

THE HIGH COURT

2007 775 SP

IN THE MATTER OF SECTIONS 10 AND 25 OF THE TRUSTEE ACT, 1893

AND

IN THE MATTER OF AN APPLICATION BY RAY CHURCH TO BE APPOINTED AS TRUSTEE

ON THE APPLICATION OF RAY CHURCH

Judgment of Miss Justice Laffoy delivered on the 25th day of March, 2010.

Title problem

1. The application to which this judgment relates was designed to resolve a title problem in relation to lands and premises at Long's Place, Dublin 8 (the Premises). Before considering the nature of, and the appropriateness of granting, the relief claimed, I propose considering the perceived title problem.

2. The Premises comprise five properties: Nos. 1, 2, 3 and 4, Brandon Terrace and No. 1A, Brandon Terrace. The title to the Premises is derived from a lease dated 24th January, 1878 made between William J. Gormley and Marianne Gormley of the one part and Richard Hayden of the other part (the lease), which created a demise for the term of 400 years from the date thereof of the land therein described as follows:

"... that plot of ground more particularly shown on the map or terchart thereof traced in the fold of these presents which said piece or plot of ground containing towards the Grand Canal Bank in a semi-circular form one hundred and fifty six feet or thereabouts on the Eastern and Southern boundaries to the North one hundred and forty two feet and on the West side one hundred and twenty feet be all or any of the said measurements more or less bounded on the North by the Grand Canal Company's yard on the South and East by the Grand Canal Bank and on the west by ground in the possession of the lessor all situate in Basin Lane in the Parish of St. James and City of Dublin."

3. Dundonnell Estates Limited (Dundonnell) became entitled to the portions of the Premises now known as Nos. 1, 1A, 2 and 4, Brandon Terrace as follows:

(a) as regards No. 1, by an assignment dated 7th January, 1981 made between Kathleen Joan Williams, Patricia Margaret Mitchell, and Hugh Michael McCormick Norman of the one part and Dundonnell of the other part;

(b) as regards No. 1A, by an assignment dated 17th June, 1977 made between Modern Veneer Importers Limited of the one part and Dundonnell of the other part, in which No. 1A was described by reference to a map on an assignment dated 31st December, 1976 to Modern Veneer Importers Limited, which is not before the Court on this application;

(c) as regards No. 2, by an assignment dated 19th February, 1979 made between Patrick Thomas Feeney and Mary Feeney of the one part and Dundonnell of the other part, in which there is an obvious typographical error in the habendum in that it refers to the term created by the lease as one hundred years; and

(d) as regards No. 4, by an assignment dated 2nd February, 2007 made between William Hooton and Derek Hooton of the one part and Dundonnell of the other part.

4. By an award of the County Registrar made on 20th July, 2006 on an application under the Landlord and Tenants (Ground Rents) Acts 1967 - 1984, it was awarded and directed that Dundonnell had the right to acquire the fee simple and all intermediate interests (if any) in part of the Premises comprising No. 1, No. 1A and No. 2, Brandon Terrace. A conveyance was executed by a Court Officer on behalf of the "Unknown and Unascertained Owner or Owners of the fee simple and any immediate interests" pursuant to s. 8(3) of the Landlord and Tenants (Ground Rents) Act 1967 on 14th November, 2006 in favour of Dundonnell on foot of that award.

5. Another company, Linford Limited (Linford), acquired the leasehold interest created by the lease in No. 3 by virtue of an assignment dated 11th May, 1990 made between Mary Esther Cribben of the one part and Linford of the other part.

6. The real applicant on this application is Kelpach Optima Properties Limited which, in 2007, acquired the issued share capital of both Dundonnell and Linford. In the course of the title investigation on that acquisition, the discrepancy which is at the heart of this application emerged. That discrepancy is outlined and, in my view, is largely resolved by an affidavit supporting this application sworn by Adrian Hill on 20th September, 2007.

7. Mr. Hill is an architect and the principal in the firm of Forrest Hill Architects Limited. His firm has carried out a topographical survey of the Premises and produced a site map dated 17th September, 2007. The discrepancy emerges when one compares the dimensions of the Premises as they are on the ground with the dimensions as set out in the parcels in the lease and their location on the ground with their location as depicted on the map on the lease. Mr. Hill has depicted that discrepancy on the site map. The northern boundary of the Premises on the ground has the same dimension as referred to in the parcels in the lease - 140 feet. However, the western boundary to Brandon Terrace is 148 feet on the ground, as opposed to 120 feet as given in the parcels in the lease. The eastern and southern boundary to the canal bank is 229 feet on the ground, as opposed to 156 feet as given in the parcels in the lease. In relation to that last dimension, Mr. Hill has averred that when one measures the dimension of the old canal towpath on the south eastern boundary from the lease map one gets a figure of 190 feet, as opposed to the figure of 156 feet given in the parcels.

8. Mr. Hill's conclusion, set out in his affidavit, is that the dimensions given in the parcels in the lease in relation to the lands thereby demised are incorrect and also that the lease map is incorrect. He bases that conclusion on a number of factors.

9. First, without invoking Pythagoras, he opines that "[b]asic geometry dictates that the measurements shown are a mathematical impossibility", in that, if the northern boundary is to be taken as 142 feet and the western boundary at 120 feet, it is simply not possible that the arc is 156 feet as stated. Likewise, if the northern boundary is taken as 142 feet and the arc is taken as 156 feet,

the western boundary would not be consistent with either its depiction on the lease map or the dimension given in the parcels.

