



**THE COURT OF APPEAL  
CIVIL**

**Neutral Citation Number [2021] IECA 109  
Record Number: 2019 No. 187**

**Haughton J.  
Murray J.  
Binchy J.**

**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**

**BETWEEN/**

**LAUNCESTON PROPERTY FINANCE DAC**

**APPELLANT**

**- AND -**

**THE PROPERTY REGISTRATION AUTHORITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Binchy delivered on the 15<sup>th</sup> day of April 2021**

1. By letter dated 18<sup>th</sup> July 2018, the respondent formally refused an application lodged by the appellant for the registration of a charge dated 9<sup>th</sup> December 2005 (the “Charge”) and made between Angela Murphy, as legal personal representative of Sean B. Murphy deceased (the “LPR”) and Ivor Murphy on the one part and Anglo Irish Bank Corporation plc (“Anglo”) of the other part insofar as the Charge relates to Folios WW4058 and WW8427F,

County Wicklow (the “Folios”). The Folios were then and remain in the registered ownership of the said Sean B. Murphy, deceased (the “Deceased”), late husband of the LPR.

2. Pursuant to s.19 of the Registration of Title Act, 1964 (the “Act of 1964”) the appellant appealed that decision of the respondent to the High Court, by notice of motion dated 31<sup>st</sup> October 2018, by which it sought, *inter alia*, an order setting aside the ruling of the respondent of 18<sup>th</sup> July 2018, and an order directing the respondent to register the Charge as a burden affecting the lands contained within the Folios. That notice of motion came on for hearing in the High Court before O’Regan J. on 15<sup>th</sup> February 2019, who delivered her judgment in the matter on 19<sup>th</sup> March 2019. She affirmed the ruling of the respondent of 18<sup>th</sup> July 2018, and, in effect, dismissed the appellant’s motion. It is against that judgment of the High Court that the appellant now appeals.

### **Background**

3. The Deceased died on 7<sup>th</sup> March 1989. At the date of his death, he was the registered full owner of the lands contained in the Folios. On 19<sup>th</sup> April 1990, the LPR extracted a grant of probate in the estate of the Deceased. By contract for sale made on 1<sup>st</sup> day of June 2005 (the “Contract”), the LPR, and her son, Ivor Murphy, agreed to sell the lands contained in the Folios, together with some of the lands contained in a third folio, Folio 8428F County Wicklow, of which the said Ivor Murphy was the sole registered owner (all of which lands I shall hereafter refer to as the “Lands”). It is the mechanics chosen for the completion of that sale agreement that have given rise to the difficulties that present in these proceedings.

4. Instead of completing the sale of the lands contained in the Folios and Folio 8428F, County Wicklow, by way of deed of transfer, Special Condition Number 11 of the Contract provided that:

*“On the completion date the Purchasers shall pay to the Vendors the sum of EUR2,100,000.00. No transfer shall be executed by the Vendors rather the Vendors*

*shall enter into a Licence Agreement with the purchasers in the terms of the Licence Agreement attached hereto.”*

5. The Court was not provided with a copy of the licence agreement. However, it is understood that the mechanism chosen for the completion of the sale involved the Folios and Folio 8428F, County Wicklow “*resting in contract*” until such time as the purchasers requested execution of a deed or deeds of transfer by the LPR and Ivor Murphy to such persons as might be nominated by the purchasers. The affidavit grounding this application and dated 18<sup>th</sup> October 2018 sworn on behalf of the appellant, by a director thereof, Mr. Donal O’Sullivan, refers to this structure as being for the purposes of tax efficiency and in this regard, the Court understands that the purpose of the structure was to avoid payment of stamp duty by the purchasers, in circumstances where it was their intention to avoid taking a deed of transfer of the Folios and the relevant part of Folio 8428F, County Wicklow on completion of the transaction. Instead, the purchasers would direct the LPR and Ivor Murphy to execute deeds of transfer directly to sub-purchasers nominated by the purchasers, in due course.

6. As part and parcel of the arrangements that were put in place at the time, the LPR and Ivor Murphy, on 9<sup>th</sup> December 2005, entered into (1) a guarantee and indemnity of the liabilities of the purchasers to Anglo, which guarantee related to monies advanced by Anglo to the purchasers to fund the purchase price payable to the vendors and (2) a deed of mortgage and charge of the same date (the Charge), completed by the LPR and Ivor Murphy in favour of Anglo. These securities were provided to Anglo by the LPR and Ivor Murphy in order to provide Anglo with security over the Lands, because the legal estate in the Lands remained registered in the name of the Deceased and Ivor Murphy following upon completion of the sale. The liability of the LPR and Ivor Murphy under the guarantee and the Charge was limited to their estate, title and interest in the Lands and the LPR and Ivor

Murphy were paid the full purchase price due to them under the Contract. According to the affidavit of Mr. O'Sullivan, there has been default on the part of the purchasers of the Lands in repayment of the purchase monies, and as a consequence of the refusal of the respondent to register the Charge the appellant is suffering a prejudice in the enforcement of its security.

