

**THE HIGH COURT****DUBLIN****MOIRA BARNES AND CAROLINE BARNES****2006 4962 P****and****APPLICANTS****THE LAND REGISTRY****and****RESPONDENT****WILLIAM MURPHY AND MARY MURPHY****NOTICE PARTIES****JUDGMENT delivered by Mr. Justice O'Neill on 3rd April, 2009**

The first named applicant is one of the registered owners of the lands contained in Folio 3174F of the Register of Freeholders County of Limerick. The other registered owner is the first named applicant's husband, Thomas. The second named applicant is their daughter.

These proceedings are the product of a long history. A dispute arose in 1991 over hedging at or near the boundary between the Barnes' land and the lands of William and Mary Murphy, the notice parties in the these proceedings. This led to two sets of proceedings in the Circuit Court in Limerick, one commenced by the Murphys against the second applicant and her sister seeking, it would appear, to restrain trespass, and the other initiated by the first applicant and her husband against the notice parties in which the dispute seems to have concerned the boundary and the right of the notice parties to interfere with the hedging in that area. The Barnes' complaint was that the Murphys used heavy machinery to remove the hedging.

It would appear that the Murphys' case came on before Judge O'Higgins, as he then was, in the Circuit Court in Limerick in April of 1994 in what appears to have been an interlocutory hearing. Three years later the Barnes' case, that is to say the boundary case, was listed for hearing on 18th February, 1997 but these proceedings were adjourned by Judge McCartan who ordered that this case be listed with the Murphy case before Judge O'Higgins at the Easter sittings of that year. Both cases were listed for 15th May, 1997. Judge O'Higgins was appointed to the High Court with the result that the cases were adjourned to 15th July, 1997. These facts are to be found in paragraphs 4 and 5 of the affidavit of the first applicant sworn on 16th February, 2007 for the purposes of an application to discharge the judgment mortgage.

When the matter came on for hearing before Judge Kelly, it is averred in the affidavit of William Murphy, the first notice party, at paragraph 4 that the second named applicant appeared and made representations to the trial judge as a result of which the cases were put back to 2:00 o'clock. In the affidavit of the first applicant just mentioned, she avers that her daughters were mocked by the Court and in protest the applicants withdrew. In any event, there was no appearance in the afternoon in spite of the judge allowing an additional hour for attendance. Judge Kelly in the Barnes' proceedings declared that the Murphys were entitled to cut the hedge. He struck out the proceedings and awarded costs to the Murphys. In the Murphy proceedings, he granted the injunctions sought with damages and costs.

Appeals were lodged in both cases for the High Court sitting in Dublin. These appeals were struck out for no appearance on 18th February, 1998. On 18th December, 2000, applications were made to reinstate these appeals and Kearns J. ordered the reinstatement and listed the appeals for peremptory hearing on 5th February, 2001. On 29th January, 2001, an application was made to Kinlen J. to transfer the appeals to Limerick. He directed that a formal motion be brought for that purpose. This was done and the application came on for hearing before Carroll J. on 5th March, 2001. She ordered the appeals to be transferred to Limerick at the next appeals sitting.

The appeals came on for hearing on 16th July before Kinlen J. The second applicant applied for an adjournment. This was opposed but the adjournment was granted but peremptorily against both sides. On 5th November, 2001, the applicants applied to transfer the appeals back to Dublin. This was refused by Kinlen J. The applicants lodged a Notice of Appeal against this refusal to the Supreme Court. This appeal was struck out by the Supreme Court on 30th November, 2001.

The Circuit Court appeals then came on for hearing before Barr J. in Limerick on 6th December, 2001. The applicants/Appellants did not appear but rang the County Registrar's office that morning to say that the second applicant's sister had been stabbed that morning at her home and was taken to hospital. Barr J. put the appeals in for mention the next day, the 7th. Evidence on that occasion was given by Sergeant Boyle of Patrickswell Garda Station. There was no appearance for the applicants. Having heard Sergeant Boyle's evidence, Barr J. dismissed the appeals and affirmed the orders of the Circuit Court. In addition he awarded the costs of the appeals to the notice parties.

