothetical.

5. Order
5.1 There will be an order dismissing the plaintiff's application.