7. Special Condition Number 3 of the Contract provided that the LPR sells the lands in the Folios (i.e. the lands of which the Deceased was registered as owner) as legal personal representative of the Deceased. At Clause 3.1 of the Charge, it is provided that the LPR and Ivor Murphy, as legal and beneficial owners of the Lands, and, in the case of the Folio 8428F, County Wicklow, Ivor Murphy as registered owner, charge unto Anglo the Lands with all amounts owing by the LPR and Ivor Murphy to Anglo, pursuant to the deed of guarantee. There are also other charging provisions of the kind normally set forth in a deed of mortgage and charge. At Clause 30 of the Charge, the LPR and Ivor Murphy assent to the registration:

*“on the folio of any registered land referred to in Clause 3 of which they are the registered owners:-*

*(a) of the fixed or specific charge hereby created on the said land; and*

*(b) of the power of any receiver appointed hereunder to charge the said land.”*

8. The lands referred to in Clause 3 are defined elsewhere in the Charge as referring to the “*Mortgaged Property*”, which in turn, in the first Schedule to the Charge refers to the Lands. Although it is not an issue raised by these proceedings, it is nonetheless appropriate to observe in passing that, as matters stand, the assent to registration of the Charge, which relates to lands registered in the name of the LPR and Ivor Murphy, may itself cause a problem in the registration of the Charge over the Folios, which remain registered in the name of the Deceased.

9. By loan sale deed dated 28<sup>th</sup> March 2014, the appellant acquired from Irish Bank Resolution Corporation Limited (“IBRC”, formerly Anglo) all of its right, title and interest

in the loan facilities advanced to the purchasers, including the Charge. Before that, however, Anglo had applied for registration of the Charge in the register of the respondent, on 5<sup>th</sup> January 2006. Registration was rejected by the respondent on the grounds that the LPR did not have the power to charge the Folios in her capacity as executrix of the estate of the Deceased. There then followed further correspondence as between the solicitors acting on behalf of Anglo in connection with that application, and the respondent. On 9<sup>th</sup> February 2006, the respondent wrote to the solicitors for Anglo advising that a personal representative can only mortgage or charge lands in certain circumstances, and referred the appellant to its own Practice Direction 3 (which states that charges in respect of the debts of a deceased owner or the liabilities of a personal representative incurred in the administration of the deceased owner's estate may be entered in the register) together with certain texts on charges by personal representatives i.e. Fitzgerald, *Land Registry Practice* (2<sup>nd</sup> ed.) and Wylie's *Irish Land Law* (3<sup>rd</sup> ed.) as well as referring the appellant to s.60(3) of the Succession Act, 1965. In a nutshell, the position taken by the respondent on the application was that a personal representative may only charge the estate of a deceased person, and have that charge registered over a folio, in the circumstances prescribed by s.60(3) of the Succession Act, 1965 (the "Act of 1965"). The respondent took the view that the circumstances of the application did not fall within those contemplated by s.60(3), which provides:

*"The personal representatives 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 being 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."*

**10.** The solicitors for Anglo responded to this correspondence by asserting that the circumstances did indeed fall within s.60(3) of the Act of 1965, arguing that the transaction

involved the raising of funds by the personal representatives of the Deceased for the purpose of making payment to the beneficiaries of the Deceased, and that the Charge was completed by the LPR in order to give effect to her contractual obligations under the Contract, i.e. in order to sell the land contained in the Folios, and was limited in its scope to the legal estate of the LPR in the Lands, which remained registered in the name of the Deceased following upon the sale of the Lands. The respondent was not however persuaded and indicated as such in a letter dated 9<sup>th</sup> March 2006 reiterating its previous position that the Charge does not come within the limited circumstances whereby a personal representative can mortgage or charge lands.

**11.** Correspondence then went dormant until 2012 when the solicitors for IBRC (formerly Anglo) again wrote to the respondent about the matter, repeating their argument that, since the transaction was for the benefit of the beneficiaries of the estate of the Deceased, it falls “*four square*” within the limited circumstances within which such charges may be created pursuant to s.60(3) of the Act of 1965.

**12.** Following upon the acquisition of the Charge by the appellant in 2014, the solicitors for the appellant (being the same solicitors that have at all times acted on behalf of Anglo / IBRC in connection with the application) wrote again, on 23<sup>rd</sup> September 2016, to the respondent, on this occasion arguing that s.60(3) of the Act of 1965 must be read in conjunction with s.50 of the same Act, which confers a general power of sale on the personal representatives of a deceased, and also with the position that obtains at common law. It was submitted that, at common law, a personal representative has the power to mortgage the personal estate of the deceased where it is done *bona fide* for the purposes of the administration. It was further argued that where a mortgage or charge was not created so as to “*raise money*” or as part of a money raising process – as in this case – the provisions of s.60(3) of the Act of 1965 were not engaged. However, it was submitted that:

*“At common law, personal representatives had very wide powers of dealing with the estate of the deceased person, both personal and real provided that the same occurred in due course of the administration i.e. to protect and administer the assets in the estate. The 1965 Act was an enactment to provide a framework for the existing and continuing common law powers of administrators and personal representatives. Section 50 of the 1965 Act in dealing with the power of a personal representative to sell the estate of a deceased person, must be read and understood by reference to the pre-existing common law position. What was done by the personal representatives in this case in executing the mortgage of 9 December 2005 was in furtherance of the sale of the property. Accordingly, the execution by Angela Murphy in this case was clearly within our power under common law and under section 50 of the 1965 Act.”*

**13.** Following further correspondence, the solicitors for the appellant, by letter dated 27<sup>th</sup> January 2018, sent to the respondent an opinion from senior counsel which expressed the view that since the execution of the Charge by the LPR was in furtherance of the sale of the Lands, in the due course of the administration of the estate of the Deceased, it was within the powers of the LPR both at common law and pursuant to s.50 of the Act of 1965. He also opined that a mortgage or charge executed as part of a sale process, and not for the purpose of raising money, does not fall within the scope of s.60(3) of the Act of 1965, and accordingly is not precluded by that section.

