

THE HIGH COURT

[2017 No. 122 C.A.]

BETWEEN

TANAGER DAC

PLAINTIFF

AND

ROLF KANE

DEFENDANT

INTERIM RULING of Mr. Justice Noonan delivered on the 22nd day of November, 2017

1. This is an appeal brought by the plaintiff from an order of the Circuit Court (Her Honour Judge Linnane) dismissing the plaintiff's claim for an order for possession of the defendant's family home being the property comprised in Folio 91184F of the Registrar of Freeholders, County Dublin and known as No. 1 Elmwood, Clonsilla, County Dublin. This is an interim ruling in advance of the pronouncement of final judgment in this appeal.

2. By a letter of loan offer dated the 10th February, 2006, Bank of Scotland (Ireland) Ltd ("BOSI") offered a mortgage loan to the defendant which he accepted by signing the letter of offer on the 27th February, 2006. On the 6th March, 2006, the defendant executed a deed of mortgage and charge. On the 20th March, 2006, BOSI became registered on the folio as owner of the charge.

3. By cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland and the Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom, all of the assets and liabilities of BOSI including the mortgage and charge the subject matter of these proceedings transferred to Bank of Scotland Plc ("BOS") by operation of law at 23.59 hours on the 31st December, 2010, and BOSI was then dissolved without going into liquidation.

4. On the 5th December, 2013, BOS entered into a purchase deed with the plaintiff whereby BOS sold a portfolio of securities to the plaintiff which included the defendant's mortgage. The transaction closed on the 14th April, 2014. On the 25th April, 2014, the plaintiff became registered as the owner of the charge previously registered in favour of BOSI. The defendant is alleged to have fallen into arrears on his mortgage repayments resulting in a demand for repayment and ultimately possession of the family home. A Civil Bill for possession was subsequently issued on the 15th January, 2015.

5. Although a number of issues arise in this appeal, the primary issue is a contention on the part of the defendant that because BOS never became registered as owner of the charge in issue, it was not entitled to transfer or assign the charge to the plaintiff. The plaintiff accordingly never acquired title to the charge and was thus not entitled to enforce it against the defendant. Insofar as the plaintiff has become registered as owner of the charge, the defendant contends that such registration was erroneous and a mistake on the part of the Property Registration Authority ("the PRA").

6. In response, the plaintiff's essential contention is that it is the registered owner of the charge and as s. 31 of the Registration of Title Act, 1964 provides that the register is conclusive, it is not open to the defendant to challenge its title in the way he has sought to do. Section 31 provides as follows:

"31 (1) 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...."

7. In the course of argument, both parties referred extensively to the judgment of the Supreme Court in *Kavanagh v. McLaughlin* [2015] 3 I.R. 555 (*McLaughlin*). In *McLaughlin*, the defendants borrowed money from BOSI on foot of a loan mortgage which BOS claimed transferred to it under the terms of the cross-border merger. BOS appointed the first plaintiff as receiver over certain properties that were the subject of the loan which included registered land.

8. The defendants challenged the validity of the receiver's appointment on the basis that the cross-border merger did not transfer the benefit of their security from BOSI to BOS. The receiver sought a declaration that his appointment was valid and he succeeded in both the High Court and the Supreme Court. Two judgments were delivered in the Supreme Court by Clarke J. (as he then was) and Laffoy J. Both made clear that the securities held by BOSI over the *McLaughlins'* property, including registered land, passed to BOS. The court held that the benefit of the underlying contracts which entitled the bank to appoint a receiver passed as a result of the cross-border merger to BOS and therefore the appointment of the receiver was valid.

9. Laffoy J. noted in her judgment that the only issue in the appeal before the Supreme Court was the right of BOS to appoint a receiver. In this regard she said (at p. 599):

"[118] As regards the appointment of the receiver, which is the only act of enforcement of the security vested in BOS over the property of the *McLaughlins* the title to which is registered in the Land Registry which is in issue on the appeal, I am satisfied that, as a matter of contract, under the terms of the 2006 Charge BOS had power to appoint the receiver, independently of the provisions of the Act of 1964, and that the receiver was validly appointed notwithstanding that BOS is not registered as owner of the 2006 Charge."

10. That accordingly disposed of the appeal which as I have noted was concerned solely with the validity of the appointment of the receiver. However, in relation to the exercise of any statutory rights under the Registration of Title Act, 1964, Laffoy J. went on to observe (at p. 599):

"[119] As regards any further steps which require to be taken to enforce the 2006 charge, for the reasons set out above, I have come to the conclusion, that, notwithstanding the manner in which the 2006 charge became vested in BOS, if BOS wishes to avail of the statutory rights conferred by s. 62 of the Act of 1964 to enforce the 2006 charge, it must comply

with the requirement that it be registered as owner of the charge. That conclusion, which is *obiter*, is based on the absence of any legislation relieving a transferee in the position of BOS of the obligations imposed by s. 62."

11. It has throughout the hearing of this appeal been conceded by Mr. Ferriter S.C. on behalf of the plaintiff that the effect of the decision of the Supreme Court in *McLaughlin* is that while BOS was entitled to rely on all its contractual rights at common law pursuant to the charge over the defendant's land, it could not exercise any of the statutory powers conferred by the 1964 Act by virtue of the fact that it never became registered as owner of the charge.

12. The position therefore is that, following the cross-border merger, the defendant's charge transferred to BOS by operation of law. However, BOSI was the registered owner of the charge on the folio. Accordingly when the merger took effect, BOS was the legal owners of a registered charge on the defendant's folio that was not registered in its name. Thus, following *McLaughlin*, this meant that BOS was entitled to exercise all of its contractual rights under the charge but not any statutory rights under the 1964 Act unless and until it became registered as owner of the charge.

