

THE HIGH COURT

LAND REGISTRY

[2016 RECORD NO. 41 CT]

IN THE MATTER OF SECTION 19(1) OF THAT REGISTRATION OF TITLE ACT, 1964

IN THE MATTER OF FOLIO CK26439 (REGISTERED OWNER: RORY O'CONNOR)

BETWEEN

STEVEN HALLIHAN

APPELLANT

AND

RORY O'CONNOR

RESPONDENT

AND

ACC LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY (FORMERLY ACC LOAN MANAGEMENT LIMITED)

RESPONDENT

KILLIAN O'SHEA AND KEVIN O'SHEA

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 7th day of March, 2018

Issues

1. By notice of motion on behalf of the appellant, in person, bearing date 18th January, 2017, the appellant has made an application under s. 19(1) of the 1964 Act seeking to annul the registration of Rory O'Connor as full owner of the above mentioned folio together with a direction to the Property Registration Authority ("PRA") to reinstate the previous owners being the appellant and Killian O'Shea and Kevin O'Shea.

2. Neither Killian O'Shea nor Kevin O'Shea have partaken in these proceedings. Rory O'Connor, the current registered owner and ACC Loan Management Designated Activity Company ("ACC") are both resisting the application of the appellant and are separately represented. ACC was the effective vendor to Mr. O'Connor resulting in Mr. O'Connor's registration of the relevant folio on 27th February, 2015.

Background

3. The property, the subject matter of the within application is comprised within folio 26439 of the Register of Freeholders, County of Cork, situate at Church Lane, in the village of Castlelyons, County of Cork.

4. On 24th September, 2008, the appellant together with Killian O'Shea and Kevin O'Shea were registered as full owners of the property as tenants in common in equal shares and on the same date at entries nos. 3 and 4, in the burden section of the folio there are charges for present and future advances repayable with interest and ACC Bank plc was recorded owner of such charges. In addition, between 29th September, 2009 and 17th December, 2010, four judgment mortgages were registered in the burden section of the folio.

Appellant position

5. To ground the appellant's application aforesaid he swore an affidavit bearing date 24th October, 2016. He has subsequently sworn two further affidavits respectively dated 27th April, 2017 and 28th June, 2017 in response to affidavits on the part of the respondents resisting his application.

6. In his initial affidavit the appellant complains that by way of a transfer of 25th February, 2015 ACC Loan Management Limited purported to transfer to Rory O'Connor the title to the within lands and as a consequence Mr. O'Connor made application to the PRA on 26th February, 2016 to become full owner of the lands. The appellant complains that the registration of Mr. O'Connor as owner by the PRA is contrary to statute law and common law and he claims the purported transfer to Mr. O'Connor is also illegal as the vendor did not have an interest in the relevant land. A further complaint is that there is no evidence of a power of attorney on behalf of ACC Loan Management Limited to support the execution of the transfer. In this regard in his affidavit he refers to Rule 55 of the Land Registration Rules 2012 where it is provided that where an instrument is executed by an attorney, the power of attorney in respect thereof shall be produced to the PRA. His said affidavit also relies on the Supreme Court Judgment in *Kavanagh v. McLaughlin* [2015] 3 IR 555, to the effect that s. 62(2) of the 1964 Act provides that an instrument of charge will not confer on the owner of the charge any interest in the land until the owner is registered as such. His final complaint in his initial affidavit is to the effect that his constitutional property rights have been breached and he relies in this regard on Article 40.3.2 of the 1937 Constitution of Ireland, which provides:-

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

7. The appellant's second affidavit is made in response to the affidavit of Rory O'Connor in which he takes issue and/or agrees with Mr. O'Connor in a number of respects, all being of no real consequence to his claim aforesaid, to para. 16 of the said affidavit. At para. 17 he asserts that ACC Bank plc resolved to re-register as a private limited company in the name of ACC Bank Limited and altered its memorandum of association on 27th May, 2014, and on that day ACC bank limited changed its name to ACC Loan Management Limited by way of special resolution. He accepts that this development was part of a process not only on change of name but also on change of status in that the company was no longer a bank. The appellant elucidates on his claim in stating that ACC Loan Management Limited was required to become the registered owner of the relevant former charge on his lands but did not do so and consequently were not conferred with any interest in the lands. Furthermore, he states that on 25th February, 2015 ACC Bank plc was no longer a public limited company nor was it a bank. He states that it was dissolved and it did not exist and had no assets.

