

THE HIGH COURT

LAND REGISTRY

IN THE MATTER OF SECTION 19 OF THE REGISTRATION OF TITLE ACT 1964

AND IN THE MATTER OF FOLIOS 4058 AND 8427F OF THE REGISTER OF OWNERSHIP OF FREEHOLD LAND COUNTY WICKLOW

[CT 40/2018]

BETWEEN

SYSTEM LAUNCESTON PROPERTY FINANCE DAC

APPLICANT

AND

THE PROPERTY REGISTRATION AUTHORITY

RESPONDENT

JUDGMENT of Ms. Justice Miriam O' Regan delivered on the 19th day of March, 2019

Issues

1. The matter comes before the court by way of an appeal on behalf of the applicant pursuant to the provisions of s.19 of the Registration of Title Act 1964 (the court has power to annul or confirm with or without modifications the ruling under appeal) from the respondent's ruling dated the 18th July 2018 wherein the respondent refused to effect registration of a charge bearing date the 9th December 2005 and made between Angela Murphy, the legal personal representative of Sean B. Murphy deceased (the LPR) and a third party, Ivor Murphy, in favour of Anglo Irish Bank Corporation plc (Anglo) on the basis that the LPR, as personal representative of the registered owner did not have power to create a charge over the registered lands registerable within the Land Registry.

Background

2. Sean B. Murphy, deceased died on 7th March 1989 and at the date of his death he was the registered full owner of the lands and premises mentioned in the title hereof. On the 19th April 1990, the LPR extracted a grant in his estate. On the 1st June 2005, the LPR joined with Ivor Murphy aforesaid who was then the registered owner of a third parcel of land, to sell the three registered plots to Michael Higgins and others for the total sum of €2.1m – funded by a loan from Anglo to the purchasers. As part of the sale process the LPR and Ivor Murphy joined in a charge bearing date the 9th December 2005 by way of security for the guarantee and indemnity granted by them to Anglo. The respondent refused to register this charge as against the subject property. It appears that the respondent did register the charge as against the property previously owned by Ivor Murphy.

3. Initially on the 5th January 2006 Anglo applied to the respondent to register the charge however the respondent declined to do so on the basis that there are limited circumstances when a personal representative may charge a deceased registered owner's property (see letter of the respondent of the 9th February 2006).

A further application to register the charge was made on the 23rd March 2012 however again, the respondent refused to register same and reiterated that the personal representative was limited in its ability to charge registered property and could only do so under s.60(3) of the Succession Act 1965.

On the 28th of March 2014 by loan sale deed Anglo sold its interest in the subject charge to the within applicant.

4. Prior to the oral hearing the parties tendered written submissions. The applicant's submissions are undated, the first of which includes a senior counsel's opinion of the 12th January 2018. Thereafter the respondent lodged submissions bearing date the 27th January 2019. The applicant tendered further written submissions, again undated, in response to the aforesaid written submissions of the respondent. At the hearing, the applicant tendered oral submissions, followed by a response by the respondent and then the applicant replied.

Preliminary matters

5. (1) The applicant submits that the transaction which occurred in December 2005 was more in the nature of a sale than a charge and therefore the respondent's submissions relative to a charge are irrelevant. The reality is that the LPR and a third party sold the relevant parcels of land to Messrs O'Higgins and others with Anglo providing the finance to the purchasers. As part of the deal the purchasers were not registered and the bare legal estate to be held by the vendors was charged to Anglo. Although the charge arose in the context of a sale nevertheless the status as between the LPR and Anglo was that of charger and chargee and accordingly the registration of the relevant document must be determined in connection with the law on registration of a charge. There simply was no sale by the LPR to Anglo to suggest that that was the nature of the relationship between the LPR and Anglo. I am satisfied therefore that the submission with regard to the within matter being in effect a sale is without merit. In the bulk of sales that occur a mortgage is also involved but this does not change the character of the mortgage document to a sale document.

