Neutral Citation [2015] IEHC 348

THE HIGH COURT

LAND REGISTRY

[2014 No. 7 CT]

IN THE MATTER OF SECTION 32 OF THE REGISTRATION OF TITLE ACT 1964

AND IN THE MATTER OF FOLIOS MY19739F, MY3691, MY44796, MY3694 AND MY3695 OF THE REGISTER OF COUNTY MAYO

BETWEEN

BORD NA MONA PLC

APPLICANT

AND

THE PROPERTY REGISTRATION AUTHORITY, THE DEPARTMENT OF AGRICULTURE, FOOD AND MARINE, PATRICK GALLAGHER, ANEAS THOMAS MCDONNELL, MARTIN JOSEPH WALSH AND MICHAEL MOYLES

RESPONDENTS

JUDGMENT of Mr. Justice Henry Abbott delivered on the 21st day of May, 2015.

1. This application comes before the court by way of notice of motion dated 9th April, 2014, wherein the applicant seeks the following relief mainly:-

> "1. An order rectifying the errors contained in folios MY19739F; MY3691; MY44796; MY3694; and MY3695 of the Register of Co. Mayo and in particular the reference in the said folios to the following:-
>
> > 'there is appurtenant to the said lands a right to graze six sums on the mountain on other part of the lands of Corvoderry aforesaid edged green in the central and local office map'."

2. The matter was heard on affidavit. The applicant is the registered owner in fee simple of 2,528 acres of land comprised and certain entries within folio MY39508 and MY39367 which were acquired by compulsory purchase orders made by the applicant in the exercise of statutory functions respectively dated the 6th April, 1951, and the 19th October, 1951, and also comprised in certain entries within folio MY39508; MY46077; MY50373; which were acquired by the applicant through a process of voluntary purchase, the latter bearing land registry dealing numbers D2006WR055016M; D2007WR036587C; D2007WR036586B; D2008WR032109M and D2009LR01652K. The third, fourth, fifth and sixth named respondents are the owners of the folios which are updated versions of the folios opened under the Registration of Titled Act following the acquisition of the land by the Estates Commissioners under the Land Purchase Act 1903 of the Florence Knox Estate and the sale and or vesting of the tenant holdings to the tenants in occupation of the tenancy therein who were entitled to such enfranchisement under the Land Purchase Acts.

3. The relevant tenant history of the lands is recorded from the period 1881 to 1882 where it appears that there were thirteen tenants renting part of the Knox Estate on an annual basis. These tenancies remained either contractual or statutory under the judicial rent system until the tenants purchased out the landlord's interest in the lands in 1904. By that time the landlord's interest in the lands had been acquired by the States Commissioners which themselves had been an innovation of the 1903 Land Purchase Act to accelerate what had, until then, been a slow moving and cumbersome system of land purchase by tenants. The system introduced by the Estates Commissioner and Land Commission under the 1903 Act enabled the Land Commission to acquire first and then sell the entire estate or a large part of the estate to the tenants having had a share in the so called dual ownership of same under the Land Acts for the previous thirty years or so. Initially all six tenants among the thirteen tenants had grazing rights in addition to their home farms on the mountain. Under the Land Acts these grazing rights would not have been *profit á prendre* in the formal sense, but in the normal evolution of the enfranchisement of tenants under the Land Purchase Acts and the prior Land Acts, these rights which would have been contractual, at best, being formally linked with the protection of judicial tenancy to the home farm which link was solidified by the operation of the Land Purchase Acts into a relationship of dominant and servient tenement with the grazing rights on the mountain held in common as appurtenant rights to the home farm. In that instance the servient tenement subject to the grazing rights might be held by the Land Commission or reclaimed by the landlord. In many cases the Land Commission would, in addition to vesting the home farm in the tenant, also vest a specific share in the area or mountain grazed in common as an alternative to the dominant/servient system.

