

THE HIGH COURT

[2009 No. 423 SPJ]

BETWEEN

STEPSTONE MORTGAGE FUNDING LIMITED

PLAINTIFF

AND

MARY TYRRELL

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 30th day of March, 2012.**1. Background**

1.1 In these proceedings, which were initiated by special summons which issued on 20th April, 2009, the plaintiff sought an order pursuant to s. 62(7) of the Registration of Title Act 1964 (the Act of 1964) for possession of the lands and premises described as "the property comprised in Folio 32225F County Clare and now more commonly known as Rahone, Kilfenora, County Clare", which were charged by the defendant in favour of the plaintiff pursuant a deed of charge dated 2nd April, 2008 (the Charge) made between the defendant of the one part and the plaintiff of the other part, which was preceded by a letter of offer from the plaintiff to the defendant of the same date offering to advance to the defendant the sum of €192,500 on the security of Rahone. The Charge was registered as a burden on Folio 32225F on 1st July, 2008 and the plaintiff was registered as the owner of the Charge. It was not until 28th January, 2011 that an appearance was entered by Mullan & Associates on behalf of the defendant. When the matter was in the Chancery Special Summons List on 31st January, 2011, the Court (Dunne J.) adjourned the proceedings until 28th March, 2011 to enable the defendant to put in a replying affidavit. The defendant swore a replying affidavit on 7th March, 2011, which was filed on 9th March, 2011. She subsequently swore a supplemental affidavit rectifying some errors in the first affidavit. However, the corrections are not material to the issue with which the Court is now concerned.

1.2 On 23rd May, 2011, Dunne J. made an order for possession of the property described in Folio 32225F County Clare in favour of the plaintiff, with a stay on execution for a period of six months from the date of the order. There was also a provision in the order that the defendant should have liberty to apply regarding the stay on condition that she made certain payments, which it is common case were not made. The order also stated:

"Liberty to the parties to apply regarding rights of way".

1.3 What happened subsequently was the plaintiff, on foot of the liberty to apply, came back into Court seeking to have the issues which arose in relation to the rights of way dealt with. Dunne J. directed the plaintiff to file points of claim and the defendant to file points of defence. The plaintiff's points of claim were dated 9th November, 2011 and the defendant's points of defence were dated 16th December, 2011. The matter was transferred out of the Chancery Special Summons List and listed for hearing on 16th March, 2012. Neither side sought to adduce any further evidence on that day. However, there was attached to the defendant's points of defence a copy of a letter dated 3rd May, 2011 from the Property Registration Authority. Up to date copies of Folio 32225F and Folio 40818F of the Register of Freeholders, County Clare have been put before the Court by the solicitors for the plaintiff.

2. The rights of way problem

2.1 The copy of Folio 32225F County Clare exhibited in the affidavit grounding the special summons was printed on 11th February, 2009. That disclosed that there were two parcels registered on Folio 32225F, namely:

(a) a plot of ground being part of the townland of Roughan containing 0.1950 hectares shown as Plan A13QR edged red on the Land Registry map (Plot (a)); and

(b) a plot of ground being part of the townland of Roughan containing 0.1810 hectares shown as Plan EF27 edged red on the Land Registry map (Plot (b)).

On the basis of the totality of the documentation before the Court I am satisfied that the dwelling house and other buildings on the land are located on Plot (b). The folio also set out the following rights as being appurtenant to Plot (b):

(i) a right of way coloured yellow and lettered ZY and ML on Plan 4 of the Land Registry map (O.S. 9/10) (Appurtenant Right (i));

(ii) a right of way coloured yellow and lettered XY on Plan 6 of the Land Registry map (O.S. 9/10) (Appurtenant Right (ii)); and

(iii) a right "to take water from the well at the point lettered L on plan 4 shown on the part of the Townland of Roughan (OS 9/10) together with the right of way as more particularly specified in "Instrument D2001CR002277H" (Appurtenant Right (iii)).

The copy of the folio exhibited also disclosed that the defendant had been registered as full owner with absolute title on the folio on 9th November, 2006 and also that the plaintiff's charge was registered as a burden on the folio, with the plaintiff being registered as owner of the charge.

2.2 There is among the documents put before the Court on 16th March, 2012 a later print of Folio 32225F, which was printed on the 2nd March, 2011 and, as regards the description of the property and the appurtenant rights, was in exactly the same terms as the print of the folio referred to in para. 2.1. There was one material change, in that on 17th February, 2011 a caution had been registered on the folio which provided that no dealing or charge by the registered owner with the property was to be registered except after notice to the plaintiff.

