THE HIGH COURT

[2006 No. 218 SP]

IN THE MATTER OF HEIDELSTONE COMPANY LIMITED
AND
COURTVIEW MANAGEMENT LIMITED
IN THE MATTER OF THE TRUSTEE ACT 1893
APPLICATION OF PAUL BOOTHMAN, PAULINE BOOTHMAN, MARY GOGGINS, PHILIP DONNELLY, ESTHER WALSH, ANNE WALSH, VALERIE BYRNE, JOHN CASHMAN, AILEEN FORBES BYRNE, HERBERT DARLINGTON AND RAYMOND FREELEY
AND
COURTVIEW MANAGEMENT (NO. 2) LIMITED

Judgment of Miss Justice Laffoy delivered 24th November, 2006.

1. The problem which the applicants seek to address on this application is, I suspect, a problem which will be encountered with increasing frequency in relation to the sale of apartments and townhouses in developments carried out during the last four decades.

2. Generally speaking, apartments have been sold by way of long lease, the internal shell only of the apartment being demised to the purchaser. As part of the scheme of disposal the vendor will have procured the incorporation of a management company with a memorandum and articles of association which provides for the apartment owners having control of the company once all of the apartments have been disposed of. The vendor will have entered into an agreement for the sale of the common areas, which generally include the external common areas such as car parking areas, the structure of the building and the internal common areas, at a nominal price but subject to the leases of the apartments. In this way, the apartment owners, through the medium of the management company, should eventually become the owners of the common areas.

3. In the case of townhouses with external common areas a similar type of scheme has been adopted with the variation that, since the enactment of the Landlord and Tenant (Ground Rents) Act, 1978, townhouses may only be sold by way of outright conveyance of the fee simple or assignment of the leasehold interest. So, in the case of a townhouse development, what the management company should ultimately acquire is the fee simple or the leasehold interest in the external common area subject to the easements and rights in favour of the purchasers of townhouses created by the conveyances or assignments to them.

4. In such developments the full implementation of the scheme of disposal by the apartment or house owners assuming control of the management company and by the common areas being conveyed to the management company is an essential element in completing the title of each apartment owner and house owner. If this becomes impossible because of the dissolution of the vendor company or the management company, or both, the title of each apartment owner and house owner remains incomplete. That is the position in which the first eleven applicants in this case find themselves.

5. In broad terms, what has happened in this case is that both the vendor company and the management company have been struck off the register of companies for failing to make returns and dissolved without the scheme of disposal having been fully implemented. The relief sought by the applicants in this case to remedy that difficulty is an order pursuant to s. 26 of the Trustee Act, 1893 (the Act of 1893) vesting the interest of the vendor company and/or the management company in a new management company which has been incorporated by the applicants. In general, for the reasons which I will now outline, I consider that the approach adopted by the applicants is correct and that they should be granted the relief sought. I will deal with the peculiarities of the applicants' own circumstances later.

6. I have no doubt that where, as part of a scheme of disposal of apartments or townhouses, a vendor incorporates a management company to manage the common areas and enters into an agreement to transfer the common areas to the management company on the completion of the sales of the apartments and houses, the management company becomes the owner in equity on the completion of the sales of all of the apartments or houses, as the case may be, subject to the terms of the agreement and subject to payment of any nominal sum provided for therein. On the completion of such sales, the vendor thereafter merely holds the legal estate as trustee on behalf of the management company.

7. Section 25 of the Act of 1893 provides that the High Court may, whenever it is expedient to appoint a new trustee or trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, make an order appointing a new trustee even if there is no existing trustee, and s. 26 empowers the court to make a consequential vesting order in favour of the new trustee or trustees. Section 26 also provides that in the other circumstances set out in that section, one of which is where a trustee entitled to or possessed of any land cannot be found, the Court may make an order, which is called a vesting order in the Act, vesting the land in any such person, in any such manner and for any such estate as the court may direct.

8. In his unreported judgment, delivered on 23rd November, 1984, in a matter entitled *In the Matter of the Trustee Act, 1893, John Kavanagh and Barbara Cantwell*, applicants, Costello J., as he then was, considered the appropriateness of making a vesting order under s. 26 vesting the property in issue in the persons shown to be beneficially entitled to the property where the property was vested in a company as trustee at the date of its dissolution. The problem in that case arose because the vendors to the applicants had mortgaged the relevant property in fee simple to a company called Moore Paragon Ireland Limited as security for a loan. In March, 1983, that company had gone into voluntary liquidation. The liquidator agreed to transfer the mortgaged property and the mortgage debt to another company called Moore Business Forms Limited for a consideration which, presumably, was equivalent to the mortgage debt. That sum was duly paid. However, while the mortgage debt was transferred to Moore Business Forms Limited, the mortgaged property was not. In connection with the sale to the applicants in 1984 the mortgage debt was discharged and Moore Business Forms Limited purported to reconvey the mortgaged property, which it did not possess. The purpose of the application was to procure the vesting of the outstanding legal estate in the applicants.