4. In many cases the vesting of a specific undivided share in the land in the area of a mountain grazed in common would be by way of fiated agreement for sale. S. 32(1) of the Land Law (Ireland) Act 1896, which, by virtue of s. 100 of the Irish Land Act 1903, is to construed together with the Act of 1903, provides for the sale of such lands by the Land Commission as follows:-

> "The Land Commission shall prepare the vesting order, or if they see fit to dispense therewith, shall fiat the agreement for the purchase of the holding, subject to such conditions, exceptions, and modifications as they think necessary; and on the advance being paid such fiat shall have effect as if it were a vesting order made by the Commission in relation to the holding purchased, and the provisions of this Act referring to vesting orders shall apply and be construed accordingly."

5. In this case the relevant Plot 1A, which the relevant part of the mountain referred to above, had been dealt with under the dual Land Act system whereby six of the tenants, who eventually purchased same from the Land Commission, had been allowed reduced rents on their overall holding on the basis that they did not exercise their rights of grazing on the said Plot 1A. This situation changed in the arrangements for the sale to each of the thirteen tenants of an undivided share in the said Plot 1A to be held in common. As a matter of convenience and efficiency it is necessary in a situation where common lands are divided in such a manner that some

regulation would be made in relation to the proportions grazed by each tenant in relation to the other but also in relation to the upper stocking rate for such a common area to provide the certainty to avoid disputes and the appropriate level of stocking to avoid over grazing. This regulation was not a mere matter for the convenience of the tenants – it was also important from the point of view of ensuring that the ability of the holdings to provide sufficient profits/income to discharge the substantial annuities to be paid by the statute tenants to the Land Commission would not be threatened by the uncertainty and unpredictability of hill grazing.

6. The current application is entitled in the matter of s. 32 of the Registration of Title Act 1964. S. 32 is substituted by s. 55 of the Registration of Deeds and Title Act 2006 and it reads as follows:-

> "(1) Where any error originating in the Land Registry (whether of misstatement, misdescription, omission or otherwise, and whether in a register or registry map) occurs in registration -
>
> (a) the Authority may, with the consent of the registered owner of the land and of such other persons as may appear to be interested, rectify the error upon such terms as may be agreed to in writing by the parties,
>
> (b) the Authority may, if of opinion that the error can be rectified without loss to any person, rectify the error after giving such notices as may be prescribed,
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> (c) the court, if of opinion that the error can be rectified without injustice to any person, may order the error to be rectified upon such terms as to costs or otherwise as it thinks just."

7. This Court accept the correctness of the submissions on behalf of the third to sixth named respondents that according to John Deeney at para. 42.05 of the *Registration of Deeds and Title in Ireland,* (Dublin, 2014) the process under s. 32, as substituted, is limited to errors occurring in the registration process rather than errors in the instrument presented for registration. He further states that the purpose of s. 32 of the Registration of Title Act 1964 (as amended) is to enable the correction of errors arising from oversight or negligence on the part of the Land Registry and not something that represented the mistake and intention of the framer of the instrument and the judgments quoted at paras. 2.3 – 2.5 from the submissions of the applicant dealing with the cases of *Re Patrick Leonard's Estate* [1912] 1 IR 212 and *Re Dooley v. Haugh* [1931] IR 197 are supportive of this contention by the third to the sixth respondent. It was submitted that the entry in relation to appurtenant grazing rights of the third to sixth respondents were registered in the original folios not in error but registered in accordance with the documents presented at the time of registration and that therefore the purported error is not one "originating in the Land Registry", and if there were errors, they originated in the fiated purchase agreements and not on the Land Registry, and so are not errors amenable to rectification as per the terms of s. 32 (as amended).

