

Neutral Citation No: [2024] NICH 7

Ref: HUD12489

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 21/79912

Delivered: 10/06/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

JACK AND PATRICIA MURPHY

Plaintiffs

and

KIERAN DOYLE

Defendant

John Coyle (instructed by Rafferty Solicitors) for the Plaintiff
Keith Gibson (instructed by Cleaver Fulton Rankin Solicitors) for the Defendant

HUDDLESTON J

Introduction

[1] In these proceedings the relief sought by Mr and Mrs Murphy (the plaintiffs) is:

- (a) A declaration pursuant to section 23 of the Judicature Act (NI) 1978 that by virtue of a conveyance to them dated 10 September 1987 by Gerald Scallon that certain lands (which are now registered in Folio DN 21890 County Down) were not then capable of later transfer to the defendant by the same Mr Gerald Scallon when he purported to do so on 2 December 2003. Sometime after that transaction the defendant procured first registration of those lands (on 14 January 2018). The plaintiffs rely on the principle *nemo dat quod non habet* arguing that at the time when the 2003 conveyance was entered into, they were already the owners of the disputed lands (ie on foot of the earlier 10 September 1987 conveyance);
- (b) Rectification of folio DN 21890 County Down pursuant to section 69 of the Land Registration Act (NI) 1970 to amend the entry of ownership to that of the plaintiffs as opposed to the defendant and cancellation of the charge now registered upon it to secure the defendant's borrowings;

- (c) Any consequential orders which this court deems appropriate together with damages.

Background

[2] There is a long and convoluted conveyancing background to the present dispute between the parties which I first need to set out. By way of a conveyance of 30 April 1970 (the “Murphy Conveyance”) Josephine Murphy conveyed a portion of lands fronting Belfast Road, Newry to Scallon Hotels Ltd (referred to in the remainder of this judgment as the “Red Lands”). Today it largely consists of a converted Victorian house and parking. That building (the “building”) is known as 1 Belfast Road, Newry, and is now occupied by the defendant as a veterinary surgery with ancillary car parking.

[3] By a conveyance of 1 September 1970 (“the McQuillan Conveyance”) and made between Michael McQuillan, Charles McQuillan, and Gerard McQuillan (1) and Scallon Hotels Ltd (2) a further portion of lands (referred to in this judgment as the “Blue Lands”) was also conveyed to Scallon Hotels Limited. There then followed on 29 October 1980 (the “1980 Conveyance”) a conveyance from Scallon Hotels Ltd to Gerard Scallon of both the Red and the Blue Lands.

[4] The next incident on title – which largely has led to the present dispute – is the conveyance dated 10 September 1987 (the “1987 Conveyance”) which was entered into between Gerald Scallon (1) and (2) Jack Murphy and Patricia Murphy (the plaintiffs to this action). To provide the full context to that conveyance several observations need to be made:

- (i) Recital 1 of the 1987 Conveyance referred to the 1980 Conveyance (ie referred to above) as the root of title by which Scallon Hotels Limited conveyed the Red and Blue Lands to the then vendor, Mr. Scallon.
- (ii) The 1987 Conveyance to the plaintiffs then in the operative section purported to convey the “land and premises hereinafter more particularly described in the schedule” to the plaintiffs in fee simple. That schedule I need to set out in detail. It reads as follows:

“All that and those that part of the land described in the first part of the Schedule to an Indenture of Conveyance made the 29th day of October one thousand nine hundred and eighty, between Scallon Hotels Ltd of the one part and the vendor of the other part which said premises are therein described as ‘all that piece or parcel of ground situate in the townland of Carneyhough Parish of Newry, barony of Newry and County of Down, has more particularly been described on the map endorsed hereon

being portion of the lands and premises comprised in and granted by an indenture of conveyance dated the 30th day of April one thousand nine hundred and seventy, between Josephine Murphy of the one part and the vendors of the other part which said piece or parcel of ground is surrounded by a red line on the said map.”

[5] The 1987 Conveyance confirms that stamp duty was paid and, more particularly, that it was registered in the Registry of Deeds on 15 September 1987 serial number 138-179.

[6] The 1987 Conveyance, at that point in time, would not have been subject to the requirements of first registration and, therefore, patently was not registered in the Land Registry.

[7] One of the difficulties with the 1987 Conveyance, however, is that whilst it (correctly) referred to the 1980 Conveyance as the root of title under which the vendor sold, it wrongly transcribed (in the Schedule) the lands which were firstly conveyed by the 1980 Conveyance (ie the Red Lands) which are not, fundamentally, in dispute between the parties and which actually relate to the Building from which the defendant operates his veterinary practice and has done since circa 2003/4 when, following the 2003 Conveyance, he went into possession.