9. On those facts, Costello J. declared that Moore Paragon Ireland Limited was at and immediately before the date of its dissolution possessed of an estate in fee simple in the property as trustee for Moore Business Forms Limited upon a trust within the meaning of the Act of 1893, and that in the events which had happened the applicants were then entitled to the beneficial interest under the trust. In order to get in the outstanding legal estate, Costello J. did not consider that it was necessary to resort to the expedient of appointing a new trustee under s. 25 of the Act of 1893, with a consequential vesting order under s. 26, as was done In re No. 9 Bomore Road [1906] 1 Ch. 359, which, incidentally, was followed in this jurisdiction in *In re Queenstown Dry Dock Ship Building Company* [1918] 1 I.R. 356. Instead he followed the English authorities in which it was held that a dissolved company is a trustee "who cannot be found" within the meaning of s. 26 (In re General Accident Assurance Corporation Limited [1904] 1 Ch. 147; and *In re Richard Mills & Co.* (Brierly Hill) [1905] W.N. 36). Accordingly, he made an order pursuant to s. 26 of the Act of 1893 that the fee simple or other estate or interest vested in Moore Paragon Ireland Limited at the date of its dissolution should vest in the applicants. However, he laid particular emphasis on the fact that the Attorney General had stated that no claim to the premises was being made by the State.

10. In my view, a similar approach may be adopted to resolve the problem which has arisen in this case.

11. The applicants in this case are the majority of the owners of apartments and townhouses in the development known as Courtview at Castle Avenue, Clontarf in the City of Dublin. The original developer and vendor of apartments in Courtview was the company first named in the title hereof (the First Company), which procured the incorporation of the Second Company mentioned in the title hereof (the Second Company) to manage the common areas. The development area comprised two Victorian houses situate at Castle Avenue, Clontarf, numbers 50 and 52 Castle Avenue, and the ground at the rear thereof which had a separate road frontage to the rear. The original plan was that No. 50 Castle Avenue would be developed as eight apartments, No. 52 would be developed as eight apartments and ten new apartments would be constructed on the ground at the rear of numbers 50 and 52.

12. The original scheme of disposal was part implemented and effected as follows:

> (1) The First Company procured the incorporation of the Second Company as a company limited by guarantee and having a share capital on 11th October, 1985. The primary object for which the Second Company was established, as set out in its memorandum of association, was to –
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> > "… acquire the Lessor's interest in certain parts of the lands situate at Courtview, Castle Avenue, Clontarf, in the City of Dublin and to hold the same as an investment for the benefit of the lessees of the flats erected thereon and to acquire common areas of the said lands for the benefit of the owners of residential units thereon."
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> It was also provided that an object of the company was to manage the flats, to provide management services to the common areas, and to collect the service charges. The memorandum of association also provided that no person should be admitted to membership of the Second Company other than the subscribers thereto and the lessees of the flats comprised in the development. The subscribers to the memorandum were Edward McKone and Nicholas McKone, each of whom subscribed for one ordinary share of IR£1 in the share capital of the Second Company, who were also the directors of the First Company.
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> (2) By an agreement dated the 21st January, 1986, made between the First Company of the one part and the Second Company of the other part (the Management Company Agreement), the First Company agreed to sell the entirety of the development (the Estate) to the Second Company at the price of IR£1 subject to and with the benefit of the leases to be granted of the apartments on the Estate and subject also to an option reserved to the vendor. The Management Company Agreement was in the form normally used for this type of development and it provided for completion of the purchase within three calendar months of the completion of the development or on 31st December, 1990, whichever should be the earlier. The only unusual feature was the option clause under which the First Company reserved the exclusive option to retain out of the Estate the building No. 50 Castle Avenue together with all necessary easements over the remainder of the Estate.
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> (3) The eight apartments in No. 52 were disposed of by leases, all in the same form, which were created between March, 1986 and October, 1986. Each lease was made between the First Company of the first part, Second Company of the second part and the purchaser/lessee of the third part and created a term of 500 years from the 1st January, 1985, at a nominal yearly rent of IR£1 (if demanded). It was recited in each that the First Company was seised of the Estate in fee simple in possession subject to the Management Company Agreement but otherwise free from encumbrances. It was further recited that the First Company had agreed to convey all its estate right title interest in the Estate as soon as leases in the same form had been granted in respect of all of the apartments subject to and with the benefit of the leases and subject further to the option but otherwise free from encumbrances. While the recital did not specifically state that the agreement was with the Second Company, that was clearly the case. What was demised was the internal shell of the apartment together with the usual easements, rights and privileges. Each lease was in the form normally used for this type of development.

