Neutral Citation No: [2022] NICh 19	*Ref:* **KEE11995**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*ICOS No:* **2007/130312/02/A01**
	Delivered: **12/12/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

Between:

ALLEN FINLAY

First named Plaintiff/Appellant

and

DONNA BERYL FINLAY

Second Named Plaintiff/Appellant

and

SAMUEL ROBERT FINLAY
(as personal representative of Nancy Millar Finlay (Deceased))

Defendant/Respondent

_____

Mr McCausland (instructed by McKees Solicitors) for the Appellants
Mr McCombe (instructed by Comerton & Hill Solicitors) for the Respondent

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KEEGAN LCJ

Introduction

[1] This case arises pursuant to chancery proceedings issued in 2007. In those proceedings the plaintiffs (who are also referred to as the appellants in this case) applied for the following relief in relation to the estate of Nancy Millar Finlay who was the mother of the first named plaintiff. The claim was for:

(a) A declaration that the plaintiffs are the beneficial owners of the premises comprised in a conveyance of 21 November 1933 made between James Nathaniel Murray and Annie Murray and Thomas Francis Murray and John Greg Murray and Walter Wallace Murray and William Ernest Murray of the one part and Rubina M Heaney of the other part and therein described as "all that shop, dwelling house, office houses, yard, garden and premises together with the parcel of land attached thereto containing one acre, two

roods and 27 purchases, statute measure or thereabouts situated in the townland of Tully in the parish of Killead, Barony of Lower Masserene and County of Antrim" and now known as 2 Carmavy Road, Killead, Crumlin, Co Antrim ("the Premises"); and

(b) An order that the defendant do execute all necessary documents to perfect the plaintiff's title to the premises in accordance with the declaration at (a) above.

The litigation history

[2] The writ was issued on 29 November 2007. A statement of claim followed fairly soon thereafter on 4 December 2007. The claim is based on the existence of two deeds termed "the unaltered deed" and "the altered deed" in relation to the subject land.

[3] The plaintiffs are husband and wife and reside at 14F Carmavy Road, Killead, Crumlin, in the County of Antrim. The plaintiffs are respectively the son and daughter in law of Nancy Millar Finlay who died on 27 January 2007 (the deceased). The defendant is the personal representative of the deceased. By deed of 5 November 2004 (the altered deed) the deceased purported to convey to the plaintiffs for natural love and affection, certain lands described in the altered deed as "the premises comprised in the conveyance and therein described as above." There was attached to the altered deed a map which delineated by a red line the public house in the area to the rear of the public house. This purported to be the only lands conveyed to the plaintiffs. The altered deed bears a stamp of the Registry of Deeds denoting that it was registered on 11 January 2005 and further bears a registration number 2005005247.

[4] The plaintiffs maintain that the deceased had in fact intended to convey not only the public house and lands to its rear but also an adjacent site upon which there was situate the deceased's dwelling house. In support of this proposition the plaintiffs rely upon the unaltered deed which does not have a map annexed. It bears the same stamp of the Registry of Deeds as the altered deed and was registered on the same date with the same registered number. The plaintiffs therefore make the case that the deceased executed the unaltered deed and conveyed to them the premises described in the unaltered deed rather than the altered deed which restricted the conveyance to the area shown on the map.

[5] A defence to the claim was lodged along with a counterclaim on a date in 2008. In these pleadings the defendant states that the solicitor acting on behalf of both the deceased and the plaintiffs erroneously drafted the unaltered deed dated 5 November 2004. As a result, it is said that the description of the lands in the schedule was inaccurate as on the one hand the schedule recited the conveyance of 21 November 1933 in its entirety making reference to all of the lands. On the other hand, it described the lands known as 2 Carmavy Road, Killead, Crumlin. The defence maintain that this deed was registered in the Registry of Deeds without the

error being perceived by the said solicitor. Upon discovery of his error, the said solicitor wrote to the plaintiffs enclosing the map and asking them to approve same by signing it. The defence states that the map was duly returned and signed by and on behalf of the plaintiffs by the first named plaintiff. The defendant therefore denies that the altered deed is a nullity and of no effect. Rather, the defence case is that it reflects the true intentions of the deceased and that this was validated by the plaintiff's actions.

[6] Next in the sequence is the counterclaim in which the following relief is sought:

(a) A declaration that the defendant as person representative of the estate of the deceased is the beneficial owner of the premises known as 2A Carmavy Road, Killead, Co Antrim.