2.3 In her first affidavit the defendant averred as follows:

"I say that I bought my home in October 2002. My home is a farmhouse and it was accessed through and drew its water supply from two rights of way over the adjoining land. On or about April 2004, I bought the neighbouring land a field of 22 acres. The adjoining surrounding lands form a perimeter around my home, my home may only be accessed through these lands."

The "adjoining surrounding lands" are the lands registered on Folio 40818F County Clare.

Later in the same affidavit the defendant further averred as follows:

"I say and believe that if the plaintiff takes possession of my home, they (sic) will have recovered a landlocked house as there is no longer a right of way for access over the surrounding lands as the dominant and the servient tenements have both come into my ownership. Any easements or rights of way are now extinguished. The plaintiff will not be able to access or sell my home. Any attempt by the plaintiff to take possession of my home is futile as in reality the plaintiff will not be able exercise any right of ownership without access."

2.4 There is also before the Court a copy of Folio 40818F County Clare printed on 2nd March, 2011. That copy disclosed that the lands registered on Folio 40818F comprised a plot of ground being part of the townland of Roughan containing 7.1300 hectares shown as Plan BAX 80 edged red on the Land Registry map. On 9th January, 2006 the defendant had been registered as full owner with absolute title on that folio. At 2nd March, 2011 the following easements and wayleaves were registered as burdens on that folio:

(a) A right of way for two named individuals, who are described as the registered owners of Folio CE20094F, over the way shown coloured yellow and lettered ZY and NL on Plan 4 on the Land Registry map. It is clear from Folio 32225F that Plot (b) registered on that folio was transferred from Folio 20094F County Clare. Accordingly, it is clear that the right registered as a burden was the Appurtenant Right (i) registered on Folio 32225F. It is reasonable to assume that the variation between NL and ML was a typographical error. That right of way was registered as a burden on the folio on 12th August, 1992.

(b) The right to take water from the well shown at the point lettered L on Plan 4 and such other easements as specified in Instrument D2001CR002277H in favour of a named person, who is described as the registered owner of the property comprised in Folio 20094F, and her heirs and assigns. The right to take water, together with other easements, was registered as a burden on the folio on 27th March, 2001, which is wholly consistent with Appurtenant Right (iii) registered on Folio 32225F.

(c) A right referred to as full right and liberty for a named individual, who is described as the registered owner of Folio CE28495, and his heirs and so forth to pass and re-pass "over the property herein" by the way shown coloured yellow and lettered A- B on Plan BAX 80 thereof on the Land Registry map. Plot (a) registered on Folio 32225F was transferred from Folio 28495 County Clare, as was the land registered on Folio 40818F. This right was registered as a burden on the folio on 9th January, 2006 by virtue of the same Instrument as the defendant was registered as owner of the lands registered on Folio 40818F on the same day, so that it is reasonable to surmise that the right was either granted or reserved to the named individual, who remained the owner of the balance of the lands registered on Folio 28495, County Clare.

In summary, the right of way referred to at (c) above has no bearing on the issue with which the Court is concerned.

2.5 The letter dated 3rd May, 2011 from the Property Registration Authority to the defendant attached to the points of defence stated as follows:

"A review of Folio CE40818F which is registered in your name has shown that the folio was subject to two rights of way in favour of the owners of Folio CE32225F.

As Folio CE32225F was subsequently transferred into your name also, and as registered owner cannot burden their own folio, we have now cancelled the rights from Folio CE40818F."

It is not clear whether that letter was brought to the attention of Dunne J. on 23rd May, 2011. In any event, the two folios in question were not materially different six months later on 4th November, 2011, as copies printed on that date indicate, save that there was a notation after the entry of Appurtenant Right (i) as follows:

"Plan Number revised

Q2011LR007782M".

Moreover, the text delimiting Appurtenant Right (i) was altered to refer to a right of way "lettered ZY and ML on Plan BAX 80". There was a similar notation to that quoted above after the entry of Appurtenant Right (iii).

2.6 The most recent copies of the two folios furnished to the Court were printed on 28th February, 2012 and show considerable variation from the earlier copies. As regards Folio 32225F, the descriptions of Plot (a) and Plot (b) remain the same. However, Appurtenant Right (i) has been deleted, but the notation which appeared for the first time on the copy printed on 4th November, 2011 remains. There is an added notation as follows:

Appurtenant Right (ii) remains, although the words "and lettered XY" have been removed. Appurtenant Right (iii) has been deleted and the notation which appeared for the first time on the copy printed on 4th November, 2011 remains and there is a notation similar to the notation after the deletion of Appurtenant Right (i) quoted above. The Land Registry map in relation to this folio does not depict any right of way whatsoever servicing the lands registered on the folio, which I cannot understand, as Appurtenant Right (ii) should surely be depicted. As regards Folio 40818F, the burdens which relate to Appurtenant Right (i) and Appurtenant Right (iii) have been deleted and there is a notation similar to the notation on Folio 32225F setting out the date of cancellation and the relevant instrument. What I believe to be Appurtenant Right (ii) on Folio 32225F is I believe depicted on the map attached to Folio 40818F and remains a burden on that folio.

