

APPROVED

[2022] IEHC 377



THE HIGH COURT

2010 No. 462 SP

BETWEEN

HUGH CARTY
JOHN CARTY
GAVAN CARTY
SHANE CARTY
PRACTISING UNDER THE STYLE AND TITLE OF KENT CARTY

PLAINTIFFS

AND

WILLIAM DORAN

AND BY ORDER DATED 7 FEBRUARY 2011

LINDA DORAN

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 June 2022

INTRODUCTION

1. This judgment is delivered in respect of a contested application to correct what are said to be a number of errors in an earlier court order. The application is made pursuant to the so-called “*slip rule*” under Order 28, rule 11 of the Rules of the Superior Courts. The proposed amendments to the court order have been set out in the notice of motion.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. At all material times, Mr. William Doran and Mrs. Linda Doran had been registered as the joint owners of the lands comprised in Folio 14725 of the Land Registry, County Kilkenny (“*the lands*”). The within proceedings are concerned only with Mr. Doran’s interest in the lands.
3. The plaintiffs had registered a judgment mortgage against Mr. Doran’s interest in the lands on 28 January 2010. Thereafter, the plaintiffs instituted the within proceedings by way of special summons on 2 July 2010. The principal relief sought in these proceedings had been a well charging order, i.e. an order declaring that the amount due on foot of the judgment mortgage, together with the interest which had accrued thereon, stands well charged on Mr. Doran’s interest in the lands.
4. The proceedings, as initiated, had been taken against Mr. Doran alone. The plaintiffs subsequently sought to join Mrs. Doran to the proceedings as a second defendant. The application to join Mrs. Doran was initially refused by the Master of the High Court by order dated 11 January 2011. The plaintiffs then applied to have the order of the Master discharged. The matter came before the High Court (Ryan J.) and an order was made on 7 February 2011 joining Mrs. Doran to the proceedings as a second defendant. An appeal was taken against this order to the Supreme Court. The appeal proceedings were subsequently transferred to the Court of Appeal upon the establishment of that court. The appeal proceedings were ultimately struck out on 30 April 2018.
5. In the interim, an amended special summons had been issued and the application for the well charging order had come on for hearing before the High Court

(Dunne J.) on 8 July 2013. The court made an order on that date, the operative part of which reads as follows:

“The Court doth declare that the principal moneys secured by the said Judgment Mortgage created by the registration as aforesaid of an office copy of a Judgment Mortgage Affidavit the interest thereon the costs of such registration and the costs herein after awarded stand well charged on the Defendant’s interest in the said lands and premises

And It Appearing that there is due to the Plaintiff on foot of the said Judgment Mortgage a sum of €44,670.77 for principal together with interest thereon from the 9th November 2009 at the rate of 8 percent per annum interest up and a sum of €160.00 for costs

And IT IS ORDERED that in default of payment to the Plaintiff of the said sum together with further interest on the principal sum of €44,670.77 at the rate of 8 per cent per annum until payment and the costs hereinafter awarded within three months from the date hereof the said lands and premises be sold at such time and place subject to such conditions of sale as shall be settled by the Court and the following Account and Inquiry are to be taken and made in the Examiner’s Office namely

No 1 An Account of all incumbrances subsequent as well as prior to and contemporaneous with the Plaintiff's demand

No 2 An Inquiry as to the respective priorities of all such demands as shall be proved

And IT IS ORDERED that the Plaintiff do have the costs including reserved costs on the appropriate scale of and incidental to this application and Order and the proceedings hereunder when taxed and ascertained in equal priority with their demand"

6. It is immediately apparent from the face of the order that there are a number of errors in same. First, the title of the proceedings is incorrect. The title does not reflect the joinder of Mrs. Doran as a second defendant to the proceedings. Rather, Mr. Doran is the only defendant named in the order. Secondly, the order, having recited that the defendant, i.e. Mr. Doran, had appeared in person, then refers to "*there being no attendance by or on behalf of Linda Doran*". Again, this aspect of the order does not reflect that Mrs. Doran had been joined to the proceedings and should thus have been referred to as the second named defendant. Thirdly, the order then refers to "*the Defendant's interest*" in the lands, without identifying which of the two defendants it is intended to refer to. Finally, the second paragraph of the order as set out above does not make grammatical sense: there appears to be some text missing after the words "*8 percent per annum interest up*". Alternatively, it is possible that some of the words appearing are surplusage.

