

**THE HIGH COURT**

[2020] IEHC 720

**Record No. 2018/414Sp**

**IN THE MATTER OF PROMONTORIA SCARIEFF DAC**

**- AND -**

**IN THE MATTER OF SECTION 25 OF THE TRUSTEE ACT 1893**

**- AND -**

**IN THE MATTER OF SECTION 26 OF THE TRUSTEE ACT 1893**

**- AND -**

**ON THE APPLICATION OF PROMONTORIA SCARIEFF DAC**

**BETWEEN/**

**PROMONTORIA SCARIEFF DAC**

**APPLICANT**

**- AND -**

**GORDON SMITH**

**RESPONDENT**

**JUDGMENT of Ms. Justice Pilkington delivered on the 26th day of May, 2020**

**1.** By amended summons, issued on the 18<sup>th</sup> August, 2018 and amended on the 29<sup>th</sup> January, 2020, the applicant seeks the following reliefs:-

- (1) An order pursuant to s. 26 of the Trustee Act, 1893 vesting all of the estate or interest of the vendors in the property more particularly described in paragraph 2 of this judgment and described as ‘the property’ in Gordon Smith and the Official Assignee.

- (2) A declaration that the vendors hold the property as bare trustees for Gordon Smith and the Official Assignee.
  - (3) An order vesting the interest of the vendors in the property in Gordon Smith and the Official Assignee subject to Gordon Smith undertaking to execute a first legal charge over his share of the property in favour of the applicant.
  - (4) In the alternative, an order that the applicant holds an equitable mortgage over the property.
  - (5) In the alternative, an order that the applicant holds a beneficial interest in the property and is beneficially entitled to the equitable interest in the property.
2. The initial background facts and circumstances are relatively straightforward, thereafter the position changes.
  3. By contract of sale dated 28<sup>th</sup> April, 2006, between Richard Mockler and Lee Cullen as vendors and Gordon Smith and Clare O’Riordan as purchasers (‘the 2006 contract’), the vendor agreed to sell and the purchasers agreed to purchase the property set out and described as:-

“ALL THAT AND THOSE the hereditaments and premises known as 1 Tassagard Drive (formerly known as 16 Coldwater Lakes), Saggart, Co Dublin as comprised in a Deed of Conveyance made the 26<sup>th</sup> day of September 2005 between HSS Limited of the first part Burnella Cottage of the second part and Lee Cullen and Richard Mockler of the third part.” (‘the property’).
  4. Gordon Smith and Clare O’Riordan, the purchasers to the 2006 contract, were originally both joined to this action. Clare O’Riordan was adjudicated bankrupt on 9<sup>th</sup> July, 2018 (the original proceedings issued on 8<sup>th</sup> August, 2018 but her status was unknown at that time). Thereafter the Official Assignee, upon being notified, has in correspondence clearly indicated that, whilst being on notice of the proceedings, did not wish to take any formal part. He is of course under no obligation to do so. The Official Assignee also indicated that, in

respect of Clare O’Riordan, there was likely to be no recovery in respect of her estate within the bankruptcy process. The applicant, within these proceedings, is now proceeding solely in respect of Gordon Smith.

5. In any event, in respect of the 2006 contract, no conveyance was ever executed between the parties. However, the purchasers have discharged the full purchase price to the vendor and at all material times continues to reside within the property. No legal mortgage has ever been executed.

6. First Active PLC initially issued a letter of loan on the 7<sup>th</sup> April, 2006, in consideration of which, Gordon Smith and Clare O’Riordan agreed to provide a first legal charge, in favour of First Active PLC, over the property and to execute all necessary paperwork. To that end, in the usual course, their solicitor, William J. Davis & Co. Solicitors furnished an irrevocable undertaking that a first legal charge would be created, in favour of First Active PLC, over the property.

7. The loan acceptance, executed by both Gordon Smith and Clare O’Riordan, is dated 10<sup>th</sup> April, 2006.

8. The solicitors undertaking in the standard Law Society approved form (1999 edition) is dated the 30<sup>th</sup> May, 2006 under the heading “Extent of Undertaking”, it asserts:-

“This undertaking is given by me in my sole capacity as solicitor for the borrowers and not as solicitor for or as agent/quasi-agent of the lender. It relates to matters of title and represents some of our obligations to the lender in relation to this loan transaction how we have no responsibility for any matter of non-title nature except insofar as any of the matters set out in this undertaking may be deemed to be matters of a non-title nature”.