8. The appellant's final affidavit of the 28th June, 2017 is in response to an affidavit of Paul Shaw on behalf of ACC. Mr. Shaw in his affidavit at para. 13 of et seq thereof referred to a facility letter of 23rd February, 2005 from ACC Bank plc to the three former registered owners together with subsequent additional facilities to Killian O'Shea and Kevin O'Shea and consequential deeds of mortgage and charge respectively dated 2nd September, 2005 and 27th September, 2007. At para. 3 of the appellant's affidavit of the 28th June, 2017, he denies that ACC had any interest in the facility letter or two mortgages and charges aforesaid. He denies that ACC Loan Management Ltd enjoyed a statutory power of sale under the 1964 Act. At para. 8 he states that the respondent (presumably referring to ACC Loan Management Ltd) did not become registered owner of any charge, therefore the PRA should not have completed an application for registration of Mr. O'Connor. At para. 10 he states that as the respondent failed to make any reference to any power of attorney and he believed that no such power of attorney is in existence. Finally, he refers to a legal office notice on the PRA website of 2014 where it states: -

"On application by ACC Loan Management Ltd, in any particular case, it may be registered in substitution for ACC Bank PLC or ACC Bank Ltd., as owner of individual charges, on payment of a fee of €40"

9. In addition to the foregoing the appellant had tendered submissions bearing date 26th September, 2017. In support of his assertion that the transfer to Mr. O'Connor, and Mr. O'Connor's subsequent registration breaches common law statute provisions and the constitution, the appellant relies on the Supreme Court judgment in *Kavanagh v. McLaughlin* aforesaid. He relies on same to support his proposition that ACC Loan Management Ltd by reason of the fact that it was not registered as owner of the charge, could not exercise a power of sale. He suggests that the agreement between ACC Loan Management Ltd and Mr. O'Connor was an illegal contract forbidden by statute and/or common law and/or the constitution, and the relevant statute being identified as s. 62(2) of the 1964 Act which in turn provides that there shall be executed on the creation of an instrument of charge an instrument in the prescribed form, but, until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land.

Position of the respondents

10. Mr. O'Connor has sworn an affidavit of the 1st March, 2017 and has also tendered submissions to the court bearing date 7th July, 2017. Aside from resisting the appellant's application it is also argued on behalf of Mr. O'Connor that s. 19(1) of the 1964 Act is not a proper vehicle in which to bring the appellant's application before the court as there was no effective order or decision of the registrar in respect of which the appellant might be considered aggrieved. Further, it is argued that an Isaac Wunder order should be made by reason of the fact that prior to the institution of the within application the appellant instituted plenary proceedings on the 9th February, 2016, wherein the appellant sought a declaration that the transfer to Mr. O'Connor was unlawful and therefore null and void together with other relief, however these proceedings were discontinued by the appellant immediately prior to the hearing of an application by Mr. O'Connor to strike out the proceedings under O. 19, r. 28 of the Rules of the Superior Court, as they were allegedly frivolous, vexatious and bound to fail. Mr. O'Connor records in his affidavit that following the deeds of mortgage and charge of the 2nd September, 2005 and the 27th September, 2007 the borrowers defaulted and ACC Bank plc appointed a receiver on the 15th May, 2012 who subsequently placed the property on the market for sale and Mr. O'Connor agreed to purchase same on the 19th November, 2012 for €45,000. Because there was a difficulty in obtaining vacant possession a contract for sale was not signed until 4th February, 2015. Further because of the judgment mortgages herein before referred to it was agreed that ACC Loan Management Ltd would effect the transfer of the property to Mr. O'Connor for the purposes of ensuring that following such transfer the judgment mortgages would be discharged or otherwise removed from Mr. O'Connor's registered ownership. Mr. O'Connor complains that on the 9th July, 2016 there was an incursion on the property with damage occasioned as a consequence whereof the gardai were called. Mr. O'Connor refers to the High Court proceedings aforesaid. At para. 15 he states that there is no basis for the contention that the transfer to him was an illegal contract and he asserts that ACC Loan Management Ltd was entitled to affect the transfer pursuant to its power of sale as the registered owner of the charge under s. 62(6) of the 1964 Act which provides that on registration of the owner of a charge the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts and the registered owner of the charge shall, for the purposes of enforcement, have all the rights and powers of a mortgagee under a mortgage by deed including the power to sell the estate or interest which is subject to the charge. Mr. O'Connor denies that there was any deficiency in the proper execution of the transfer to him by ACC Loan Management Ltd.

11. In submissions on behalf of Mr. O'Connor, the basis for suggesting that s. 19(1) is not a proper vehicle for the within grievance on the part of the appellant is set out namely that there is no formal ruling by the PRA and this is an effective prerequisite in the triggering of a right to appeal under s. 19(1) as per McAllister on Registration of Title, Deeney on Registration of Deeds and Title in Ireland and r. 212 of the Land Registry Rules, 1972.