(b) Rectification of the deed of 5 November 2004 insofar as the same is necessary to reflect the declaration in paragraph (a).

(c) An order that the plaintiffs do execute all necessary documents to perfect the defendant's title to the premises as aforesaid in accordance with the declarations sought above.

[7] Following the defence and counterclaim there were requests for further and better particulars. A list of documents was filed on behalf of the defendant. An amended statement of claim was served on 17 April 2008. A reply to the defence and counterclaim was lodged on 6 June 2008. In that the plaintiffs denied that the defendant was entitled to any of the reliefs as set out in the prayer of the counterclaim and denied all particulars in relation to that. A list of documents was filed by the plaintiff dated 2 March 2009.

[8] Thereafter, the litigation progress slowed considerably. It was not until the solicitors for the defendant issued a summons on 12 May 2017 that there is any re-energising of this case.

[9] The summons issued on 12 May 2017 was for an order pursuant to Order 3 rule 6(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 and in the alternative Order 34 rule 2(2) that the action against the defendant be dismissed and judgment entered for the defendant with costs. This summons was accompanied by an affidavit sworn by the defence solicitor.

[10] This affidavit referred to the fact that the case had not been set down by the plaintiffs. Therefore, the case was made that there had been inordinate and excusable delay on the part of the plaintiffs and that the defendant has been seriously prejudiced by that delay. A hearing before the Master then took place to determine this application.

[11] This court has reviewed the various orders of the Master that followed. An "unless order" was made on 6 November 2017 that "unless the plaintiff sets the action down for trial within 14 days of the order the plaintiffs' writ shall be struck out." On 21 November 2017 Master Hardstaff made an order which provides that the plaintiffs' action be dismissed and that the plaintiffs pay to the defendant the costs of the action and any consequential applications.

[12] The plaintiffs effectively made the case that they did not know that the order was made against them. During this period the plaintiffs changed solicitors.

[13] Next is an application made on 20 August 2019 by the plaintiffs to set aside the judgment obtained on 21 November 2017. This application was accompanied by an affidavit of the second named plaintiff Beryl Finlay. At para [4] of this affidavit the reasons for the set aside application are set out as follows:

> "In summary, my application to set aside the judgment is based on the following arguments:
>
> (i) We were not aware that the subject proceedings were listed for a strike out application on 21 November 2017.
>
> (ii) Neither our legal representatives nor the court informed us that the subject proceedings were listed for a strike-out application.
>
> (iii) Our legal representatives did not attend the strike-out application.
>
> (iv) Neither our legal representatives nor the court informed us that the subject proceedings had been struck out and the judgment made.
>
> (v) We were unaware that the subject proceedings were struck out until 23 October 2018.
>
> (vi) We were unable despite our best efforts over several years to get out legal representatives to engage with us so that we could pursue the subject proceedings.
>
> (vii) If the set aside application is granted the subject proceedings have good prospects of success and are not, in any way, speculative.

(viii) The subject proceedings are an issue of great personal and financial importance to us.

(ix) The costs order made under the judgment would significantly prejudice us financially.

(x) To deny the application would be unjust."

[14] The set aside application was heard by Master Hardstaff and concluded with his order of 16 March 2022. By this stage the plaintiffs were self-representing. The order states as follows:

"1. The court hereby refuses the application to set aside the judgment made on 21 November 2017.

2. Amend the said judgment to include the words 'and judgment to the defendant with the defendant's costs in the main action and the application for a strike out to be paid by the plaintiffs' under the slip rule.

3. The defendant to have his costs paid by the plaintiffs for this application to set aside the judgment made on 21 November 2017.

4. In addition, the defendant to have his costs of the wasted review on 4 February 2022 paid by the plaintiffs.

5. Extend time to applicants to 28 days from today."

[15] A Notice of Appeal from this order was lodged dated 6 May 2022. It is this appeal that that I am adjudicating on.

Related chancery proceedings

[16] At this juncture I refer to the related proceedings are before the chancery court. They are proceedings brought by a third party who purchased 2A Carmavy Road, from the plaintiffs. They are Samuel Richard McComb and Carolyn Sarah McComb. Mr Corkey has appeared on their behalf at this hearing.

[17] In an affidavit of 25 January 2022 that I have been provided with the McCombs claim ownership of 2A Carmavy Road. They confirm that they instructed Wilson Nesbitt solicitors to purchase the property for them. The property was not marketed. The sale was agreed privately with the owners who they understood to

be the first defendants. The McCombs agreed with the first defendants to buy the property for £200,000 comprised of £115,000 mortgage along with £85,000 cash.