9. The undertaking continues:-

“In consideration of the lender agreeing to the drawdown of a loan facility in respect of the property before the lender’s mortgage security has been perfected and subject to the

payment through us of the loan cheques, unless we have consented in writing to another form of payment, we, the undersigned solicitors for the borrower, hereby undertake with the lender as follows...”.

**10.** Again, attached to that undertaking and dated the 30<sup>th</sup> May, 2006 is the borrowers’ signatures, duly witnessed, authorising their solicitor William Davis & Co. to give the undertaking in the following terms:-

“We irrevocably authorise and direct you to give an undertaking in the form and containing the information set out overleaf (including an undertaking to lodge with the lender, the title deeds of the property including any land certificate which is issued in relation to the property) to First Active PLC and in consideration of your foregoing undertaking, we hereby undertake that we will not discharge your retainers, our solicitor in connection with the foregoing matter unless and until we have procured from the lender your effective release from the obligations imposed by such undertaking and we hereby indemnify you and all your partners and your and their executors, administrators and assignees against any loss arising by our act or default”.

**11.** The above is all in accordance with what might be described as standard conveyancing practice.

**12.** Between the 1<sup>st</sup> June, 2006 and the 6<sup>th</sup> July, 2007, a total of €1.365 million was advanced by the mortgagee to the purchasers of the property. The entire purchase price was discharged.

**13.** Up to this point there was nothing untoward in respect of this standard conveyance. Thereafter matters deviated significantly from the usual path of such a transaction.

**14.** Whilst the full contract price was paid, there was never any completion of the transfer of the vendors’ interest in the property to the purchasers. No deed of conveyance (it appears to be freehold land or, if not, no deed of assignment) was ever executed. None appears to have

been forwarded by the purchasers' solicitor to the vendors' solicitor for execution. In any event no conveyance or assignment was ever executed.

**15.** It should be pointed out that Mr. Thomas Byrne of Thomas Byrne & Co. Solicitors acted for the vendors in the transaction. Unfortunately, Mr. Thomas Byrne's conduct as a former solicitor is well known. His firm no longer exists and I understand and accept that he is in no position to assist in the matter.

**16.** It is understood and the averments of Mr. Tallon, in his affidavit on behalf of the applicant, sworn on 1<sup>st</sup> November 2018 confirm, that the vendors of the property can no longer be located (apparently, they are understood to reside in Canada).

**17.** Matters continue to worsen, as the purchasers' solicitor failed to comply with his undertaking to register the legal mortgage. He is no longer in practice and was struck off by Order of the High Court (it appears in or about 2009). The duties upon solicitors in honoring solicitors' undertakings are stringent and well known. They were not complied with in this case.

**18.** So, in respect of this property, the title remains vested in the vendors to the 2006 contract who have received the entirety of the purchase monies, the respondent (and possibly Ms. O'Riordan) have remained in residence since acquiring the property and no legal charge has been executed in favour of the applicant.

**19.** On 29<sup>th</sup> July, 2019, by Order of Meenan J., the present applicant, Promontoria Scariff DAC was given leave that it be substituted for Ulster Bank Ireland DAC as the applicant in the above entitled proceedings. It was further ordered that the proceedings continue between that entity and the respondents herein.

**20.** Within that application before Meenan J. the global deed of transfer dated 30<sup>th</sup> November, 2018 was exhibited. It is redacted, in what is now accepted to be in the usual or standard manner. It is expressed to be between Ulster Bank DAC, Ulster Bank Ltd and

Promontoria Scariff DAC, Schedule 2 headed 'Mortgage Assets' discloses the following entries:-

- (a) An undertaking dated 27<sup>th</sup> March, 2006 between William Davis and Co. Solicitors and First Active PLC; and
- (b) Security over the property in the name of the defendants Gordon Smith and Clare O'Riordan described as 1 Tassagard, Coldwater Lake, Saggart on foot of a facility offer dated 7<sup>th</sup> April, 2006 and acceptance dated 10<sup>th</sup> April, 2006 between the same parties.

**21.** It is common case that the entirety of the loan monies have been advanced and used by the purchasers to acquire the property.

**22.** In my view there are separate but interlinked matters that require adjudication in this case;- title to the property, the entitlement to utilise s. 26 of the Trustee Act 1893 and the interest of the applicant in the property.

