[2020] IEHC 105

THE HIGH COURT

2008 No. 1036 SP

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

OLIVER MOLONEY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 March 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application to amend an order pursuant to what is referred to informally as the "slip rule", i.e. Order 28, rule 11 of the Rules of the Superior Courts. The principal issue for determination in this judgment is whether the application to amend should be referred to the High Court judge who made the original order, or whether the application to amend may properly be made to the High Court judge now sitting in the relevant court list.

2. For the reasons set out herein, I am satisfied that, in circumstances where the application to amend merely seeks to correct what is an obvious clerical mistake in the drawing up of the original spoken order, it is appropriate to make the application to the judge now sitting in the relevant court list. This is especially so where, as in the present case, the High Court judge who had made the original order has since been appointed to the Court of Appeal.

PROCEDURAL HISTORY

3. These proceedings were instituted by way of Special Summons on 3 November 2008. The principal relief sought is an order for possession pursuant to section 62 of the Registration of Title Act 1964. This order had been sought by reference to a charge registered against the defendant's title to the relevant lands. The charge had originally been created in favour of GE Capital Woodchester Home Loans Ltd ("*GE Capital")*. That company has since changed its named to Pepper Finance Corporation (Ireland) Ltd. More recently, the company has changed its status to a "designated activity company" or "DAC" pursuant to the Companies Act 2014.

4. The proceedings were heard and determined by the High Court (McGovern J.) on 11 October 2010. An order was made on that date directing the defendant to deliver up possession of the mortgaged lands to GE Capital. I will refer to this order as "*the substantive order*" to distinguish it from subsequent orders made in the proceedings

5. For various reasons, the substantive order has not yet been enforced, and the defendant has not delivered up possession of the lands. To assist the reader in understanding the various procedural applications which have been brought since the making of the substantive order on 11 October 2010, it is necessary to set out the relevant rules governing the enforcement of orders. In particular, it is necessary to refer to Order 42, rules 20 to 24 (inclusive).

20. An execution order or an order of committal, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such order may, at any time before its expiration, by leave of the Court, be renewed by the party issuing it for one year from the date of such renewal and so on from time to time during the continuance of the renewed order, either by being marked with the seal of the High Court, bearing the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal; and an execution order so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

21. Where it shall appear to be just that an order of possession should be re-executed, the same may, at any time after its execution, be renewed by leave of the Court for one year from the date of such renewal by being marked, or by the giving of the notice, as in rule 20 mentioned.

22. The production of an execution order, or of the notice renewing same, purporting to be marked with such seal as in rules 20 and 21 mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

23. As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order.

24. In the following cases, viz.:

    (a) where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;
    (b) where a party is entitled to execution upon a judgment of assets in futuro;
    (c) where a party is entitled to execution against any of the shareholders of a company upon a judgment recorded against such company, or against a public officer or other person representing such company;

    the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly. The Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried: and in either case the Court may impose such terms as to costs or otherwise as shall be just. Provided always that in case of default of payment of any sum of money at the time appointed for payment thereof by any judgment or order made in a matrimonial cause or matter, an order of fieri facias may be issued as of course upon an affidavit of service of the judgment or order and non-payment.

6. As appears, there are specific time-limits prescribed for different procedural steps. An execution order may be renewed within one year under Order 42, rule 20. Where six

years have elapsed since the judgment or order, it is necessary to apply for leave to issue execution pursuant to Order 42, rule 24.

7. Insofar as relevant to the application to amend, the chronology of events subsequent to the substantive order on 11 October 2010 was as follows.

14 September 2011	An order of possession issued to the County Registrar for the County of Galway. This order of possession was not executed within one year, and an application was made by notice of motion dated 4 December 2012 to renew the order of possession.
4 February 2013	An order renewing the order of possession was made by the High Court (Dunne J.) pursuant to Order 42, rule 20.
15 April 2013	An order granting Pepper Finance Corporation (Ireland) Ltd liberty to issue execution was made by the High Court (Dunne J.) pursuant to Order 42, rule 24.
28 January 2014	Notice of motion issued seeking to renew the order of possession which had previously been renewed on 4 February 2013.
10 February 2014	An order is made by the High Court (McGovern J.). This order was drawn up on 12 February 2014 and records that "liberty to issue execution" had been refused.

