

## THE HIGH COURT

## LAND REGISTRY

CT 11/2006

## IN THE MATTER OF FOLIO 6881F OF THE REGISTER OF FREEHOLDERS FOR THE COUNTY OF DUBLIN

## IN THE MATTER OF SECTION 120 OF THE REGISTRATION OF TITLE, 1964 (RULE 216)

## AND IN THE MATTER OF AN APPLICATION BY LAURENCE DALY FOR COMPENSATION OUT OF THE CENTRAL FUND

**Judgment of Mr. Justice Henry Abbott delivered on the 7th day of December, 2006.**

1. This case involves the back garden of a semi detached urban house in Lusk Co. Dublin (the disputed plot). At the date of his death, Thomas Daly, deceased, was the registered owner of a house and the disputed plot, which was comprised in folio 6881 of the Register of Freeholders County of Dublin.
2. The registered owner, Thomas Daly, died on 12th September, 1989. On 9th April, 1990, a grant of probate issued to his son, Laurence Daly. By his will, the said Thomas Daly devised the house and the disputed plot to his widow Bridget for life with remainder to his said son Laurence Daly. By assent, dated 30th day of September 1991, Laurence Daly assented to the registration of his mother Bridget as limited owner and thereafter to the registration of himself Laurence as full owner. On 4th October, 1991, the assent was lodged for registration and it is common case that, in error, Laurence's mother Bridget was registered as full owner. By transfer dated the 8th May 1997, Bridgit Daly, as registered owner, transferred part of the folio being the disputed plot to Alan Carson in consideration of the payment of £8,000. This transfer was registered and transferred to a new folio 118144F on 1st August, 1997. The error in registration on balance of folio 6881 on which the house of the late Thomas Daly still stands was rectified by the Land Registry.
3. On 25th June, 1998, a claim for compensation was made by Laurence Daly for loss arising out of alleged error by the Land Registry in registering Bridget as full owner and registering the transfer by her. The amount claimed for such compensation was not stipulated in the claim, but a valuation of the property supplied by Grimes Estate Agents put a value on the disputed plot, as of June 1996, at £35,000, and the report put a valuation of £98,000 on the entire property, including house and disputed plot.
4. The Chief State Solicitor disputed the claim on behalf of the Minister. By letter dated 29th October, 1999, the Land Registry offered to set a date for hearing of the claim. By letter dated 19th November, 1999, the solicitors for the applicant replied that they had issued proceedings to have the deed of transfer to Alan Carson set aside. By letter dated 23rd day of November, 1999, from the Deputy Registrar of Titles, the Land Registry confirmed to the applicant's solicitor that the matter could be held over pending the determination of the validity of the transfer. On 29th January, 2002, the applicant's court proceedings to have the deed of transfer set aside were unsuccessful. On 20th October, 2003, a fresh claim was submitted setting out the value of the property in dispute as €270,000 with the addition of costs of proceedings in the Circuit Court at €17,141.00. There followed a period of delay in having a hearing date fixed. This delay culminated in the applicant applying to the High Court, *ex parte*, for leave to apply for judicial review against the Registrar of Titles, compelling the Registrar to fix a date for the hearing. The judicial review proceedings were compromised on the undertaking by the Minister to pay the costs of the hearing for compensation before the Registrar. The hearing before the Registrar commenced on 12th July, 2004, and was adjourned to 7th September, 2004.
5. The adjudication and order of the Registrar of Titles was made in writing on 7th July, 2004 and comprehensively sets out the evidence heard by the Registrar and the reasons for the Registrar's decision. The findings of the Registrar are substantially set out on p.p 7, 8 and 9 of the adjudication and are set out herein, as follows:-

*"That an error was made in the Land Registry is not disputed. Mrs. Bridget Daly was registered in error as full owner instead of limited owner of folio 6881 Co. Dublin. Much of the argument and evidence as referred to above attempted to deal with when and the extent to which, Mr. Daly and/or his solicitors, McGowans became aware of the error or contributed to the error and any steps taken to minimise the loss. For a claim to succeed under Section 120 however a loss must firstly be proven.*