10. Secondly, Mr. Hill has compared the map on the lease with the 1864 Ordnance Survey map and the 1907 Ordnance Survey map and the other maps on the title or on the title to adjoining property of more recent origin. One of the latter is the map on an assignment dated 31st May, 1945, which I understand to be a map on an assignment of No. 1A from Violet Kathleen McCormick and Elizabeth Ivy Norman to Irish Pharmaceuticals Limited. Another is a map on a conveyance dated 31st December, 1979 from Córas Iompair Éireann to Dundonnell, which appears to relate to land at the Grand Canal to the east and south of the Premises. Mr. Hill concludes that the location of the Grand Canal is wrongly depicted on the map on the lease, having regard to the location of the Premises on the ground and as depicted on the various maps to which he has compared the lease map. For instance, he points out that the 1907 Ordnance Survey map shows No. 4 as bounded on the south east by the Canal towpath rather than the Canal. Mr. Hill avers that it can be said "with absolute certainty" that the location of the Canal did not move at any point.

11. On the basis of his survey and analysis, Mr. Hill avers that the map on the lease is clearly inaccurate and cannot be relied on and his opinion is that it is most likely that the lease map was intended to reflect the Premises as they stand today. That opinion is consistent with the depiction of the area on Ordnance Survey maps going back as far as 1864, prior to the construction of the houses on Brandon Terrace, and, in particular, with the location of the buildings and the physical boundaries of the Premises as depicted on the 1907 Ordnance Survey map. As Mr. Hill points out, the Premises abut a long established public road, which is Brandon Terrace, and the public services.

12. By way of general observation, I find the opinion expressed in Mr. Hill's affidavit to be totally convincing. I consider that any reasonable lawyer advising prospective purchasers on the title to the Premises would adopt the same view.

Relief claimed

13. The applicant named in the special summons, Ray Church, is a director of Dundonnell and of Linford. The relief sought on the special endorsement of claim is as follows:

(a) an order that the applicant be appointed trustee of all the estate right title and interest held by William J. Gormley and Marianne Gormley as lessors in the lease in the Premises; and

(b) an order vesting all the estate right title and interest held by the said William J. Gormley and Marianne Gormley in the Premises in the applicant.

Sections 10 and 25 of the Trustee Act 1893 (the Act of 1893) are invoked in the title of the proceedings. The intention, if the applicant is appointed trustee, is that he will assign the interest vested in him by the Court in relation to their respective components thereof to Dundonnell and Linford respectively.

The law

14. There are situations in which the provisions of ss. 25 and 26 of the Act of 1893 may be utilised to perfect a defect in title. This occurred in *Re Kavanagh* (Unreported, High Court, Costello J., 23rd November, 1984) and more recently in *Re Heidelberg Company Limited* [2007] 4 I.R. 175. In *Re Kavanagh*, Costello J. stated:

"This Court, whenever it is expedient to appoint a new trustee, and if it is found impracticable to do so without its assistance, may make an order for the appointment of a new trustee under s. 25 of the Trustee Act 1893

But the court has additional powers under s. 26 of the Act. Where a trustee entitled to any land 'cannot be found' (sub-section (ii)(c)) the Court may make a vesting order vesting the land in 'any such person in any such manner and for any estate as the Court may direct'."

15. Before making an order under either s. 25 or s. 26 of the Act of 1893 the Court must be satisfied that the property to which the application relates is held in trust. An obvious example is where a company, which was a bare trustee of property having contracted to sell it and having been paid the purchase money, has been dissolved without conveying the property and it is necessary to get in the outstanding legal estate. Similarly, in *Re Kavanagh*, it was necessary to get in the legal estate in mortgaged property which remained vested in the original mortgagee company on the purported transfer of the mortgage to another company, where the original mortgagee had been dissolved by the time the error was discovered. Of course, in those types of situations, if the outstanding estate is statute-barred, an application to Court is unnecessary, and, in any event, there would exist no estate or interest on which an order under the Act of 1893 could operate.

Decision

16. As I have stated, I find Mr. Hill's conclusion that the map on the lease was intended to reflect the Premises as depicted on his site map totally convincing. I am satisfied that both the dimensions in the parcels in the lease and the depiction of the land intended to be demised on the map on the lease are incorrect. For over a century, the layout on the ground supports that finding, as does the manner in which the title has passed over the years, not only by reference to the manner in which the various components were depicted on the maps on the title deeds, but also taking into account the occupation and possession of the components and the manner in which the rent was apportioned.

17. In effect what the Court is being asked to do at this juncture is to rectify the lease, which was created over one hundred and thirty years ago, on the basis that an order for rectification would have been made at the suit of the lessee against the lessors, if it had been pursued at that time, or, in other words, on the basis that, in equity, the lessors had remained trustees in relation to any part of the lands intended to be demised which was not effectively demised because of the errors in the lease and lease map.

18. While I have reservations as to whether it is necessary to do so having regard to the manner in which leasehold title has been dealt with for over a century, I propose making an order under s. 26 of the Act of 1893 vesting the Premises as depicted on the site map dated 17th September, 2007, which I envisage being attached to the order, as to –

(a) Nos. 1, 1A, 2 and 4, Brandon Terrace in Dundonnell, and

(b) No. 3, Brandon Terrace in Linford,

insofar as the same are not already vested in them, for all the residue unexpired from the date of the order of the term of four hundred years from 24th January, 1878 created by the lease. As regards the form of the order proposed, two observations are necessary. First, the rectification can be a one-stage process under s. 26, rather than a three-stage process whereby the applicant is appointed trustee, the Premises are vested in him and he then executes an assignment in favour of Dundonnell and Linford. Secondly, I am of the view that it would be inappropriate for the Court to purport to deal with "all the estate right title and interest" of the lessors, on the basis of the evidence before the Court. At best, the lessors intended to create a demise for four hundred years of any premises intended to be, but not, demised by the lease and they clearly intended to retain a reversion.

19. Finally, the reasoning behind the order, which I consider to be very much a "belt and braces" operation, is contained in this judgment.