[8] The lands to which the plaintiffs claim title are the Blue Lands – an area of approximately 0.998 acres which were identified by a map or plan attached to the 1987 Conveyance but not expressly incorporated within its terms. It is the Blue Lands or that virgin site that is the subject of the dispute between the parties.

[9] It is the plaintiffs’ case, as confirmed by Mr Murphy’s affidavits, that in and around 1988 he sought (and obtained) planning permission on a part of the Blue Lands. The court was furnished with a copy of the consent reference P/88/04/90 which confirms that fact.

[10] In and around May 1993, Mr Murphy also entered into an informal agreement with the Royal Ulster Constabulary (as the owners of the adjacent Ardmore RUC Station) allowing them to place gates upon the laneway leading from Downshire Road to the police station/“his” lands subject to the conditions that (a) he was supplied with a key to the gate (when installed) and (b) he was not denied access to the lands.

[11] Aside from that and permitting some peripheral grazing rights to be exercised it does not appear that the plaintiffs did much with the land in dispute.

[12] Moving forward, the transaction which has led to the dispute between the parties ostensibly took place on 2 December 2003. Whilst it took the court some time to secure the fundamental details they were, eventually, collated in an affidavit of

discovery provided by Charlotte Neary of DND Law Limited as the successor of SC Connolly & Co, Solicitors. SC Connolly & Co was the firm that had undertaken the original transactions on behalf of Mr Scallon and, indeed, acted for the defendant in his acquisition of the lands in question in 2003. Before turning to the circumstances around that, the conveyance of 2 December 2003 between Gerard Scallon (1) and Kieron Doyle (2) (the "2003 Conveyance") also requires comment:

- (a) It purported to convey the lands and premises more particularly described in "the Schedule" to that Deed to Mr Doyle in consideration of the sum of £197,000;
- (b) The Schedule itself was divided into two parts and, again, for the sake of completeness I need to set both out. The first part contains the following conveyancing description:

"All that piece or parcel of ground situate in the townland of Carneyhough Parish of Newry, barony of Newry and County of Down, as more particularly described on the map endorsed hereon being portion of the lands and premises comprised in and granted by an indenture of conveyance dated 30 April one thousand nine hundred and seventy, between Josephine Murphy of the one part and Scallon Hotels Ltd of the other part which said piece or parcel of ground is surrounded by a red line on the said map" [ie patently a reference to a conveyance of the Red Lands].

And continues in the second part:

"All that piece or parcel of ground in the townland of Carneyhough town Parish and barony of Newry and County of Down, as more particularly described on the said map endorsed hereon and thereon surrounded by a blue line being portion of the premises comprised in and granted by an Indenture of Conveyance dated 1 September one thousand nine hundred and seventy, between Michael McQuillan, Charles, McQuillan and Gerard McQuillan, of the one part, and Scallon Hotels Ltd of the other part [ie patently a reference to the Blue Lands]."

[13] It is based on this 2003 Conveyance that the defendant now asserts his title to both parcels of land – the red and the blue. He has sought – and secured – registration of both in the Land Registry of Northern Ireland, albeit at different times.

[14] Reverting to Ms Neary's affidavit of disclosure (which was largely prompted by queries from this court) there are a few observations which are germane to the issues which must be determined:

- (i) The historic conveyancing file of SC Connolly & Co does not appear to hold any replies to pre-contract enquiries, so we know little of what disclosures were made at that time;
- (ii) as is customary a DOE property certificate was sought by SC Connolly & Co and was issued by the Department of the Environment in reply on 11 August 2003. The following points can be made:
 - (a) The request address is simply given as "Belfast Road, Newry" The map appended to the property certificate (bearing reference CU/2003/024844) shows only the building and its curtilage (ie the Red Lands).
 - (b) The planning history disclosed only the planning applications for 1 Belfast Road, and/or the adjacent (now) PSNI site. It does not disclose the planning permission sought and obtained by Mr Murphy which confirms that only the smaller area of the Red Lands was searched against;
- (iii) The local authority property certificate confirms the address of the subject property as 1 Belfast Road, Newry. There is no reference to the additional Blue Lands.
- (iv) There is a statutory charges search dated 7 August 2003 against the address which relates to the building (as distinct from the Blue Lands), but no map is appended.

[15] On the plain copy of the Deed of 2 December 2003 attached to her affidavit, Ms Neary has provided a map which she says is the "single map" attached to the 2003 Conveyance. That map is based on an ordnance survey scale, printed on 11 August 2003 and references 1 Belfast Road, Newry. It shows, outlined in red, the building and its curtilage. It makes no reference to the Blue Lands.