(2) The respondent in written submissions states that no beneficial interest passed to the purchaser as a consequence of the transaction by reason of the fact that no transfer was executed. However, in the circumstances where the purchaser paid to the LPR and the third party the full purchase money of €2.1m it is inconceivable that a beneficial interest did not pass (see *Tempany v. Hynes* [1976] IR 101).

(3) The applicant states at para. 27 of the second set of submissions that the LPR doesn't have precisely the same powers as the registered owner. At para. 36 it is stated that s.61(2) authorises the registration of charges by an LPR as though the LPR was a registered owner. At para. 11 of the submissions it is stated that the LPR has the same rights as the registered owner – they are "co-extensive".

(4) The respondent's submission proceeds on the basis that it is not disputed that there may be in existence a common law power enabling a LPR to enter into the instant transaction, but rather, the respondent adopts the position that there is no statutory power rendering the transaction capable of registration. Accordingly, for the purposes of this judgment it is assumed that the personal representative was vested with a common law entitlement as asserted by the applicant.

(5) The respondent does not dispute jurisprudence identified by the applicant on statutory interpretation in written submissions. However, in oral reply submissions the applicant introduced an additional judgment which the respondent did not have an opportunity to respond to namely the judgment of Mr. Justice Feeney in *Commissioner of An Garda Síochána v. Oberoi* [2014] 3 IR 444. At para. 22 of that judgment it is recorded that the purpose of statutory construction by the court is to discern the intention of the legislature. *DPP v. Grey* [1986] IR 317 is also cited and in particular the judgment of Henchy J. at para. 325 to the effect that there is a general rule that the court leans against the interpretation of a repeal of early statutes by implication when no expression of intention to exclude the earlier provision is included.

As aforesaid the entitlement of the LPR at common law is not disputed however the Registration of Title Act 1964 in its introduction is identified as an act to consolidate with amendments. In addition, in the schedule of repeals in that act the 1891 Act is the first enumerated statute.

(6) In both oral and written submissions, the applicant raises the issue of prejudice as a matter to be taken into account in the event of ambiguity in relation to the provisions of in particular s.61 (2) and s.69 (2) of the 1964 Act, being the cornerstones of the applicant's submissions. In this regard, it is noted that the within applicant secured the Anglo interest in the property under a loan sale deed of the 28th March 2014 and at that time there had been two failed attempts to register the charge with the respondent. This factual matter is clearly known to the applicant as the applicant has detailed the sequence of events from the date prior to entry into the charge to the date of refusal of the 18th July 2018 in a Grounding Affidavit.

(7) The respondent relies on a number of text books in support of the respondent's interpretation of the 1964 Act and in particular s.61 (2) thereof. As already mentioned the applicant submitted submissions both before and after the respondent's submissions and indeed, similarly, oral submissions were made by the applicant both before and after the respondent's oral submissions. Nevertheless, the respondent did not address the relevant textbooks or indeed the fact that on foot of the applicant's submissions there would appear to be no purpose to the provisions of s.60 (3) of the Succession Act 1965. When the court raised these matters in oral submissions it was explained that the textbooks did not take into account s.69 (2) of the 1964 Act.

The applicant in turn relied on the textbook of Dodd on statutory interpretation.

Considering

The specific topic dealt with;

The eminence of the authors;

The consistency of views expressed

the manner in which the applicant dispatched the authors quoted is unfortunate and unconvincing. For the sake of completeness, the following textbooks were drawn to the applicant's attention: -

(a) In the letter from the respondent of the 9th February 2006 the respondent refers to Wylie (3rd edition) at para. 16.59 which is similar to the content of McAllister on *Registration of Title*, at pp. 168 and 169, which states as follows: -

"The personal representative may, likewise, raise money by way of mortgage for the payment of any expenses, debts, liabilities or legal rights. They may, with the approval of all beneficiaries *sui juris*, or the court, raise money by way of mortgage or charge for the erection, repair, improvement or completion of buildings or the improvement of lands being part of the estate of the deceased".