13. The original development plan was not fully implemented. In 1987 the First Company sold off the rear area of the Estate, with the participation of the Second Company, to Langarth Properties Limited (Langarth). Langarth developed that area by the construction of five houses. The houses were disposed of by conveyances made in 1988, each being made between Langarth of the first part, the Second Company of the second part and the purchaser of the third part. Each conveyance recited that, as part of the scheme for the disposal and future management of "the Estate", Langarth had agreed to convey all its estate, right, title and interest in "the Estate" to the Second Company as soon as conveyances of the houses to be erected on "the Estate", had been granted, subject to such easements, rights and privileges as were granted or were intended to be granted to the purchasers of the houses. In this context "the Estate" meant the land at the rear of numbers 50 and 52 Castle Avenue, known as Courtview which, as I understand the position, corresponded with the land conveyed to Langarth by the First Company. The participation of the Second Company in each conveyance was for the purpose of assuring all its estate, right, title and interest in the house site being sold to the purchaser. This participation was necessary because of the rights of the Second Company under the Management Company Agreement. Each conveyance recited that the purchaser was a member of the Second Company.

14. A further change to the original scheme of disposal took place in July, 1987, when the option reserved in the Management Company Agreement was exercised, which had the effect of taking No. 50 Castle Avenue out of the scheme.

15. As a result of the foregoing changes, the Estate within the meaning of the Management Company Agreement has been reduced and now comprises No. 52 Castle Avenue with adjoining unbuilt-on land as depicted on the map which is exhibit A in the supplemental affidavit of the first applicant sworn on the 3rd November, 2006. It is that property which is the subject of this application. In the interests of clarity, I will refer to it as the Varied Estate hereafter.

16. The complications arising from the variation of the original development plan and the original scheme of disposal have been dealt with on this application as follows:

> (i) The first eleven applicants on this application have procured the incorporation of the last named applicant, Courtview Management (No. 2) Limited (the New Management Company), a company limited by guarantee with a share capital. Its objects are to acquire the Varied Estate subject to the leases of the apartments in No. 52 and to manage it, collect the service charges and such like in conjunction with the management of the external common areas on the property conveyed to Langarth in 1987. The New Management Company was incorporated on 16th June, 2005. It will be controlled by the owners of apartments in No. 52 and the owners of the houses at Courtview. Its memorandum of association, in essence, replicated the memorandum of association of the Second Company in all material respects.

(ii) Three of the five owners of houses developed and sold by Langarth on the property acquired by it are applicants on this application. The owners of the remaining two houses have not participated. In his grounding affidavit sworn on the 19th May, 2006, the first applicant has averred that they "have taken no part good, bad or indifferent in relation to this and I believe them to be persons of advanced years who do not wish to be disturbed". Having considered the matter carefully, I am satisfied that they will not be prejudiced in any way if the order which I propose making is made. Nonetheless, I consider that they should be informed by letter from the applicants' solicitors of the intention to make the order and they should be advised that unless they object to the making of the order by informing the applicants' solicitors of their objection within two weeks of the date of that letter, the order will be perfected. If they object, the matter will be re-listed to hear their objection. Alternatively, on production of an affidavit from the applicants' solicitors proving that this requirement has been complied with and that they have either indicated that they have no objection or not responded, the order will be perfected. As I understand the position there is vested in Langarth some external common area around the houses developed by Langarth and the intention is that Langarth will convey that area to the New Management Company.

(iii) In relation No. 50 Castle Avenue, on the direction of the court, the applicants' solicitors wrote to Nicolas McKone, who had been a director of the First Company and the Second Company, requesting that he either confirm in writing that he has no objection to the application or, alternatively, that his legal advisors contact them. By letter dated 15th November, 2006, to the applicant's solicitors, Mr. McKone set out his understanding that the application was "to effectively regularise matters at 50 & 52 Castle and the 5 townhouses at the rear of the same". He consented to the application and indicated that he welcomed it. The applicant's solicitor's letter of the 8th November, 2006 and that letter of 15th November, 2006, should be exhibited in an affidavit sworn by the applicants' solicitors and filed in court. The order I intend making will not be perfected until such affidavit is filed. The evidence put before the court is that searches in the Registry of Deeds from 1985 to 2006 did not disclose any conveyance from the First Company to Mr. McKone of No. 50. The vesting declaration I intend to make will be worded in such a way as not to prejudice the owner for the time being of No. 50 Castle Avenue and to preserve any easements and rights it was intended should be enjoyed by that property over the Varied Estate.

