

THE HIGH COURT

[2004 No. 135 SP]

BETWEEN

NOEL SHERIDAN AND PETER QUINN TRADING UNDER THE STYLE AND PRACTICE OF SHERIDAN QUINN

PLAINTIFF

AND

JOHN GAYNOR

DEFENDANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 8th day of November, 2012

1. This judgment is given on a motion issued on 8th February, 2012, by the plaintiff seeking, *inter alia*, an order that the defendant deliver vacant possession of the lands contained in Folio 2538 in the Register of Freeholders, County Meath.
2. The background to the present application is a long-running dispute between the plaintiff and the defendant which originated in the plaintiff acting as solicitors for the defendant and unpaid costs. In High Court proceedings [2002 No. 539 SJ], on 8th December, 2003, judgment was granted in the sum of €77,016.57 and costs against the defendant herein. A judgment mortgage affidavit in respect of the said judgment was registered in the Land Registry on 16th February, 2004, on the defendant's interest in the lands in Folios 5864, 2299 and 2538, County Westmeath.
3. In the present proceedings, an order was made on 12th July, 2004, declaring that the principal monies secured by the said judgment mortgage was well charged on the defendant's interest in the lands in Folios 5864, 2299 and 2538, County Westmeath. The order records that the amount then due to the plaintiff pursuant to the judgment of 8th December, 2003, was a sum of €63,486.90 (a portion of the judgment had been paid by the defendant) and provided that in default of payment within one month that the lands be sold.
4. By further order of the High Court made on 22nd January, 2007, the order of 12th July, 2004, was varied by the deletion of the references to the lands in Folios 5864 and 2299 of the Register of Freeholders, County Westmeath. Thereafter, the well charging order and order for sale applied only to the defendant's interest in the lands in Folio 2538 in the Register of Freeholders, County Westmeath.
5. By a motion issued in January 2008, the plaintiff sought vacant possession of the lands comprised in Folio 2538 in the Register of Freeholders, County Westmeath, for the purpose of the sale of the said lands. In response thereto, the defendant contended that his sister, Ms. Cecilia Gaynor, had an interest in the said lands. Thereafter, by order of 28th April, 2008, the Court set down certain issues for trial as to the interest, if any, of the said Ms. Gaynor in the lands in Folio 2538 of the Register of Freeholders, County Westmeath. After further procedural steps, those issues were heard and determined by Feeney J. in a judgment delivered on 12th September, 2009. It was decided that Ms. Gaynor did not have an interest in the said lands. An order for costs (to be taxed in default of agreement) of the trial of the issues was made against the defendant and Ms. Gaynor, jointly and severally. The defendant appealed the judgment and order of Feeney J. to the Supreme Court. The Supreme Court struck out the appeal on 16th April, 2010, and made a further order for costs against the defendant.
6. On 26th July, 2010, on the application of counsel for the plaintiff and in the presence of the defendant who was in Court, an order was made in the motion issued in January 2008, that the defendant deliver up possession of the lands in Folio 2538, County Westmeath to the plaintiff or a person authorised on its behalf on or before 17th September, 2010. Vacant possession was not delivered up by that date.
7. In January 2011, attempts were made to serve the said order with a penal endorsement on the defendant. Those attempts failed and an order for substituted service was made by the Court (Peart J.) on 23rd January, 2012, that service be effected by hand delivery at the defendant's premises at Rathconrath, Mullingar, County Westmeath. Service was effected in accordance with that order on 31st January, 2012.
8. In the meantime, the plaintiff had taxed the orders for costs made by the High Court (Feeney J.) on 12th October, 2009, and the order of the Supreme Court dated 16th April, 2010, and obtained Certificates of Taxation dated 16th March, 2011, in the sums of €51,714.68 and €5,274.43 respectively. Upon the failure of the defendant to pay the amounts due pursuant to those certificates for costs, the plaintiff herein issued a petition for bankruptcy dated 8th June, 2011 (Record No. 658P). On 13th December, 2011, the defendant paid to the plaintiff a cheque in the sum of €50,000 and the bankruptcy proceedings were struck out on 21st December, 2011.
9. The plaintiff issued the present motion on 8th February, 2012, seeking both an order for attachment and committal by reason of the defendant's failure to comply with the order of the Court made on 26th July, 2010, and seeking, in the alternative, a fresh order that the defendant deliver up vacant possession of the lands in Folio 2538 in the Register of Freeholders, County Westmeath.
10. At an early stage in this application, I indicated that I was unwilling to make an order for attachment and committal as the order required the delivery up of vacant possession on or before 17th September, 2010, and it had not been served on the defendant until 31st January, 2011, and therefore he did not have an opportunity of complying with the terms of the order subsequent to its service on him. Hence, the matter proceeded only as an application for a fresh order for possession.
11. In the affidavit of Mr. Quinn sworn on 16th May, 2012, in this application, he averred, *inter alia*:

"8. I say that since the grant of the order of 26th July, 2010, the plaintiff issued bankruptcy proceedings by way of petition for bankruptcy dated 8th June, 2011, against the defendant by way of proceedings bearing Petition Record No.