**23.** Counsel for the respondent, with regard to the Trustee Act 1893 and the beneficial interest of his client in the property, within his submissions, quoted from the third edition of *Keane: Equity in the Law of Trusts in Ireland* setting out the changes brought by s. 52(1) of the Land and Conveyancing Law Reform Act, 2009 ("the 2009 Act") in contradistinction to the Supreme Court decision in *Tempany v. Hynes* [1976] I.R. 101. It was suggested that this altered the nature of any potential beneficial interest of the defendant in the property.

**24.** On the facts of this case I disagree with that contention.

**25.** As this matter predates the 2009 Act the position is as set out in the well-known Supreme Court judgment of *Tempany v. Hynes* [1976] I.R. 101 Kenny J., delivering the majority judgment, stated:-

"The first argument for the plaintiff was that when the contract for sale was signed on the 26<sup>th</sup> of February 1974, the company became a trustee for the defendant who became

the owner of the entire beneficial interest in the lands and that the company did not own any estate or interest on which the two judgment mortgages of the 2<sup>nd</sup> day of May 1974 and the 1<sup>st</sup> day of July 1974 could operate and so they would be removed from the folio on the registration of the transfer to the defendant. A vendor who signs a contract with a purchaser for the sale of land becomes a trustee in the sense that he is bound to take reasonable care of the property until the sale is completed but he becomes a trustee of the beneficial interest to the extent only to which the purchase price is paid. He is not a trustee of the beneficial interest merely because he signs a contract.”

**26.** *Tempany v. Hynes* is clearly authority for the proposition that, between contract and completion, a purchaser’s beneficial interest extends to the percentage apportionment of the monies paid (by deposit or otherwise) in respect of a property. In this case, the position is different from the norm in that the entire purchase price has been discharged.

**27.** Thus, on the authority of *Tempany v. Hynes*, the purchasers’ beneficial interest extends to 100% because, quite simply, between contract and completion, the entire purchase price has been paid. Accordingly, it follows that the respondent holds a 100% beneficial interest in the property.

**28.** *Tempany v. Hynes* itself prescribes and confirms the delineation of the legal and beneficial interest in property between contract and completion. There is clearly a division of interest here. The vendors retain a bare legal interest as they remain the registered owners of the property, the purchasers the entire beneficial interest.

**29.** Section 26 (ii) of the Trustee Act, 1893 states:-

“Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,

.....

(b) is out of the jurisdiction of the High Court or

(c) cannot be found; and

..... the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to any such person as the Court may direct...”

**30.** The case opened to the court, focused upon the decision of *In re Kavanagh* (unreported Costello J. 23<sup>rd</sup> November, 1984) (*‘Kavanagh’*) as elaborated upon and analysed in the decision of Laffoy J. in the well-known decision of *In re Heidelberg* [2006] IEHC 408 (*‘Heidelberg’*).

**31.** The issue in *Heidelberg* concerned a difficulty that had arisen in respect of the common areas within an apartment complex, where both the vendor/developer and management company had been struck off and essentially there was no longer an entity to deal with the title issues concerning the common areas as they affected the apartment owners.

**32.** On the facts of that case, Laffoy J. held that at the date of the dissolution of each company (vendor and management company respectively) that they held certain interests upon trust; the developer held the legal interest in the common areas on trust for the management company. That management company held the legal interest in the common areas on trust for the apartment owners. Accordingly, in respect of those interests the court was satisfied that the criteria within s. 26 of the Trustee Act 1893, permitted the court to order the vesting of the interests of the developer company and the management company in a new company incorporated for that purpose.

**33.** *Heidelberg* in turn cited *Kavanagh*, which held that, where a company is dissolved without property being transferred, it can properly be said that the case is one in which, where the trustee cannot be found within the meaning of s. 26 of the 1893 Act as quoted above, a court can make an order that the property should vest in the company to which the assignment ought to have been made prior to the dissolution of the liquidated company.



**34.** On the facts of this case the situation is different in so far as s. 26 of the Trustee Act 1893 is concerned.

**35.** Counsel for the respondent was very clear in his submissions that his client, the respondent, did not wish to seek to rectify his title or obtain a proper good marketable title at this time. Indeed, in correspondence, initially from the former applicant's solicitors, the purchasers had initially been offered to join in the proceedings (it appears at no expense to himself) for the purpose of rectifying his title. I have considered the correspondence between the parties and I simply do not understand, as a matter of law, the reasons advanced by this respondent for not agreeing to such a course. In my view there was little or no merit to any of the suggested legal difficulties or impediments to his doing so, which would not have permitted his seeking the order had he wished to do so. That may be of relevance should he wish to make an application to court in respect of his title to the property at some point in the future, but his position, in respect of this application, is clear.