On 7th February, 2002, the applicants filed and served motions to have the orders of Barr J. set aside and the appeals reinstated. This motion came on before Butler J. on 18th February, 2002 who struck out the motions. On the same day the applicants sought clarification from Barr J. and leave to set aside his orders of 7th December, 2001. It is averred by the first applicant in her said affidavit that Barr J. indicated that the only evidence heard on 7th December, 2001 was in connection with the stabbing incident and he directed the applicants to seek clarification from the Court Registrar and that the applicants apply by notice of motion to the High Court sitting in Dublin. It is averred that on 1st March, 2002, Barr J. "duly authorised" the said application.

By notice of motion dated 15th March, 2002, the applicants applied to reinstate their appeals. This motion came on for hearing before Kearns J. on 22nd March, 2002 who determined that he had no jurisdiction to hear the motion and he referred the motion to Barr J. When the matter came back before Barr J., he said that he could not hear the matter as he was due to retire on 26th June, 2002, thus the two notices of motion of 15th March, 2002 were listed before the

President of the High Court, Mr. Justice Finnegan, and came on before him on 12th July, 2002. Finnegan P. ordered that the appeals be reinstated and he listed them for hearing on 14th October, 2002. The appeals came on for hearing before O'Donovan J. on 14th October, 2002. There was no appearance by the applicants before O'Donovan J. and the order of O'Donovan J. confirms this.

Following on this, the notice parties filed an affidavit to register judgment mortgages in respect of the land in the Land Registry for the taxed costs of the Circuit Court case and the High Court appeal in the Barnes case only. This was done on 26th May, 2003. Subsequently because of a perceived error in the affidavits, fresh affidavits were lodged on 15th March, 2004. These affidavits were registered as burdens 3 and 4 and 5 and 6 on Folio 3174F. Because of the complaint of obvious duplication, the first two burdens were removed in 2008. At no stage were the first applicant or Thomas Barnes prejudicially affected by these.

On 23rd April, 2004, equity proceedings were issued in the Circuit Court in Limerick seeking Well Charging Orders in respect of these two judgment mortgages. No appearance was entered by the applicants and there was no appearance by them at any stage during these proceedings.

By letter of 6th May, 2004, the first applicant and her husband, Thomas, applied to the respondents to remove the judgment mortgages as burdens from their folio. On 22nd April, 2005, Judge Moran in the Circuit Court declared the judgment mortgages well charged on the interest of the first applicant and her husband in Folio 3174F. The first applicant and Thomas Barnes did not discharge the debt and on 22nd May, 2006 Judge Kenny ordered that one acre of the Barnes land be sold by public auction. At public auction this land was sold to the highest bidder at the figure of €170,000. The highest bidder was a son of the notice parties. On 9th January, 2007, Judge Moran approved the sale price. Because of these proceedings, I am told that the sale has not yet been completed. The respondent in this case on 9th August, 2007 by its order refused to cancel the entry of the judgment mortgage from Folio 3174F and leave was obtained from this Court, Peart J, on 3rd December, 2007 to bring these judicial review proceedings.

At hearing, the second applicant sought to challenge the order of Judge Kelly made on 15th July, 1997 on the basis that the case had already been heard by Judge O'Higgins and therefore Judge Kelly had no jurisdiction to hear it. Firstly leave was not obtained for making such a case. In any event, it is clear from the affidavit evidence that what came before Judge Kelly on that day was the trial of both actions. The proceedings before Judge O'Higgins appeared to have been of an interlocutory nature. I am satisfied that Judge Kelly had ample jurisdiction to make the order of 15th July, 1997. It can of course be observed that a judicial review challenge to Judge Kelly's order 12 years after the event is so far beyond the requisite time limit as to be wholly beyond any imaginable reason for extending the time limit for such a challenge.

The applicants challenged the refusal of the respondents in its order of 9th August, 2007 to grant the application to cancel the judgment mortgages registered against the land of the first applicant and her husband. The basis on which the applicants make that challenge is that they say that the order of Barr J. was set aside and hence the court order claimed to be the basis for the judgment mortgages was missing and as a consequence of which the respondents were not entitled in law to register these mortgages as burdens on Folio 3174F.