**14.** The respondent replied by letter dated 8<sup>th</sup> March 2018. The respondent remained of the view that a charge executed by the personal representative of a deceased registered owner is only registerable if it comes within s.60(3) of the Act of 1965. The respondent further observed in this letter that whether or not a common law power for a personal representative to charge registered property survived the passing of the Act of 1965 was not a matter for the respondent. Following some further correspondence, the respondent issued, on 18<sup>th</sup> July

2018, a formal refusal of the application for registration of the Charge, on the grounds that it was *“not satisfied that the applicants have established their rights to the registration sought.”*

15. The formal decision of the respondent of 18<sup>th</sup> July 2018 enabled the appellant to bring proceedings pursuant to s.19 of the Act of 1964 i.e. an application for an order setting aside the ruling of the respondent of 18<sup>th</sup> July 2018. This motion was issued on 31<sup>st</sup> October 2018, and was grounded upon the affidavit of Mr. Donal O’Sullivan of 18<sup>th</sup> October 2018. In this affidavit, Mr. O’Sullivan relies upon the opinion of senior counsel previously furnished by the appellant to the respondent, and he avers that the Charge was part of a structure by which the Lands were to be sold for the benefit of the beneficiaries of the estate of the Deceased, and that this is consistent with the powers and duties of personal representatives in the administration of estates.

#### **Relevant legislative provisions**

16. Before proceeding further, it is useful at this stage to set out in one place the statutory provisions relied upon by the parties and by the trial judge in arriving at her decision, although I may repeat these provisions where expedient as and when they are specifically referred to below:

1) Section 84(3) of the Local Registration of Title (Ireland) Act, 1891:

*“On the death either of a sole registered full owner or of the survivor of several registered full owners of any such land not being registered as tenants in common, the personal representatives of the sole owner or survivor shall alone be recognised by the registering authority as having any right in respect of the land, and shall have the same powers of dealing with the land, and any registered dispositions by them shall have the same effect, as if they were the registered owners of the land.”*

2) Section 61(2) of the Registration of Title Act, 1964:



*“On the death of a sole registered full owner of land, or of the survivor of several registered full owners of land not being registered as tenants in common, (which owner or survivor is in the succeeding provisions of this section referred to as the deceased owner), the personal representatives of the deceased owner shall alone be recognised by the Authority as having any rights in respect of the land, and any registered dispositions by them shall have the same effect as if they were the registered owners of the land.”*

3) Section 61(3)(a) of the Act of 1964:

*“An application for registration made by a person who claims to be by law entitled to the land of a deceased registered full owner, accompanied by an assent or transfer by the personal representative in the prescribed form, shall authorise the Authority to register such person as owner of the land.”*

4) Section 61(3)(c) of the Act of 1964:

*“It shall not be the duty of the Authority, nor shall it be entitled, to call for any information as to why any assent or transfer is or was made and it shall be bound to assume that the personal representative is or was acting in relation to the application, assent or transfer correctly and within its powers.”*

5) Section 68(1) of the Act of 1964:

*“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.”*

6) Section 69(1)(b) of the Act of 1964:

*“(1) There may be registered as affecting registered land any of the following burdens, namely—*

...

*( b) any charge on the land duly created after the first registration of the land”.*

7) Section 69(2) of the Act of 1964:

*“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 interested in the burden but, if the application is made without the concurrence of the registered owner of the land or such other person as may be prescribed, the burden shall not be registered except in pursuance of an order of the court.”*

8) Section 77 of the Act of 1964:

*“(1) Where a person has, under or by virtue of any enactment, a charge on registered land for the payment of any money, or a power to charge registered land with the payment of any money, he shall have the same power to create a registered charge on the land for that money as if he were the registered owner of the land.*

*(2) Registration of a charge under this section shall have the same effect as, and make unnecessary, registration thereof in pursuance of any other enactment.”*

9) Section 50 of the Succession Act, 1965:

*“(1) The personal representatives may sell the whole or any part of the estate of a deceased person for the purpose not only of paying debts, but also (whether there are or are not debts) of distributing the estate among the persons entitled thereto, and before selling for the purposes of distribution the personal representatives shall, so far as practicable, give effect to the wishes of the persons of full age entitled to the property proposed to be sold or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons so, however, that—*

*( a) a purchaser shall not be concerned to see that the personal representatives have complied with such wishes; and*

*(b) it shall not be necessary for any person so entitled to concur in any such sale.*

*(2) Subject to section 20, it shall not be lawful for some or one only of several personal representatives, without leave of the High Court, to exercise any power conferred by this section or section 60 to dispose of any land.”*

10) Section 60(3) of the Act of 1965:

*“The personal representatives 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 being 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.”*