12. Insofar as the Isaac Wunder order application is concerned, Mr. O'Connor's submissions do refer to such an order being granted where a person has habitually and persistently instituted frivolous and vexatious civil proceedings.

13. By way of response to the substance of the argument on behalf of the appellant, Mr. O'Connor's submissions refer to s. 62 of the 1964 Act and assert that a power of sale arises under s. 62(6) of the Act. References made to s. 62(9) of the 1964 Act dealing with the owner of a charge transferring that charge to another person and the necessity for the transferee thereof to become the registered owner of the charge – it is on the registration of the transferee of a charge that the instrument of transfer shall operate as a conveyance by deed enabling enforcement thereof.

14. The submissions refer to the application of the 18th June, 2014 on behalf of ACC Bank plc to the Register of Companies to be reregistered as a private company by the name ACC Bank Ltd. In this regard it is to be noted that there is exhibited to the affidavit of Paul Shaw on behalf of ACC a certificate of incorporation and change of name bearing date the 27th June, 2014 issued from the Register of Companies to the effect that ACC Bank plc by special resolution and by approval of the registrar, changed its name and is now incorporated as a limited company under the name ACC Loan Management Ltd. The submissions refer to s.14 of the Companies Amendment Act, 1983, subsections 5 and 6 thereof. Under subsection 5, a certificate of incorporation is conclusive evidence that all requirements in respect of re-registration have been complied with and under subsection 6 the re-registration of a public company as a private company will not affect any rights or obligations of the company. The submissions refer to McCann and Corden on Companies Act: 1963 – 2012, p. 94 thereof to the effect that the re-registration of a public company as a private company does not impact on its corporate persona.

15. The submissions also deal with the fact that a power of attorney was not availed of by ACC Loan Management Ltd to effect the transfer as same was done in accordance with its articles of association and the seal of the company was affixed to the transfer authenticated by duly authorised persons.

16. As aforesaid, Paul Shaw on behalf of ACC swore an affidavit of the 1st June, 2017 wherein he sets out at para. 13 the facility letter of 2005 and the two subsequent mortgages of 2005 and 2007 together with various provisions thereof and the fact that the borrowers made default, and as a consequence on the 11th May, 2012 a receiver was appointed. It is noteworthy that none of these

matters are at issue between the parties.

17. The affidavit asserts that the transfer to Mr. O'Connor was executed in accordance with s. 64 of the Land and Conveyancing Law Reform Act, 2009 and to this end the articles in memorandum of association of ACC are exhibited. Section 64(2)(ii) of the 2009 Act provides that an instrument executed after *inter alia* the 1st December, 2009 shall be a deed (within the meaning of the section) if it is executed by a company registered in the State under the seal of the company in accordance with its articles of association.

18. The submissions on behalf of ACC are undated. ACC suggests that reliance on s. 19(1) of the 1964 Act is misconceived and further suggests that the appellant effectively had misunderstood the decision of *Kavanagh v. McLaughlin*. The submissions deal with the provisions contained in s. 62 of the 1964 Act and the adequacy of execution of the transfer by ACC. Insofar as the impact of re-registration and/or change in status of the company is concerned, reference is made to s. 23(4) of the Companies Act, 1963 now incorporated in s. 30(6) of the Companies Act, 2014, to the effect that a change of name by a company shall not affect its rights and obligations. It also refers to s. 52(7) of the Companies (Amendment) Act 1983, a provision now incorporated in s. 1285(9) of the Companies Act 2014 to the effect that re-registration of a limited company to an unlimited company shall not affect rights and obligations of the company and quotes briefly from Courtney's *The Law of Companies*, 4th Ed. 2016, at para. 34.006 which succinctly states: -

"Reregistration does not change the identity of the entity: it remains the same legal entity, albeit a new type of company with a new name."

19. Reliance is placed on a decision of Gilligan J. in *Kearney v. Allsop Ltd* [2016] IEHC 166 to the effect that s. 64(2) of the 1964 Act does not create any obligation on a company to transfer a charge in the event of re-registration as an unlimited company (see para 8/9 of that judgment).

20. The submissions state that whether or not the company holds a banking licence is irrelevant to the collection of debts.

Decision

21. In *Kavanagh v. McLaughlin* the Supreme Court was dealing with a transfer of undertakings from one corporate entity to another namely from Bank of Scotland (Ireland) to Bank of Scotland. Immediately following such transfer, Bank of Scotland (Ireland) was dissolved. Laffoy J. in the Supreme Court held that in those circumstances, the statutory power of sale under s. 62 of the 1964 Act could not arise until registration of the charge previously registered in favour of Bank of Scotland (Ireland) was registered in favour of Bank of Scotland.