[16] Ms Neary also appends to her affidavit a copy of the Registry of Deeds search against Gerald Scallon from 28 October 1980 to 15 July 2003, which was procured as part of the conveyancing process. That search, conducted by law searchers, was against premises described as "Belfast Road, Newry" (quoting the townland etc) and discloses the existence of the 1987 Conveyance to the plaintiffs. The copy search appended to Ms Neary's affidavit has been annotated with the solicitor's observations or comments as it being "on title." This is the conventional way that conveyancers explain entries that otherwise might be prejudicial to the property

being conveyed. There is nothing in the evidence to suggest other than this was done at the time and as part of the transaction.

[17] The file also discloses a copy of the contract dated 5 September 2003 between Scallon (1) and Doyle (2) which led to the 2003 Conveyance. By its terms the property in sale is described simply as “all that and those the property known as 1 Belfast Road, Newry, Co Down more particularly described in an Indenture of Conveyance dated 29 October 1980 between Scallon Hotels Ltd (1) and the vendor [Gerard Scallon] (2).” It was accepted/entered into by Mr Scallon on 5 September 2003 and reflects:

- The consideration of £197,000 (which is the amount reflected in the subsequent 2003 Conveyance);
- Is subject to a condition that the purchaser is able to obtain finance in the sum of £150,000.
- Is subject to a special condition the contract is conditional upon “a change of use being granted by the Planning Service to permit **the premises** to be used as a veterinary surgery and ancillary services without unduly onerous or unreasonable conditions [before] 30 November 2003.” [emphasis added]. This would appear, on construction, to refer to the building.

[18] Consistent with the other documentation, there is no map attached to the copy contract nor does it purport to refer to one.

[19] Through the existence of the finance condition this court became aware of the funding arrangements. It asked the defendants to seek further information from the Bank of Ireland who were the funders and have security over the property. That resulted in the following:

- (a) A copy of a mortgage deed dated 2 December 2003 from the defendant to the Bank of Ireland which was registered on 11 February 2004 (in the Registry of Deeds) as an all-monies charge.
- (b) The premises charged by that mortgage are simply described within the Deed as “the property situate and known as 1 Belfast Road, Newry, Co Down, BT34 1EF.”
- (c) The court sought clarification as to whether there was a valuation. This conceivably might have provided some contemporaneous evidence of what the expectation of the Bank had been, distinct from the parties. To that the bank replied “Unfortunately, due to the passage of time we no longer hold the hard copy of the report. But I can see from our records that this property was valued during this period and came in at a valuation of £180,000.”

[20] It was confirmed by reference to the Facility Letter that the advance made by the Bank at that time was £240,000. The facility letter describes the loan as “£240,000 by way of loan to assist with the purchase of premises on Belfast Road Newry, adjacent to Ardmore Police Station at a cost of £197,000 with the balance to be used to assist with renovation of the aforementioned property.”

[21] The loan was conditional upon a “solicitor’s undertaking to register legal charge over property at Belfast Road, Newry – purchase price £197k.”

[22] Unfortunately, whilst as I say, I asked the defendant to seek the original bank valuation it was not available. A subsequent valuation for a renewal of the facilities was, however, made available. It is dated in 2019 and values the building at 1 Belfast Road, Newry, at £180,000. No reference is made within that valuation to the vacant Blue Land. Neither do earlier renewals/extensions of the facilities in 2006 or 2013 when revised Facility Letters were issued make any reference to the lands now in dispute. Copies of those were made available to the court. They all speak only in terms of the building and security held over it – by then registered in DN149894 & DN158540 Co Down.

[23] Mr Doyle in his original affidavit avers as follows:

“3. In May 2003, I viewed the property which was for sale with Collins & Collins Estate Agents. I attended on site and was shown a two-bedroom flat attached to commercial premises with approximately an acre of overgrown land adjacent to Newry police station close by but not immediately adjacent (the red lands and the blue lands respectively).”

It should perhaps be noted at this stage that through discovery and the affidavit of Mr Murphy, the court had sight of both the original advertisement for the sale and the agent’s letter of instruction/sales advice. Neither refer to the Blue Lands.

“4. I was keen to relocate our veterinary clinic from old premises and these premises were ideal for us to renovate and renew the veterinary clinic. The land (the blue lands) which was being sold along with the commercial premises was by no means essential to my veterinary business, however I realised that it had some development potential albeit that any location beside a police station in Newry brought inherent risks. ...

7. ... I left the issue of title to SC Connolly Solicitors but there is absolutely no doubt that I was always

purchasing the building (the red lands) along with the plot (the blue lands). On 15 April 2004 my solicitors made an application for first registration and included within the documents lodged was the original conveyance dated 29 October 1980 and a deed of conveyance dated 2 December 2003.

8. On 10 June 2004 the Land Registry reverted to say that there was an issue insofar as the property shown edged red on the map encroached on a neighbouring folio, namely Folio DN 100 which was the folio in respect of the police station. To that end my solicitors wrote to the PSNI on 15 September 2004 pointing out that the ownership of the ground had been fenced and occupied by "their clients" referring not only to myself but also Mr Gerard Scallon for a long period of time. The PSNI accepted the issue and a joint application for registration was launched with Land Registry in or about July/August 2005."

