

THE HIGH COURT

[2022] IEHC 554

Record Number 2018/414Sp

IN THE MATTER OF PROMONTORIA SCARIFF 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 SCARIFF DAC

BETWEEN/

PROMONTORIA SCARIFF DAC

APPLICANT

- AND -

GORDON SMITH

RESPONDENT

JUDGMENT of Ms. Justice Pilkington delivered on the 22nd day of March 2022

1. This short judgment, which is to be delivered electronically, follows a further hearing of the parties on 25 February 2022 for the purposes of finalising all outstanding matters and is supplemental to my principal judgment delivered on 26 May 2020.
2. Both parties indicated that they had hoped to settle or deal with any outstanding issues between themselves, but this has not proved possible. In the circumstances two issues arise:
 - (a) the form of order as to the principal relief sought and

(b) attendant upon that, the question or adjudication of costs.

3. The principal issue is the manner in which my final order might be framed in light of my principal judgment. Within that judgment I was clear that:

(a) a bare legal title vested in the former vendor(s) of the property (as more particularly set out and described later within this short judgment but otherwise referred to throughout as ‘the property’) and the entire beneficial interest vests in the respondent; and

(b) the applicant holds an equitable mortgage in the property;

4. As can be seen from the title to the pleadings and as reflected pursuant to the terms of my judgment, s.26 of the Trustee Act 1893 could, in my opinion, be invoked. However, counsel for the respondent made it clear that his client did not wish to rectify the title or obtain a good marketable title at this time. This is against the background of the respondent having been offered by the applicant to join in the proceedings for the purpose of rectifying the title. At no point does the respondent agree to the adoption of such a course. I have little doubt that, had he done so, it would have considerably shortened these proceedings and indeed the difficulties attendant upon the title to the property.

5. At the hearing on 25 February 2022 counsel for the applicant made clear that given the lands, the subject matter of these proceedings, were unregistered, he did not wish at this point to go beyond simply seeking a determination that the applicant held an equitable mortgage over the property together with a declaration that the respondent was its sole beneficial owner. In those circumstances I have not pursued further any possible entitlement to register in the Property Registration Authority (PRA) in such circumstances.

6. In written submissions each of the parties submitted a form of order that they felt appropriate to the final order(s) in this matter. In essence the difference between them is that the draft order submitted by the applicant is more expansive in its terms than that

proposed by the respondent but does not, as a matter of law, differ in any material sense. In circumstances where the respondent did not wish to correct or deal with the question of obtaining a good marketable title for the present, in my view, if the applicant requires a more expansive description of its equitable mortgage then it is entitled to it, but I have chosen to reflect that within the terms of this short judgment.

7. With regard to the question of costs, the applicant points to the potential utilisation of ss. 25 and 26 of the Trustee Act 1893 which was afforded to the respondent as an infinitely preferable solution to the marketability of the property and the interest of the applicant within it. I agree.

8. The respondent argues to the contrary that the applicant was only successful in one aspect of his claim and accordingly in such circumstances there should be no order as to costs.

9. In my view, there was a well-recognised route by the utilisation of ss. 25 and 26 of the Trustee Act 1893 for the resolution of this matter; the respondent chose not to adopt it and certain cost consequences must follow in circumstances where the applicant has been put to additional expense arising from that decision.

10. In the circumstances therefore, having carefully considered Order 99 of the Rules of the Superior Courts and ss. 168 and 169 of the Legal Services and Regulation Act 2015, I note that these proceedings issued (in amended form) on 29 January 2020 and accordingly I am assuming that most, if not all, of the costs incurred post the enactment of the recast Order 99 of the Rules of the Superior Courts and the enactment of the 2015 Act. In any event, the point was not raised before the court and in my view I have considered the criteria for the application of costs under both the new and former legislation in any event.

11. Accordingly, the order reflects that the respondent is the sole beneficial owner of the property.

12. It further reflects that the applicant is an equitable mortgagee over the entirety of that beneficial interest which arises pursuant to a solicitor's undertaking dated 30 May 2006 by William Davies & Co., Solicitors, to First Active plc (now the applicant) pursuant to an assignment Ulster Bank DAC (formerly Ulster Bank Ireland Limited) in respect of whom the business of First Active plc had been transferred by way of statutory instrument whereby the firm of William Davies & Co. (through its solicitor, Liam Davis) undertook to execute a first legal charge/mortgage over the said property in the form required by the then mortgagee, First Active plc, as security for its home loan provided to the now sole beneficial owner of the property which undertaking had not been complied with and remains outstanding.

13. Accordingly, the proposed orders are as follows:

- (a) A declaration that the respondent, Gordon Smith, is the sole beneficial owner of the property more particularly 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, County Dublin pursuant to the terms of the Deed of Conveyance dated 16 September 2005 between HSS Limited of the first part, Burnella Cottage of the second part and Lee Cullen & Richard Mockler of the third part. In respect of this aspect of the order there will be liberty to apply;
- (b) An order for the award of the costs of these proceedings, including any interlocutory applications including this costs application, in favour of the applicant against the respondent, such cost to be adjudicated in default of agreement.