22. Significantly therefore, *Kavanagh v. McLaughlin* dealt with a transfer of a charge between two separate and distinct entities unlike the situation which has occurred in the instant circumstances.

23. In accordance with: -

(a) Gilligan J.'s express views in *Kearney v. Allsop* at para. 8 and 9 to the effect that s. 62(2) of the 1964 Act does not create an obligation to transfer a charge on re-registration;

(b) Section 14(6) of the Companies (Amendment) Act 1983 which provides that on re-registration of a public company as a private company, the rights and obligations of the company are not affected;

(c) The statement in McCann and Corden on Companies Acts: 1963 – 2012, at p. 904 that the change from public company to private company status the same corporate persona subsists, Courtney's *Law of Companies* at para. 34.006 to the effect that on re-registration the same legal entity subsists;

(d) The provisions of s. 52(7) of the Companies (Amendment) Act 1983 and currently s. 1285(9) of the Companies Act, 2014,

I am satisfied that the re-registration of the company herein from a public company to a private company has not had any altering effect on the rights and obligations of the company - there was no necessity to re-register the charges in the burden section of the folio at numbers 3 and 4 thereof.

24. I have the benefit of sight of a certificate from the Register of Companies as aforesaid bearing date the 27th June, 2014 and I am satisfied that pursuant to s. 14(5) of the Companies (Amendment) Act 1983, this certificate is conclusive. This fact coupled with the fact that s. 23(4) of the Companies Act 1963, (now s. 30(6) of the Companies Act 2014), a change of name of a corporate entity will not affect its rights and obligations, I am satisfied that the change of name from ACC Bank plc to ACC Loan Management Ltd has not had the impact contended for on behalf of the appellant and therefore the registration of Mr. O'Connor as full owner was in compliance with statutory provisions.

25. Therefore, at the date of transfer from ACC to Mr. O'Connor, the transfer was effected pursuant to the entitlement of ACC under s. 62(6) of the 1964 Act and therefore the registration of Mr. O'Connor as full owner was in compliance with s. 62(9) of the 1964 Act so that upon his registration this had the effect as a registration on a transfer for valuable consideration by a registered owner.

26. The legal office notice no. 5 of 2014, posted on the PRA website is an enabling provision only and does not alter the foregoing statutory provisions in any manner whatsoever.

27. The suggestion made by the appellant at para. 17 of his affidavit of the 27th April, 2017 to the effect that on the 25th February, 2015 ACC Bank plc was not any manner of a company for the purposes of the Companies Act and was dissolved and did not exist is not supported by the evidence and is not a correct statement of law.

28. There is no requirement at law that only banks can recover debts due and owing and in those circumstances, the fact that as and from the 25th February, 2015 ACC Bank plc (then known as ACC Loan Management Ltd) was not a bank, is entirely immaterial to the sequence of registration in this matter.

29. The transfer in favour of Mr. O'Connor and executed by ACC Loan Management Ltd was done so in accordance with s. 64 of the Land and Conveyancing Law Reform Act, 2009 and therefore clearly operated as a mortgage. It is also evident that in or about the execution by the transferor of that transfer no reliance was placed on any asserted or alleged power of attorney and in those circumstances the argument as to the failure to produce a power of attorney within the PRA at the time of application to register Mr.

O'Connor as full owner, was not necessary and therefore no lapse arose.

30. In the circumstances there is no illegality or want of compliance with legislation in or about the valid and effective transfer of 2015 in favour of Mr. O'Connor and in accordance with s. 62(9) of the 1964 Act, once this transfer was registered it had the effect as registration on a transfer for valuable consideration by a registered owner. Given this status there is no breach of any constitutional right of the appellant.

31. The respondents' arguments relative to s. 19(1) of the 1964 Act are noted. That notwithstanding I note that on the heading of the notice of motion the three affidavits of the appellant and the appellant's submissions reference is made to O. 96. Order 96 deals with the making of an application or the bringing of an appeal to the court under the 1964 Act and accordingly in all of the circumstances I consider it appropriate that the court would deal with the misgivings expressed by the appellant in his documents aforesaid for the purposes of finally concluding the issues raised by him and indeed in the interests of ensuring that Mr. O'Connor will not henceforth be visited with these issues again.

32. I am not satisfied that it is appropriate at this time that an Isaac Wunder order should be made as against the appellant – the prior plenary proceedings were discontinued and the within hearing and judgment represent a full airing and determination of the issues which have clearly exercised the appellant.

33. The reliefs sought in the notice of motion of the 18th January, 2017 are hereby refused.