[24] Pausing there it would appear to be the case that once that boundary issue was resolved SC Connolly proceeded to make an application for first registration in respect of the Red Lands only resulting, ultimately, in their registration in Folios DN 118138 and DN158540 Co Down (the latter in the name of the defendant and his brother Brian Doyle). I have seen a copy of the application for first registration of these lands as lodged in April 2004. That application refers to "the land shown edged red on the map...known as 1 Belfast Road, Newry." The map attached to the application shows only the Red Lands. Similarly, the SDLT Certificate (and its precursor the transaction return made to HMRC) refers only to the postal address. No reference is made, therefore, either through the SDLT or initial registration of the Blue Lands.

[25] Mr Doyle proceeds to say that in or around 2016 he approached Fisher & Fisher (incorporating McGuigan Malone) "to establish why I have not been yet registered as owner of the blue lands." According to his affidavit his solicitors then wrote to SC Connolly on 20 September 2016 asking them to confirm the position. That prompted an application, made by SC Connolly & Co, in February 2017 for the registration of the defendant as owner of the Blue Lands on the basis that the "area shaded blue [had not been] included in first registration." A Land Registry form 1 (being the form prescribed by the Land Registry Rules for such an application) was signed by SC Connolly on 13 December 2006 supported by a certificate by Mr Doyle. Mr Doyle's certificate included the following declarations:

"2. It was and is the intention of the parties thereto to convey the entirety of the premises therein described (ie in the 2003 Conveyance) to me.

3. Upon completion of this purchase papers were submitted to the Land Registry for compulsory first registration. Upon completion of this process, it was noted that the map submitted to Land Registry to support this application was defective in that it omitted a portion of ground on the southern boundary coloured blue ... by virtue of the mapping area which not noticed at the time of first registration."

[26] On the basis of this later 2017 application, the Land Registry subsequently registered Mr Doyle as the registered owner of the Blue Lands in Folio DN 21890 Co Down subject to the charge in favour of Bank of Ireland.

[27] It makes sense at this point to deal with the correspondence passing between the parties leading up to that registration. On 24 October 2016, SC Connolly wrote to Mr Doyle's solicitors indicating that they did not hold the original documentation leading to first registration and that "in addition the solicitor dealing with the Land Registry process is no longer with us." That letter continues:

"However, **on the basis of your assertion** that the second portion of land purchased by your client and conveyed to him under deed of conveyance dated 2 December 2003 was omitted from first registration we will take steps to rectify the position immediately and without further cost to your client." [emphasis added]

[28] Once the circumstances leading to the dispute which was before the court became apparent SC Connolly sent Fisher & Fisher their "entire file". In their letter of 18 December 2019 (ie after the second application for first registration had been completed and being the letter under cover of which the file was transmitted) the solicitor then having carriage of the matter included the following comment:

"Having reviewed our file which **we did not do on the recent compulsory first registration** we overlooked the enclosed search which confirms that part of the lands coloured blue on a deed of conveyance dated 29 October 1980 between Scallon Hotels of the one part and Gerard Scallon of the other part had previously been conveyed to Jack and Patricia Murphy on 10 September 1987 and therefore obviously should not have been the proceed [sic] of the first registration in favour of your client.

For the record we do not believe said lands at the rear of the veterinary practice at 1 Belfast Road, Newry were

ever intended to be included in the transaction when purchased by our client in 2003.”

[29] Within that file there was also an earlier letter of 5 March 2007 to Mr Doyle, in the following terms:

“We refer to the above matter and would advise that registration has now been completed in the Land Registry in respect of the portion omitted from the previous map”
[I take this to relate to the boundary realignment with PSNI].

The letter continues:

“We enclose copy Land Registry map of the lands in Folio DN 149894 County Down [(ie a portion of the Red Lands)] and would be grateful if you could confirm that all registration is now in order.”

[30] In a similar vein the completed title documents were remitted to the Bank of Ireland and acknowledged by them on 23 June 2004. No issue appears to have been raised by either Mr Doyle or, indeed, the Bank of Ireland at that point in time. There is nothing either within Mr Doyle’s affidavit evidence or in his evidence to the court which satisfactorily clarified why the issue before the court took more than 10 years to be raised.

[31] What triggered the present proceedings was that in 2018 the plaintiffs commenced some preliminary work on the site which led, ultimately, to these proceedings.

Expert evidence

[32] Mr Arthur Moir, Solicitor, and former Registrar of Titles, provided an expert report on behalf of the defendant identifying that his task was “to consider the title to the Premises (ie both the blue and red lands) and the effect of first registration in the Land Registry.” Mr Moir highlights the inconsistency in the drafting of the respective conveyances. In particular, he highlights that the 1987 Conveyance:

- (a) purports to convey the Red Lands; and
- (b) Makes no mention of the map which is appended to it.

