

LYNCH MONAHAN & O'BRIEN LTD

414

THE HIGH COURT

1984 No. 2938p

IN THE MATTER OF LYNCH, MONAHAN AND O'BRIEN LIMITED

(IN LIQUIDATION)

Judgement of Mr. Justice Costello delivered the 14th day of
October, 1986.

THE FACTS

By an assignment of the 31st July 1973 Paul Ryan assigned to one Edward Rogers the residue of a term of 999 years created by a lease of the 25th April 1956. Mr. Rogers was a solicitor in the firm of Rogers and Byron practising in the town of Navan and the property assigned was known as Eastham House and contained about 22 acres. By a declaration of trust executed on the same day it was recited that a Mr. Fintan O'Brien had provided the purchase money for the property and Mr. Rogers declared that he held the property in trust for Mr. O'Brien. Mr. O'Brien was the principal shareholder in Lynch, Monahan and O'Brien Limited, the company which is now in liquidation.

In a letter of the 14th July 1975 Mr. Rogers wrote to the Bank of Ireland (to which the company was then indebted) stating that he had received instructions from Lynch Monahan & O'Brien Ltd. to lodge with the Bank the title deeds of "their property at Eastham House, consisting of two portions of land, one of which contains 7.889 acres and the other 7.289 acres". The letter stated that these properties together with the house and surrounding land had been "bought some time ago and are presently held in trust by our Mr. Rogers". It was pointed out that the lands had not yet been registered but that when the Land Certificate was obtained it would be lodged with the Bank. In an affidavit filed in these proceedings on behalf of the Bank it is accepted that

the company had in fact, at that time, no interest in the land, the legal interest being vested in Mr. Rogers and the equitable in Mr. O'Brien, and not his company. This seems to be so and no evidence to suggest otherwise has been filed. The Bank therefore makes no claim in these proceedings arising from Mr. Roger's undertaking.

Previously, on the 26th June 1975 the company's directors had met and resolved to execute a Debenture in favour of the Bank. This was in fact executed by the company on the same day (but not, apparently, by the Bank) and registered as a charge pursuant to section 99 of the Companies Act, 1963 on the 16th July, 1975. The Debenture was in the usual form and under its terms the company charged as a specific charge all estate or interest legal or equitable in all freehold or leasehold property which during the continuance of the security might become the property of the company.

Registration of the lands at Eastham House had not been effected when the Debenture was executed and indeed first registration did not take place until 28th July 1981 when Mr. Rogers was registered as full owner in Folio 2434L of the Register of Leasehold interests for the County of Meath. On the same day an inhibition in favour of Mr. O'Brien was entered on the Folio. The Bank's Debenture was not then nor at any time prior to the liquidation of the company (which occurred on the 7th May, 1984) registered as a burden on the Folio, nor was a caution entered in respect of its interest in the lands.

Part of the lands comprised in Folio 2435L were sold prior to the 3rd November, 1981 and the proceeds lodged with the Bank in reduction of the company's indebtedness. On the 17th November, 1981 another part of the lands was transferred to Mr. O'Brien and a new Folio (Folio No. 2595 L) opened in respect of them. On the 3rd November, 1981 Mr. Rogers as beneficial owner and for the consideration of £1 executed a transfer of a third part of the lands (comprising 4.396 hectares) to Lynch Monaghan and O'Brien Limited. This transfer was not registered prior to the liquidation of the company and this has given rise to the problems leading to these proceedings. It was lodged with the Revenue Commissioners by Messrs Rogers and Byron on behalf of the company for assessment and adjudication for stamp duty who submitted that the transfer should be stamped on a nominal basis only because, it was claimed, the lands had prior to the transfer been held in trust by Mr. O'Brien for the company. A dispute on this point arose (the stamp duty office claiming that it should be stamped at market value). This dispute remained unresolved ever since, and Mr. Rogers remains to this day the registered owner of the land.

