THE COURT OF APPEAL

Peart J.
Whelan J.
Baker J.

Neutral Citation Number: [2018] IECA 352

Appeal No.: 2018/29

BETWEEN/

TANAGER DESIGNATED ACTIVITY COMPANY

PLAINTIFF/APPLICANT

- AND -

ROLF KANE

DEFENDANT/RESPONDENT

- AND -

PROPERTY REGISTRATION AUTHORITY

AMICUS CURIAE

- AND -

BANK OF SCOTLAND

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 31st day of October 2018

1. This judgment concerns the entitlement of Tanager DAC ("Tanager") to obtain an order for possession against Mr Kane in a mortgage suit and deals primarily with the interplay between the provisions of s.64 and s. 90 of the Registration of Title Act 1964 ("the 1964 Act").

2. Noonan J. has referred certain questions of law for determination by this Court.

Material facts
3. Mr Kane is the registered owner of the property comprised in folio 91184F of the Register of Freeholders, Co. Dublin, a dwelling house known as 1 Elmwood, Clonsilla, Co. Dublin, which is his principal private residence.

4. On 20 March 2006, Bank of Scotland (Ireland) Ltd. ("BOSI") became registered as owner of a charge on the folio, having advanced money to Mr Kane secured by way of charge.

5. All the assets and liabilities of BOSI including the mortgage and charge on Mr Kane's folio transferred to Bank of Scotland plc. ("BOS") pursuant to the cross-border merger made under S.I. No. 157/2008, the European Communities (Cross-Border Mergers) Regulations 2008 of Ireland ("the Irish Regulations"), and The Companies (Cross-Border Mergers) Regulations 2007 of the United Kingdom ("the UK Regulations"), the operative time whereof was 23.59 on 31 December 2010. BOSI was then dissolved without going into liquidation.

6. BOS then sold a portfolio of securities to Tanager including its interest in the charge on the defendant's dwelling. That transaction closed on 14 April 2014, and on 25 April 2014, Tanager became registered as owner of the charge previously registered in favour of BOSI. BOS never became registered as owner of the charge and it is this fact that forms the case of the questions to be determined in this judgment.

7. Tanager claims that the defendant fell into arrears on his mortgage repayments, and ultimately, a civil bill for possession issued on 15 January 2015 in the Circuit Court.

8. Noonan J. was hearing an appeal from the order of Judge Linnane in the Circuit Court, where she dismissed the plaintiff's claim for an order of possession, and he gave an interim ruling on 22 November 2017, *Tanager DAC v. Kane* [2017] IEHC 697.

9. He identified the issue in respect of which a case was stated to this Court at para. 5 of his judgment:

> "Although a number of issues arise in this appeal, the primary issue is a contention on the part of the defendant that because BOS never became registered as owner of the charge in issue, it was not entitled to transfer or assign the charge to the plaintiff. The plaintiff accordingly never acquired title to the charge and was thus not entitled to enforce it against the defendant. Insofar as the plaintiff has become registered as owner of the charge, the defendant contends that such registration was erroneous and a mistake on the part of the Property Registration Authority ("the PRA")."

General: the *dictum* in *Kavanagh v. McLaughlin*
10. The case stated raises the issue not required to be answered in the judgment of the Supreme Court in *Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 IR 555. That judgment concerned the effect of the cross-border merger by which the BOSI portfolio transferred to BOS, and was concerned, *inter alia*, with the question of the title of BOS following the merger. Two judgments, of Clarke and Laffoy JJ., were delivered, in which it was determined that the securities held by BOSI over the McLaughlin property, including those held by way of charge on registered land, passed by operation of law to BOS.

11. *Kavanagh v. McLaughlin* was concerned with the validity of the appointment by BOS of a receiver but at para. 119, in an *obiter* comment, Laffoy J. noted the following:

> "As regards any further steps which require to be taken to enforce the 2006 Charge, for the reasons set out above, I have come to the conclusion, that, notwithstanding the manner in which the 2006 Charge became vested in BOS, if BOS wishes to avail of the statutory rights conferred by s. 62 of the Act of 1964 to enforce the 2006 Charge, it must comply with the requirement that it be registered as owner of the charge. That conclusion, which is *obiter*, is based on the absence of any legislation relieving a transferee in the position of BOS of the obligations imposed by s. 62."

12. That observation by Laffoy J. concerned the question, not central to the present case stated, of whether BOS, which had taken the benefit of the charge from BOSI, could exercise rights under s. 62 of the 1964 Act which were wholly statutory in origin.