The evidence on affidavit established that an application to set aside his orders of 7th December, 2001 was made to Barr J. It is not clear what order he made on such application, if any. He is described by the applicants as "authorising" the setting aside sought. Later it would appear he declined to hear the application to set aside due to his imminent retirement.

There is no doubt however that when the matter came before Finnegan P. as he then was on 12th July, 2002, he did make an order setting aside the order of Barr J. of 7th December, 2001 and he listed the appeals for hearing on 14th October, 2002. It is averred in the affidavit of William Murphy that there was no appearance on that date by the applicants and this is confirmed by the order of O'Donovan J.

The applicants seek to suggest that they made an application to Finnegan P. on that day to the effect that he alone could hear the matter and indeed the second applicant submitted to this Court that Finnegan P. was the only judge who had jurisdiction to hear the matter on 14th October, 2002. Clearly the applicants are entirely wrong in that submission. It was entirely within the legal competence of the President to assign any Judge of the High Court to hear the matter and O'Donovan J. had full jurisdiction to hear and determine the matter as he did. I find the averment of the applicants concerning an application to the President on that day wholly unconvincing as an explanation for not appearing before O'Donovan J. and I have no difficulty in rejecting it.

Accordingly, these appeals were finally disposed of by the order of O'Donovan J. The order takes the form of refusing to set aside the order of Barr J. on 7th December, 2001 rather than the dismissal of the appeals. At this stage in my view this is immaterial as the net result is the same, namely the dismissal of the appeals in question, which was what was done in the order of Barr J.

Thus as of 14th October, 2002, the position was that the order of Judge Kelly of 15th July, 1997 was affirmed and the appeals were dismissed with costs against the applicants. Thereafter nothing stood in the way of the notice parties in enforcing these orders. This they did in the customary way by getting the two cost orders taxed and having done that they sought to register the judgment as judgment mortgages on the property of the first applicant and her husband by lodging the affidavit required for the purposes of section 6 of the Judgment Mortgages (Ireland) Act, 1850, to the Land Registry pursuant to section 118(1) of the Land Registry Rules, SI 230/1972. Due to an error in the affidavits, fresh affidavits were lodged on 15th March, 2004. It is quite clear that once the affidavits were lodged with the Land Registry in the prescribed form, the respondent had no discretion whatever as to whether to register the mortgages as burdens on the folio. The respondent was obliged by law to register the burdens in question.

As mentioned earlier, having obtained the registration of these mortgages, the notice parties then initiated equity proceedings in the Circuit Court to have the mortgages declared well charged and to seek an order for sale. The applicants did not appear at all in these proceedings and hence raised no challenge to the validity of the judgment mortgages. The applicants did apply to the respondents pursuant to section 121 of the Land Registry Rules to cancel the judgment mortgages.

In the absence of any challenge to the validity of these judgment mortgages in the Circuit Court equity proceedings and when it was apparent that the affidavits grounding the judgment mortgages complied with section 6 of the Judgment

Mortgages Act, 1850, there was no conceivable basis whatsoever on which the respondents could have granted the application to cancel the judgment mortgages.

I am quite satisfied that the applicants have not advanced any sustainable ground for quashing the order of the respondent of 9th August, 2007 or the orders of the Circuit Court in the well charging proceedings.

At hearing, the second applicant made curiously a complaint that the respondents had no power to remove or cancel the burdens on the folio registered as burdens 3 and 4 which were in respect of the two affidavits which contained erroneous material and were withdrawn. Initially the applicants had complained of the duplication created by the lodging of the later affidavit on 15th March, 2004. It is quite clear that the first applicant and her husband were never in any jeopardy as a result of that duplication, which was accepted as being duplication by all concerned. It is of course right that burdens 3 and 4 should be removed and I am quite satisfied that the respondents had ample power to do so. Like some of the other arguments advanced in the hearing, no leave was obtained to pursue this strange complaint.

For all of the foregoing reasons, I am satisfied that I must refuse the reliefs sought in these proceedings.