[18] Thereafter, the affidavit explains how an issue with title arose. On 7 October 2021 the solicitors received from Reid Black Solicitors on behalf of the first defendants' copies of the title deeds for the property with the following explanation

> "…the original title deeds for the property are not available. My clients confirm that the title deeds were misplaced a number of years ago by Malpas and Green Solicitors who are no longer trading. Some checks undertaken then in relation to the property."

[19] In the course of the conveyancing process it is apparent that a statutory declaration was signed by both Beryl and Allen Finlay. These statutory declarations were sworn on 24 November 2021. They are important legal documents as they provide assurances from the appellants that they were the owners of the property and that the original title deeds had gone missing.

[20] On 4 December 2021 the McCombs received a letter in the post from Comerton & Hill Solicitors stating that their client, the second defendant, was the owner of the property and that they were effectively squatting on the property.

[21] Thereafter, there was some contact between the parties in relation to title. This culminated in further correspondence from Comerton & Hill of 16 December 2021. In that correspondence the solicitor was clear that "the first defendants do not own and did not own property at 2A Carmavy Road." Comerton & Hill went on to say:

> "The ownership of the property at 2A Carmavy Road is the subject of proceedings in the High Court. We have sought and have been given a hearing date before Master Hardstaff on 7 January 2022 at 12noon and are seeking his directions."

[22] As a result of the above an injunction was granted to freeze the monies received as part of the conveyance pending resolution of the title dispute.

[23] Given the history and connected proceedings I queried whether or not I needed to hear the appeal from Master Hardstaff's refusal to set aside the strike-out application or whether it could be heard alongside the other proceedings. Both Counsel asked that I hear the appeal. I also enquired as to whether or not oral evidence was going to be called given the issues that arose in the case. In relation to that query, I was told that by agreement, the case would proceed on submissions. I therefore turn to the arguments raised.

The arguments made

[24] Mr McCausland, on behalf of the appellants relied upon the following synopsis in Beryl Finlay's sworn affidavit:

> "My husband and I make the straightforward and frank case that this is an altered deed and rather the deceased had intended to convey not merely the public house and the lands to the rear but also an adjacent site upon which there was situated the deceased's dwelling house."

[25] He also maintained that there was strong evidential support for the above proposition because the unaltered deed along with the altered deed were both stamped on the same date and registered on the same date with the same number at the Registry of Deeds. Mr McCausland therefore argued that the appellants are entitled to rely on the unaltered deed and that the title to 2A is theirs.

[26] Mr McCausland went on to contend that the unless order was to provoke a relatively simple step which was to have the case set down because the appellants had attended to the burdensome tasks of providing instructions for pleadings and providing a list of documents. He reiterated the point made on affidavit that the delay was not because of any inaction or inactivity on behalf of the plaintiffs but was really laid at the door of the solicitors. In particular, the affidavit states:

> "Had I known that the case was subject to an unless order, I would of course, have attended to whatever was required in order to rectify the situation."

[27] The case was made that a change of solicitors from McKervill Neilly to McCann & McCann dated 8 September 2017 caused the problem. It was also tentatively suggested that the unless order was not served on the appellants by post or personally and not served on McCann & McCann and so it cannot be relied on. As submission progressed, the latter point was not pursued.

[28] The kernel of the plaintiff's case is set out succinctly at paragraph [38] of Mr McCausland's skeleton arguments that:

(a) The appellants were not given any or adequate notice as to the application to strike out the proceedings that resulted in the unless order.

(b) That the unless order was invalidly and improperly served or simply just not served on the appellants.

(c) That once the unless order was made, the appellants were given inaccurate and inadequate advice about it.

(d) In any event, the appellants have a meritorious case that is well-advanced and can properly come on for hearing within a minimum of prejudice.

[29] In support of his argument Mr McCausland relied upon *McNeely v Pierse Contracting Ltd and others* [2018] NIQB 37 which draws on the case of *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 166. Relying on *Hytec*, Mr McCausland said the circumstances in this case were not so stark as to justify the plaintiff's being deprived of a trial.

[30] A subsidiary argument was made in the skeleton argument at para [36] as follows. In making the impugned order the Master used the slip rule to "amend" the unless order to provide for judgment to the defendant rather than simply strike out the writ. Mr McCausland submitted that to use the slip rule to make a positive finding for judgment in favour of the defendant was not appropriate.

