

THE HIGH COURT

[2015 No. 4642 P.]

BETWEEN

LAGAN BITUMEN LIMITED

PLAINTIFF

AND

TULLAGOWER QUARRIES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on 2nd day of May, 2017

Introduction

1. This judgment, by the agreement of the parties at the end of the trial on 15th February 2017, is limited to determining the boundaries of the lands comprised between Folios CE52291F [in respect of which the plaintiff is the transferee according to the Deed of Transfer dated 1st April, 2016, from Whelan's Limestone Quarries Limited ("**WLQL**") and the receiver appointed to WLQL on 28th January, 2011] and those comprised in Folio CE 19816F registered in the name of the defendant. Once the boundaries are defined, the entitlement to a right of way appurtenant to Folio CE52291F over the defendant's land may be the subject of a further hearing and determination.

History**2003 Contract**

2. The basis for a thirteen year delayed claim for rectification by the defendant constitutes, on the most favourable construction of events for the defendant, an extraordinary tale of alleged lack of attention to detail by two limited liability companies each owned or controlled by two brothers.

3. In short, the defendant owned by Mr. Jackie Whelan ("**Jackie**") executed a contract dated 23rd December, 2003 ("**the 2003 contract**") for the sale of 11.185 acres (4.52660891 hectares) of land in Co. Clare to WLQL, then owned by Mr. Paddy Whelan ("**Paddy**").

2004 Transfer

4. By Deed of Transfer dated 24th February, 2004, ("**the 2004 transfer**") the defendant transferred to WLQL the parcels of lands which were the subject of the 2003 contract and described in the 2004 transfer as:-

"All that and those that part of the lands in the town land of Tullagower, Barony of Moyarta in the County of Clare being that part of the property comprised in Folio 19816F of the Register of Freeholders County of Clare outlined in blue on the map attached hereto and containing an area of 11.185 acres or thereabouts statute measure TOGETHER with a right of way for the Transferee, its successors in title...with or without vehicles...at all times and for all purposes in connection with the Transferee's use and enjoyment of the lands hereby transferred for access to and egress from the lands hereby transferred over that part of the access way and shown outlined in orange on the said map attached hereto and marked with the letters 'A', 'B', 'C' and 'D'."

Absence of Maps

5. None of the witnesses who gave evidence remembered whether a map was actually attached to the 2003 contract or the 2004 transfer when executed, despite the reference to a map in both. The Court was informed that no map which may have been attached to the original 2003 contract or the 2004 deed was retained by the same solicitor representing the defendant since 2003, up to and including the duration of the trial of these proceedings in February 2017.

6. Moreover, the Court was further told that the solicitor acting for WLQL in 2004, the solicitors acting for Anglo Irish Bank ("**Anglo**") which provided loan monies to WLQL for the purchase of the lands and the rates department in Clare County Council, (which was furnished with a map by the defendant's solicitors by letter dated 16th February, 2004, showing the portions of lands transferred) have been unable to produce a copy of a map of the lands transferred.

7. Even more perplexing is the absence of any map on the file of the Property Registration Authority ("**PRA**") for the 2004 transfer. Nevertheless, the PRA registered and plotted the lands transferred with the benefit of a map which cannot be located now. That is the situation presented by the parties and particularly by the defendant who now seeks rectification of the 2004 transfer and the alteration of the PRA mapping for Folio CE52291F.

The Property Registration Authority

8. According to the mapping and records of the PRA, Folio CE52291F now shows two separate oblong like blocks containing 4.25 hectares and 0.90 hectares respectively. The total area in CE52291F is now 5.15 hectares or 12.72593 acres.

9. Folio CE19816F, from which Folio CE52291F was created, now contains 2.38 hectares or 5.88108 acres. It has a narrow stretch of land leading from the N68 (Ennis to Kilrush road) to a block of land surrounding all sides of the small block of CE52291F save for the southern side.

Registration Process

10. By letter dated 25th March, 2011, the solicitors for Anglo (the lender to WLQL) forwarded a subdivision map to the PRA. The digital mapping section of the PRA asked those solicitors by letters of:-

(i) 27th July, 2011 – whether "*the northern and western boundary (shown in blue) align with the extent of the folio boundary showing red?*"

(ii) 7th November, 2011 – whether "*the subject of the transfer is the portions outlined in blue on the map enclosed*"

11. The Court was given no information about the responses to those requests even though the Court directed that the original PRA file be brought to the Court for the parties and for any relevant submissions arising from observations which may be made.