658P. The bankruptcy proceedings were for the recovery of a debt due to the plaintiff which was separate and distinct from the debt underlying the within proceedings . . .

9. On 13th December, 2011, the plaintiff herein accepted a cheque from the defendant for €50,000 in the context of the bankruptcy proceedings and in settlement of the debt due in the bankruptcy proceedings. It was always the case that the plaintiff's acceptance of this sum was without prejudice to the plaintiff's right to continue with the proceedings herein. On 21st December, 2011, the bankruptcy proceedings were struck out."

12. He further averred that in respect of the amount declared well charged in the present proceedings "there remains due and owing the amount of €63,486.90 together with accrued and accruing Courts Act interest by the defendant to the plaintiff which sum remains due and owing by the defendant".

13. The matter was subsequently adjourned from time to time to allow the defendant file an affidavit in response. The defendant initially was not legally represented and subsequently was represented by Farrell & Company, solicitors, and at the hearing, by counsel. The defendant filed an affidavit sworn on 18th June, 2012. The affidavit deals with many matters, most of which have been raised numerous times before in the course of this long-running saga and relate to issues previously decided by the Court. Having referred to an extract from the bankruptcy petition recording that he was indebted to the petitioner in the sum of €56,989.11 pursuant to a Certificate of Taxation, the defendant stated in his affidavit at paragraph 43:

"I say that it was open to Mr. Quinn to include such sums as he believed to be owed by me but did not do so. I say that he accepted payment of the monies advanced by me to him and made no reference to the acceptance of them being without prejudice."

14. At the time of the settlement of the bankruptcy proceedings, it does not appear that the defendant was represented. Whilst the defendant now disputes that Mr. Quinn made any reference to the acceptance of the monies being without prejudice to the present proceedings, the defendant does not contend that the payment of €50,000 was made by him in settlement of the monies due on the judgment of 8th December, 2003, in proceedings [2002 No. 539 S] and declared well charged on the lands in Folio 258, County Westmeath on 12th July, 2004, in the present proceedings.

15. The above affidavit sworn by the defendant herein was also an affidavit grounding a notice of motion which he issued and in which he sought orders setting aside the orders made by this Court in these proceedings commencing with the order of 12th July, 2004. That motion was heard and determined by me on 2nd July, 2012, and I refused an order extending the time to bring an application to seek to set aside the earlier orders as set out in the defendant's notice of motion.

16. The defendant herein swore a similar affidavit to ground a notice of motion sought to be brought in proceedings [2002 No. 539 S] seeking to set aside the order of the High Court made on 8th December, 2003, perfected on 18th December, 2003, granting judgment against the defendant herein in the sum of €77,016.57 and costs. I also heard and determined that application on 2nd July, 2012, and refused to make an order extending the time to bring the proposed application.

17. On the affidavit evidence of Mr. Quinn and the defendant, Mr. Gaynor, the Court must conclude that the sum of €63,486.90 declared well charged on the lands in Folio 2538, County Westmeath, by order of the Court of 12th July, 2004, as varied by the order of 22nd January, 2007, together with interest thereon continues to be due and owing by the defendant to the plaintiff. The order of 12th July, 2004, provides that in default of payment within one month, the lands must be sold subject to such conditions of sale as shall be settled by the Court.

18. The normal practice of the Court in relation to sales through the Court is to require a plaintiff to have had the conditions of sale settled by counsel and arrangements in place for a proximate sale of the lands prior to the Court making an order for possession. That is so as to ensure that arrangements are in place to permit a sale to proceed within a short period of time of obtaining possession of the lands. The conditions of sale have not yet been settled by a Court counsel in these proceedings. Counsel for the plaintiff indicated that the plaintiff did not wish to incur the cost of this being done until such time as vacant possession had been procured by reason of the difficulties encountered to date in seeking possession of the lands in Folio 2538, County Westmeath. In my judgment, on the particular facts of this case, it appears to me to be in the interests of justice that the Court make an order for possession in advance of the plaintiff incurring the expense of Court counsel settling the conditions of sale.

19. The plaintiff requires vacant possession of the lands in Folio 2538, County Westmeath, in order to effect the sale of the lands which has already been ordered by the Court. The Court has already made an order for possession on 26th July, 2010, following protracted procedural steps and determination of issues raised by the defendant.

20. In my judgment, the plaintiff is now entitled to an order that the defendant do deliver up to the plaintiff or a person duly authorised on the plaintiff's behalf the lands in Folio 2538 in the Register of Freeholders, County Westmeath.

21. Having regard to the length of time that these proceedings have been before the Court and the prior order for possession which has been made, and in respect of which possession ought to have been delivered up by the defendant on or before 17th September, 2010, I propose specifying a date within the next three to four weeks as the date by which possession must be delivered up. However, prior to fixing the dates, I will hear the parties in relation to the current use to which the lands are being put and any practical arrangements which would have to be made for the purposes of delivering up possession as those matters are not on affidavit before the Court at present.