*In the case at hand the limited owner sold part of the property subsequent to having been registered as full owner, in error, six years previously. The Settled Land Acts 1882-1890 allow for such a sale by a limited owner but require the existence of two trustees of the settlement for the purposes of the said Acts. Had Mrs. Bridget Daly been registered correctly as limited owner therefore she would still have been entitled to sell the property by having two trustees appointed to whom the capital money raised would have been paid and who would have invested same and held it until the termination of the settlement.*

*Section 45 of the Settled Land Acts 1882 requires the life tenant to give at least one month's notice of the proposed sale to the trustees. However the trustees are under no obligation to bring any action against the tenant for life even if they consider her actions improper. The result of Sections 41 & 42 of the Settled Land Act 1882 appears to be that trustees are free from all responsibilities of any kind except to take care of the money paid to them and to see that the investment or application, under section 21, of money in their hands is properly undertaken.*

*In Wheelwright v. Walker (no 1) (1883) 23 Ch. D 752 Pearson J said 'as far as I can see there is no restriction whatsoever in the act on the power of a tenant for life to sell. There is not, as far I can see, any power either in the Court or in trustees to interfere with his power of sale'.*

*In a subsequent action (Thomas v. Williams (1883) 24 CH D. 558) by remaindermen to have a sale, at the request and by the direction of the tenant for life, restrained evidence was adduced that a sale of the estate was quite unnecessary and would be very prejudicial to the remaindermen. Of course, there was evidence to the contrary as well, but is significant that the tenant for life admitted that, if the estate were his own absolutely, he would not sell it. However, Bacon V.C's rejection of the remaindermen's claim was chiefly due to his conclusion that under the settlement and, even more so, under the Act of 1882, the Court had no jurisdiction to interfere with the exercise of his powers by the tenant for life:- 'It is his right to derive any benefit he can from his tenancy for life, and if he is satisfied that he will derive a larger benefit from the sale of the estate than from its enjoyment in its present condition he has a right to have sold it.'*

*And, in Cardigan v. Curzom-Howe, ((1885), 30 CH.D. 531 p. 359) Chitty J. spoke of the tenant for life's absolute right to sell.*

*Of course, there are certain cases in which the Courts have interfered with the exercise by the tenant for life of a statutory power but which do not raise any difficult questions of principle. In Wheelwright vWalker (no. 2), (1883 31 W.R. 912) for example, the court restrained the tenant for life from selling to a third party for less than the price offered by a beneficiary, or from selling at all without informing the beneficiary of the proposed price and giving him two days in which to increase his offer.*

*Mrs. Daly therefore was entitled to sell part of the property as limited owner provided the capital raised was invested. Evidence was given that this was done and that in fact the money is still held in an account. Mrs. Daly died in 1999 so Mr. Daly, the applicant, as remainderman, has had entitlement to that money since that time and that as remainderman inherited the rest of the property. It is clear from the evidence adduced at the hearing that Mr. Daly was prepared to sell the property himself had he had been in a position to do so. No loss per se therefore was incurred by the registration of Mrs. Daly as full owner instead of limited owner of folio 6881 Co. Dublin.*

*The error however facilitated the transaction of the transfer part to be concluded without the appointment of trustees. Whilst as stated above, the powers and duties of such trustees, had they been appointed, would have limited, I am of the opinion that their presence/involvement might have resulted in a price nearer to the valuation given by the valuer and lodged with the original application for compensation by Mr. Daly i.e. £35,000.*

*On the basis that the Land Registry error facilitated the sale of the garden for less than the market value of £35,000, Mr. Daly would appear to be entitled to the sum of €34,290 (£27,000) that is £35,000 less the €8,000 already received for the property and held in account for him.*

*In the absence of the particulars in the Circuit Court proceedings and the files relating to the property I am not making any decision or deduction in accordance with subsection (2) of the Section 120 of the Registration of Title Act 1964.*

*The net sum awarded is to attract the same rate of interest as has been availed of on the £8,000 originally lodged by Mrs. Daly and which Mr. Daly has had control over since 1999.*

*I am not allowing the costs of the Circuit Court case taken by Mr. Daly as it appears that the Land Registry was "not given any opportunity whatever to indicate whether they considered it as a necessary precondition to their liability to pay compensation". (Keane J. Supreme Court in Persian Properties Limited and the Registrar of Deeds and Titles and the Minister for Finance. Unreported 100/01 February 2003).*

*I am however allowing the costs of the compensation claim, as agreed and taxed."*

6. By notice of motion dated 10th January, 2006, the Appellant appealed the adjudication of the Registrar and order granting compensation of the Appellant be limited to the sum of £34,290 together with the said judgment and order. The grounds of the said appeal were set out *in paras.* 1 to 6 thereof and are set out in full later in this judgment in relation to the decision of the court reached thereon. There was no cross appeal by the defendant.