13. Mr Kane, however, derives his argument from another obiter comment of Laffoy J. in *Kavanagh v. McLaughlin* concerning the interplay between s. 64 and s. 90 of the 1964 Act. Section 64 deals with the means by which title to a registered charge may be assured, and s. 90 confers powers on a person on whom the right to be registered as owner of a charge has passed in prescribed circumstances to assure or charge that interest before registration of his or her title has been completed.

14. At para. 108 of her judgment, Laffoy J. said the following:

> "Section 90 of the Act of 1964, which was referred to in *Freeman v. Bank of Scotland Plc* [2014] IEHC 284, (Unreported, High Court, McGovern J., 29th May, 2014), confers powers on a person on whom the right to be registered as owner of the charge has devolved in prescribed circumstances, for instance, by reason of an instrument of transfer made in accordance with the provisions of the Act of 1964, to transfer or charge the charge before he himself is registered as the owner of the charge, subject to certain qualifications. I am satisfied that s. 90 has no application to the issue of the entitlement of BOS, as successor to BOSI, to enforce the security which was transferred to it by operation of law on the cross-border merger against the McLaughlins."

15. The defendant raised the argument before Judge Linnane, and on appeal to Noonan J., whether, in the light of the provisions of s. 64 and s. 90 of the 1964 Act and this observation by Laffoy J., the correct position at law is that BOS was not entitled to transfer its interest in the charge which had devolved to it by operation of law without itself first becoming registered.

16. Mr Kane, therefore, argues that not only is the Register which reflects Tanager as owner of the charge incorrect, but that the Property Registration Authority ("PRA") was not entitled, as a matter of law, to register Tanager as owner of the charge, because it had taken its title from BOS before BOS was registered as owner of the charge and in circumstances where it could not be said that BOS had taken its title by any of the matters recognised in s. 90 of the 1964 Act.

The questions asked in the case stated
17. Noonan J. asked five questions for determination by this Court as follows:

> 1) does the defendant have an entitlement to challenge the registration of the plaintiff as owner of the charge at entry no. 7 on the defendant's folio in these proceedings having regard to the conclusiveness of the Register pursuant to s. 31 of the 1964 Act?
>
> 2) if the answer to the foregoing question is in the affirmative, is it open to this court to join the PRA as a notice party for the purpose of hearing further argument from it on this issue?
>
> 3) if the answer to (i) is in the affirmative, is this court entitled to have regard to the circumstances in which the plaintiff became the registered owner of the charge on the defendant's folio?
>
> 4) is it open to the defendant to argue that those circumstances amounted to a "mistake" within the meaning of s. 31 of the 1964 Act?
>
> 5) in considering the validity of the registration of the plaintiff as owner of the charge, do the provisions of s. 90 of the 1964 Act apply to the transfer of the charge by BOS to the plaintiff as the party entitled to be registered as owner of the charge?

18. Prior to determining the questions to be stated, Noonan J. granted liberty to the PRA and to BOS to apply to be joined in the proceedings as *amicus curiae* and notice parties respectively and orders to that effect were made by him on 17 January 2018. The application by the defendant to join each of Ireland, the Attorney General, and the PRA as defendants to the proceedings was refused.

The hearing of the case stated
19. Submissions were made orally and in writing by counsel on behalf of Tanager, Mr Kane, the PRA, and Bank of Scotland, the notice party.

20. The public interest in the determination of the questions raised by Noonan J. for consideration by this Court cannot be denied, and PRA records show that there were some 1,768 registrations of onward transfers of former BOSI charges where BOS was not previously registered as owner, most of which applications were made by Tanager. In that context, and in its limited role as *amicus curiae*, the PRA advocates a particular outcome in respect of one only of the questions raised in the case stated, question 5, and counsel argues that the provisions of s. 90 of the 1964 Act do permit registration of Tanager on foot of the transfer of the charge by BOS. The answer to this question is important in the context of PRA practice generally.

21. The questions raised at numbers 1 to 4 concern the nature of the system of registration of title and the conclusiveness of the Register and the question raised at number 5 deals specifically with dealings in registered charge effected before registration. The

precise question has not been answered in any previous judgment of the Superior Courts of which any of the parties is aware.

The system of registration of title

22. Before dealing with the questions raised by Noonan J., it is convenient to briefly consider the operation of the statutory system by which title to land may be registered.