#### **Judgment of the High Court**

17. In a judgment handed down on 19<sup>th</sup> March 2019, the High Court (O'Regan J.) dismissed the motion of the appellant. It is apparent from the judgment of the High Court, and indeed the submissions made to the High Court, that there was a shift in the arguments made by each of the parties before the Court when compared with those rehearsed in the correspondence, insofar as the focus of the argument before the High Court was not so much on whether or not the LPR was acting within her powers (whether at common law or pursuant to s.60(3) of the Act of 1965) in granting the Charge to Anglo, but on whether or not the respondent has the statutory power to register the Charge. At para. 5(4) of her judgment, O'Regan J. stated:

*“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.”*

18. At para. 5(8) of her judgment, O'Regan J. stated:

*“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.”*

The trial judge then proceeded to set out the relevant statutory provisions that form the basis of the submissions of the parties, and thereafter to consider ss. 5(1) and 26(2)(e) of the Interpretation Act 2005 (the provisions of which I set out below) and the decisions of the High Court in *Minister for Industry and Commerce v. Hales* [1967] I.R. 50 and the Supreme Court in *McGrath v. McDermott* [1988] I.R. 258, as well as certain passages from Dodd on Statutory Interpretation (to which I also refer below). She then referred to an argument made by the appellant as regards the interpretation of s.61(2) of the Act of 1964. This section provides:

*“On the death of a sole registered full owner of land, or of the survivor of several registered full owners of land not being registered as tenants in common, (which owner or survivor is in the succeeding provisions of this section referred to as the deceased owner), the personal representatives of the deceased owner shall alone be recognised by the Authority as having any rights in respect of the land, and any registered dispositions by them shall have the same effect as if they were the registered owners of the land.”*

19. The appellant submitted that this section makes clear that personal representatives have the power to make dispositions which may be registered, and that they may do so as though they are the registered owners of the lands. However, the respondent submitted that this argument ignores the precise wording of the section which states that any *registered*

disposition made by a personal representative shall have the same effect as if they were the registered owners of the land. In other words, the respondent submitted that the section cannot be interpreted without regard to the use of the word “*registered*” before “*disposition*”. It is only when a disposition of a personal representative has been registered that it has the same effect as if it had been made by the registered owner of the land.

**20.** The trial judge also referred to an argument that appears to have been made before her to the effect that a personal representative may deal with the land generally as though he or she is the registered owner, and the trial judge rejects that proposition on the basis that this is not what s.61(2) provides. She concluded that the section relates only to the impact of a registered disposition by a personal representative.

**21.** The trial judge noted that the Act of 1964 repealed in full the Local Registration of Title (Ireland) Act, 1891 (the “Act of 1891”), and that while s.61(2) of the Act of 1964 is almost identical to s.84(3) of the Act of 1891, importantly it omits the words “*and shall have the same powers of dealing with the land*”, which refer to the personal representative and appeared in s.84(3) of the Act of 1891. She stated (at para. 14) that she was not satisfied that there is any ambiguity in s.61(2) of the Act of 1964 which makes it clear that it is only any “*registered disposition*” made by a personal representative that has the same effect as if made by the registered owner.

**22.** The trial judge rejected an argument that s.69(2) of the Act of 1964 could be relied upon by the appellant as she did not consider that a personal representative has the same charging powers as a registered owner (para. 18 of her judgment).

**23.** The trial judge also rejected an argument that s.50 of the Act of 1965, which confers a power of sale on personal representatives, could be relied upon by the appellant, because the document which is the subject of the application for registration is identified as a mortgage and charge, and the fact that it was generated in the context of a sale does not alter its

essential character. She accepted an argument advanced on behalf of the respondent that there must be a statutory basis for registering any document in the Land Registry, and the appellant had failed to bring the application within any of the relevant statutory provisions as to registration. In doing so, she expressly rejected the argument made on behalf of the appellant that the effect of s.61(2) of the Act of 1964 is to render the powers of a personal representative co-extensive with those of a registered owner. The trial judge quoted extracts from Fitzgerald on *Land Registry Practice* (2<sup>nd</sup> ed.), McAllister on *Registration of Title in Ireland*, Deeney on *Registration of Deeds and Title in Ireland* and Wylie's *Irish Land Law* (3<sup>rd</sup> ed.), all of which, in effect, relate the power of a personal representative to charge registered land derives to s.60(3) of the Act of 1965. She considered that these text books supported the view that the Charge, not being one made under s.60(3) of the Act of 1965, was not registrable.

24. The trial judge rejected an argument made on behalf of the appellant that the interpretation of the respondent of ss. 61(2) and 69(2) of the Act of 1964 would, if accepted, give rise to an absurdity. While the trial judge does not identify the absurdity contended for by the appellant, she concluded that there is no absurdity, because it has always been the case that certain charges e.g. equitable charges by deposit of title deeds are not registrable in the Land Registry. She referred to Wylie's *Land Law* (4<sup>th</sup> ed.), para. 12.25 wherein it is stated that:

*“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.”*

25. In summary, the trial judge concluded that there is no ambiguity in s.61(2) of the Act of 1964. It does not confer any power on a personal representative, equivalent to that of the

registered owner, to charge registered lands, or require the respondent to register such a charge. Nor does this interpretation give rise to an absurdity, such as to require an alternative interpretation. She further concluded that registration of the Charge pursuant to s.69(2) is not possible because it makes no reference to the personal representative of the registered owner.