7. Written submissions were furnished to the court by the Appellant which relied on a recitation of the facts and s. 120 of the Registration of Title Act 1964 to set out the entitlement to compensation. The Appellant also relied on the decision of Darcy J. in the High Court in Application of Sean Leonard, Folio 20518 County Limerick (Unreported, 30th June, 1981), which states *inter alia*:-

*"Having first determined the liability, the question of amount was argued as a separate issue. Counsel for the appellant urged that the current date was the proper one whereas counsel for the Minister said that the value of the lands [as at the date on which the Appellant had actual notice that the lands had been transferred to the ownership of another party] was the relevant one. I held for the current date. I did this on the basis that under the Land Act and the Housing Acts and the Landlord and Tenant Acts current dates are taken. In time such as the present this works both ways on claimants. There was very little difference on the evidence of the Appellant's value and that of the Minister. Mr. DeCourcy for the Appellant valued the land at £20,000 per acre as at the present date, giving a value of £125,000 for six and a half acres ...*

*There was a claim that the Appellant has been ousted from the use of six and a half acres since 1976 to date inclusive. Mr. DeCourcy values the letting value of the lands at £1,500. Acting on these figures I give a decree for £126,500."*

8. The judgment of Darcy J. was appealed by the Minister for Finance to the Supreme Court. On 15th December 2001, the Supreme Court, having heard the appeal, upheld the decision of the High Court.

9. It was submitted by the applicant that the Registrar of Titles accepted that the Land Registry had been informed of the institution of the proceedings against Mr. Carson to recover the disputed plot and accepted that when the Land Registry moved in October, 1990, to set a date for the hearing, the solicitor for the Claimant replied they had issued proceedings for the trial of the deed by Bridget Daly to Alan Carson to be set aside. It was submitted that the Land Registry never indicated to the Appellant that the legal proceedings which he (the appellant) had initiated in the Circuit Court were an unnecessary step nor advised him that he could not visit the costs of those proceedings on the Land Registry, should the same prove unsuccessful. At the hearing of the appeal by this court, counsel for the defendant argued that the fact that the Land Certificate was forwarded by the applicant's solicitors to him, showing that his mother was the registered full owner, indicated that the applicant had implied or constructive notice of the error from that stage. The defendant further submitted that by reason of the fact that the appellant did not take steps, such as requesting an inhibition to be placed on the folio, he was not entitled to compensation pursuant to s. 120 of the Registration of Title Act 1964, which provides -

*"(2) Where any persons sustains loss to which this section applies, and the loss is not caused or substantially contributed to by the Act, neglect default on himself or his agent, that person and also any person deriving title from him shall be entitled to compensation for that loss in accordance with this section."*

10. Counsel for the applicant argued that this provision did not apply by reason of the provisions of s. 120(5)(d)(ii) which provides-

*"(d) For the purpose of para (c) the right to compensation shall be deemed to have accrued - ...*

(ii) in regard to any estate or interest in remainder or reversion, on the date when such estate or interest would, but for such registration as aforesaid, have fallen into possession.”

11. The applicant argued that, in any event, the defendant had not brought any cross appeal, and that the Rules of the Superior Courts did not envisage the appeal hearing to be a hearing de novo, but was governed by the terms of the appeal brought on behalf of the applicant. Counsel for the defendant argued further that the provisions of s. 120(5)(d)(ii) set out above did not relate to the operation of subsection 2, but was to be construed as being applicable only to periods of limitation and not to issues of causality of loss. Counsel for the defendant also relied on the factual basis of the adjudication of the Registrar of Titles in relation to valuation issues. Counsel for the applicant responded again that the defendant was not entitled to make this argument as there had been no cross appeal and no affidavit filed on behalf of the defendant at any stage relating to valuation or any other evidence.