8. It is this last order, i.e. the order of 10 February 2014, which is the subject of the application to amend. The essence of the application is that the reference to Order 42, *rule 24* is a clerical error.

9. To assess this contention that the order of 10 February 2014 contains a clerical error, it is necessary to review the procedure leading up to the making of the order. The order refers on its face to a notice of motion of 28 January 2014. The notice of motion had sought relief in the following terms.

> 1. An Order pursuant to Order 42 Rule 20 of the Rules of the Superior Courts giving liberty to renew and Order of Possession which issued on the 14th September 2011 and was previously renewed on the 4th February 2013;
>
> 2. Such further Order as this Honourable Court may seem fit.
>
> 3. Costs.

10. The application had been grounded on an affidavit sworn by Grainne Naughton on 28 January 2014. The affidavit sets out the detail of exchanges between the plaintiff and the defendant since the date the order of possession was first renewed on 4 February 2013.

It seems that a temporary payment arrangement had been put in place but that, ultimately, the defendant failed to make the agreed payments.

11. The rationale for the application to renew the order of possession is stated as follows towards the end of Ms Naughton's affidavit.

> 24. I say that the Order of Possession will expire on the 3rd February 2014 and that it has not been executed during the period of one year that it was in force for the reasons set out above.
>
> 25. Accordingly, I say and believe that the Plaintiff wishes to apply to this Honourable Court for liberty to renew the said Order of Possession during the continuance of the renewed Order.
>
> 26. I therefore pray this Honourable Court for the relief sought in terms of the Notice of Motion herein.

12. The notice of motion came on for hearing before the High Court (McGovern J.) on 10 February 2014. The spoken order of the court had been embodied in a formal order a number of days later, on 12 February 2014. The formal order reads as follows.

> "Upon Motion of Counsel for the Plaintiff made unto Court this day pursuant to Notice dated the 28th day of January 2014 there being no attendance by or on behalf of the Defendant
>
> Whereupon and on reading the said Notice and the proof of service thereof, the Affidavit of Grainne Naughton filed on the 28th January 2014 together with the exhibits referred to therein and on hearing said Counsel
>
> IT IS ORDERED that said Motion dated the 28th January 2014 seeking pursuant to Order 42 Rule 24 of the Rules of the Superior Courts that Pepper Finance Corporation (Ireland) Limited be at liberty to issue execution in respect of the Order for Possession dated the 11th day of October 2010 do stand refused
>
> And the Court doth make no Order as to costs"

13. The reference to Order 42, rule 24 is obviously mistaken. The notice of motion of 28 January 2014, which is expressly referenced in the court order, had sought relief pursuant to Order 42, rule 20 and not pursuant to rule 24. It is obvious from both the terms of the notice of motion and the grounding affidavit of Ms Naughton (set out above) that what was being sought was to *renew* the order for possession which was set to expire on 3 February 2014. Such applications are made pursuant to rule 20. Indeed, an application under the other rule, i.e. Order 42, rule 24, would appear to have been unnecessary in 2014 given that six years had not yet elapsed since the making of the substantive order in the proceedings on 11 October 2010.

14. The precise circumstances in which the application to renew the order of possession came to be refused in February 2014 have since been explained in an affidavit of Ciaran Kirwan sworn herein on 31 January 2020. It seems that the application to renew was refused by reference to the judgment in *Carlisle Mortgage v. Canty* [2013] IEHC 552; [2013] 3 I.R. 406, [21].

