

THE HIGH COURT

[2017 No. 252 S.P.]

BETWEEN

DAVID DULLY

PLAINTIFF

AND

ATHLONE TOWN STADIUM LIMITED, DECLAN MOLLOY, CIERAN TEMPLE AND PADDY  
MCCAUL

DEFENDANTS

AND

THE FOOTBALL ASSOCIATION OF IRELAND

NOTICE PARTY

(No. 6)

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of October, 2019**

1. As will become clear, there is a slightly convoluted constellation of *dramatis personae* in the present application. I have received helpful submissions from Mr. Kieran Collins B.L. for the plaintiff, from Mr. Michael Forde S.C. (with Mr. Laurence Masterson B.L.) for the first-named defendant, Athlone Town Stadium Ltd., and from Mr. Cormac Ó Dúlacháin S.C. who acted initially for the second, third and fourth-named defendants, the directors of the first-named defendant. However, the second-named defendant, Mr. Declan Molloy, indicated during the hearing that he wanted Prospect Law Solicitors, who instruct Mr. Ó Dúlacháin, to cease to act for him, so I made that order without objection and Mr. Molloy thereafter represented himself.
2. There are five previous judgments in this matter culminating in *Dully v. Athlone Town Stadium Ltd (No. 5)* [2018] IEHC 704 [2018] 11 JIC 1402 (Unreported, High Court, 14th November, 2018) which involved an award of damages in favour of the plaintiff against the first-named defendant. That defendant has appealed a number of orders in the proceedings to the Court of Appeal (Court of Appeal Record numbers 2018/184 and 2018/478). Those appeals are currently listed for hearing on 16th October, 2020. Following filing of the appeal, the Court of Appeal made an order requiring the appellant to give security for costs and requiring €50,000 to be lodged in court, which was done. Subsequent to the award of damages against the first-named defendant in the High Court, the plaintiff sought to have the directors of the first-named defendant made liable for the award of damages and costs. That action was purportedly compromised on 23rd May, 2019, and an order was made on foot of that, although there are some infelicities in the wording of the order, to which I will come shortly.
3. Mr. Forde, on behalf of the company, now brings a motion dated 13th September, 2019, seeking to vacate the order of 23rd May, 2019, and also seeking a declaration that the first-named defendant is not bound by the undertakings in the agreed statement to the court given on that date. In an affidavit filed on 7th October, 2019, he gave notice of an intention to extend the relief sought, in order firstly to amend the order of 23rd May, 2019 to reflect the reality that the appropriate parties were the three directors rather than the company and secondly, seeking an order directing that the plaintiff's solicitor

repay the €50,000 to the Accountant of the High Court or lodge €50,000 to the credit of the appeal. Insofar as concerns the application to amend the order (in effect under the slip rule), I gave Mr. Forde liberty to file an affidavit of Declan Molloy of 15th October, 2019 for the purposes of that issue. Insofar as it might be relied on subsequently for the substantive relief of setting the order aside, the liberty to file it was expressly on the basis that the door would be left open to the other parties to reply as appropriate.

4. To complete the factual background for present purposes, I should also note that following the apparent settlement of the action, two EGMs of the company took place and on both occasions the company refused to endorse the settlement agreement.
5. The parties agreed that the first issue is to deal with the question of amending the order of 23rd May, 2019 under the slip rule to reflect what actually happened on that date and subject to that, the second issue is whether that order as so amended should be set aside.
6. Dealing with the slip rule issue, one question that presents itself is whether Mr. Forde has standing to make an application under the slip rule when his client was not involved in the application originally. On the one hand, that absence would militate against standing to make such an application. On the other hand the agreed statement of the court does purport to impose duties on his client. While the point is interesting procedurally, it appears to be somewhat irrelevant because it is accepted that I have jurisdiction of my own motion to correct slips under O. 28 r. 11 and in any event the other parties who were involved in the application on 23rd May, 2019 appear to accept the necessity for some adjustment of the wording of the order. Mr. Forde at one point argued that if the other parties were making a slip rule application, that should be by motion on notice grounded on affidavit and so forth but that seems to be a pointless formality given the nature of the amendments required, to which I will come very shortly, as well I might add as somewhat counterproductive and contradictory to his own stance of seeking similar adjustments himself (indeed of doing so without a formal notice of motion either).
7. Mr. Collins helpfully drew attention to my judgment in *Lavery v. D.P.P. (No. 3)* [2018] IEHC 185 [2018] 3 JIC 1310 (Unreported, High Court, 13th March, 2018), where I set out the various different circumstances in which a court can amend a decision after having given it, but errors of the kind that arise here, where the wording of the perfected order does not reflect what actually happened on the day, certainly come within the category where a post-perfection amendment under the slip rule is permissible.
8. The various amendments required are as follows:
  - (i). To amend the title of the proceedings as set out in the order to include the second, third and fourth-named defendants; namely, the directors.
  - (ii). To change the first preambular paragraph of the order so that it refers to "*the claim in the amended special summons dated the 17th day of December, 2018 insofar as it relates to the second, third and fourth named defendants*" as opposed to "*this*