In 1981 the Bank, its evidence discloses, had become concerned about the adequacy of the security it held for the money owed to it by the company and it had been instrumental in having the Transfer of the 3rd November executed by Mr. Rogers in favour of the company. In addition it sought to obtain as an extra security, a legal charge over the lands which were

being transferred by Mr. Rogers to the company. This charge was executed by the company on the 21st January, 1982. This Deed recited (incorrectly, for the company was not yet registered) that the chargeant (i.e. the company) was the registered owner of the lands described in the Schedule, and "being the registered owner" the company charged the lands in the schedule with payment of monies due by it to the Bank and assented to the registration of the charge as a burden on the lands. The lands were described in the Schedule as "All that the subject matter of Land Registry Transfer dated the 3rd November, 1981 wherein Edward Rogers transferred that part of the property described in Folio 2434L of the Register, County Meath, specified in the Schedule thereto to Lynch, Monahan and O'Brien Limited". This charge was registered under s.99 of the Companies Act, 1963 on the 11th February, 1982. But it was never registered as a burden on the Folio as the dispute on the stamping of the Transfer of the 3rd November, 1981 had not been resolved when the company went into liquidation.

From these facts two different points arise for consideration. The first relates to the Debenture of the 26th June, 1975. It is urged on behalf of the Bank that the agreement by the registered owner of the land, Mr. Rogers, to sell the land to the company and the payment of the consideration for the transfer (albeit, a nominal one of £1) created an equitable estate in the lands in the Bank which is captured by the Debenture

and this equitable estate is unaffected by the order to wind-up the company. Secondly, it is urged that the 1981 agreement to grant a charge created an equitable interest which is also captured by the Debenture. Alternatively, it is claimed that on payment of the correct amount of stamp duty, the company can now be registered as owner of the lands and the Bank's charge of the 21st January 1982 over them can then be registered by it as a burden, notwithstanding the order that the company be wound up.

The Debenture of the 26th June, 1975

The principle on which the Bank relies is well established as regards non-registered lands. When the owner of an estate contracts with a purchaser for the immediate sale of it the ownership of the estate is in equity transferred by that contract. When the purchaser has paid his purchase money though he has got no conveyance the vendor becomes a trustee for him of the legal estate and he is in equity considered the owner of the estate. The question now for decision is the application of this principle in the case of registered land; a question considered and authoritatively decided by the Supreme Court in In re Strong (1940) I.R. 382. The facts of that case were straightforward. The registered owner of lands in county Meath had sold them by auction. On the 18th October, 1939 at 11.30 a.m., the purchase money having been paid, the registered owner executed a transfer of the lands in fee simple. Later that day the purchaser was registered as owner. But on the same day and before her title was registered a

judgment mortgage was entered on the register. The purchaser applied to the Register of Titles to cancel the judgment mortgage. The Registrar did so. The judgment mortgagee appealed to the High Court. The High Court found in his favour. The purchaser appealed to the Supreme Court. By a three-to-two majority the Supreme Court reversed the High Court decision and held that the purchaser was entitled to have the judgment mortgage cancelled.

The judgment of the majority was delivered by O'Byrne, J. His conclusions depended in the main on a construction of section 44 of the 1891 Act (now section 68 of the 1964 Act). This section, having enacted that the registered owner alone was entitled to transfer or charge registered land, went on to provide that nothing in the Act was to prevent a person from creating any right in or over registered land, but such rights would not affect a registered transfer of the land for value unless the right was registered as a burden or was one of the burdens to which though not registered all registered land was subject. The judgment pointed out that this section recognises that "rights" including estates, interests, equities and powers can be created in registered land which do not appear on the register, and that the interest of a person who has entered into a contract for the purchase of registered land and has paid the purchase price is a "right" within the meaning of the section. It concluded that the judgment mortgagee could not be regarded as a transferee for value of the land and so

could not obtain the protection which the section conferred on such transferees. It considered the effect of section 35(2) of the 1891 Act (now section 53(2) of the 1964 Act) which provided that until a transferee is registered as owner of the land the instrument of transfer confers no estate in the lands on the transferee and rejected an argument based on this subsection by pointing out that subsection 44 (2) had provided that unregistered rights could be created in registered land and that the purchaser in the case was relying not on the transfer which had been executed (but not registered before the registration of the judgment mortgage) but on the equitable interest created by the contract of purchase coupled with the payment of the purchase price. Rule 117 of the Rules then in force allowed a judgment mortgage to be removed from the register if it could be shown that "the judgment debtor had no estate or interest capable of being affected by the registration of the Affidavit". The effect of the majority judgment was to decide that the Vendor in that case had no estate or interest capable of being affected by the judgment mortgage after the contract for sale had been entered into and the purchase price paid, and to reject the contrary view, advanced in the minority judgment delivered by Murnaghan, J., that section 44(2) afforded no protection for whatever right the purchaser had obtained under the contract.