### **Grounds of Appeal**

26. The appellant raises twelve grounds of appeal in its notice of appeal dated 18<sup>th</sup> April 2019. These may be summarised as follows:

- 1) The trial judge erred in interpreting ss. 61(2) and 68(1) of the Act of 1964 as not empowering a personal representative to register a charge over registered land in the due course of administration of the estate, and in further interpreting the same sections as not empowering the respondent to register such a charge.
- 2) The High Court judge erred in interpreting s. 69 of the Act of 1964 as not entitling the appellant to apply for registration of the Charge as a burden pursuant to s.69(2) of the Act of 1964, or alternatively, in interpreting the same section as not entitling the appellant, as the person entitled to the Charge to register the Charge.
- 3) The High Court judge erred in failing to interpret ss. 61(2), 68(1) and 69(2) of the Act of 1964 in a manner which does not reflect the plain intention of the Oireachtas, which fails to give effect to the ordinary meaning of the words used and which produces an absurd result.
- 4) The High Court judge conflated the question of whether a personal representative has the power to charge land – which was not contested by the respondent – with the separate question as to whether the personal representative could successfully apply to the respondent for registration of the same.

- 5) The High Court judge erred in her description of the reliance placed by the appellant on the question of prejudice, by which the appellant had submitted that where an interpretation of an unclear provision of a statute yields a harsh result, there is a presumption that the legislature did not intend such a result, in the absence of clear language. The High Court judge addressed the question of prejudice on a different basis i.e. that when the appellant acquired the Charge, it would have been aware of the issues raised by the respondent in relation to registration of the same, and therefore is precluded from advancing arguments based on prejudice.
  - 6) The High Court judge erred in awarding costs against the appellant in circumstances where the stance adopted by the respondent at the hearing before the High Court was materially different from the position maintained by it in correspondence prior to the appellant bringing the application before the High Court.
27. In its response delivered on 23<sup>rd</sup> May 2019, the respondent states:
- 1) The High Court judge correctly interpreted s. 61(2) as being applicable to *registered* dispositions by a personal representative, and was also correct in holding that the reference to “*registered owner*” in s.68(1) did not include a personal representative and therefore the personal representative of a deceased registered owner is not entitled to transfer or charge land by registered disposition unless such authority is conferred by some other provision in the Act.
  - 2) The High Court judge was correct to determine that s.69 of the Act of 1964 did not entitle the appellant to have the Charge granted to it registered a burden on the lands in question, because for a charge to come within s.69, it must be granted either by the registered owner or it must be created in some other manner



expressly authorised by the Act of 1964. A charge granted by the personal representative of a deceased registered owner is not a charge which has been *duly created* (as required by s.69(1)(b) of the Act of 1964) unless it has been granted in compliance with s.60(3) of the Act of 1965.

- 3) Even if the Charge is valid and effective in equity, and the LPR was acting *intra vires* in granting the same, that is not sufficient to permit the respondent to register that Charge as a burden on the Folios.
- 4) The trial judge was correct in her interpretation of all of the relevant provisions i.e. ss. 61(2), 68(1), 69(1) and 69(2). S.68(1) is clear: only the registered owner is entitled to transfer or charge the land (save as otherwise provided in the Act of 1964).
- 5) The trial judge correctly rejected the argument of the appellant that such interpretation of the relevant sections of the Act of 1964 produces an absurd result. The absurdity alleged by the appellant was that the personal representative of a deceased registered owner could create a charge over land which would be recognised in equity, but which the respondent could not register. The High Court judge observed that the fact that, at common law, it is possible to create rights over land that may not be registered, is a feature of the Registration of Title system and is not absurd. The non-registrability of charges created by personal representatives is consistent with a legislative policy which seeks to restrict the ability of personal representatives to encumber estates and which is discernible in s. 60(3) of the Act of 1965.
- 6) The High Court judge did not conflate the questions as to whether the personal representative has power to charge land with whether the respondent had authority to register such a charge. On the contrary, the appellant conflated these

issues by asserting that if the LPR was not acting *ultra vires* in granting the Charge, then it followed that the respondent was authorised to register the same. In doing so, the appellant ignored the import of the word “*duly*” in s.69(1)(b) and also the word “*registered*” in s.61(2) of the Act of 1964.

- 7) The High Court judge correctly interpreted s.61(2) of the Act of 1964, in recognising that there is a distinction between “*registered dispositions*” and “*dispositions*” and that the meaning of the former is clear and refers to dispositions which have been registered.
- 8) The respondent denies that there was any change on its part of the position that it had adopted in correspondence prior to the hearing in the High Court. It was always the position of the respondent that the only basis on which a personal representative of a deceased registered owner may grant a valid charge is if the personal representative is acting within the parameters of s.60(3) of the Act of 1965.

**Issues to be decided on this appeal**

28. The appellant submits that there are three questions arising:

- 1) Does a legal personal representative have the power to create a mortgage or charge over land other than in the circumstances described in s.60(3) of the Act of 1965? The appellant submits that a personal representative does have such a power. However, it is not clear to me that this is in fact a question requiring determination on this appeal. As already mentioned above, at para. 5(4) of the decision of the High Court, the trial judge noted that the respondent was not disputing the existence of such a power, but rather was adopting the position that there is no statutory power permitting it to register such a transaction.