#### **Decision**

12. As the issue as to whether entitlement to compensation by reason of s. 120(2) of the Registration of Title Act of 1964 may preclude compensation entirely, it is appropriate to consider same on a preliminary basis. I am satisfied that when the provisions of O. 96, r. 5 of the Rules of the Superior Courts relating to appeals under the Registration of Title Act 1964 are considered in conjunction with the provisions of O.61, r. 5, relating to appeals from the Circuit Court to the High Court, the special nature of a Land Registry appeal emerges. It is clear that, whereas the appeal from the Circuit Court is considered to be a re-hearing, unless of course, limited by notice of the respondent or by cross appeal by the respondent, no such implication for a full re-hearing or modified re-hearing is to be gleaned from O. 96, r. 5 relating to Land Registry Appeals. Accordingly I consider that it was not open to the defendant to argue the issue of non-compensation under s. 120(2) of the Act of 1964.

13. However, if I am incorrect on this view, and for the sake of completeness, I have considered how the facts of this case might affect or be applied by the provisions of s. 120(2) of the Registration of Title Act 1964, I find that there was a lack of care on the part of the applicant's solicitors in not checking the Land Certificate when returning same to the appellant on completion of the registration process following the assent properly executed by the applicant. However, such lack of care or oversight is to be judged, in the scheme of things, as of the most minimal variety. For example, if the error itself was caused by some oversight in the presentation of the assent and associated documents presented by the applicant's solicitor, causing the loss to be sustained, it could hardly be argued that the applicant's agent did not substantially contribute to the loss. Neither could it be argued that the applicant or his solicitor did not substantially contribute to loss if, having discovered the error, they did not proceed to request that the Registrar would register an inhibition on the folio to prevent the occurrence of an event such as an undesired transfer. I hold that on the facts of this case the highest point of the allegation of the loss being contributed to by the applicant, or his agent, did not remotely reach the level of culpability envisaged by "loss caused or substantially contributed to by the act neglect default of the applicant or his agent" as envisaged by the Act of 1964. While counsel for the applicant argued that s. 120(5)(d)(ii) in defining the time of accrual for the purpose of the limitation period specified in subs. (5), prevented the court from penalising the applicant in respect of any event which may have contributed to the loss prior to the applicant's interest vesting in possession on the death of his mother, I consider that the provisions of para. (d)(ii) relate only to considerations relating to the accrual of the claim for the purpose of the six year limitation period provided for claiming compensation by subs. 5(c) in the Act of 1964, and not to the causality issue as envisaged by s. 120 of same.

14. In regard to the actual grounds of appeal of the applicant I shall set them out and deal with them seriatim.

**Ground 1** "The Registrar of Deeds and Titles was incorrect in law and on the facts in determining that Bridget Daly was entitled to sell a portion of the property comprised in folio 6881 County of Dublin as limited owner."

#### **Decision**

15. The Registrar did not in fact hold that Bridget Daly was entitled to sell the disputed property as limited owner, notwithstanding the fact that in her adjudication, she set out a detailed analysis, having regard to case law, of the manner in which the Settled Land Acts 1882 to 1890 (by way of their overreaching policy) gave a right to sale to the tenant for life. The adjudication concludes however, that the tenant for life, Bridget Daly, would only have been entitled to sell the disputed property had trustees been appointed, and had they been appointed they would have ensured in all probability that the property would be sold at a price nearer to the valuation given by the valuer and lodged with the original application for compensation by the applicant i.e. £35,000, and that the Land Registry error facilitated the sale of the garden for less than the market value of £35,000. Having considered the affidavit submissions, evidence and the adjudication of the Registrar, I find that the Registrar was correct in so holding. I therefore reject Ground 1 as a basis of appeal.

**Ground 2** "The Registrar of Deeds and Titles was incorrect in law and on the facts in determining that no loss was incurred by the applicant by reason of the registration of Bridget Daly as full owner instead of limited owner of folio 6881 County of Dublin."

#### **Decision**

16. I reject this ground also on the basis that the Registrar did in fact hold that there was a loss incurred by the applicant by reason of the registration of Bridget Daly, but of course the applicant is not happy with the extent of that loss as determined by the adjudication of the Registrar.