8. A substantial time was taken by this Court at the hearing examining the pre-registration title documents which were submitted for the purpose of obtaining registration of the properties after vesting which was made compulsory in the case of land purchase under the Land Purchase Acts by the Local Registration of Title (Ireland) Act 1891. The hearing of the case proceeded by analysis of the Form P. undertaking by a tenant to purchase a holding from the Irish Land Commission in the case of Mr William Hopkins, the predecessor of one of the third to sixth named respondents. This is a vital pre-registration document which was used by all parties in the proceedings but counsel for the third to sixth named respondent object to a certain pre-registration documentation being admitted in the trial on the basis that there was insufficient proof of same through the use of the appropriate witness in the Land Commission records department. It was claimed that the case *White and Ors. v. Taylor and Anor.* [1969] 1 Ch 150 was authority for the proposition that such documents were hearsay. During the course of the hearing this Court rejected this submission on the basis that these documents were on their face within the general exception to the hearsay rule and found that this objection was entirely inappropriate by reason of the fact that these documents had been exhibited throughout the proceedings to be heard on affidavit in the same fashion without the necessity of the form of proof of same by the keeper of records and if any point were to be taken on lack of form it should have been taken by a case managing point rather than to allow the issues to be set up painstakingly by the filing of long affidavits and exhibits without protest or insistence that more formal proof would be obtained. The analysis in para. 5.5 – 5.8 in the written submissions of the third to sixth respondents are helpful to take the analysis of the fiated purchase agreement to a certain level and are set up verbatim for that purpose:-

> "5.5 If one takes the Form P. (so called Fiated Purchase Agreements), paragraph 1 states, *inter alia*;
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> '…I will purchase the said holding with the grazing and sporting rights…'
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> 5.6 Paragraph 2 thereof includes the words;
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> '…I hereby agree to pay for a share of the grazing and sporting rights over the mountain marked 1a on map and as set out in paragraphs 7a and 8.'
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> 5.7 Paragraph 7a states;
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> 'I hereby agree not to graze more than six sums on the mountain marked 1a on map.'
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> 5.8 Whereas it is not agreed that there was any error by the Registrar, the registrations affected in 1904, were affected in accordance with the relevant Forms P.. If there were errors in those forms (which is not admitted), the errors originated therein, and if the errors were replicated in the relevant folios, then the errors in those folios (which are sought to be corrected by the applicant in the proceedings) were not errors 'originating in the Land Registry'."

9. While this conclusion might be urged with some reason, without further examination of the Form P, it is in my opinion a conclusion that cannot be made having regard to the fact that the entries quoted in para. 5.5, 5.6 and 5.7 of the submissions are to be read in conjunction with the description of the lands set out in the first schedule especially entry number 4 thereof relating to an undivided one thirteenth part of number 1a stating the same to be 2,689 acres, 2 roods and a purchase state measure. The recital in form P states that:-

> "I, William Hopkins the tenant in occupation of the holding described in the first schedule hereto, hereby undertake as follows:-
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> 1. In the case of the Irish Land Commission buy under the provisions of the Irish Land Act, 1903, an Estate of which

> the said holding forms a part, I will purchase the said *holding with the grazing and sporting rights* from them for the sum of…" (emphasis indicates handwritten amendment).

10. This recital and the particularisation thereof in the further paragraphs of the agreement accorded in the undertaking which was fiated on the 1st December, 1904, sets out the full context of the quotation on behalf of the third to sixth respondents in their submissions paras. 5.5 to 5.7. This Court is of the opinion that an error occurred in the registration by the registration of a mere note of appurtenant rights affecting the lands, as the registering authority should have noted the qualifications as set out in paras. 5.5 to 5.7, referred to above not as notes of right appurtenant, but as conditions for the exercise of the grazing on the one thirteenth share in a rational way in the interests of tenants and Irish Land Commission as the authority advancing the purchase price for the combined holding and hoping to have arranged same so as to leave the tenant in a position to repay the annuities in respect of such advance. To have imposed such conditions assigned by the Irish Land Commission was not an error originating in the Irish Land Commission but a reasonable exercise by the Irish Land Commission of their powers under s. 32(1) of the 1896 Act.