- 2) Does a legal personal representative have power to create a charge over registered land which may be registered by the respondent?
- 3) Does a charge holder in the position of the appellant have an entitlement to seek registration of the charge?

29. In his written submissions on behalf of the respondent, counsel for the respondent phrases the issue to be determined a little differently, but the general thrust is the same and so I propose now to consider questions 2 and 3 above, which in my opinion are the questions requiring determination in these proceedings. However, in doing so I should say that I agree with an observation made by counsel for the respondent in his submissions that the determination of these issues does not involve a consideration of the common law powers of personal representatives, or the statutory powers of personal representatives, save insofar as such statutory powers confer, expressly or by implication, a right to create registerable charges.

### **Discussion**

30. The issues requiring determination fall to be decided in accordance with the rules of statutory interpretation about which there was no disagreement between the parties either in the court below, or at the hearing of this appeal. At para. 8 of her judgment, the trial judge referred to and set out ss. 5(1) and 26(2)(e) of the Interpretation Act 2005 which, insofar as is relevant provide as follows:

*“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.”*

*“26(2) Where an enactment (‘former enactment’) is repealed and re-enacted, with or without modification, by 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.”*

**31.** The trial judge then cited the following passage from the decision of Finlay C.J. in *McGrath v. McDermott* [1988] I.R. 258 in which he said, at p. 276

*“The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective.”*

**32.** The trial judge also had regard to the following passage in Dodd on *Statutory Interpretation in Ireland*, at para.4.110:

*“It is presumed that the legislature does not intend to make any radical amendments to the law beyond what it declares in express terms or by clear implication. Where*

*provisions give rise to plausible alternative constructions, one of which is a narrow interpretation and one of which is a wider interpretation that radically changes the law, the narrow interpretation may be preferred. It is considered improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intentions with irresistible clarity. It is presumed that the legislature does not intend to change the law beyond the immediate scope and object of an enactment. The more radical a change, the more weight may be assigned to the presumption. There are many examples of this presumption being applied in Ireland.”*

**33.** In this case, both parties submit that there is no ambiguity in the provisions under discussion. The appellant submits that the legislature has made it clear through s.61(2) of the Act of 1964, that personal representatives are entitled to register a charge as if they were the registered owners of the land. The appellant argues that this is clear from the sub-section itself, taken together with the definition of “*Disposition*” as stated in s.3 of the Act of 1964, which defines the word simply as meaning both transfers and charges. Moreover, it is submitted that any alternative interpretation would lead to an absurd result, which the legislature could not have intended.

**34.** The effect of this submission, if accepted would be to equate the requirement of the respondent to recognise the personal representatives of a deceased registered owner as alone having any rights in respect of the land registered in the name of the deceased, with an obligation to recognise *and register* any dispositions made by the personal representative in respect of those lands, and in that capacity. However, while these two obligations may overlap, they are by no means identical; there is a clear distinction to be drawn between requiring the respondent to recognise a personal representative as alone having any rights in the lands of a deceased registered owner on the one hand, and requiring the respondent to

register all dispositions made by a personal representative on the other. While the section describes the legal effect of a disposition registered by a personal representative, it does not expressly refer to the personal representative registering any disposition, or require the respondent to do so.

**35.** The trial judge held against the appellant in relation to the interpretation contended for on its behalf of s.61(2) on the basis that that interpretation effectively required the court to disregard the description of dispositions in the second last line of the section as being “*registered*”. I think it is difficult to disagree with the conclusion of the trial judge in this regard. If the word “*registered*” is omitted then the interpretation contended for by the appellant would surely prevail. But the reference to “*registered*” dispositions is problematic for the appellant’s interpretation of the section. It clearly suggests that the relevant disposition must first be registered before it is accorded the same status as a disposition made by the registered owner.

**36.** Another difficulty with the appellant’s argument is that it would apply equally to transfers and charges, by reason of the definition of “*Disposition*”. However, s.61(3)(a) of the Act of 1964 makes express provision for the registration of a transfer completed by a personal representative, or to which the personal representative has given his/her assent in the prescribed form. Why would it confer such an express power for the registration of transfers made by a personal representative, if the power was already conferred by s.61(2)? And why is there nowhere in the Act of 1964 an express power to register charges, executed by personal representatives, equivalent to that provided for transfers completed by personal representatives?

**37.** On the other hand, insofar as the legislature has chosen to refer to “*registered dispositions*” in s. 61(2) of the Act of 1964, it is clear that it is intended to refer also to charges. This suggests therefore (as the appellant contends) that the legislature envisaged

that charges executed by a personal representative can be registered in the register maintained by the respondent. Moreover, since s.61(2) of the Act of 1964 predates s.60(3) of the Act of 1965, it must have been envisaged that at least some charges executed by personal representatives not being charges within the meaning of that section, could be entered in the register maintained by the respondent.

**38.** All of this suggests that, contrary to the conclusion of the trial judge in this respect, there is indeed some ambiguity in s.61(2) of the Act of 1964. On the one hand the use of the word “*registered*” before disposition suggests that in order for a disposition to have the same effect as a disposition made by the registered owner, it must first be registered by the respondent, such as a transfer registered under s.61(3)(a). On the other hand, the use of the word “*dispositions*” rather than “*transfers*” in s.61(2) embraces both charges and transfers. But the difference between the two is that an express mechanism is provided for the registration of transfers made by the personal representative or to which the personal representative assents, but no equivalent express mechanism is provided in respect of charges.