23. The word "transfer", either as a verb or a noun, and its cognates are used in the 1964 Act and later legislation. Title to registered land is assured by means of an instrument of transfer or a "transfer", and the word in that context is a noun. The provisions of s. 64(1) of the 1964 Act provide the means by which the interest in a charge on registered land may pass to another person, and in that section, the word "transfer" is used as a verb, and refers to the action by which the rights under a charge pass or are assured to another person. To avoid confusion, in this judgment, except where the context requires, I will use the neutral words "pass" or "assure" and their cognates rather than "transfer" to describe the means by which title to registered land may be passed from one person to another.

24. The system of the registration of title to land was established by the Local Registration of Title (Ireland) Act 1891 ("the 1891 Act") and continued and modified in later legislation. By that Act, there were established central and local registers of title to land and the transmission of title was to occur by the means provided for in the statute. As Glover said in his seminal text *A Treatise on the Registration of Ownership of Land in Ireland* (Falconer, 1933), the purpose of the establishment of the system of registration of title to land was to avoid the "disasters" that followed when errors were made in the conveyancing of unregistered title and as the author said, the transfer of title "should be a simple matter; but it is not".

25. The establishment of the Register was intended to simplify and regulate the record of ownership and the means by which title to land could be passed. At p. 18, Glover explains that, unlike with the system that operates in unregistered conveyancing, the entries in the Register "are not registrations of documents, but of the effect of documents". What is registered is the ownership or encumbrance created by a document, and thereafter, the documents "cease to be the evidence of title, and the Register becomes the evidence of the ownership and the encumbrances on it."

26. For that reason, and deriving precisely from that distinction, the Register is, by statute, declared to be conclusive evidence of title.

27. The conclusiveness of the Register has been a cornerstone of the system of registration. Section 34 of the 1891 Act provides as follows:

> "The register shall be conclusive evidence of the title of the owner to the land as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and any such court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

28. The principle is continued in the modern legislation and the starting point is s. 31(1) of the 1964 Act:

> "The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

29. The Register is, therefore, evidence of the title of the owner of the land, and evidence of the title to any charge that is registered against that title as a burden. Section 31(1) of the 1964 Act, in particular, provides that such title shall not be in any way affected "in consequence of such owner having notice of any deed, document, or matter relating to the land".

30. The seminal modern Irish text on the practice and principles governing registered title, McAllister, *Registration of Title in Ireland* (Incorporated Council of Law Reporting for Ireland, 1973) observes that s. 31(1) of the 1964 Act establishes the Register as an "iron curtain" behind which it is neither appropriate nor necessary to penetrate. He quotes a passage from Watson L.J. in a Privy Council appeal from the Supreme Court of Victoria, Canada, in *Gibbs v. Messer* [1891] AC 248, at p. 254:

> "The object [of the registration of title] is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity."

31. McAllister also notes the "curative effect" of registration, described in Curtis and Ruoff, *The Law and Practice of Registered Conveyance* (2nd ed., Stevens & Sons, 1965):

> "Past defects of title no longer vex each successive owner after the date of first registration with absolute title because henceforth, in the case of freehold land, the proprietor is deemed to have vested in him the fee simple absolute in possession subject to the incumbrances that appear on the register or title and subject to those well-recognised incumbrances, interests, rights and powers known as overriding interests, which do not necessarily always appear on the register, but free from all other estates and interests whatsoever. These are not idle words. The whole essence of the matter is that after the date of first registration of absolute title it is neither necessary or permissible to go behind the impenetrable curtain of the register."

32. That statement of principle underlies the clear deeming words of s. 31(1) of the 1964 Act which, in its express language, makes conclusive the registered title to ownership of land and, inter alia, to charges registered against such title.

33. In his recent text *Registration of Deeds and Title in Ireland* (1st ed., Bloomsbury Professional, 2014), at para. 6.01, Deeney explains the meaning of "conclusive" in the context of s. 31(1) of the 1964 Act as follows:

> "'Conclusive' in this context means that the facts stated are to be regarded as true and that no other evidence is necessary or permitted to verify or contradict this statement."

34. Gannon J. explained the matter in Guckian v. Brennan [1981] 1 IR 478, at p. 489, as follows:

> "[…] the provisions of s. 31, sub-s. 1, of the Registration of Title Act, 1964, afford a sufficient protection of the vendor and the intending purchaser in relation to all prior transactions affecting the registered ownership as appearing on the title. The duty of ensuring that any instrument of transfer is valid and effective, so as to enable a transmission of ownership to be duly registered, falls upon the registrar at the time of the registration. Thereafter, in the absence of fraud, the register affords conclusive evidence of the validity of the title."