Applying the law as established in In re Strong it seems to me to be perfectly clear that when in 1981 the

registered owner of the lands, Mr. Rogers, contracted with the company to sell to it for £1 the lands in Folio 2434L and was paid the agreed purchase price and an equitable estate was created in the lands in favour of the company, and that this is a right which is recognised and protected by section 68(2) of the 1964 Act. This equitable estate immediately became subject to the charge in favour of the Bank contained in the Debenture of the 26th June, 1975. The company it seems to me still enjoys an equitable estate in the lands, which is still subject to the Bank's charge. And these equitable rights are unaffected by the fact that the company is now in liquidation. Mr. Rogers holds the lands in trust for the company, and the company's equitable estate is subject to the charge in favour of the Bank. If the liquidator now registers the company as owner (but the Bank's Debenture is not registered) a purchaser for value without notice of the Bank's charge would not be bound by it. But the liquidator would be under a duty to the Bank to obtain the best price for the lands and to hold the proceeds in trust to discharge the company's liability under the Debenture.

A question also arises as to whether the Bank's charge can now be registered as a burden on the Folio. Mr. Collins on behalf of the liquidator referred to section 218 of the Companies Act, 1963 which provides

"In the winding-up by the court, any disposition of the property of the company.....made after the commencement of the winding-up shall, unless the court otherwise orders, be void"

and suggested that this section would, after the company

had been registered as owner, render void the registration by the Bank of its Debenture as this would amount to a "disposition" within the meaning of the section and the court should not exercise its discretion in the Bank's favour and permit such a "disposition" to occur. But I am very doubtful as to whether section 218 applies to the facts of this case. The modern English text books commenting on the corresponding section in 1948 English Companies Act, quote with approval an early authority (In re Wiltshire Iron Company, (1868 3 Ch. App. 443) which decided that a similar section in the 1862 Companies Act only applied to completed transactions and no discretion under the section was given to allow the disposition of a company's property where the transaction had not been completed when the winding-up order was made. A winding-up order has of course a retrospective effect, and the object of this section is to give the court a discretion to validate transactions bona fide entered into in the ordinary course of trade after the presentation of the petition and completed before the date of the winding-up order. I therefore do not think that the section applies to transfers or dispositions of the company's lands which remains uncompleted at the date of court's order. This does not mean that the transferee is automatically entitled to have the transaction completed; it means that however the court may be seised with the problem (be it in the course of a specific performance action in respect of which liberty to proceed has been given, or pursuant to an appeal from an order of the Registrar of Titles, or, as in the present

case, pursuant to an application for directions relating to the parties' rights) the court will be required to consider whether the completion of the transaction will infringe the rights which the Act confers on the company's other creditors. If it does, then the transferee will be left to his right to claim damages for breach of contract; if it does not, the transaction can be completed.

Creditors in a winding-up are entitled to have the company's lands sold and the proceeds distributed in accordance with the provision of the Act. But if the lands have been encumbered by the company prior to the date of winding-up (as has happened in this case) the liquidator has only an encumbered interest to sell. So by permitting the registration as a burden on the Folio the charge created by the Debenture of the 26th June, 1975, the court in this case is merely enabling the Bank to protect the equitable interest which it already enjoys and subject to which the liquidator holds the lands. In my judgment therefore the creditors have no rights in this winding-up which would be infringed by the registration of the Debenture. I propose therefore to answer the first two questions in the Notice of Motion in the affirmative.

The Charge of the 21st January, 1982

The evidence establishes that in 1981 Mr. Rogers and the company agreed with the Bank that the company would be registered as owner of the lands and that it would execute a charge in favour of the Bank charging the lands with sums due by it to the Bank. Although not so stated,

I presume that the consideration for this agreement was the continuance of the Bank's overdraft facilities to the company. In pursuance of this agreement a Deed of Transfer was executed between Mr. Rogers and the company and the company executed a charge in favour of the Bank on the 21st January, 1982.