[31] In reply to the above Mr McCombe disputed the claim that the factual circumstances are such that the order of the Master should be set aside. He referred to the *Hytec* case where Ward LJ said at paras1675:

> "Ordinarily this court should distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed, and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."

[32] Mr McCombe disputed the argument that the plaintiffs were not aware that the subject proceedings were listed for a strike out application on 21 November 2017 (the date was actually 6 November 2017). In doing so he effectively drew on the material that was provided by way of discovery from the solicitors involved, in particular the following facts :

(i) On 30 August 2017 McKervill Neilly wrote to the plaintiffs' solicitors stating that they would "draw to your attention that this case is next before the Master on 12 September 2017, and we will require your urgent response not least in relation to the Notice of Change of solicitor in this matter."

(ii) On 19 October 2017 McCann and McCann wrote to the plaintiffs enclosing a letter from Comerton & Hill the letter stating that:

> "The Master directed that we write to you to advise that unless the previous orders of the court are complied with within the next seven days it is likely that the court will accede to the defendant's application for judgment to be entered for the defendant together with costs."

(iii) The letter also refers to the adjournment date. McCann & McCann's letter states that:

> "We would be grateful if you could revert to our office immediately with your comments in the previous matter, namely the outstanding Bill of Costs in respect of McKervill Neilly Solicitors and whether or not you are in a position to place to us in funds for our continued representation in this matter."

(iv) An email was then sent to the plaintiffs on 8 November referring to the email of 19 October and awaiting their updated instructions as a matter of urgency.

(v) On 17 November 2017 a letter is written to the plaintiffs enclosing the order of Master Hardstaff dated 6 November 2017 and an email is sent on the same date.

[33] Drawing on this core material Mr McCombe argued that the plaintiffs knew very well about the proceedings but failed to put their solicitors in funds or discharge their previous solicitor's Bill of Costs.

[34] In answer to the plaintiffs' other limb of argument that "neither our legal representatives nor the court informed us that the subject proceedings were listed for a strike-out application" Mr McCombe relied heavily on a solicitor's attendance note. This is an attendance note of Orla McDonald, solicitor, dated 28 June 2017. It states as follows:

> "Allen and Beryl advise that they had attended with their counsel late in June for the purposes of filing a reply to an affidavit that had been served. At this meeting it was the first indication they had had that the case had been listed

> in court and a time and date had been set by the Chancery judge."

[35] There are further attendance notes in relation to consultation with counsel on 1 June 2017 the fullness of which I do not need to record. Suffice to say that the application and other papers were then sent to the plaintiffs by McKervill Neilly on 1 June 2017 and as a consultation was requested there was a further consultation with counsel on 1 September 2017.

[36] In reply to the third point made by the plaintiffs that the legal representatives did not attend the strike out application Mr McCombe reminded the court that the reason why there was no legal representation at the strike out application which is to do with putting the solicitors in funds.

[37] The next argument was that neither the legal representatives nor the court informed the plaintiffs that the subject proceedings had been struck out and the judgment made. In this regard Mr McCombe relied on an attendance at McCann & McCann's office on 24 November 2017.

[38] Following from this, on 28 November 2017 an email was sent to the plaintiffs indicating that:

> "We shall proceed to engage with the court in respect of ascertaining the position regarding an application to set aside the order, however, we must request the sum of £2,000 is placed on account for us to initiate this work."

[39] Mr McCombe referred to the attendance note of 20 June 2017 which clearly indicates that the plaintiffs had attended with their counsel in late June for the purposes of filing a replying affidavit. There were further attendances until on 25 February 2018 McCann & McCann emailed the plaintiffs in the following terms:

> "Due to lack of instructions and misinterpretation of instructions we do not feel that we can proceed with your case any further."

[40] As to the ancillary argument made by Mr McCausland, Mr McCombe maintained that the Master had given full judgment for the defendant and thereby effectively resolved the title dispute in their favour. In this regard he relied on the slip rule and refers to the Practice Direction.

Conclusion

[41] In my view this case requires determination of two questions. The first is whether or not the dismissal of the plaintiffs' claim should be set aside as a result of the inaction on the part of the plaintiffs associated with their relationships with two

sets of solicitors during the relevant time period. As to this question I find Mr McCombe's arguments are more compelling. They are also supported by the attendance notes and the contemporaneous correspondence sent by solicitors the details of which I have summarised above. It appears clear to me that there was a difficulty with paying previous solicitors McKervill Neilly, putting McCann & McCann in funds, and providing instructions to McCann & McCann.