[33] As regards the 2003 Conveyance, Mr Moir comments that the description (ie the two-part schedule recited above) very closely follow the descriptions in the 1980 Conveyance. Mr Moir concludes that “it appears that Mr Scallon failed to inform

either the defendant or SC Connolly that he had previously sold the red land to the plaintiffs.”

[34] Commenting on the procedures for first registration Mr Moir acknowledges that Form 1, as prescribed by Rule 11 of the Land Registration Rules (NI) 1994, requires a solicitor to certify a number of matters regarding the title as part of an application for first registration. These include:

- (a) That the solicitor has investigated the title “fully;”
- (b) That all necessary searches and enquiries [have been made];
- (c) That all material information has been supplied.

[35] Based on the two separate certificates provided by SC Connolly (albeit at different times) the defendant became registered as full owner of the folios that now comprise both the Red and the Blue Lands.

[36] As to section 16 of the Land Registration Act (NI) 1970 (the “LRA”) Mr Moir comments that on first registration of a person as full owner of the subject land with an absolute title the “fee simple vests in him whether or not it was previously vested in him subject to [certain burdens].” In the present case Mr Moir comments that had the plaintiffs been in occupation of the Red Lands (consistent with the erroneous 1987 Conveyance to them) their rights would have been protected by virtue of paragraph 15 of Part II of Schedule 5 of the LRA (ie a burden that affects registered land without registration). Absent such physical occupation he asserts that section 11(1) of the LRA provides that the title register is conclusive evidence of ownership and in the absence of actual fraud is “not affected in any way by virtue of the owner having notice of any deed document or matter relating thereto.”

[37] He opines, therefore, that “unless the court should decide that the defendant’s registration was in some way fraudulent, or that the title should be rectified under section 69 LRA that registration of the defendant as owner of the Blue Lands is “conclusive evidence of [his] title.” I should say, at this point that the issue of fraud has not been pleaded or suggested.

[38] Mr Moir acknowledges the court’s powers under section 69 LRA. For ease, I set that out in full:

“Rectification of errors

- (1) Subject to subsection (3), where any error (whether of misstatement, misdescription, omission or otherwise) occurs in the register, the court, upon such application and in such manner as may be prescribed by rules of the appropriate court and after such notices, if any, as it may

direct, may order such error to be rectified upon such terms as to costs or otherwise as it may think fit.

(2) Where, in the opinion of the Registrar, an incorrect entry in, or omission from, the register is of a clerical nature, he may, after making such enquiries (if any) and serving such notices (if any) as he considers necessary, rectify the register.

(2A) The Registrar may in his discretion, after making such enquiries (if any), serving such notices (if any), and obtaining such consents (if any) as he considers necessary, amend any mistake in, or omission from, any document presented to the Land Registry, if, in his opinion, the mistake or omission is of a clerical nature.

(2B) The Registrar may, after making such enquiries (if any) and serving such notices (if any) as he considers necessary, order the rectification of the register where all persons interested –

- (a) consent to the rectification; or
- (b) do not, within the prescribed period after being served with notice of the Registrar's intention to order the rectification, notify the Registrar in writing that they object to the rectification.

(2C) Where the Registrar exercises the power conferred by subsection (2) or (2B) he may make such order as to the costs of rectification as the persons interested may, in writing, agree.

(3) The register shall not be rectified under subsection (1) so as to affect the title of a registered owner, unless such rectification can be made without loss or damage to any person claiming for valuable consideration and in good faith through such registered owner and unless –

- (a) the registered owner or, as the case may be, a person claiming as aforesaid through the registered owner or anyone acting on behalf of either has, by his act, neglect, or default, been in any way responsible for, or has contributed to, the error; or

- (b) in the case of an error made before such registered owner was so registered, he was, in fact, aware of such error at the time of his registration as owner; or
- (c) in the case of an error made after such registered owner was so registered, he or a solicitor acting on his behalf became aware of such error at a time when such error was capable of being rectified without causing loss or damage to any person except the expense of such rectification; or
- (d) the immediate disposition to such registered owner, or the disposition to any person through whom he claims otherwise than for valuable consideration, was void; or
- (e) such registered owner acquired the land otherwise than for valuable consideration and rectification of the error could have been made against the person through whom he claims if such person had been the registered owner; or
- (f) such registered owner consents to rectification;

but so that this subsection shall –

- (i) limit the power of the court to rectify the register only where the registered owner of the land is in possession thereof; and
- (ii) not limit the power of the court to rectify the register in any particular case if the court is satisfied that it would be unjust not to rectify the register against the registered owner.” [emphasis added]

[39] Mr Moir acknowledges that the court’s power is subject to that overriding discretion to order rectification and that in the exercise of that power the court may take account of matters such as the behaviour of the parties, the loss of ownership status and the adequacy of compensation.