Overview

12. The defendant alleges that the 2004 transfer and subsequent registration effected by the PRA does not accord with the agreement between Jackie for the defendant and his brother, Paddy, for WLQL in 2003. The defendant seeks inter alia rectification of the 2004 transfer by:-

(a) "amending the area referred to in Part 1 of the schedule thereto..." "from 11.185 acres to 8.45 acres"; and

(b) "attaching thereto the map prepared by Hardiman McMahon dated 6th October, 2015 ("the HMcM map"), to identify the areas actually transferred.

together with orders pursuant to statute or equity directing the PRA to rectify the Land Registry maps attached to Folios CE19816F and CE52291F.

13. The 12.72593 acres presently registered in the PRA for Folio CE52291F does not accord with the figure of 11.185 acres in the 2004 transfer.

14. The defendant pleaded in its Defence and Counterclaim delivered on 22nd June 2016 that "*the correspondence between*" the solicitors for Anglo and the PRA together with the maps submitted did not reflect the agreement between WLQL and the defendant. The Defence pleaded that those solicitors were guilty of negligence, breach of contract, misrepresentation, negligent misstatement, and slander of title for which Anglo and the plaintiff among others "*are jointly and severally liable therefor to the Defendant.*" It is important to stress that neither the said firm of solicitors nor Anglo were represented at the trial of these proceedings. No one who worked at the relevant times in the said firm of solicitors, in Anglo or in the PRA was called to give evidence.

Evidence of Mr. Jackie Whelan

15. During the trial Jackie found it difficult to hear questions at times. Nevertheless, he satisfied this Court that he was an experienced businessman and a civil engineering contractor who still controls the defendant with experience and understanding of maps and acreage. Under cross examination he said that he "walked the place" with Paddy during which they decided what WLQL sold and what the defendant bought. Significantly, Jackie did not state when he "walked the place" with his brother and particularly whether the walk occurred before or after the execution of the 2003 contract or the 2004 deed even though he was able to mention that that they "were working there together for seven or eight years". The Court also notes at this point that Paddy did not give evidence about walking the boundaries to agree them with Jackie.

16. Jackie admitted under cross examination that he viewed a map before the execution of the contract and that he was kept informed by the defendant's solicitor of the transaction as it progressed. He pointed out that Mr. Liddy, who prepared a map in 2003 outlining two plots resembling those which are now comprised in folio CE52291F, worked for WLQL ("the Liddy map"). Jackie did not explain in a satisfactory manner whether that map was relied upon by the defendant and WLQL. If Jackie was not sure, he was consciously unclear when answering questions about what he inspected or knew at the time of the 2003 contract and the 2004 transfer. In answer to my own question he "*put a lot of blame on [himself] for the simple reason that I should have followed it up more closely.*"

17. This Court was neither satisfied nor convinced by Jackie that in December 2003 he had agreed the boundaries other than as set out in the 2004 transfer or as presently registered following replies given to the PRA. Rather the Court finds on the balance of probabilities that he and his brother, Paddy without any regard to the necessity for formal transfers, allowed the defendant to use lands outside its own boundaries as time unfolded for the operation and building conducted by their respective companies. Having listened to the witnesses, the Court is sceptical about the accounts given at trial in so far as it conveniently allows Paddy to help Jackie and more particularly his defendant company to wrestle back ownership of land which is registered in Folio CE52291F, in addition to accommodating or benefitting the defendant after the appointment of a receiver to WLQL in January 2011.

Evidence of Mr. Paddy Whelan

18. I should mention in this context also, Paddy's clarification that a Mr. McKeogh, an accountant and director of WLQL, dealt with the paperwork for WLQL which had several engineers and some three hundred people working in and around 2003. Mr. McKeogh was among a number of witnesses including solicitors, engineers such as Mr. Liddy and others who could have assisted the Court and were not called to give evidence. The only engineer called to give evidence was a Mr. Hardiman who prepared the HMcM map in 2015 which was over twelve years after the transaction.

19. Paddy testified that it was "*quite possible*" that he saw the Liddy map before the execution of the 2003 contract and that the 2004 deed mentioned 11.185 acres. He explained that WLQL operated seven quarries at that time and was busy. He was unduly truculent when answering questions on cross examination and indicated a resentment of the plaintiff. Be that as it may, he admitted that there was a "*cock-up with the map*" and stated that "*it's quite possible*" that the Liddy map with 11.185 acres in the top right hand corner was the basis of the 2003 contract.