3. The issue

3.1 Despite the fact that the defendant's legal team had participated in the process following the making of the order dated 23rd May, 2011 in the Chancery Special Summons List, which led to the matter coming on for hearing on 16th March, 2012, on that day it was submitted on behalf of the defendant that this Court could not deal with the issue of the rights of way and it would have to be dealt with by Dunne J. As I understand the position, that proposition was rejected by Dunne J. when it was put to her by counsel for the defendant. I am satisfied that the issue which arises on the liberty "to apply regarding rights of way" element of the order dated 23rd May, 2011 is properly before this Court. As to what a court can do on a liberty to apply provision, counsel for the defendant referred the Court to Delany and McGrath on *Civil Procedure in the Superior Courts* (3rd Ed., at para. 24 - 25), the decision of the High Court (McCracken J.) in *Donegal County Council v. Ballantine* [1998] IEHC 203 and an article from the English Law Gazette on *Liberty to Apply- What it Means*.

3.2 As I pointed out at the hearing, I consider the Court's function is to amplify what the order for possession in relation to the property registered on Folio 32225F County Clare means and, in particular, whether it embraces Appurtenant Rights (i) and (iii), which, on the evidence before the Court, were registered as appurtenant rights on Folio 32225F at the dates on which the charge was created, these proceedings were initiated, and the order for possession was made. This is the issue I propose addressing.

4. Pleadings/submissions

4.1 As I have already noted, points of claim were delivered on behalf of the plaintiff and they were responded to by points of defence delivered on behalf of the defendant. In addition, the plaintiff's legal team furnished comprehensive written submissions to the Court, although the primary position adopted by counsel for the plaintiff was that the plaintiff was entitled to rely on the conclusivity of the register (*i.e.* Folio 32225F) as provided for in the Act of 1964. My understanding is that written submissions were to have been furnished on behalf of the defendant. This was not done.

4.2 In any event, what I consider to be the appropriate course is to focus on the points of defence, which contain a plethora of non-denials, including that the defendant does not deny that the register, which I understand to mean the Property Registration Authority register, "shall be conclusive evidence of the title". The elements of the points of defence which get to the nub of the issue include the following pleading:

"The Defendant does not deny that she contracted to give a saleable asset as security to the Plaintiff. The Defendant did not suppress any knowledge or act in any unconscionable way and the Plaintiff was advised by their (*sic*) solicitor and at all times could have and should have made their (*sic*) own enquiries. The Plaintiff was negligent as they (*sic*) did not make even the most basic enquiries. The Defendant denies an act of deliberate misrepresentation, by offering the copy folio showing her as registered owner of the appurtenant rights as above described. The Defendant believed that the rights remained in force and was not aware that they had been extinguished, nor did her solicitor, or, the Plaintiff advise her to the contrary."

Later, the following pleading is included in the points of defence:

"In advance of the date on which the above mentioned Order was made, Counsel advised the Defendant that the two rights of way on Folio 40818F County Clare in favour of Folio 32225F would have been extinguished once the dominant and servient tenements came into common ownership. This was the first time the Defendant had any legal advice on this issue."

There follows a reference to enquiries made by the defendant with the Property Registration Authority and the letter dated 3rd May, 2011 is referred to. It is pleaded that, once the defendant became aware that there was an issue, she took all reasonable steps to assist the Court and advise the plaintiff. It is asserted that it was an issue that the plaintiff should have been aware of as a result of its inquiries during the mortgage application process. Finally, it is stated that the defendant has acted honestly and reasonably at all material times.

5. Conclusions

5.1 In my view, whether the order for possession made in favour of the plaintiff includes Appurtenant Rights (i) and (iii) turns primarily on the application of the provisions of the Act of 1964.

5.2 Section 31(1) of the Act of 1964 provides:

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just." .

In s. 3 of the Act of 1964, "land" is defined as including "incorporeal hereditaments".

