

THE HIGH COURT

Record No. 2018/6394P

Between:

Brian O’Riordan and Michael O’Shea

Plaintiffs

And

SLGI (Holdings) plc, ADT Limited,

American District Telegraph Services International Limited and the Property Registration Authority

Defendants

JUDGMENT of Mr. Justice Alexander Owens delivered on the 11th day of April 2019.

1. The plaintiff has applied for trial of a preliminary issue in a notice of motion dated 12th December 2018. It is agreed between the parties that the hearing of this application can be treated as a hearing of the issue and that for this purpose, I can have regard to the elements in the affidavits filed which establish undisputed facts.
2. The action relates to an office block known as “*ADT House*” which is located at 113 Phibsborough Road, Dublin 3. This unit is just south west of Cross Guns Bridge at the Royal Canal and it was formerly part of the Ranks City Mill. The plaintiffs acquired the freehold and intermediate titles by a conveyance dated 31st August 1993, Park Avenue Estates Limited -to- Michael O’Shea and Brian O’Riordan, subject to and with the benefit of a 35-year lease dated 4th September 1987 in favour of the second defendant, ADT Limited.
3. At the end of March 2018, Mr. O’Shea and Mr. O’Riordan asked ADT why it had not paid the rent. They were told that the first defendant had succeeded in becoming registered in the Land Registry as owner of the property and that ADT had surrendered the lease and vacated possession. ADT had paid the first defendant to get out of the lease and it may be inferred that the first defendant used the registration to represent that it had acquired the superior interest in order to negotiate the surrender and get this payment. The Folio shows the 1997 lease as a registered burden on the superior freehold interest.
4. It has long been recognised that the registration of deeds system does not enable searching which allows precise identification of lands described in the memorials to deeds. The old index of lands never functioned properly and the index of names searches and memorials of deeds often do not identify with precision the location of the lands assured in the acts which turn up on searches. It is difficult to avoid the conclusion that somewhere in this case fraudsters identified this weakness in the system and interposed a fake deed and a false title with a superficial plausibility.
5. *ADT House* now appears in the file plan referred to in Part 1 (A) of Folio 220572F County Dublin.
6. The issue before me is whether the matters deposed to establish that the plaintiff is entitled to an order cancelling the registration of the first defendant as full owner with absolute title of Folio 220572F County Dublin. This registration was made on foot of Dealing D2017LR131291W and took effect on 15th November 2017.
7. Since 1st June 2011, the compulsory registration provisions of section 24 of the Registration of Title Act 1964, as amended, have applied to conveyances and assignments on sale of freehold and leasehold unregistered land in Dublin. Where sales were completed after that date it became necessary to apply for first registration in any case where an application for first registration could have been made on a voluntary basis previously.
8. Where unregistered land is bought, the solicitor for the purchaser investigates the title to that land prior to completion and nowadays prior to the contract of sale. Title is shown by the vendor and is deduced from an acceptable root of title. Copies of the deeds and other documents to vouch that title are produced by the vendor’s solicitor for inspection by the purchaser’s solicitor.
9. Applicants for first registration of a property following a sale where the purchase money does not exceed €1,000,000.00, may avail of the Form 3 procedure set out in Rule 19 (3) of the Land Registration Rules 2012. This permits the Property Registration Authority to register without itself carrying out any investigation of the title, in reliance on the certificate of a solicitor as embodied in that form. I refer to the content of Form 3 as set out in the Rules. The solicitor certifies that the title is in order.
10. The solicitor who acts for the purchaser in a sale will usually process the purchaser’s application for first registration. That solicitor will have fully investigated the title. If the title is in order that solicitor should be in a position to give the certificate in Form 3, which must be based on title deduced from a root of title set out in Rule 19 (1). This Rule specifies that the title must be deduced from a conveyance for value made more than 15 years prior to the date of the application and the solicitor who signs the Form 3 certifies that the title is in order on that basis. If the title is not sufficiently evidenced, the solicitor should not give an unqualified certificate and Rule 19 procedure may not be availed of.
11. A conveyance dated 20th December 2016, Kent International Holdings LLC -to- SLGI (Holdings) plc, purported to assure the freehold of *ADT House* the first defendant. This claim to title was based on the assertion that *ADT House* had previously been assured by a conveyance dated 1st February 1990, Park Avenue Estates Limited -to- Woodslim Limited. The evidence establishes that the property assured by the 1990 conveyance did not include *ADT House*. It conveyed an adjoining property situated immediately to the west of *ADT House* and the map attached to it made this clear.
12. Following the 2016 conveyance, an application to the Land Registry for first registration was submitted by Mr. Herbert Kilcline, a solicitor on behalf of the first defendant. This included a Form 3 certificate dated 27th October 2017, signed by Mr. Kilcline. Paragraphs 2 and 3 of this certificate were incorrect. They stated as follows:

“I have investigated the title to the property described in the Deed of Conveyance dated the 20th day of December 2016 lodged herewith. The property in or over which the estate or interest acquired by the conveyance exists is shown on the application map lodged herewith edged in red.”

"As a result of my investigation of title, I certify the Deed of Conveyance of 1st of February 1990 conveyed the freehold in the property, effecting the merger of prior leases, subject to the lease in perpetuity of 20th June 1851 (between John William Bell later misspelled as Bayly and John Pemberton) and subject to the lessee's interest in a lease dated 4th September 1987 from Park Avenue (sic) Limited to ADT Limited in the property for 35 years commencing on 4th September 1987, an attested copy of the memorials are lodged herewith in the applicant, free from any adverse rights, restrictive covenants or incumbrances except those subject to which the conveyance expressly conveyed the property."

13. The true position is that *ADT House* was not conveyed to Woodslim Limited in 1990. It was occupied by ADT Limited under the 1987 lease and they were paying rent to Mr. O'Riordan and Mr. O'Shea who had bought the property in 1993. The property did not devolve to the vendor to the first defendant in the manner asserted in the Form 3 or the recitals to the conveyance dated 20th December 2016.

14. Woodslim Limited has denied that it had ever conveyed the property to the vendor to the first defendant and no copy of an executed deed from that company has been produced. A copy of a statutory declaration of a very inadequate sort has been exhibited on behalf of the first defendant. This purports to give an explanation from the vendor to the first defendant of how it came to lose the original of a deed from Woodslim conveying the property to it. It seems very doubtful that any such document was ever executed and no competent solicitor would accept this sort of evidence without much more detail.

15. Affidavits filed on behalf of the first defendant exhibit documents which point to materials which Mr. Kilcline may have had available to him when he provided his certificate. Whether or not Mr. Kilcline believed what was stated in his Form 3 certificate is not relevant. The certificate was wrong. It is unlikely that he had copies of the original title documents. He cannot have had a copy of the 1990 deed which included a map and made clear that it related to the adjoining property. The material produced by the first defendant's deponent and the Property Registration Authority suggest that the only pre- 2014 documents held were copies of memorials of registered deeds and Registry of Deeds hand searches.

16. The application of the first defendant to the Property Registration Authority for first registration of its freehold title in the Land Registry, was misconceived. The first defendant had at no stage acquired the title which it claimed to hold. The affidavits filed on its behalf are most unsatisfactory and do not indicate the identity of any solicitor who acted for it in the acquisition of the property, or whether that solicitor also acted for the vendor or the circumstances of when and how Mr. Kilcline came to be involved or what documents he had available to him. It is unclear what, if any, investigations of title took place at the time of the deed to the first defendant.

17. The paper trail of title which the first defendant relied on as the basis of its application for first registration started with a fundamental mistaken assumption, misstatement and error as to the effect of the 1990 deed and then proceeded through a series of documents, each of which was either dubious, non-existent or unimpressive and in some cases a mixture of all three. The matter has been dealt with on the affidavits. It is unnecessary for me to decide whether the participation of the first defendant in all of this involved foolishness or knavery. The upshot of the error is that an application was made for registration of the first defendant in the Land Registry as owner of freehold land which it did not in fact own and had no title to good, bad or indifferent.