**36.** This respondent has chosen not to do so and one may perhaps discern a reason for his not wishing to accede to a request from his mortgagee, this applicant, who, he has averred, has obtained judgment against him. There may of course be matters in the background of this dispute, of which the court is unaware, in respect of issues between the parties to this litigation.

**37.** In usual circumstances, I cannot envisage circumstances whereby the persons holding legal title to this property could resist any application that the title be transferred to the purchasers. They have paid the entirety of the consideration in or about 2006 and have resided there since that time. That constitutes a clear bare legal title in the property; one which they hold upon trust for the respondent (and possibly Ms. O'Riordan or now the Official Assignee if she remains a bankrupt).

**38.** In my view this applicant cannot, on the basis of the submissions before the court, advance the position and seek an order of the court that the property should vest in this

respondent. He holds a separate and distinct interest in the property and in my view, also noting the position adopted by the respondent, the applicant does not have a sufficient interest to satisfy the criteria within s.26 of the Trustee Act, 1893. There is an insufficient nexus between the vendor, the bare trustee of the property and the applicant mortgagee.

**39.** However, the position is different in the categorisation of the relationship between the applicant as mortgagee and the respondent as mortgagor. I am satisfied, on the balance of probabilities from the examination of the documentation exhibited to the grounding affidavit of Mr. Tallon that the monies were advanced (and it was a significant sum) on foot of the agreement by the purchasers to execute a legal mortgage over the property. That transaction was not unfortunately completed for the reasons set out above. At no point in his replying affidavit does this respondent deny that the monies were received and that the monies were advanced to discharge the payment for the property. The applicant advanced monies upon an undertaking to register a charge over the property and an agreement by the purchasers that this be done. Those facts also give rise to an equity in favour of the applicant.

**40.** It is also submitted on behalf of the respondent that the statute of limitations should be applied in this case by analogy to the statutory position where non-equitable relief is sought. On the facts of this case, given the matters that I have considered, I can only, for the present, give reliefs in respect of the declaratory matters sought as to the respective interests held by the parties to this litigation in the property. In my view, the statute of limitations has no applicability in such circumstances. I do not see in this court, for the moment, merely being in a position to clarify the legal and beneficial ownership of the property and the matters charged that this invokes the statute in the manner contended for by the respondent.

**41.** In his replying affidavit the respondent avers:-

(a) That there should be a plenary hearing – I accept that the matters upon which I am required to adjudicate in this matter have been correctly instituted by special summons,

pursuant to the criteria within Order 3 of the Rules of the Superior Courts. The respondent urges that oral testimony is required but is silent as to the nature of the evidence to be adduced and how it affects his defence of these proceedings.

(b) That the entirety of the applicant's claim is statute barred and that "there has been no acknowledgement and/or part payment by me or on my behalf during the entirety of the corresponding statutory limitation period."

This averment I do not understand. At the time of swearing his affidavit there was no adjudication in respect of the statute of limitations, nor if he was concerned on the point, has the respondent suggested or averred to any other arrangement been put in place for retaining the monies to discharge his financial obligations to this applicant.

(c) that the interest in the trust property is barred and has expired. I do not see how any interest that I am required to adjudicate upon in this property is time barred and no proper basis has been advanced,

**42.** I am assuming the property is unregistered land. There is no reference to any folio in the papers and unfortunately the registry of deeds documents which have been exhibited do not appear to relate to the property.

**43.** In respect of the property, for the reasons set out above I accept that a bare legal interest vests in the vendor and the entire beneficial interest in the purchasers. However, there is a difference between the relationship between the mortgagor and the mortgagee and between the applicant mortgagee and the vendor.

**44.** Accordingly, on the basis of the matters set out above in respect of the application I make orders in terms of paragraph 4 of the special summons that the applicant holds an equitable mortgage over the property. In respect of paragraph 5, it is the respondent who holds a 100% beneficial interest in the property.

**45.** I will hear the parties as to what if any consequential or other orders are required including any as to costs.