7. For reasons which have never been properly explained, the plaintiffs, who are a firm of solicitors, failed to notice these errors. It seems that the plaintiffs only became aware of these errors for the first time in January 2019 when the High Court Examiner's Office raised queries in response to the plaintiffs' application to proceed to enforce the well charging order. The relevant letter from the Examiner's Office was not exhibited until well into the exchange of affidavits. This is regrettable. A party seeking to amend a court order owes a duty of candour to the court. The letter of January 2019 was the motivating factor in the making of the amendment application and it should have been exhibited from the outset. This should have been obvious to the plaintiffs who are a firm of solicitors.
8. The plaintiffs have now, belatedly, brought an application to have the order of 8 July 2013 corrected. The application to amend the court order has been made pursuant to Order 28, rule 11 of the Rules of the Superior Courts. As required in the case of a contested application, the application has been brought by way of notice of motion directed to the two defendants. The notice of motion was issued on 26 July 2019, with an initial return date on 14 October 2019. The hearing of the motion was, however, delayed as a result of the restrictions on certain court sittings introduced as part of the public health measures enacted in response to the coronavirus pandemic.
9. In the ordinary course, an application to correct or otherwise speak to the minutes of a court order is brought before the judge who had made the original order. If, however, this is impossible or impractical because, for example, the judge has since retired or has been appointed to a different court, then it is permissible to make the application to a sitting judge of the relevant court: see *Pepper Finance*

Corporation (Ireland) DAC v. Moloney [2020] IEHC 105. The judge who made the order in the present case has long since been appointed to the Supreme Court. Accordingly, the application pursuant to the slip rule has been made to me as the High Court judge assigned to the list in which the original order was made, namely, the Chancery Special Summons List.

10. Given the dispute between the parties as to what had been intended by the court order, I had directed that the parties should take up a transcript of the digital audio recording (“*the DAR*”) of the hearing on 8 July 2013. This seemed the simplest way of resolving the dispute. Unfortunately, it appears that, as a result of technical issues, there is no recording in existence in respect of the relevant part of the proceedings for that day.
11. Accordingly, if and insofar as any amendment is to be made to the court order, it can only be done if it is manifest from the materials before this court that there was, indeed, a clerical mistake or an accidental error or omission in the order as drawn up, and equally manifest as to what the correct form of the order should have been.

DISCUSSION AND DECISION

12. The object and effect of the slip rule has been explained as follows by the Supreme Court in *McMullen v. Clancy* [2002] IESC 61; [2002] 3 I.R. 493 (at pages 502/503):

“It seems to me, in the public interest and in the interest of the due administration of justice, that the High Court at all times retains its jurisdiction to amend its own orders where, due to accidental error, they do not correctly state what the court actually decided. Consistent with these considerations, it is noteworthy that O. 28, r. 11 expressly provides that such errors or mistakes ‘may *at any time* be corrected by the Court ...’ (emphasis added). Undoubtedly, the jurisdiction

of the court is a discretionary one and it may in the exercise of that discretion refuse to amend an order if it would be inequitable to do so.”

13. The Supreme Court addressed the question of delay as follows (at page 505 of the reported judgment):

“It is, however, axiomatic to say that in making any order, a court may have regard to the rights and interest of persons affected by the order. In the case of an order pursuant to O. 28, r. 11, delay in seeking to have the order corrected may give rise to changed circumstances from the time when the application ought to have been made which may, in turn, be prejudicial to other parties, including third parties.”

14. I turn now to apply these principles to the circumstances of the present case. The application to amend the order has two elements, as follows. First, it is sought to amend the order so as to reflect the joinder of Mrs. Doran to the proceedings. Secondly, it is sought to amend the order so as to ensure that interest is payable at the rate of 8% per annum until payment of the principal sum and accrued interest. This does not form part of the amendments sought in the notice of motion. I address these two elements in turn below.

15. It is immediately apparent from the face of the well charging order that it does not reflect the earlier order made joining Mrs. Doran to the proceedings. This error is apparent both from the title of the proceedings as set out in the well charging order and from the body of that order. This is precisely the type of clerical mistake which is properly subject to correction under Order 28, rule 11. The making of the proposed corrections simply ensures that the order as drawn up reflects the earlier order joining Mrs. Doran to the proceedings. The making of the proposed corrections does not call for speculation as to what had been the intent of the court in making the order on 8 July 2013. It is manifest from a reading of the order that what was intended is that Mr. Doran’s interest in the

lands be well charged. The order distinguishes between “*the Defendant*” and Linda Doran, and it is only the former’s interest in the lands which is charged with the judgment mortgage. The deficiency in the order is that it fails to describe Mrs. Doran as a defendant. It is obvious from the title and the text of the order that the registrar must have been working off the original, unamended special summons when she prepared the order. The registrar records the fact that Mrs. Doran had not been in court on 8 July 2013, but mistakenly refers to her as if she was a non-party to the proceedings rather than a defendant. Both the nature of the mistake and the remedy to same are manifest.

16. Given the very significant delay in the bringing of the application to amend the order, it is necessary to consider whether the proposed corrections could result in prejudice to either Mr. Doran or Mrs. Doran. For the reasons which follow, I am satisfied that no such prejudice arises.
17. The practical effect of the amendments is simply to make it explicit that the well charging order is confined to Mr. Doran’s interest in the lands. Matters would have been very different if, for example, the plaintiffs were seeking an amendment which would have the effect of extending the well charging order to Mrs. Doran’s interest in the lands.
18. There is no question of Mr. Doran having been misled as to the effect of the original order nor of his being prejudiced by its correction. Even without correction, it is apparent from the terms of the order that it is his interest alone in the lands that has been charged. Mr. Doran is the only party named as defendant in the original, uncorrected order and, accordingly, all references to “*the Defendant’s interest*” in the lands would be understood as referring to Mr. Doran’s interest in the lands.