17. The First Company was struck off the register of companies and dissolved with effect from 26th October, 1990, and the Second Company was struck off the register and dissolved with effect from 19th May, 1993, in each case for failure to make annual returns. Since the mid 1990's the applicant's solicitors have made Herculean efforts to regularise the position for the owners of the apartments and houses at Courtview. They engaged in correspondence with the office of the Chief State Solicitor between April, 1997 and November, 1997. The outcome of that correspondence was that the Minister for Finance was not prepared to exercise his power under s. 31 of the State Property Act 1954 (the Act of 1954). The explanation for this refusal was given in a letter dated the 8th May, 1997, from the Chief State Solicitor to the applicants' solicitors in the following terms:

> "As you are aware, under the provisions of s. 28 of the State Property Act 1954, where a body corporate holds property which it does not dispose of prior to its dissolution, immediately upon such dissolution that property vests in the State. An exception is property held by the dissolved body corporate upon trust for another person. The agreement of the 21st February, 1986, between Heidelstone Company Limited and Courtview Management Limited appears to amount to a trust. As you will appreciate, until this property has passed to the State the powers of the Minister for Finance under section 31 of the State Property Act, 1954 do not come into force. In that event it might be possible for you to bring an application under the Trustee Acts."

18. The applicants gave notice of these proceedings to the Chief State Solicitor and furnished a copy of the special summons and grounding affidavit and exhibits, including the correspondence with the Chief State Solicitor in 1997. There has been no intervention by any State authority in these proceedings.

19. On the facts of this case, I find as follows:

(a) At and immediately before the date of its dissolution, the First Company held the Varied Estate in fee simple upon trust for the Second Company by virtue of the provisions of the Management Company Agreement. While no evidence has been adduced that the nominal consideration of IR£1 was paid to the First Company, in my view, that may be overlooked in reliance on the *de minimis* principle.

(b) At and immediately before the date of its dissolution, the Second Company held its beneficial interest in the Varied Estate for the benefit of the lessees of the apartments in No. 52 holding under the leases created by the First Company in 1986 carved out of the fee simple. Those lessees or their successors, who are applicants on this application, are the ultimate beneficiaries of the Varied Estate.

(c) Both the legal estate of the First Company and the beneficial interest of the Second Company were subject to the leases of the apartments in No. 52 and also to such easements, rights and privileges in favour of No. 50 and the purchasers of houses on the property conveyed to Langarth in 1987 as were created by virtue of the scheme of disposal.

(d) The beneficial interest of the owners of the apartments in No. 52, by their consensus, is now to be held by the New Management Company and regulated by it.

20. In view of the foregoing findings, and having regard to the attitude adopted by the Minister for Finance, who properly concluded in 1997 that the State has no claim to the Varied Estate under the Act of 1954, I consider that the court does have power to make a vesting order under s. 26 of the Act of 1893. Accordingly, there will be an order vesting the Varied Estate in the New Management Company in fee simple and for all other estate, right, title and interest as the First Company and the Second Company had therein at the respective dates of dissolution, subject to the leases of apartments in No. 52 Castle Avenue created by the First Company and subject also to such easements, rights and privileges for the benefit of No. 50 Castle Avenue and the lands conveyed to Langarth in 1987 as subsist thereover.

21. It is not inconceivable that prior to 26th October, 2010 an application might be brought under s. 12B(3) of the Companies (Amendment) Act, 1982 to have the First Company restored to the Register of Companies. If such an application were successful, the First Company would be deemed to have continued in existence as if its name had not been struck off. However, in my view, that possibility does not in any way militate against the making of the vesting order I have made, because the restored First Company's interest in the Varied Estate would be subject to the trusts which have been clearly established in evidence, even if the vesting order were not made and the restored First Company could be compelled to execute a conveyance which would have the same effect as the vesting order.

22. Finally, I am satisfied that, having regard to the circumstances of this case, it was probably more cost effective and it is certainly a more clear cut solution to the title problem to procure the incorporation of the New Management Company rather than seek to have the Second Company restored to the register of companies.