11. It is important to test the foregoing conclusion that there was an error originating in the Land Registry. It is important to check against the standards of registration at the time of registration. As indicated to the parties this Court read the provisions of the 1903 Act and the 1996 Act together with the relevant Rules made under these Acts relating to particulars to be transmitted to the Registrar of Titles. The main provisions relevant to the Rules under the Land Purchase Acts made on the 16th March, 1897, are set out at Richard R. Cherry, *The Irish Land Law and Land Purchase Acts 1860-1901*, 3rd Ed., (Dublin, 1903) 809. Order XIX of these Rules provide for the particulars to be transmitted to the Registrar of Titles in order that the title of the purchaser to the holding be registered pursuant to the Local Registration Title Ireland Act 1890. These particulars are set in paras. (a.)-(k.) of Rule 1 of Order XIX. Order XIX provides that such particulars shall be embodied in a schedule which shall be prepared and certified by the examiner and most importantly Rule 3 of Order XIX provides as follows:-

> "The schedule shall be accompanied by an Ordinance sheet having the several holdings delineated thereon as they appear on the map used for the proceedings unless there be a map endorsed upon and referred to the vesting orders, in which case a copy of such map may be endorsed upon the schedule by the Ordinance Survey Department, or the vesting orders may be produced to the Registrar of Titles for inspection."

11. These Rules were amended by further Rules of the 29th April, 1899, which are short and do not affect the issue here. They were further amended by a Rule of the 19th March, 1900, which provided as follows:-

> "It is this day ordered that, notwithstanding the provisions of Rule 2, Order XIX of the Rules dated the 16th March, 1897, the particulars prescribed by Rule 1 of the same Order may be transmitted to the Registrar of Titles in the form of a copy of the Vesting Order, certified by the Examiner as 'a true copy transmitted to the Registrar of Titles for the purpose of Registration', and the provision of Rule 3 of the same Order shall apply as if such copy were the Schedule therein referred to."

12. The Rules were amended again on the 17th May, 1901, but not to any extent relevant to the consideration of this case. These Rules were not updated after the enactment of the 1903 Act until the 2nd day of July, 1910, but Order VII substantially repeated the provisions thereof, and are only referred to lest they reflected any evolving standard different than the formal rules just cited by this Court after the passing of the 1903 Act. These Rules are printed in T. Henry Maxwell, *The Irish Land Acts 1903 to 1909; A Supplement to Lord Justice Cherry's Irish Land Law and Land Purchase Acts 1860-1901*, 2nd Ed., (Dublin, 1910) at p.1361. A footnote to Order VII relating to registration of purchase ownership in the 1910 Rules set out in Maxwell's work reads as follows:-

> "The following directions dated 1st January, 1904, in reference to the transmission and cancellation of land certificates have been issued by the Land Commission:-
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> > "1. When the Land Commission by vesting order, or fiat in lieu thereof, vest a holding in a purchaser, and the title to the lands comprised in such holding is already registered pursuant to the Local Registration of Title (Ireland) Act, 1891, the land certificate evidencing the title to such lands shall, if in the custody of the Land Commission, be transmitted to the Registrar of Titles, together with the copy vesting order or schedule of particulars prescribed by the Land Commission Rules."

13. Three very important principles emerge from a perusal of the combined effect of these Rules and the note of January, 1904, as follows:-

> 1. The vesting order had taken the place of the schedule of particulars originally envisaged by the Rules of 1897.
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> 2. The directions dated the 1st January, 1904, by referring to vesting orders and fiated purchase agreements interchangeably confirms the conclusion that this is an appropriate interpretation under the Land Purchase Act relating to fiated agreements as they occurred in this case.
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> 3. The 1897 Rules and the format of the vesting order/fiated agreement placed a central importance to the identification to the property with reference to maps. It is clear from the inspection of the fiated agreement/vesting order that the word "appurtenant" or "appurtenant rights" was not mentioned in the documentation in these cases which was required to be furnished to the Land Registry for first registration. It is clear that the use of the word appurtenant crept into the description of the Register as a result of the registration process in the Land Registry.