19. Similarly, Mrs. Doran is not prejudiced by the proposed corrections. The fact, if fact it be, that Mr. Doran may subsequently have sold or otherwise transferred his interest in the lands to Mrs. Doran does not affect this. The judgment mortgage has been registered as a burden against Mr. Doran's interest in the lands since 28 January 2010 and would have affected any transfer of the lands. In any event, it is apparent from even the uncorrected version of the court order of 8 July 2013 that Mr. Doran's interest was subject to a well charging order and Mrs. Doran, having been served with the order, would have been on constructive notice of this fact if and when she took a transfer of his interest in the lands.
20. The title of the order should, therefore, be corrected. Similarly, the references to "*the Defendant*" should be corrected so as to read "*the first named defendant*", and the references to Mrs. Doran should be corrected so as to read "*the second named defendant*". It is also appropriate to correct the date of the registration of the judgment mortgage so as to read 28 January 2010. This date is apparent from Folio 14275. It is also properly pleaded in the amended special summons. The inclusion of a different date in the court order can only have been as the result of a clerical error on the part of the registrar.
21. Turning next to the position in relation to the payment of interest on the principal sum of the judgment mortgage, the amendments now sought in this regard had not been identified in the notice of motion. It is essential that the moving party in a contested application under Order 28, rule 11 identify with precision, in its notice of motion, the amendments it is seeking. The failure to do so in the present case is fatal to this aspect of the application to amend.
22. For completeness, this amendment would have been refused, for the following reasons, even if it had been sought as part of the notice of motion.

23. It is not readily apparent that the order of 8 July 2013 had been intended to impose interest in the terms now suggested by the plaintiffs. Whereas it appears that some words may have been omitted from the order, it cannot be said with certainty what those words should have been. The plaintiffs had expressly indicated in their application for judgment in default of appearance in the earlier summary summons proceedings that they had waived their claim to interest. Accordingly, there is no interest allowed in the summary judgment of 9 November 2009 upon which the judgment mortgage is predicated. It is not clear as to from what date, and upon what legal basis, the plaintiffs now assert a right to interest. These are all matters which should have been—but were not—addressed by the plaintiffs some nine years ago when the court order was obtained.
24. It is not appropriate to rely on the slip rule in circumstances where the actual intent of the court in making the original order is not manifest. This is especially so where, as in the present case, the application to amend is made many years later and would have the effect of imposing a significant additional burden on the other side, i.e. in the form of a very high rate of interest for all of the intervening years. Whereas it is understandable that the plaintiffs did not take active steps to enforce the well charging order until such time as the pending appeal against the joinder of Mrs. Doran had been resolved, there was no good reason why they should not have checked the form of the order when it was taken up. The order was perfected within a matter of weeks of its having been made in court on 8 July 2013: the date of the perfection of the order is 14 August 2013. Had the plaintiffs bothered to check the form of the order, it would have been obvious to them that, from their perspective, there was some difficulty in relation

to the wording in respect of interest and they could have arranged then to speak to the minutes of the order if so advised. The plaintiffs failed to do so. Instead, matters were let drift and it was not until July 2019 that an application was made to amend the order.

25. In summary, even if the amendments in respect of the payment of interest had been sought as part of the notice of motion, same would have been refused on the grounds of prejudicial delay and the absence of any certainty that the court had intended to award interest in the manner now contended for.

CONCLUSION AND FORM OF ORDER

26. An order will be made pursuant to Order 28, rule 11 of the Rules of the Superior Courts directing that the order of 8 July 2013 be amended so as to reflect the earlier joinder of Mrs. Doran. This will necessitate, *inter alia*, adding Mrs. Doran's name to the title of the proceedings as per the order, and then clearly distinguishing between the first and second named defendants throughout the body of the order. The date of the registration of the judgment mortgage will be corrected so as to read 28 January 2010.
27. No amendment is allowed in respect of the payment of interest on the principal sum of the judgment mortgage in circumstances where the notice of motion does not address this issue. The only relief sought at the time that the motion was issued was in respect of amendments necessary to reflect the earlier joinder of Mrs. Doran as a defendant to the proceedings. Moreover, there is no interest allowed in the summary judgment of 9 November 2009 upon which the judgment mortgage is predicated.

28. As to costs, the plaintiffs have only been partially successful in their application. Given the fact that the necessity for the application to amend the order was contributed to by the failure on the part of the plaintiffs to check the order at the time it was perfected, and given the delay on the part of the plaintiffs in exhibiting the crucial letter from the Examiner's Office, my *provisional* view in relation to costs is that each party should bear its own costs of the application under the slip rule. If either side wishes to contend for a different form of costs order, then they should contact the registrar, within fourteen days of today's date, with a view to having the matter listed, remotely, on a suitable Monday in the Chancery Special Summons List. If neither party contacts the registrar within fourteen days, the order will be drawn up as indicated above.

Appearances

Conor E. Byrne for the plaintiffs instructed by Kent Carty Solicitors
William Doran represented himself
No appearance on behalf of Linda Doran