**39.** In order to resolve such an ambiguity, the Court must first attempt to identify the intention of the legislature from other provisions of the statute concerned. In this regard s.68(1) is instructive, providing, as it does, that “[s]*ubject 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 a registered disposition.*” This section, on the face of it, poses a significant obstacle to the interpretation of s.61(2) for which the appellant contends. However, the appellant relies upon the opening qualification in s.68(1) – “*subject to the provisions of this Act*” – and in a somewhat circular argument, suggests that s.61(2), being another provision in the Act of 1964, overcomes this obstacle on the basis that this clearly empowers a personal

representative to charge registered land. The problem with this analysis is that it does not help the Court with the interpretation of s.61(2), but instead simply requires the Court firstly to interpret the ambiguity under consideration in the way contended for by the appellant, before then using that interpretation to construe s.68(1). This approach could hardly be correct. The words “*subject to the provisions of this Act*” in s. 68(1) can hardly refer the Court back to the very provision that it is endeavouring to interpret. The restriction in s.68(1) is itself very clear, and it must require very clear words in another provision of the Act of 1964, such as those in s.61(3)(a) in relation to transfers, to avoid this restriction. It cannot be the case that the very ambiguity under consideration is resolved without other explanation and in a self-fulfilling way to overcome the very clear restriction (contained in s.68(1) ) on the persons entitled to transfer or charge the land of a deceased registered owner, as though that ambiguity is not present. Moreover, this is in sharp contrast to the very clear terms of s.61(3)(a) of the Act of 1964, which, so far as transfers of registered land are concerned, provides a very clear exception to s.68(1).

**40.** The Act of 1964 repealed in its entirety the Local Registration of Title (Ireland) Act, 1891. As I have noted earlier, section 84(3) of that Act provided as follows:

*“On the death either of a sole registered full owner or of the survivor of several registered full owners of any such land not being registered as tenants in common, the personal representatives of the sole owner or survivor shall alone be recognised by the registering authority as having any right in respect of the land, and shall have the same powers of dealing with the land, and any registered dispositions by them shall have the same effect, as if they were the registered owners of the land.”*

**41.** Save for the phrase underlined, this is in terms identical to s.61(2) of the Act of 1964. However, the words underlined are of obvious importance, conferring, as they did, identical



powers on the personal representative of a deceased registered owner, to those of a registered owner.

**42.** The respondent submits that the omission of the words underlined reflects an intention on the part of the legislature that the personal representative of a registered owner should not be treated as having the same powers of dealing with registered land as did the registered owner, while he/she was still alive. As a result, it is submitted, it was necessary for the legislature to enact a specific section authorising the Registrar of Titles to register transfers by personal representatives (s. 61(3)(a) of the Act of 1964), since such authority could not, without the words omitted, be derived from the section dealing with registration of transfers by registered owners (s.51(1) of the Act of 1964).

**43.** In response to this argument, the appellant, firstly, refers to s.26(2)(e) of the Interpretation Act 2005. While that provision is in itself clear, it is unclear how it advances the appellant's case. In this case the new enactment – s.61(2) omits a significant phrase such that it can hardly be said that the new enactment expresses the same idea of the former enactment. The trial judge considered that s.61(2) represented a definite change in the law as previously contained in s.84(3) of the Act of 1891, and stated that the two sections could not be "*equated*" or regarded as having the same meaning (para. 21).

**44.** The appellant further submits that there was no need to include the words previously appearing in s.84(3) of the Act of 1891, because s.61(2) expressly permits a personal representative to register dispositions. However, this does not explain the omission of the words from what was otherwise an identical section in the Act of 1891. The appellant further submits that the legislature may have wished to make it clear that the personal representative does not have precisely the same powers of dealing with land as the deceased registered owner.

45. The appellant further submits that the interpretation urged on the Court by the respondent leads to a patent absurdity. In this case it would mean that the Charge will not be registered (whatever the attendant consequences are for the appellant), in circumstances where there is no benefit to any other party. In this regard, the appellant relies on a passage from Dodd, at paras. 7.08 – 7.09:

*“7.08. 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, 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, the High Court approved the comment of Newey J. [in R v. Lands Tribunal, ex parte City of London Corporation, 1 AER, 753]: ‘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.’”*

*“7.09. The issue of determining ambiguity arises in this context. It does not appear that a provision must be found to be prima facie ambiguous before the results that flow from it can be considered, but that is not to say that the literal meaning is to be departed from. Certainly, courts on occasions will seek to avoid certain consequences and actively consider whether the words will bear an alternative meaning. The consequences rather than ambiguity per se appear to drive the process. Something of this can be seen In re Cleary, in which the court rejected what was said to be a remarkable result that s.54(2) of the Irish Land Act 1903 meant that a sale by an executor must be only to one person, unless the Land Commission consents otherwise.*

*Wylie J. said: 'It is quite possible that this is so; but if there is any other construction which can be placed on sub-s. 2 by which such a result could be avoided, I should be inclined to adopt it.'"*

46. I pause at this point to consider the issue of hardship, which is relied upon in a general way by the appellant, in urging the Court to rely on the passages above in support of its interpretation of s.61(2). While it may reasonably be presumed that the appellant will suffer some inconvenience if it cannot secure registration of the Charge, in response to a specific question from the Court as to whether or not the appellant would be able to enforce its security through other means, counsel for the appellant replied that this is possible, but this was not what was envisaged by the transaction as originally structured. Counsel for the appellant was also asked whether any absurdity relied upon results from the transaction structure rather than any interpretation of s.61(2). To this, counsel replied that, on the interpretation of the section urged by the respondent, it would be required to recognise a charge executed by a personal representative of a deceased registered owner, but at the same time would not be permitted to register that charge – this, it is submitted, is an absurdity.