20. Both Jackie and Paddy were well familiar with the area of an acre when solicitors were instructed or when they reviewed documentation from solicitors. Moreover, both had been involved in many business transactions. Suffice to say that the Court was bemused by the suggestion that it should in some way direct the alteration of the PRA records to identify boundaries which would reduce the area identified in the 2004 transfer by 2.735 acres or 1.1 hectares.

21. The case presented at trial for the defendant concentrated on the confusion arising from the various maps and sought to focus the Court's attention on the absence of any boundary issue until after the appointment of the receiver to WLQL which sold the affected lands to the plaintiff.

22. Jackie and Paddy were brought through a rather improvised appearing one page agreement dated 1st December 2004 (one year after the 2003 contract) for the supply of water and electricity by the defendant to WLQL in exchange for stone from WLQL. Jackie and Paddy were the only signatories to this agreement. The purpose of this evidence was to indicate that the floor of the quarry was the principal area which was intended to be transferred to WLQL. This evidence did little, if anything, to corroborate the story which Jackie and Paddy would like this Court to believe. Similarly, the planning and quarrying details for the defendant merely showed that arrangements were made by two companies, (the owners of which were related and friendly to each other) which allowed them to operate their different businesses in close proximity to each other. Importantly scant regard was had by Jackie or Paddy over the years for the obligations of each company to regularise their title or legal status in respect of the lands used for the businesses and

to the independent nature of each company.

23. Ms. Mary Burke (employed by Clare County Council from 1994 to 2014 and ultimately as a Senior Executive Chemist in the Environment Section of Clare County Council) explained that the defendant applied for a water discharge licence in 2005 (over a year after the 2003 contract) which was granted in January 2006. In her role for the County Council, she had viewed the quarry, ponds and recycling business on the lands. The outline of regulatory compliance for waste water by the defendant may have helped to convince the Court of the defendant's claims if the Court was not so sceptical of the accounts given by Jackie and Paddy to wrestle back ownership of ponds and land for the defendant. In short, Ms. Burke, who readily acknowledged that she was neither a map surveyor nor an engineer, merely explained that a water discharge application by the defendant after the 2003 contract was consistent with the defendant's allegation of ownership of the ponds.

Entitlement to Seek Rectification

24. The defendant in its Defence and Counterclaim delivered on 22nd June, 2016, sought for the first time an order rectifying the 2004 transfer. The defendant claims that there was a mistake in the 2003 contract and the 2004 transfer. The leading Irish authority on the issue of mistake in a contract for the sale of land is *Irish Life Assurance Company v. Dublin Land Securities Limited* [1989] I.R. 253, where the Supreme Court recognised the heavy burden on a party seeking to displace the express terms of an executed contract. Griffin J. observed at 263 that:-

"The question to be addressed is whether there was convincing proof reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties on which the court can act and whether the plaintiff can positively show what that intention was." [Emphasis added by this Court].

25. The defendant has failed to establish that WLQL in December 2003 or at the time of executing the 2004 deed had agreed to take an area of land which was less than that described and particularised in the 2004 deed. As for convincing proof, the Court restrains itself from commenting any more unfavourably about the evidence adduced than it has already done earlier in this judgment.

Significance of Registration

26. Section 31(1) of the Registration of Title Act 1964 ("**ROTA**") provides:-

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

27. Section 85(2) of the ROTA (as substituted by s. 62 of the Registration of Deeds in Title Act 2006) further provides:-

"Except as provided by this Act, neither the description of land in a register nor its identification by reference to a registry map is conclusive as to its boundaries or extent."

Submissions for the Defendant

26. Counsel for the defendant submitted that the jurisdiction granted by s.31 of the ROTA is broad and exercisable on proof of either fraud or mistake, while mistake is not qualified in any sense. In other words, counsel urged that culpability, inadvertence or negligence added nothing to the use of the word "*mistake*". Counsel mentioned that once the Court is satisfied from credible evidence that a mistake has occurred, it may then go on to consider rectification of the register. Ultimately, the defendant relies on the equitable jurisdiction of the Court because of the last phrase in s.31(1) of the ROTA "*on such terms as it thinks just*".

27. In *Boyle v. Connaughton* [2000] IEHC 29, Laffoy J. found that the defendant had established a right in equity to have the land registry map rectified, once she was satisfied that the intention of the parties to the relevant transaction had not been given effect to because of a mistake in mapping boundaries. The mistake in that case was far less than that suggested on behalf of the defendant.