[40] He cites Professor Wallace’s book on Land Registry Practice in NI [2nd ed, 1987] where the author states that “despite the ultimate width of the court’s powers in this matter it must be borne in mind that the whole justification for the elaborate system of registration of title is to provide certainty in land title. For this reason,

section 69(3) sets out various restrictions which, save in exceptional circumstances, should be observed by a court considering rectification.” He supports this view by reference to the case of *Hayes v McGuigan* [2011] NI Ch 25 where the court referred to “the heavy onus of proof” which rests on the party claiming rectification.

The defendant's case

[41] Much of the focus of the defendant's case focuses on:

- (a) the principle of the conclusiveness of the Register;
- (b) the unavailability of rectification under either statute or common law.

[42] As to the issue of rectification:

- emphasis is placed on the fact that the 1987 Conveyance refers only to “the said map” within the description and that that reference in turn is to be construed as a reference to the description in the 1980 Conveyance rather than to the map that is annexed to (but not expressly incorporated in) the 1987 Conveyance. They describe that map as “floating”;
- as it is not incorporated they say it should be treated as extrinsic and only is of assistance if there is ambiguity in the construction of the words of the Deed itself – as to which they say there is no such ambiguity within the Deed;
- in support I was referred to the case of *McCoy v McGill & Roe* [2010] 2 IR 417
 - o first, at para [16] – “the plan attached ...is usually for the purposes of identification only. It cannot normally be relied upon as delineating precise boundaries”;
 - o also, at [17] – “in relation to rules of construction of a deed:
 - (a) the court must give effect to the intention of the parties as expressed in the Deed;
 - (b) to determine this, the court must determine what is meant by the words actually used rather than what the court might conjecture they actually meant. The court should only do so where absolutely necessary to avoid defeating the object which the parties had clearly intended.”

[43] The case of *Lord Waterpark v Fennell* (1859) 7 HL CAS 650 was also cited in similar vein:

“Where, indeed, words have a clear and definite meaning, no evidence can be admitted to explain or control them” as was Stamp LJ in *Grigsby v Melville* [1974] 1 WLR 80 – “it is the unhappy fact that conveyances sometimes do convey that which was not intended to be...conveyed...”

[44] On that basis they say that there was nothing to suggest to the defendant or SC Connolly (in 2003) of the existence of the earlier 1987 Conveyance, that the 1987 Conveyance was in any event ineffective in conveying the Blue Lands to the plaintiffs and that the defendant’s position is that he was purchasing both the Red and the Blue Lands – and raised the point in 2016 **before** the events of 2018 brought the dispute into the open.

[45] They say there is no ambiguity as regards the 2003 Conveyance – or its effect – which was to vest both sections of land in the defendant as confirmed by his subsequent registration as absolute owner in the Land Registry – thereby attracting the argument (and protection) of the provisions of section 11(1) LRA.

[46] As to that point on the conclusiveness of that registration I was referred to *Wylie’s Irish land Law 3rd Ed* at paragraph 21.13:

“The title of any person shown on the register is not affected by his having notice of any deed, document or matter relating to or affecting the title shown, unless there is actual fraud on his part.”

[47] This, however, then leads into a discussion of the court’s powers under section 69 of the LRA. That power is contained in section 1 of that section but is subject to the restrictions in section 3.

[48] As to that the defendant argues, based on the defective 1987 Conveyance that there is neither “a legal nor factual basis” upon which to amend the Register as sought in the pleadings. They say, “the court cannot give effect to a non-existent transaction” and suggest that what the plaintiffs ought to have done is to have sought rectification at common law.

[49] To that they argue that:

- The position of Mr Scallon is unclear – it having been made clear to the court at the start of the trial that he was no longer fit to give evidence;
- The equitable remedy of rectification would have to be considered subject to the delay and/or doctrine of laches – in circumstances where the defendant has been the registered owner for almost 20 years and has pledged to a bank as security;

- The defendant has been prejudiced in monetary terms on the basis that he paid for both parcels - "the valuation refers to a value of £180,000 presumed to be for the veterinary surgery ...and so by implication the blue part must have been worth circa £17,500..."

[50] Whilst the wide discretion of the court under section 69 is acknowledged the defendant says it is clearly constrained. I was referred to Murray J in *Re Skelton* [1976] NI 132:

"It seems to me that the only error which can be rectified is an error of the registering authority in registering the effect of a transaction and an error of the parties to a transaction....obviously, if the parties themselves make a mistake ...they are entitled to rectification as between themselves but not necessarily to rectification before the Register..."