15. The High Court (Dunne J.) had held as follows in Canty.

> [21] The plaintiff in these proceedings was entitled to obtain an order of possession. Subsequently, that order not having been executed, it was open to the plaintiff to seek to have that order renewed. Once the order was so renewed, it was necessary thereafter, in order to retain the priority of the original order of possession obtained pursuant to O. 42, r. 5 to seek the renewal of the order during the continuance of the renewed order. In other words, a second and subsequent renewal of the order of possession must be obtained during the continuance of the order so renewed. That was not done in this case as the application to renew was not issued for some months after the expiration of the order as renewed. However, there is absolutely nothing to prevent the plaintiff from seeking to have another execution order in the form of an order of possession issued in the usual way in the Central Office. It should be remembered that the only reason why the order of possession in this case was not executed during its continuance was because of the conduct of the defendant. The only penalty, if that is the appropriate word to use, for the plaintiff is that it does not have priority in respect of its execution order over any other execution order that might be in existence in respect of the same property.

16. In short, it seems that the application to renew the order of possession a second time was refused by McGovern J. in circumstances where that order had already expired by the time the application came to be heard on 10 February 2014 (albeit that the notice of motion had been issued prior to its expiration).

17. The clerical mistake in the order of 10 February 2014 only came to the attention of the parties, a number of years later, when an application was made pursuant to Order 42, rule 24. More specifically, Pepper Finance Corporation (Ireland) DAC ("*Pepper Finance*") had issued a motion on 3 November 2017 seeking certain reliefs including relief under Order 42, rule 20 and rule 24. The motion ultimately came on for hearing before the High Court (Reynolds J.) on 22 January 2020, but had to be adjourned in circumstances where counsel for Pepper Finance indicated that he would have to seek to amend the order of 10 February 2014.

18. Pepper Finance next issued a motion dated 3 February 2020 seeking to amend the order of 10 February 2014. This application was made pursuant to Order 28, rule 11 of the Rules of the Superior Courts (as amended). This motion was made returnable to the Chancery Special Summons List.

DISCUSSION AND DECISION

19. Order 28, rule 11 of the Rules of the Superior Courts (as amended in 2009) provides as follows.

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal:
>
> (a) where the parties consent, and with the approval of the Court, by the registrar to the Court,
> (i) on the application to the registrar in writing of any party, to which a letter of consent to the correction from each other party shall be attached or
> (ii) on receipt by the registrar of letters of consent from each party; or
>
> (b) where the parties do not consent, by the Court,
>
> (i) on application made to the Court by motion on notice to the other party or
> (ii) on the listing of the proceeding before the Court by the registrar on notice to each party.

20. The application to amend the order of 10 February 2014 came on for hearing before me on Monday, 24 February 2020. Pepper Finance was represented by counsel, Mr Gavin Miller, BL. The defendant, Mr Oliver Moloney, did not attend in person. His son did, however, attend, and I took the very unusual step of allowing him to make a short submission *de bene esse*. It should be emphasised, however, that Mr Moloney's son does not have a right of audience on behalf of his father. The essence of the son's submission was to the effect that any application to amend should be made to the High Court judge who had made the original order, namely Mr. Justice McGovern.

21. Mr. Justice McGovern is no longer a judge of the High Court, having been appointed to the Court of Appeal in 2018.

22. Counsel on behalf of Pepper Finance cited the judgment of the Supreme Court in *Minister for Justice v. McArdle* [2005] IESC 76; [2005] 4 I.R. 260 as authority for the proposition that the amendment of an order did not necessarily have to be made by the same judge as had made the original order. Reference was made, in particular, to paragraphs [11] and [12] of the Supreme Court judgment as follows.

> "In my judgment in *McMullen v. Clancy* [2002] 3 I.R. 493 I pointed out at p. 502 that '… there is a fundamental public interest in the due administration of justice which requires that the order of a court accord with what the court has decided and that the decision of a court should not be thwarted, by an accidental slip or error or clerical mistake'. As I also pointed out in that case the courts have an inherent as well as an express (in the case of O. 28, r. 11) jurisdiction to amend a final order. *In the ordinary course of events an application would be made to the judge who decided the case to correct an error or slip in the order but the courts' inherent jurisdiction to correct such errors made in orders, particularly where they are clear and manifest, is not confined to the judge or court from which the error emanated*.* Indeed there have been cases where such errors have been corrected

after a considerable lapse of time, such as in two cases referred to in my judgment cited above where corrections were made after a lapse of 19 years and 33 years respectively.