(b) Fitzgerald on *Land Registry Practice* (2nd edition) at para. 9.3 states:-

"A personal representative of a deceased registered owner in certain circumstances (see s.60 (3) of the Succession Act 1965)"

in identifying the list of persons entitled to charge registered land.

(c) Deeney on *Registration of Deeds and Title in Ireland* states at para. 21.02 (under the heading "Who may charge registered land?") :-

"Succession Act 1965, s.60 (3) provides that the personal representative of the registered owner, in certain circumstances can charge registered lands".

There is no evidence whatsoever that the Authors aforesaid failed to have regard to the entirety of the 1964 Act, including s.69 (2).

The point raised to the effect that the applicant's understanding of s.61 (2) of the 1964 Act would render s.60 (3) of the Succession Act 1965 obsolete was not addressed by the Applicant.

(8) Both the applicant and the respondent accept that s.60 (3) of the 1965 Act is not engaged, that is, that the instant charge although it was to raise money was to do so in favour of the relevant purchasers rather than the LPR.

(9) The applicant states that the respondent's construction would be absurd – presumably this refers to the assertion by the respondent that there is no statutory power other than s.60 (3) of the 1965 Act enabling an LPR to charge registered property. However, it is the court's view no such absurdity arises even in circumstances where it is assumed for the purposes of this matter that there is a common law power vested in an LPR to charge registered land –

(i) it was legally possible prior to the coming into force of the 2006 Act to effectively charge lands by way of equitable deposit of title documents however there was no mechanism to effect registration of this position;

(ii) equitable interests are not registerable and

(iii) under s.69 (1) (g) of the 1964 Act leases shorter than 21 years are not registerable

In Wylie's *Land Law* (4th edition) at para. 12.25 it is stated that the registration of title is governed by the 1964 Act and the Registration of Deeds and Title Act 2006 which governs the method of creation of mortgages of lands the title to which is registered but they do not prevent the creation of equitable mortgages which do not appear on registers.

Relevant Statutory Provisions

6. The Registration of Title Act 1964: -

Section 61(2)

"On the death of a sole registered owner of land... the personal representatives of the deceased owner shall alone be recognised by the registrar as having any rights in respect of the land, and any registered disposition by them shall have the same effect as if they were the registered owners of the land."

Section 61(3) (a)

"An applicant for registration made by a person who claims to be by law entitled to the land of a deceased registered full owner, accompanied, in the case he is not the personal representative, by an assent or transfer in the prescribed form, shall authorise the property registration authority to register such person as the owner of the land."

Section 68 (1)

"Subject to the provisions of this Act the registered owner of land shall alone be entitled to transfer or charge the land by registered disposition and the registered owner of a charge shall alone be entitled to transfer the charge by registered disposition."

Section 69 (2)

"A burden may be registered under this section on the application of the registered owner of the land or of any person entitled to or interest in the burden but if the application is made without the concurrence of the registered owner of the land or such other persons as may be prescribed the burden shall not be registered except in pursuance of an order of the court."

7. The Succession Act 1965

Section 60 (3).

The personal representative of a deceased person may from time to time raise money by way of mortgage or charge for the payment of expenses, debts and liabilities and any legal right and, with the approval of all the beneficiaries *sui juris* or the court (but not otherwise), for the erection, repair, improvement or completion of buildings or the improvement of lands forming part of the estate of the deceased.

8. Interpretation Act 2005

Section 5 (1).

In construing a provision of any act, (other than a provision that relates to the imposition of a penal or other sanction) -

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned as the case may be where the intention can be ascertained from the act as a whole.

Section 26 (2) (e)

"where an enactment (former enactment) is repealed and re-enacted, with or without modification, but another enactment (new enactment) the following provisions apply:

...[...]... (e) to the extent that the provisions of the new enactment express the same idea in a different form of words but are in substance the same as those of the former enactment, the idea in the new enactment shall not be taken to be different merely because a different form of words is used."