13. Section 64 (1) of the 1964 Act creates the means by which title to a registered charge may be effected, and by whom the transfer may be made.

14. Section 64 (1) of the 1964 Act provides as follows:

"64.—(1) The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee shall be registered as owner of the charge.

(2) There shall be executed on the transfer of a charge an instrument of transfer in the prescribed form, or in such other form as may appear to the Registrar to be sufficient to transfer the charge, but until the transferee is registered as owner of the charge, that instrument shall not confer on the transferee any interest in the charge..."

15. As held by Laffoy J. in *McLaughlin*, s. 64(2) has no application in the case of BOS as the transfer occurred by operation of law and not on foot of any instrument of transfer.

16. BOS was therefore not entitled to rely on the power to transfer a registered charge provided for by s. 64(1), as it was not registered as owner.

17. Section 90 of the 1964 Act expressly provides for the powers of a person to whom the right to be registered as owner of a registered charge has devolved to transfer the charge before he is himself registered in circumstances which do not arise in the case of BOS. Accordingly, although the 1964 Act confers on a person who has a right to be registered but is not in fact registered a right to transfer a registered charge in certain circumstances, that provision did not apply to BOS. This was recognised in the judgment of Laffoy J. where she said (at p. 595):

"[108] Section 90 of the Act of 1964, which was referred to in *Freeman v. Bank of Scotland Plc* [2014] IEHC 284, (Unreported, High Court, McGovern J., 29th May, 2014), confers powers on a person on whom the right to be registered as owner of the charge has devolved in prescribed circumstances, for instance, by reason of an instrument of transfer made in accordance with the provisions of the Act of 1964, to transfer or charge the charge before he himself is registered as the owner of the charge, subject to certain qualifications. I am satisfied that s. 90 has no application to the issue of the entitlement of BOS, as successor to BOSI, to enforce the security which was transferred to it by operation of law on the cross-border merger against the *McLaughlins*."

18. In the present case, BOS purported to transfer the charge to the plaintiff by the use of Land Registry Form 56 which on its face appears to relate to transfers by the registered owner under s. 64(1) or transfers by the person entitled to be registered as owner under s. 90. Neither category applies to BOS and indeed the use of a Land Registry form in itself suggests that powers exercisable under the 1964 Act were being availed of since presumably otherwise, a Land Registry form would not have been appropriate.

19. All of this begs the question whether BOS, perhaps uniquely, as the unregistered owner of a registered charge was entitled to transfer that charge without first itself becoming registered. This is the core point raised by the defendant in this appeal.

20. Of course I do not overlook for a moment the plaintiff's fundamental contention that it is now the registered owner of the charge and s. 31 provides that the register is conclusive and the plaintiff's argument represents an impermissible attempt to go behind the register. Section 31 however expressly preserves the jurisdiction of the court to rectify the register on the ground of actual fraud or mistake. What sort of mistake could give rise to such rectification is of course a matter yet to be argued but the defendant in his submissions suggests that the PRA in registering the plaintiff did so on foot of a mistake of fact or law. It seems to me that it must be born in mind that the transfer from BOS to the plaintiff and the plaintiff's subsequent registration as owner of the charge on the defendant's folio took place as part of a process, and perhaps one that is unprecedented, which undoubtedly affected the defendant's interests but in which he had no right to participate. To that extent, this might be seen as giving rise to a potential unfairness in the plaintiff now being precluded from raising that issue by s. 31, if indeed that is its effect, in proceedings where his family home is at stake.

21. Needless to say, an order for rectification could not be made within the scope of the present proceedings which are brought pursuant to s. 62(7) of the 1964 Act for possession in a summary manner and certainly not in the absence of the PRA as a party. I note that in the course of the hearing of the appeal, the defendant indicated to the court that he intends bringing or has brought such proceedings.

22. Given these facts and also the fact that as this is a circuit appeal where the decision of this court may not be appealable further, it seems to me desirable that an appellate court should have the opportunity of ruling on this matter. I am conscious of the fact that this is an application for an order for possession of the defendant's family home and moreover, that there may be many hundreds of other cases which will be directly affected by the outcome of this case. There is clearly therefore an issue of considerable public importance involved.

23. I am therefore of the view that this is a case where I should consider, if either of the parties wish me to do so, stating a case for the opinion of the Court of Appeal pursuant to s. 38(3) of the Courts of Justice Act, 1936 which provides:

"(3) The judge hearing an appeal [from the Circuit Court] under this section may, if he so thinks proper on the application of any party to such appeal, refer any question of law arising in such appeal to the Supreme Court by way of case stated

for the determination of the Supreme Court and may adjourn the pronouncement of his judgment or order on such appeal pending the determination of such case stated and, in particular, may so adjourn such pronouncement to Dublin and there pronounce his said judgment or order at any time after such determination.”

24. The reference to the Supreme Court is now to be construed as a reference to the Court of Appeal. The sort of questions which might usefully be referred to the Court of Appeal include all or any of the following:

(a) In considering the plaintiff’s claim, is this court entitled to have regard to the circumstances in which the plaintiff became the registered owner of the charge on the defendant’s folio?

(b) Is it open to the defendant to argue that those circumstances amounted to a mistake within the meaning of s. 31 of the Registration of Title Act 1964?

(c) If the answer to the foregoing two questions is in the affirmative, is it open to this court to join the PRA as a notice party for the purpose of hearing further argument from it on this issue?

(d) If the answer to all the foregoing questions is in the affirmative, what consequences would flow from a determination by this court that the PRA was not entitled to register the plaintiff as owner of the registered charge on the defendant’s folio?

25. Arising from this ruling, I will consider any further submissions from the parties as to how this matter should be progressed and any further or other questions that the parties contend should be raised.