Where a matter comes before this court on appeal and there is no dispute concerning the terms of the decision as set out in the judgment of the High Court and there is a clear and manifest error in the order made on foot of that judgment, this court has, in my view, an inherent jurisdiction, in the interests of the proper administration of justice, to amend the order so as to accurately reflect the decision made in the High Court. This is necessary so that the appeal can be determined on the basis of what was actually decided rather than on the basis of an erroneous order. There may be circumstances where this court, in its discretion, might consider it more appropriate for such an issue to be remitted for decision by the High Court but given the clear and manifest nature of the error in the order I do not think that this is one of those cases. Therefore in my view this court should exercise its inherent jurisdiction to amend the High Court order by substituting a reference to s. 16(1) for the reference s. 16(2) of the Act of 2003 in that order."

*Emphasis (italics) added.

23. Whereas the judgment in *McArdle* addresses the jurisdiction of an appellate court to invoke the slip rule to correct a clear and manifest error in the order under appeal, the principles are nevertheless of assistance in the present case. For the reasons set out in the passage from *McMullen v. Clancy* [2002] 3 I.R. 493 (cited in *McArdle*), the courts' inherent jurisdiction to correct a "clear and manifest" error made in the drawing up of an order is not confined to the judge who made the original order.

24. Applying these principles to the facts of the present case, it is obvious that a clerical error occurred in reducing the spoken order, made by Mr. Justice McGovern on 10 February 2014, to writing. The formal order, as drawn up by the relevant registrar a few days later, mistakenly refers to an application under rule 24 of Order 42, instead of rule 20. The text of the formal order also uses the wording appropriate to rule 24, i.e. leave to execute. This very minor error is entirely understandable in that applications under the former rule are far more common in practice.

25. This clerical error can properly be characterised as clear and manifest. It is obvious from both the terms of the notice of motion of 28 January 2014 and the grounding affidavit of Ms Naughton of the same date (set out earlier) that what was being sought was to *renew* the order for possession which was set to expire on 3 February 2014.

26. There can be no doubt from a reading of the order of 10 February 2014 in conjunction with the notice of motion that the application had been made pursuant to rule 20. There can be no prejudice to the defendant in making an amendment to reflect this uncontroversial fact.

27. Given that the clerical error is clear and manifest, I am satisfied that this is not a situation whereby it is necessary or appropriate to have the application to amend listed before the judge who made the original order. This is especially so where that judge has since been appointed to the Court of Appeal. Special arrangements would have to be put in place to have Mr. Justice McGovern sit as a High Court judge to hear this application. There would be no practical benefit at all in doing this.

28. An application to amend of this type, i.e. one involving a clear and manifest error, can properly be made to whichever judge is sitting in the relevant court list at the time. This application came before me as part of the regular Chancery Special Summons List which takes place each Monday. The existence of the clerical mistake in the drawing up of the order is self-evident. The identification of the mistake is not, in any way, reliant on the recollection of the judge who determined the application. Moreover, the proposed amendment is entirely uncontroversial.

29. (Different considerations might apply in the case of a more complex order or where the alleged error is not clear and manifest. In such a scenario, it might be preferable, if possible, to have the matter relisted before the relevant judge (assuming of course that he or she has not since retired)).

30. In all the circumstances of the present case, I am satisfied that the application to amend pursuant to the slip rule was properly made to me as the judge sitting in the Chancery Special Summons List on the relevant date.

31. I am further satisfied that the amendment to the order is a proper one to make.

CONCLUSION

32. The application to amend the order of 10 February 2014 (perfected on 12 February 2014) is allowed pursuant to Order 28, rule 11.

33. The amended order will read as follows.

> "IT IS ORDERED that said Motion dated the 28th January 2014 seeking pursuant to Order 42 Rule 20 of the Rules of the Superior Courts liberty to renew and Order of Possession which issued on the 14th September 2011 and was previously renewed on the 4th of February 2013 do stand refused"