[51] It is not suggested that there is fraud or mistake on the present facts. I was cited the case of *Farquar v Boyd* [1997] 10 BNIL 57 where a plaintiff was able to persuade the judge (Campbell J) to order rectification where someone whom he trusted got him to sign a transfer when the plaintiff thought he was signing a form involving his state benefits. No money was paid, and the defendant pleaded guilty at trial to the offence of obtaining property by deception. The defendant stridently makes the point that fraud is no part of the facts of this case (which I accept) and that the defendant paid for both parcels of land (of which I am less certain there is concrete evidence).

[52] They suggest that the weakness in the case is that if there was mistake Mr Scallon would be seeking rectification but that he has neither sought to do so nor provided evidence of his position that "it is impossible to see what legal power exists to grant the declaratory relief sought and/or order rectification."

Consideration

[53] It goes without saying that the history of this case reflects nothing positive on the standard of conveyancing throughout. Nonetheless, we must deal with the facts as we find them.

The 1987 Conveyance

[54] The summons before the court does not actually seek rectification of the 1987 Conveyance but rather a declaration under section 23 of the Judicature Act (NI) 1978 that the effect of the dealing between Mr Scallon and the plaintiffs was such that the later 2003 Conveyance could have no effect because the *nemo dat quod non habet* principle applies.

[55] As I have set out the defendant disagrees on the basis that strictly construed the 1987 Conveyance - and in error - purported to convey the Red Lands to the plaintiffs. I don't find that an attractive argument for the following reasons:

- Firstly, I am satisfied that there was a contract between Mr Scallon (1) and the plaintiffs (2). No one suggested otherwise than that the agreed consideration was paid, and I accept that post-completion they went into possession - even if limited to:
 - Procuring planning for a building site;
 - Asserting rights against the RUC/PSNI in terms of access;
 - Permitting in albeit a limited way, grazing rights.

[56] In analytical terms, therefore, they would at the point of contract have secured an equitable interest in the lands that are the subject of this dispute. On the point of completion Mr Scallon, ie on receipt of the purchase monies, became subject to trust in favour of the plaintiffs and they, upon entering into possession acquired an equity which the defendant accepts (although it is argued in respect of the Red Lands) that is capable of constituting an overriding interest which may be protected as a burden capable of binding the registered ownership by virtue of section 38 and Schedule 5 of the LRA. The defendant, at best, acquired paper title subject to those equities.

[57] Secondly, this is not a case of a simple misdescription. It is a case where the draftsman of the 1987 Conveyance singularly failed to give effect to what I am satisfied was the common intention of the parties. There is nothing in the evidence before me to suggest other than Mr Scallon intended to convey the Blue Lands to the plaintiffs and that both parties thought they had achieved that end and that the plaintiffs then entered into possession.

[58] I have not been invited to consider rectification at common law, but such would have been my analysis.

The 2003 Conveyance

[59] Adopting a similar and hopefully common-sense approach to the later 2003 Conveyance, I could rely on the *nemo dat* principle as pleaded but ignoring that for the moment I do think it is worth analysing the events that pertain to that transaction.

[60] Firstly, in terms of considering both the advertisement that appeared in the local press and the sales advice note of the agent who documented the sale to Mr Doyle, there is nothing in them to suggest the Blue Lands were included in the sale.

[61] Secondly, the contract makes no reference to the Blue Lands and speaks only of the lands in sale as defined by the postal address – which quite clearly corresponds to the Red Lands. The special condition again was drafted by reference back to the postal address of “the premises.” There is, in fact, nothing within the contract that suggests the Blue Lands were included in the 2003 deal.

[62] Thirdly, the post completion formalities – sequentially, the submission of an SDLT return, the procurement of an SDLT certificate and then the application for registration in the Land Registry **all** focused on the lands described as 1 Belfast Road, Newry. It is a function of the SDLT return that if there is no postal address (as would have been the case with the Blue Lands) that there is facility to both describe and then append a map. It is significant, in my view that in none of the post-completion (and so contemporaneous) documentation is there anything to corroborate the defendant’s view as expressed in his affidavit. The application for first registration of the title to the building was completed in 2004 and as I have indicated above neither the Bank (who would have been anxious to ensure its security was in place) nor the defendant raised any issue. [See above at [29]]

[63] The defendant has invited rather than adduced evidence to the court to “assume” that the consideration of £197,000 as paid on foot of the contract between Doyle (1) and Scallon (2) was apportioned as to £180,000 for the building and £17,500 for the Blue Lands. There is, however, not a shred of evidence that that was in fact the case. The contract only referred to the postal address of the building in the particulars so based on the rules of construction there is no ambiguity that would allow for such an interpretation – even taking the terms of the contract as a whole – and equally the post-completion documentation to which I have referred forms no basis for any such conclusion.