*action*” and also to change the reference to the matter having been called on for hearing in the presence of counsel for the plaintiff and for the defendant to be a reference to counsel for the plaintiff and counsel for the second, third and fourth-named defendants. That simply reflects the reality of what happened on the day, namely that the application was between the plaintiff and the directors, with the company not formally appearing by its own legal representatives on that date.

- (iii). To note that the court was informed by Mr. Ó Dúlacháin, counsel for the second, third and fourth-named defendants, that an undertaking as set out in the agreed statement of the court was being given on behalf of the company and the third and fourth-named defendants. Mr. Ó Dúlacháin now informs me that his instructions were that the company had by email from the company solicitor Mr. McNelis dated 15th May, 2019, authorised his solicitor to compromise the matter in such a way so that he was therefore in a position to give an undertaking on behalf of the company despite not formally appearing for it. Mr. Molloy’s affidavit suggested that his recollection was that the statement that the undertaking was being given on behalf of the company and the third and fourth-named defendants was made by the counsel for the plaintiff but the parties had no objection to my listening back to the DAR for that date, which I have done, and it is quite clear from that that in fact it was Mr. Ó Dúlacháin who stated that, rather than counsel for the plaintiff. Nonetheless, the basic point made by Mr. Molloy was correct, simply the precise details as to who said what were misremembered.
- (iv). To delete the statement that it was ordered that the first-named defendant discontinue the appeals lodged with the Court of Appeal with no orders. Listening back to the DAR it is clear that my own recollection that I did not make such an order is borne out. Rather, I simply noted the undertakings; and the question of the appeal being discontinued is contained in the agreed statement rather than being something ordered by the court as such.
- (v). The final amendment required is simply to amend the addressees of the order to delete McNelis and Company Solicitors for the first-named defendant and to substitute Prospect Law Solicitors, who were solicitors for the second, third and fourth-named defendants.

- 9. Having discussed all of these necessary amendments with counsel, I arranged for the preparation of a draft order which was made available to the parties. No particular objection was put forward to that draft order other than that Mr. Forde put down the caveat that an EGM of the company might disagree with his instructions that the matter can be dealt with in that way. But that cannot be a reason not to make an order. Litigation involving companies could never proceed in an orderly fashion if it had to be interrupted every time a decision needed to be made so that an EGM could be held.

**Order**

- 10. Accordingly, the appropriate order is:

- (i). an order that the first-named defendant have liberty to file the affidavit of Mr. Declan Molloy of 15th October, 2019, it being understood that that has been received for present purposes only in relation to the slip rule application and that the other parties will have the opportunity to reply to it should they so require in relation to the other reliefs sought by the first-named defendant;
  - (ii). an order declaring that Prospect Law Solicitors have ceased to act for the second-named defendant; and
  - (iii). an order amending the order of 23rd May, 2019 under the slip rule (O. 28 r. 11 of the Rules of the Superior Courts 1986) in the terms of the draft order furnished to the parties.
11. Finally, Mr. Forde indicated that if and when the order was corrected under the slip rule he would require some time to consider the matter further before proceeding with the second leg of his submission, which related to setting aside the order, and I will now hear the parties in relation to that.

**Postscript – further directions**

12. Having heard from the parties, the two further directions required are that the matter will be adjourned until 21st October, 2019 for mention, with Mr. Forde to have liberty in the meantime to put in a further affidavit exhibiting the email of 15th May, 2019 from Mr. McNelis and setting out any further evidence he so wishes in support of his application to set aside the order of 23rd May, 2019. Secondly, because of the need to resolve any uncertainty about the position of the third and fourth-named defendants I will direct the third and fourth-named defendants to inform Prospect Law Solicitors before 21st October, 2019 whether they wish those solicitors to continue to act on their behalf and if not, to attend in person at 11am on 21st October, 2019 to enable any necessary consequential orders to be made without further delay.