**Ground 3** "The Registrar of Deeds and Titles was incorrect in law and on the facts in determining for the purpose of calculating the level of the applicants compensation for the error on the part of the Land Registry in facilitating sale by Bridget Daly of the garden plot of the lands comprised in Folio 6881 County Dublin by Bridget Daly, that the appropriate valuation of the lands as aforesaid was as of the day they were sold by Bridge Daly."

#### **Decision**

17. I uphold this ground of appeal on the basis that I consider the decision of Darcy J. in *Application of Sean Leonard, Folio 20518 Country Limerick* (Unreported, 30th June 1981) as affirmed by the Supreme Court on 15th day of December, 2001, to be binding authority for the proposition that the proper valuation date is the date of hearing. The course adopted by the Registrar to make an award in the region of £35,000 equivalent and interest might have some basis, if the Minister responded as envisaged by the Land Registry rules by indicating that this level of compensation was conceded within the time limited for defence of such nature as provided by the rules.

**Ground 4** "The Registrar of Deeds and Titles was incorrect in law and on the facts in determining that the applicant was entitled to compensation for the error on the part of the Land Registry in facilitating the sale of the garden portion as a property comprised in folio 6881 County Dublin the sum of €34,290."

#### **Decision**

18. I uphold this ground on the same basis as Ground 3 above.

**Ground 5** "The Registrar of Deeds and Titles was incorrect in law and on the facts in determining that the applicant was not entitled to recover the costs of the Circuit Court action which he perused in an event to recover that portion of the lands comprised in folio 6881 County Dublin which were sold by Bridget Daly as a consequence of her registration as full owner – instead of limited owner of the lands."

#### **Decision**

19. I uphold this ground on the basis that the facts of this case can be readily distinguished from the facts held by the former Chief Justice in *Persian Properties Ltd v. Registrar of Titles* 1 I.R. 450. In that case the Land Registry was not given any opportunity to indicate whether they considered it as a necessary pre-condition to their liability to pay compensation. In the instant appeal, the Deputy Registrar agreed to the postponement of the hearing on being furnished with a letter indicating that proceedings had commenced in the Circuit Court. I hold as a fact that this notification by letter of the proceedings was tantamount to an opportunity given to the Registrar, to consider whether such proceedings were a necessary pre-condition to their liability to pay compensation. I do so having regard to the fact that many claims for compensation are averted by the fact that litigation or negotiation or s. 49 claims under the Registration of Title Act 1964, based on possessory title, have been obtained in relation to the disputed property and much of these pre-compensatory claim dealings proceed with the degree of informality.

20. On the basis of the above findings, I find that the Registrar ought to have valued the compensation on the basis of the best evidence available to her, which was the updated claim and valuer's report of €270,000 for the disputed plot. However, I do accept that the valuer's report did not discount the valuation of the disputed plot as it was sold at the date of valuation when there was a dwelling house which was planning permitted (and presumably by law-approved) in the course of construction on the disputed plot. While it was argued by Mr. O'Tuathail S.C. for the applicant that the discount might only involve €10,000 to €12,000 being the cost of obtaining planning permission, I do not accept this should be the sole reason for discounting. The value of the plot must be taken as that of a green field site without planning permission, with all attendant worries of third party objectors to planning permission, difficulty of obtaining and locating services to cater for an additional dwelling, apprehension about third party objections leading to a planning appeal and consequent delay, and the like. I consider that the discount should therefore be more substantial, and that the valuation of the property as of the date of hearing in 2004 was more realistically €200,000.00.

21. Accordingly I propose to award compensation under s. 120 of the Registration of Title Act 1964 in the sum of €200,000.00 in respect of the disputed garden. From this sum should be deducted the value of €8,000.00 already received with the property and held on account with interest for the applicant. Accordingly the net compensation is €192,000.00 to which should be added in accordance with the Supreme Court decision interest at Courts Act rates for awards since the date of the hearing on 7th September, 2004, until payment. I also award the sum of €17,121.04 claimed for costs in the proceedings entitled Circuit Court Record Number 12439/1999 Dublin Circuit County of Dublin between Laurence Daly Plaintiff and Alan Carson Defendant or such sum in that regard as shall be taxed, whichever is the lesser sum together with the costs of the claim before the Registrar of Title. I shall hear further argument from counsel for the parties in relation to costs and such further refinements to the order of this court on the appeal as may be fit and proper.