5.3 When the acceptance of the letter of offer was executed by the defendant on 2nd April, 2008 and when she executed the Charge in favour of the plaintiff on 2nd April, 2008, whereby she charged the lands registered on Folio 32225F County Clare in favour of the plaintiff, Folio 32225F, as it appeared on the register and was replicated on the official copy of the folio, was conclusive evidence of

the title of the defendant to Plot (a) and Plot (b) and also to Appurtenant Rights (i), (ii) and (iii), because her ownership of those lands and of those appurtenant rights appeared on the register at that date. Nothing could be clearer. The plaintiff was entitled to rely on the conclusivity of the register. As it is put in McAllister on *Registration of Title* (at p. 277), s. 31(1) is an attempt by the legislature to build up the "Iron Curtain" of the register behind which it is not necessary to penetrate. It was a successful attempt as regards both the ownership of the lands and of the appurtenant rights by the defendant when the Charge was created. The plaintiff, as a chargee for value, did not have to penetrate the "Iron Curtain".

5.4 When the plaintiff was registered as owner of the charge on Folio 32225F, s.62 (6) of the Act of 1964 was still in force in its original form before it was amended by the Land and Conveyancing Law Reform Act 2009 and it provided:

"On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

Apropos of the Conveyancing Acts, apart from the various provisions in relation to mortgages contained in ss. 15 - 29 of the Conveyancing Act 1881 (the Act of 1881), the word "conveyance" was defined in the Act of 1881 as including, unless a contrary intention appears, a mortgage. Section 6 of the Act of 1881 provided that a conveyance of land should be deemed to include, *inter alia*, all privileges, easements, rights and advantages whatsoever appertaining to the land at the time of the conveyance. Therefore, in my view, there is absolutely no doubt but that on 1st July, 2008 the plaintiff, for the purposes of enforcing the charge, acquired all the rights and powers of a mortgagee not only in relation to Plot (a) and Plot (b) but also in relation to Appurtenant Rights (i), (ii) and (iii).

5.5 I simply cannot understand how the Property Registration Authority purported to cancel Appurtenant Rights (i) and (iii) from Folio 32225F with effect from 27th April, 2011 without giving prior notice to the plaintiff. Section 32 of the Act of 1964 does make provision for the rectification of errors in the register. It is not clear from the letter of 3rd May, 2011, which I have quoted earlier, whether the jurisdiction conferred by s. 32 was being invoked. If it was, then it was not properly invoked. Section 32(1) (as substituted by s. 55 of the Registration of Deeds and Title Act 2006) provides as follows:

"Where any error originating in the Land Registry (whether of misstatement, misdescription, omission or otherwise, and whether in a register or in a 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 ...".

The plaintiff, as the owner of the charge registered on Folio 32225F was certainly a person with an interest in whether the appurtenant rights which appeared on the folio when it took its charge should be cancelled from the folio. Not only that, but prior to 28th April, 2011 the plaintiff's caution had been registered on the folio and the wording of that caution, in my view, is broad enough to preclude the cancellation of appurtenant rights appearing on the register, the conclusivity of which was statutorily guaranteed, at the behest of the defendant without reference to the plaintiff.

5.6 I do not consider it necessary to embark on an examination of the application of the general principle that, if the dominant and servient tenements come into the ownership and the possession of the same person, any easement or profit annexed to those lands is extinguished, to the facts of this case. It is true that the title position in relation to the two folios in issue is, at a superficial level, rather confusing, because the chronological order in which the defendant averred that she acquired the lands registered on the two folios is not consistent with the chronology in relation to the registration of her ownership, presumably because of the order in which the various instruments were lodged in the Land Registry. Her evidence on affidavit is that she bought the lands registered on Folio 32225F in October 2002 with the assistance of a mortgage from the Educational Building Society and that she subsequently bought the lands registered on Folio 40818F in April 2004. In fact, the lands registered on Folio 40818F were registered first in the name of the defendant on 9th January, 2006. Her registration on Folio 32225F was effected on 9th November, 2006 and on the same day the charge in favour of the Educational Building Society was registered as a burden on the folio and Educational Building Society was registered as the owner of the charge. It is reasonable to infer that Educational Building Society would, as regards Appurtenant Rights (i) and (iii) have been in the same position as I consider the plaintiff to be in now and its rights as chargee could not have been affected by the acquisition by the plaintiff, subsequent to giving the Educational Building Society the charge on Folio 32225F, of the lands registered on Folio 40818F.

5.7 Accordingly, I find that the order for possession made on 23rd May, 2011 relates to the property comprised in Folio 32225F County Clare together with Appurtenant Rights (i), (ii) and (iii), which were registered on that folio when the plaintiff's charge was created and when the plaintiff was registered as owner of the charge. I also find that the Property Registration Authority acted in error in cancelling Appurtenant Rights (i) and (iii) from Folio 32225F.

6. Order

6.1 With a view to avoiding any further unnecessary cost and expense in this matter, I propose making an order directing the Property Registration Authority to reinstate Appurtenant Rights (i) and (iii) on Folio 32225F County Clare with effect from 27th April, 2011. Subject to that, I will hear the submissions of the parties as to the form the order should take.