#### **Conclusion on interpretation of section 61(2)**

47. Having considered the detailed written submissions of the parties and the oral arguments at the hearing of this appeal, I have come to the conclusion that the decision of the trial judge as to the interpretation of s.61(2) of the Act of 1964 is correct. For the reasons I have given above, I disagree with the trial judge's conclusion there is no ambiguity in the meaning of the sub-section. I have found that the sub-section is ambiguous. That conclusion requires the Court to look at other provisions in the Act of 1964 in an attempt to resolve that ambiguity. Those other provisions support the interpretation arrived at by the trial judge. Specifically, express provision is made for the registration of a transfer made by a personal representative, and no such express provision is made for the registration of a charge.

Section 68(1) of the Act of 1964 provides that, save as provided for by the Act, only the registered owner of land shall be entitled to transfer or charge the land by way of registered disposition. While an express provision is provided in the Act for the purposes of registering a transfer by a personal representative, no equivalent provision is made for the registration of a charge.

48. In my opinion the trial judge was also correct to conclude that enactment of s.61(2) without the words “*and shall have the same powers of dealing with the land*” represented a definite change in the law. It is difficult to see how it can be otherwise understood. While it has not been necessary for the Court to determine the scope of the LPR at common law to create the Charge, it seems clear that the omission of these words from s.61(2) of the Act of 1964 represented a definite legislative intent to curtail the statutory powers of a personal representative. No credible explanation was advanced in this appeal as to why else this change had been made. That being the case, it is only logical that charges executed otherwise than pursuant to statutory powers are not registrable, unless expressly provided for by statute.

49. I do not consider that any absurdity arises by reason of this interpretation. As the trial judge pointed out, there are other circumstances in which equitable interests in land are not registerable. Although no longer relevant, since the abolition of land certificates, the most obvious example is the provision of security by way of equitable deposit of a land certificate. Additionally, s.72 of the Act of 1964 sets out many circumstances in which burdens may affect registered lands, even though they are not registered.

50. Furthermore, insofar as hardship has been relied upon in opposition to this interpretation of s.61(2), such hardship has not been established on the evidence, and, as a matter of law, counsel for the appellant has acknowledged that the appellant may have other remedies available to it to enforce its security.

**Section 69(2)**

51. On its face, this section looks promising for the appellant. It permits the registration of a burden upon the application of the person entitled to the benefit of the burden, either with the concurrence of the registered owner of the land or such other person as may be prescribed, which would surely include the personal representative of the deceased registered owner. The difficulty however lies in the use of the word “*duly*” in s.69(1)(b), which provides:

*“(1) There may be registered as affecting registered land any of the following burdens, namely – ...*

*(b) any charge on the land duly created after the first registration of the land.”*

52. Section 69(2) refers to burdens described in s.69(1). Accordingly, to avail of s.69(2), the Charge must have been “*duly created*”. The respondent submits that this means that the charge must be created by a person upon whom the entitlement to charge registered land has been conferred by statute. It is submitted that this provision in effect re-enacts s.45(1)(b) of the Act of 1891 which referred to “*any charge on the land created in pursuance of the foregoing provisions of this Act after the first registration of the land*”. The respondent submits that charges which can be regarded as having been duly created in this sense are:

- (a) Charges created by the registered owner in exercise of the power granted by s.62(1) of the Act of 1964;
- (b) Charges granted by persons entitled to be registered as owners for the purposes of s.90 of the Act of 1964;
- (c) Charges granted by the parties identified as having a power to charge registered land in ss. 76, 77, 78 and 79 of the Act of 1964 and,
- (d) Charges granted by personal representatives pursuant to s.60(3) of the Act of 1965.

**53.** I agree with the submissions of the respondent in this regard. If the argument of the appellant is correct, this would have the effect of conferring on the personal representative of a deceased registered owner, indirectly, the ability to create, without limitation of any kind, a registrable charge over the lands of the deceased registered owner, which I have already determined above is not a power conferred by the Act of 1964. Nor, for that matter, is such a wide ranging power conferred by the Act of 1965, although s.60(3) of that Act clearly does confer a power on the personal representative to create a charge over the lands of the deceased in specified circumstances. Whether or not such charges are registerable under the Act of 1964 is not an issue with which these proceedings are concerned.

**54.** As the respondent has been entirely successful in this appeal, my provisional view is that it is entitled to its costs both in this Court and the High Court. If the appellant wishes to contend for an alternative form of order, it will have liberty to apply to the Court of Appeal Office within 21 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the Court, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

**55.** Since this judgment is being delivered electronically, Haughton J. and Murray J. have indicated their agreement to the same.