9. In *Minister for Industry and Commerce v. Hales* [1967] IR 50 McLoughlin J. quoted with approval the well recognised principle of statutory interpretation to the effect that there is a presumption that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms of a clear implication or, in other words beyond the immediate scope and object of the statute.

10. In *McGrath v Mc McDermott* [1988] IR 258 Finlay C.J. indicated that it was the function of the court in the interpretation of a statute to strictly confine itself to ascertain the true meaning of each statutory provision resorting in cases of doubt or ambiguity to a consideration of the purpose and intent of the legislature from other provisions or other statutes expressed to be construed with it. The court's function is not to add or delete from express statutory provisions.

11. Dodd on *Statutory Interpretation in Ireland* at para. 4.110 states that the presumption that the legislature did not intend to make any radical amendment beyond what it declares expressly of a clear implication is applied and if there are a number of plausible alternative constructions the more narrow interpretation may be preferred on the basis of a presumption that the legislature would not infringe rights or depart from the general system of law without expressing its intention with irresistible clarity.

12. Dodd aforesaid at para.7.08 states: -

"Different considerations arise where a provision is ambiguous and capable of bearing a number of meanings. A court may consider the consequences of alternative meanings to determine which is the intended meaning.

In *Campbell v. O'Donnell and Boyle and The Motor Insurers Bureau of Ireland* [2005] IEHC 266 Finnegan P. stated:

"It is permissible to have regard to the consequences in construing a statute if the statute is ambiguous".

In *Proctor and Gamble Company v. the Controller of Patents Designs and Trade Marks* [2003] 2 IR 580 the High Court approved the comment of Newey J.:

"If, however, the meaning of the section is ambiguous, since parliament is unlikely to have intended to create a hardship, consequences likely to result from alternative constructions may, I think, be taken into account".

Dodd went on to say that the literal meaning will not be departed from but the court on conclusion will seek to avoid certain consequences and actively consider whether the words will bear an alternative meaning. He suggests the consequences rather than the ambiguity per se appear to drive the process and he quotes from *in re Cleary* when Wiley J. stated:

"It is quite possible that this is so: But if there is any other construction which can be placed on subsection (2) by which such a result could be avoided I should be inclined to accept it".

Discussion

13. (i) The applicant argues that the clear meaning of s.61 (2) of the 1964 Act is that the personal representatives have the power to make dispositions which may be registered, and that they may do so as though they were the registered owner of the lands.

The respondent counters this argument by suggesting that in the interpretation of the applicant no meaning is ascribed to the word "registered" prior to the word dispositions.

The applicant does acknowledge that there is a difference between a registered disposition and a disposition however does not otherwise identify how the words "registered disposition" as they appear in s.61(2) can simply be read as though "disposition".

Insofar as the assertion that "they may do so as though they were the registered owner of the land" is concerned this wording is simply not included in the section. Rather the section relates to the impact of a registered disposition by the LPR.

Furthermore, it does appear that in lieu of the words "any rights" the applicant's submission incorporates "all rights".

Although the applicant objects to the respondent attempting to use the prior somewhat similar section of the 1891 Act as evidence of the meaning of s.61 (2) of the 1964 Act nevertheless it is noteworthy that in s.84 (3) of the 1891 Act there was included "and shall have the same powers of dealing with the land".

As aforesaid the 1964 Act is an amending act and the 1891 Act is repealed in full.

As mentioned above the applicant's submissions are not consistent in identifying the nature of the powers vested in a legal personal representative according to their interpretation of the Act – at para. 11 of the 2nd written submission it is stated that the LPR has the same rights as a registered owner and identifies such rights as being co-extensive. At para. 27 of the same submissions it is stated that a personal representative does not have precisely the same powers as the deceased registered owner.

(ii) The applicant suggests that under s.69 (2), above, the LPR having the same (or, possibly, almost the same depending on which paragraph you are looking at) powers of the deceased owner these included in the ability to register a burden under s.69 (2) in lieu of the registered owner.

In s.3 of the 1964 Act a disposition is said to include a transfer and a charge and rights is said to include estate interest, equity and power nevertheless I am not satisfied that these definitions avail the applicant in making the argument as to the meaning of s.61 (2).