[42] I am not satisfied to any extent that the Master was wrong to issue the first order on 21 November 2017 dismissing the claim. There is no convincing case made as to this and Mr McCausland could see that this was not his strongest point.

[43] The more contentious argument is in relation to the set aside application at which the plaintiffs were represented and the Master's order of 16 March 2022. Again, it seems to me that there is insufficient evidence to support an application to have this decision of the Master reversed. That is for the same reason that the first decision should stand, namely that the plaintiff's knew about this court hearing and for whatever reason did not take the necessary action to deal with the issues. Again, Mr McCombe's arguments are more convincing.

[44] However, unfortunately that is not the end of the matter. Whilst I consider that the plaintiffs' action should remain struck out for non-compliance, I do not consider that the Master's order, in fact properly addresses title. The order was ostensibly amended under the slip rule but that was to effectively adjudicate on the merits of the counterclaim that has been set out above. That included a claim for declaratory relief and rectification of a deed.

[45] *Valentine Supreme Court Practice* at 15.12 refers to use of the slip rule as follows:

> "**Correction of judgments and orders**
>
> 15.12 Clerical mistakes and errors arising from accidental slip or omission in a judgment or order may be corrected at any time by the court on motion or summons under the 'slip rule' (Ord.20 r.11). Beyond the terms of that rule, the court has inherent jurisdiction to vary its own order to carry out or clarify its manifest intention; and to correct errors on the court record. It must be a mistake, whether induced by the judge, the parties or the court official in expressing the manifest intention of the court. It can be an error in an order induced by a mistake in the notice of motion; an arithmetical miscalculation; misnaming of a party, and omission of a provision which the judge would have put in the order but forgot and was not reminded by the parties. It does not allow a change of mind; nor a correct of a misapprehension of law or fact

> or of an error induced by misrepresentation or fraud; nor where the order made has unforeseen effects; nor can it cure an excess of jurisdiction."

[46] I have not heard substantive argument as to whether the slip rule encompasses such a step. I have my doubts about this. In any event the problem arises given the nature of judgment sought. The counterclaim seeks specific relief in relation to title. The courts, as is well known, are reluctant to grant declaratory relief without a hearing. That is because this is a discretionary remedy. The particular nature of this form of relief is explained in *Valentine, Supreme Court Practice* as follows:

> "**Declaration**
>
> 14.95 Section 23(1)(2) of the Judicature Act provides that in any action or proceeding the High Court may make a binding declaration of right whether or not consequential relief is claimed; and a merely declaratory judgment or order can be sought on its own. A declaration can be made as to rights depending on events which have not yet occurred (s.23(3)). The declaration must relate to the legally enforceable rights or liabilities of the plaintiff, subsisting or future. Declaration is a statutory not an equitable remedy, but it is discretionary and can be refused if the plaintiff does not come with 'clean hands.' The High Court will not grant, at least in a writ action, a declaration that an inferior court should make a particular decision under a statute which conferences exclusive jurisdiction on that court, nor should it grant an injunction to stop a court from exercising its jurisdiction. Declarations as to matters of public law rights should be sought in judicial review applications and not in actions. The courts are reluctant to grant declaratory relief without a full contested hearing. There is little point in giving a declaration by consent, as that can be achieved by agreement between the parties themselves."

[47] Mr Corkey who appears for the McCombs also provided further extracts from *Valentine* which highlight the fact that estoppel arises only if the prior proceedings have ended, and a judgment has been given on the merits not where proceedings have been dismissed for procedural default.

[48] The fact is that the order of Master Hardstaff does not actually record the making of a declaration of title or order rectification of the deed. It was not suggested that the Master had any hearing on the merits of these matters. Therefore, the issue of title remains to be determined. This is an unfortunate state of affairs

given the appellants default. I also observe that there are potentially very serious issues arising in this case if the allegations that statutory declarations were made erroneously prove to be true.

[49] With the benefit of hindsight, it is clear to me that this case may have been best dealt with alongside the other chancery proceedings. In any event, a merits determination will require oral evidence to be heard.

[50] Accordingly, I consider that the order of Master Hardstaff to refuse to set aside the dismissal of the plaintiffs' claim for failing to comply with the requirements of litigation was correct. However, as I have said this does not solve the case entirely. I am not satisfied that a valid declaration has been made as to the disputed title or rectification of the deed ordered. These matters fall to be determined on their merits. I consider that a dismissal of the appeal is the appropriate order. I will allow the parties to make any further representations on matters arising and costs. My provisional view is that the appellants are liable for costs to date.