28. Counsel for the defendant cogently argued that the plaintiff's own surveyor, Mr. Kestell, acknowledged that the Liddy map, which was suggested to be on the balance of probabilities the map attached to the 2004 transfer, showed a smaller area of land than that actually registered on Folio CE52291F now.

29. It was also submitted that the defendant should not be punished for an error of which it did not have notice until 2012, when the receiver to WLQL attempted to enter upon the land. Furthermore, an argument was made that the plaintiff was on notice of the dispute by reason of the *lis pendens* registered on 22nd September, 2015 for the defendant, when the plaintiff purchased its interest in Folio CE52291F in 2016.

Decision

30. Taking account of the detailed submissions of both sides, including those written submissions for the defendant dated 27th February, 2017 delivered following the conclusion of the trial, the Court determines as follows:

(1) The notice given to the plaintiff by way of the *lis pendens* registered on the 22nd September, 2015, in advance of the purchase by the plaintiff of its interest in Folio CE52291F, does not have any effect on the function of the Court under the relevant sections of the ROTA being sections 21, 31 and 85 thereof. My determination of the facts does not support an argument which avails the defendant in this regard.

(2) The remedy of rectification in this case is concerned principally with the 2004 transfer and the Court is therefore particularly concerned about whether there was complete agreement about the extent of the land transferred by the 2004 transfer, along the lines now suggested on behalf of the defendant. I have neither been convinced nor satisfied that the parties agreed anything on or before the 2004 transfer which could displace the terms of the 2004 transfer.

(3) Despite the harsh criticism in the Defence and Counterclaim of Anglo, its solicitors, and its assigns, for which they have not been given an opportunity to respond to in the course of these proceedings in addition to the conclusiveness of the register, counsel for the defendant undertook the rather uncomfortable task of alluding to, if not suggesting, rectification of the PRA register based on the 2004 transfer with the Liddy map as an alternative to rectification of the

2004 transfer. The difficulty for the Court in pursuing that line is that it must determine whether the boundaries in the 2004 transfer more accurately reflected the boundaries now between the two relevant folios, than those delineated by the PRA following receipt of replies to its enquiries.

(4) The conclusiveness of the register maintained by the PRA is not easily displaced. Although s.85 of the ROTA does not extend such conclusiveness to boundaries, it has long been recognised that s.85 gives protection against minor errors only. In this case the alleged error is not minor, because the defendant claims:

(i) The 2004 transfer related only to 8.45 acres, and/or

(ii) The difference between the 11.185 acres in the 2004 deed, and the actually registered area, as a result of the transfer and subsequent clarifications given to the PRA, led to an area of 12.72593 acres being registered for Folio CE52291F.

(5) Therefore, the Court proceeds to look at s.31 ROTA and whether its jurisdiction is triggered by a mistake. Bluntly put, the Court repeats that it is neither convinced nor satisfied on the balance of probabilities that a mistake has arisen as might justify the operation of the Court's jurisdiction as sought. I have outlined how the defendant's claim for rectification has failed due to the absence of a common intention concerning different boundaries on or before the execution of the 2003 contract, through to the execution of the 2004 transfer and beyond, which would entitle the defendant to rectification. The inability to explain when and how the PRA made the alleged mistake when plotting the boundaries following receipt of replies from solicitors having ostensible authority to answer queries concerning the boundaries, does not encourage the Court to upset the conclusiveness of the title to Folio CE52291F, or the more limited conclusiveness of the boundaries, as appear on the PRA mapping.

(6) The defendant has already averted in its defence and counterclaim to the possibility of negligence and other causes of action arising from what it alleges are the incorrect boundaries outlined for Folio CE52291F. The Court makes no finding for the purpose of any such action which may be pursued, because the relevant impugned parties have not been afforded an opportunity to vindicate their professional reputations if and when they are given an opportunity to comment upon or deny those claims.

(7) Lest there be any doubt, this Court is not seeking to punish or sanction the defendant for its conduct. The Court emphasises that it is acutely conscious of the significance of registration, and the onus to prove a mistake, as that term ("mistake") is used in s.31 of the ROTA, and in the established case law for claims seeking rectification.

Conclusion

31. In the circumstances, the reliefs sought by the defendant in its Defence and Counterclaim are refused.

32. The Court further refuses to make an order directing the rectification of the register or map for Folio CE52291F.