Section 62 of the 1964 Act deals with the creation and effect of registered charges. Subsection (1) provides that the "registered owner of land" may charge the land with the payment of money and that the owner of the charge "shall be registered as such": an instrument of charge in the prescribed form is to be executed, "but until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land" (subsection 2); on registration the instrument of charge operates as a mortgage by deed within the meaning of the Conveyancing Acts and for the purpose of enforcing the charge the registered owner "shall have all the right 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" (subsection 6).

It will be recalled that when the deed of charge of the 21st January, 1982 was executed by the company it had not yet been registered as owner of the lands. But section 90 of the Act deals with such a situation. It provides that where a person on whom the right to be registered as owner of registered land has devolved by reason of an instrument of transfer made in accordance

with the provision of the Act (as was the position of the company in this case after the execution of the Deed of Transfer of the 3rd November, 1981) desires to charge the lands before he himself is registered as owner of the land (as the company desires in this case), he may do so "in the like manner and with the same effect as if he were the registered owner at the time of execution of the charge" (subject to certain qualifications which are not relevant for the purposes of this case).

The instruments which the parties executed in this case were therefore executed in accordance with the provisions of the 1964 Act, but until registration they have conferred no estate in the lands on the Bank. It became necessary, therefore, firstly to consider whether, apart from these instruments the Bank obtained from the transactions an equitable interest in the lands and the application of the principles established in In re Strong to these transactions. As pointed out in McAllister "Registration of Title" (at p. 186) a contract for a charge creates an unregistered right over the land pending registration. But it is necessary to look a little closer at the nature of the right which the Bank now enjoys. Counsel has drawn attention to the distinction between "an equity" and an "equitable estate". As Mr. Justice Kenny (in Allied Irish Banks Ltd. v Glynn (1973) I.R. 188 at 192) pointed out, "an equity" does not create any estate in the land; it is a right against persons that is enforceable against those who were parties to the transaction which created it. And it has been urged that the 1981 agreement and 1982 unregistered Deed of Charge has at most given an "equity" to the

Bank, but conferred on it no estate in the lands. I agree that the Bank obtained no estate on the lands. It is well established that the registered owner of a charge created by deed on registered land has no estate in the land (see; Northern Ireland Banking Co. v Devlin (1924) I.R. 90) and I do not think that an agreement to create a charge can create any estate or interest in the lands in the person to whom it is to be granted. This means that this transaction created no equitable estate in the lands in the Bank's favour and so the Bank obtained no estate which could be made subject to the charge in the Debenture of the 26th June, 1975.

If then the Bank has no equitable interest in the lands following these transactions, and if the unregistered Deed of Charge confers no estate until it is registered, it is necessary to consider whether the Bank can now apply to be registered as owner of the charge, notwithstanding the order winding-up the company.

For reasons which I have already given, I do not think that I should consider this problem by reference to the provisions of section 218 of the Companies Act, 1963; rather, I should, as in the case of the registration of the charge contained in the Debenture, consider whether to do so would be to infringe the rights conferred on the company's other creditors by the 1963 Act.

Let me look at the company's interest in the lands at the date of winding-up; to what rights in the Bank's favour were they subject by virtue of the transactions I am now considering? Although they created no

equitable estate in the lands at the date of winding-up the Bank had an equity arising from the agreement to grant the charge which would have entitled the court to make an order for specific performance in its favour. But it had more than this equity; it had, because the company had in fact executed a Deed of Charge in its favour, a statutory right to have the charge registered. At the date of winding-up therefore the lands were subject to rights conferred on the Bank by statute and what the liquidator has in his hands is an estate in the lands which is encumbered by the Bank's statutory rights. If the court permits the Bank to register its charge it will not be making an order pursuant to its equitable jurisdiction against the company for the specific performance of a contract to grant a charge; it will be making an order permitting the Bank to exercise rights conferred on it prior to the liquidation by the 1964 Act. And it will not be depriving the company's creditors of any rights under the Companies Act because the assets which they are entitled to have sold are encumbered in the way I have described.

I propose, therefore, to answer question 3 in the Notice of Motion in the affirmative. I will discuss with counsel whether in the light of the conclusions I have reached any further specific questions require to be answered.

Approved
J.C.

15-10-86