14. While the penultimate page of the Schedule of Areas for the Estate dated the 12th August, 1898, and exhibited EW4 at para. 5 of the affidavit of Ms Emma Walsh sworn on behalf of the applicants on the 9th April, 2014, contains a helpful narrative of the history of the predecessor tenants of the third to sixth respondents giving up their right of grazing afforded considerable assistance to the court in understanding the background to the preparation of the fiated agreements/vesting orders, this document would not have been, nor should it have been available or furnished to the Land Registry under the Rules relating to particulars to be furnished. It was not necessary that this documentation would be needed to have enabled the Land Registry to register a condition relating to the use of the lands held in common by, *inter alia*, the predecessors in title of the third to the sixth respondents in relation to the use of same for grazing. The Land Registry official dealing with the matter should have recognised that the references to grazing in the fiated purchase agreement/vesting order were stinting conditions such are described in P. Bland, *The Law of Easements and Profits á Prendre*, (Dublin, 1997) para. 8-09 p. 161. It must be remembered that the fiated agreement incorporated the undertaking to purchase details when the fiat was stepped on it.

15. The conditions in the fiated agreement/vesting order did not confer any appurtenant right to the purchasers. The description of

same as an appurtenant right confers no value on same as it is not a saleable interest in any respect in registered land and it is interesting to note that no attempt has been ever made to establish rights under a sale or transfer for valuable consideration though a solicitous investigation of the Land Registration Acts in respect of same. The entry in relation to appurtenant rights, as has crept into the folios, is of no value and hence its removal may be effected by rectification of it without injustice to the third to sixth respondents or to the applicant. It is therefore also an error which does not nor cannot even theoretically give rise to any claim in relation to the compensation code of the Registration of Title Acts.

16. With regard to unity of possession. The applicants have argued that, even if a court held that somehow there was evidence of an appurtenant right to be gleaned from the entry into the folio, which has been held to be subject of an error in the Land Registry, the unity of possession between the dominant and servient tenements, however defined, by reason of the unity of possession of the applicant of the one thirteenth share of each of the third to sixth respondents, has resulted in an extinguishment of a right or *profit á prendre* relying on the judgment of Buckley J. in *White and Ors. v. Taylor and Anor*. [1969] 1 Ch. 150 at 158.

17. Counsel for the third to sixth respondents countered this proposition by submitting that the case *Margil Property and Anor. v. Stegul Pastoral Property Ltd. and Ors.* [1984] 2 NSWLR 1 was an opposing authority to the principles set out in White. This Court does not accept the submissions of counsel in that regard for the following reasons:-

> 1. The profit appurtenant of grazing resembles an easement in many respects. It is impossible to identify the same with the occurrence of a right of way across very extensive acreages in New South Wales which in many respects would become a right of way of necessity by reason of the terrain and lack of development by private and public authorities to provide access or convenient access for severed land. The rights identified in the New South Wales case are after severance more in the nature of quasi easements as identified by P. Bland, *The Law of Easements and Profits á Prendre,* (Dublin, 1997).
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> 2. The Rule in *White* which is generally applied has to be persuasive in all the circumstances.

18. With regard to prescriptive rights. As an alternative position, the third to the sixth respondents sought to rely, through the affidavit of their solicitor Ms Orla Clarke sworn on the 8th October 2014, on a prescriptive right to graze. This was countered in the submissions by the applicants but the parties agreed that, as these proceedings were determined by affidavit, it was not appropriate that, if such rights were to be pursued, an oral hearing in the circuit by way of Equity Civil Bill would be more appropriate. In the circumstances it is absolutely inappropriate for this Court to express any view in relation to the possibility or otherwise of prescriptive rights arising outside of the recorded Title in the Registry.

19. This Court has concluded that the offending entry confers no title to anyone and may be rectified without injury to anyone and was an error occurring in the Land Registry and that it is a mischievous anomaly which is appropriate to be rectified by order of the court using its discretion as there is a danger that same may be used (as occurred in this case) for an opportunist attempt to gain some advantage, however described. It therefore grants the application of the applicants in accordance with the notice of motion but awaits the submissions of the parties in relation to the exact form of that order having regard to the provisions of the section as now substituted.