14. I am not satisfied that there is any ambiguity in the provisions of s.61 (2) – on the death of the sole or last surviving registered owner only the personal representatives will be recognised by the respondent as having "any rights" and any "registered disposition" (a disposition which has been registered as opposed to a disposition simpliciter) will have the same effect as though the personal representatives were the registered owners.

15. This view is fortified by the views expressed by the various authors in their textbooks recited above.

16. The applicant argued that by virtue of the words "subject to the provisions of this act" at the commencement of s.68 (1) it is clear that such provision also refers to the rights of the LPR.

17. Such an argument is valid. However, what remains outstanding is the provision which entitles the LPR to charge the land by a registered disposition; to be found, if at all, elsewhere in the act.

18. The applicant suggests it is clear that a person other than the registered owner or his LPR may also apply for registration of a validly created charge.

As there is no reference whatsoever to an LPR in s.69 (2), and as s.61 (2) does not in fact state, as contended for by the applicant, that the terms "LPR" and "registered owner" are interchangeable, the argument that the LPR has the same charging powers as a registered owner is without foundation.

19. The applicant states that because the LPR is entitled to effect a sale under s.50 (1) of the Succession Act 1965 without any third party looking behind such sale it is argued that the within transaction equates to a sale and the respondent is obliged to register

the charge without question.

20. As previously mentioned the document sought to be registered is identified as a mortgage and charge, and correctly so notwithstanding that it certainly arose in the context of sale however that does not convert the document of mortgage and charge between the LPR and Anglo into a document of sale as between the LPR and Anglo. The applicant argues that the provisions of the 1891 Act cannot be availed of to interpret the 1964 Act.

21. In my view there is no necessity to interpret s.61 (2) of the 1964 Act by reference to s.84 (3) of the 1891 Act – it is mentioned above merely to identify that the meaning now ascribed to s.61(2) was precisely contained in the 1891 Act but since then there has been a clear definite change by the deletion of “and shall have the same powers of dealing with the land” so that the two sections cannot be equated nor can the applicant ascribe the meaning in s.84 (3) of the 1891 Act to s.61 (2) of the 1964 Act.

22. I am satisfied that having regard to s.26 (2) (e) of the Interpretation Act 2005 the two sections are not in substance the same.

23. The respondent argues that a statutory basis for registering a document executed by the LPR must be established as the registration of titles is exclusively statutory based with common law and equitable interests being effectively irrelevant as they are not registerable. This argument is consistent with Wylie’s comments mentioned at para. 5. (9) hereof.

24. The applicant argues that there is nothing in s.60 (3) of the 1965 Act to preclude the making of the charge of the 9th December 2005 however as aforesaid this matter has progressed on the assumption that it is not the creation of the charge of the 9th December 2005 by the LPR that is an issue but rather whether or not such charge can be registered under the Registration of Title Act 1964 as amended.

Conclusion

25. I am satisfied that there is no ambiguity in ascertaining the ordinary and natural meaning of s.61 (2). The section does not, in accordance with the submissions made by the applicant, refer to any dispositions but rather any registered dispositions and indeed the applicant acknowledges there is a difference between a disposition and a registered disposition.

Further there is nothing in s.61 (2) to suggest that the rights of a legal personal representative are co-extensive with the rights of registered owner.

Notwithstanding opportunity the applicant has failed to identify the purpose of s.60 (3) of the 1965 Act in the event that the applicant’s submissions were acceptable.

Although the textbooks mentioned can be considered persuasive rather than binding nevertheless I am satisfied that the applicant has not presented an argument to counter the views expressed uniformly by Fitzgerald, McAllister, Deeney and Wylie in each of their separate texts. I am satisfied that it is possible to effect registration of a charge under s. 60(3) of the 1965 Act by virtue of s.77 and/or s.69(1)(r) of the 1964 Act.

In the circumstances, the ruling of the respondent on the 18th July 2018 is hereby confirmed.