[64] Secondly, while it is a matter of record that the Bank made an offer of facilities in the sum of £240,000 – ie sufficient to allow for the purchase and the improvement of the premises – no breakdown was given as to the allocation of those facilities. It is accepted that the Bank at that time placed a valuation of £180,000 on the building but although the court asked for sight of it the underlying valuation upon which the Bank relied was not forthcoming. The later valuations also significantly only ever referred to the building and contain no reference at all to the Blue Lands.

[65] Thirdly, one cannot ignore that when the second application for first registration was made by SC Connolly & Co in 2017 it was made by a solicitor who had not been involved in the original transaction and assumed that an error had been made – an assumption which was then contradicted when the deeds were made available post registration. The correspondence cited at [28] above makes that clear.

[66] Fourthly, the court has had the benefit of the Registry of Deed search commissioned at the time of the 2003 Conveyance. Only two possibilities permit

themselves. Either Mr Doyle's conveyancer at the time had sight of the results of the search disclosing the conveyance to the plaintiffs, or he was negligent in not requiring it before completion. Either way, Mr Doyle is fixed with actual (in the former case) or deemed (in the latter case) knowledge of the fact of that conveyance. In any event the result of that search should, ultimately, have featured in the 2017 application for First Registration and might have avoided this litigation. Clearly it did not and the Registrar, relying solely on the certified facts as per the Form 1 submitted, registered Mr Doyle as the registered owner. There were though clearly doubts at that stage – as the letter releasing the deeds confirms.

[67] Such an analysis inevitably brings me to a consideration of the alternative relief sought – that under section 69 LRA. As Mr Moir pointed out and both parties accepted, section 69(1) is widely cast in terms of the discretion that is open to the court to order rectification “upon such terms as it thinks fit.” This is, however, circumscribed by section 69(3) which requires that two conditions be met.

[68] Those are:

- (i) That rectification can be made without loss or damage to any person claiming for valuable consideration and in good faith through the registered owner; and
- (ii) One of the conditions set out at (a)-(f) are satisfied.

[69] In the present case, I start from the perspective that (contrary to the assertion made) I do not have clear evidence that Mr Doyle paid a separate sum for the Blue Lands. Firstly, therefore, there is no concrete evidence that he was a purchaser for valuable consideration. I have been invited to make that assumption but there is substantial contemporaneous documentary evidence that points the other way entirely and nothing to corroborate that suggestion. Even the registration of the bank charge against the Blue Lands as part of the 2017 application to the Land Registry appears to have been part of the enthusiasm adopted at that time by S.C. Connolly to rectify a perceived error – a position they ultimately resiled from. Certainly, the Bank neither then nor since sought such security and, as I have said, none of the subsequent renewal or extension of facilities relied upon the existence of the Blue Lands. In that context and in the absence of evidence that “valuable consideration” was paid (as under limb (i)) I do not see where actual “prejudice” to the defendant (as it has been termed) has been demonstrated.

[70] Further for the reasons given before I do not consider the 2003 Conveyance insofar as it purported to convey the Blue Lands was effective. The *nemo dat* principle I find does apply in substance if not form and is sufficient to trigger an argument that any one or more of the circumstances set out in section 69(3)(ii)(a)-(e) are met on the facts. In my view, the 2003 Conveyance was as regards the Blue Lands void. In addition, because of the entry on the Registry of Deeds search I take the view that Mr Doyle's solicitor and through him Mr Doyle as the registered

owner were aware of the mistake at a point when it could easily have been rectified (and certainly not compounded in the way in which it was).

[71] Even if I am wrong in this analysis, however, I take the view that the overriding discretion that exists under section 69(3)(ii) is appropriate on the facts – namely that, frankly, it would be unjust not to order rectification. Clearly, it is right that in such cases there is a “heavy onus of proof” – to borrow the words of *Hayes v McGuigan* [2011] NI Ch 25 – but I think that threshold has been reached on the facts here. On the plaintiffs' case they did absolutely nothing wrong – other than be at the wrong end of poor conveyancing practice. On the defendant's case he may have believed that he was getting the Blue Lands throughout, but the documentary evidence fails to establish that was shared by others or indeed a prejudice to either he or his bank. Arguably if his legal advisors failed to either read and/or inform him of the results of a Registry of Deeds search – either in 2003 or later in 2016 – contrary to his expectations then his relief may lie elsewhere but it should not deny the relief sought by the plaintiffs.

Conclusion

[72] Taking all of that into consideration and pursuant to the powers vested in me under section 69 LRA, I therefore order that the Land Registry entries in respect of folio DN21890 Co Down be amended:

- To reflect the ownership of the plaintiffs as joint tenants;
- To cancel the charge registered thereon in favour of the Governor and Company of the Bank of Ireland.

[73] If required, I will hear the parties on the question of costs or any ancillary orders that may be necessary to give effect to this judgment.