18. It is urged on me on behalf of the first defendant that Mr. Kilcline was acting as agent for the Property Registration Authority and that any mistaken suppositions which he made in his Form 3 certificate is not the responsibility of the first defendant. There is no evidential support for this fanciful contention. Mr. Kilcline was acting on behalf of the first defendant and the Authority was relying on his certificate in the same way as a bank taking security relies on the title certificate of a solicitor acting on behalf of a borrower. The scheme of the Form 3 procedure set out in the 2012 Rules places responsibility for the certificate on a solicitor who certifies to the Authority that the title of the applicant has been investigated and is in order. The certifying solicitor performs his task on behalf of the applicant and is not engaged by the Authority.

19. If the property had been transferred to a purchaser by the registered owner prior to the issue of the plaintiff's ownership coming to light, there might have been something to the submission that the registration should stand and that the Authority would have to assume responsibility for the faulty certificate and compensate for losses arising as a result. Nothing of this sort happened in this case and the first defendant must live with any shortcomings in the certification by its agent.

20. It is also asserted that there was an arrangement between the first defendant and its vendor that the consideration of €250,000.00 specified in the deed would not be released until the first registration was completed and that the subsequent release of this money should preclude an order for rectification of the register to cancel the ownership. The suggestion appears to be that this release of money, if it took place, was a change of position in reliance on the registration which should have an equivalent effect to that of a sale or charge in favour of a purchaser. I do not accept this. The application for first registration was processed on behalf of the first defendant who must have known of the potential deficiencies in the title. There is nothing to indicate that either of the parties to this arrangement had a copy of the original of the 1990 deed or the map attached to it. They were taking their chances.

21. Affidavits filed on behalf of the first defendant disclose that it is in the business of buying in doubtful titles. In this case, it took it upon itself to put up a doubtful title for registration and any arrangement to postpone payment by it of money can only be viewed as a recognition of this reality. This title would never have passed muster if the land had been put up by the first defendant for sale prior to first registration, or if it had been produced by it to demonstrate to ADT that the first defendant was now its landlord. The affidavits put in on behalf of the first defendant do not demonstrate that Mr. Kilcline conducted an examination of title which was sufficient to permit him to issue the Form 3 certificate. The fact that the application for first registration succeeded was an undeserved stroke of good fortune.

22. I have no doubt that I have jurisdiction to make an order setting aside the registration of the first defendant as registered owner of Folio 220572F of the Register, county Dublin. Section 31 (1) of the 1964 Act, recognises the existence of the jurisdiction of this Court to make orders of this sort, where a first registration or any registration has resulted from "*actual fraud or mistake*".

23. In some cases, it may be inappropriate to rectify the register, as would happen if the rectification would disturb the registration of a subsequent transfer or charge for value. A purchaser who takes a transfer but has not yet been registered as owner, would be in a similar position to resist rectification if the claim was not protected by the registration of a *lis pendens* as a burden on the Folio prior to the closing of the sale. None of these potential bars to rectification apply for the benefit of the first defendant here.

24. There is nothing in what I propose to order which interferes in any way with the general rule set out in section 31 (1) of the 1964 Act. This general rule is that the register is conclusive evidence of the title of the registered owner and can be relied on as such. A person acting in reliance on what is in the register and who is not a party to what is called "*actual fraud*", is not on notice of matters other than burdens which have not been registered or burdens which affect the land without registration.

25. I am not making any finding in relation to whether ADT was entitled to rely on the then registration of the second defendant as the full owner of the superior at the time that the 1987 lease was surrendered by it to the first defendant. That is an issue for another day.

26. There will be an order that the register of freeholders be rectified by the elimination of the registration of Folio DN220572F, which was the subject matter of Dealing number D2017LR131291W and that the registration of the first defendant as full owner of the lands described in that Folio be set aside.