35. Registration is evidence of the "title of the owner to the land as appearing thereon". It is not, and was never intended to be, evidence of beneficial ownership and there can exist unregistered rights, under s. 72 of the 1964 Act, and even burdens, affecting the title registered. Such rights or burdens are not an issue in the present case stated. Rather, it is the nature and effect of the conclusiveness of the registration of ownership that is to be examined.

36. It is important to note also that the Register does not necessarily identify the ownership of a charge registered upon a folio as ownership may, but does not require to be registered in a subsidiary Register maintained pursuant to s. 8(b)(ii) of the 1964 Act and r. 186 of the Land Registration Rules 2012 to 2013 ("the Land Registration Rules"). Absent a subsidiary folio, the registration of a charge as a burden on a freehold or leasehold title is conclusive of the existence of the burden.

37. The registered owner of a charge may engage any of the remedies provided by statute which vest by virtue of registration, including the power of sale under s. 62(9) of the 1964 Act, by which title may be passed freed from puisne mortgages.

Relevant recent authorities

38. The question raised in the present case was not required to be answered by Laffoy J. in *Kavanagh v. McLaughlin*. Her judgment, however, forms the primary basis on which Mr Kane sought to raise the entitlement of Tanager to seek an order for possession against him, and he relies on the *dicta* of Laffoy J. in that judgment to argue that Tanager was wrongly registered as owner of the charge on his folio.

39. The judgment of the Supreme Court in *Kavanagh v. McLaughlin* concerned the specific question of whether a person who was not registered as owner of a charge over registered land was entitled to appoint a receiver independently of the powers conferred by the 1964 Act. It was concerned, in other words, with enforcement; as Laffoy J said, whether "having regard to the provisions of Irish law, given that the lex situs applies, BOS could enforce the securities in question without further action".

40. The Supreme Court held that the fact that BOS had not become registered as owner of the charge on the relevant folio did not prevent it exercising contractual rights including the right to appoint a receiver over the property secured by that charge, as that right derived from contract and did not depend on the exercise of any statutory power conferred by the 1964 Act only on the registered owner of a charge.

41. The judgments of Laffoy and Clarke JJ. dealt comprehensively with the effect and consequences of cross-border mergers and the correct interpretation of Art. 14 of Council Directive 2005/56/EC on Cross-Border Mergers of Limited Liability Companies ("Directive 2005/56/EC") and r. 19 of the Irish Regulations.

42. Laffoy J. dealt, *inter alia*, with the provisions of ss. 62 and 64 of the 1964 Act, which provide mandatory requirements for the exercise of statutory powers of enforcement over registered land. With regard to both s. 62(2) and 64(2) of the 1964 Act, as each provides that the instrument of transfer in itself "shall not confer" on the transferee any interest in the charge until the transferee is registered as owner of the charge, she went on to say as follows, at para. 111 of her judgment:

> "While that provision is not of relevance in this case because the transfer took effect by operation of law, it is consistent with the crucial requirement for enforcement of a charge on registered land imposed by an Act of the Oireachtas. That requirement is contained in s. 62(6) and it is that the owner of the charge be registered as such and, when registered, subs. (6) provides that the owner "shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee". Insofar as BOS has not applied to be substituted for BOSI on the relevant folios in accordance with para. 4 of Legal Office Notice No. 1 of 2011, it is BOSI which is registered on the relevant folios as the owner of the charges on registered land transferred to BOS with effect from just before midnight on the 31st December, 2010. BOS is not registered as owner of the said charges and, accordingly, in my view, BOS does not meet the requirement of s. 62(6) and cannot exercise the powers conferred by that subsection or avail of the protections afforded by s. 62(9) and (10)."

43. It was the next part of her judgment that gave rise to the arguments made by Mr Kane in the present case. Having considered the passing of title from BOSI to BOS, Laffoy J. went on to consider the effect on third parties, such as the McLaughlins, at para. 112 of her judgment. Having noted that, as regards contractual obligations, a "novation" had occurred, she said that "the special formalities required by the law of this jurisdiction to enforce the security must be complied with" in accordance with r. 19(2) of the Irish Regulations. That much is authoritatively determined and Mr Kane does not offer any credible alternative view.

44. The judgment of the Supreme Court in *Kavanagh v. McLaughlin* is clear and authoritative but does not answer the question at issue in the present case, whether BOS could pass its interest in the charge without itself becoming registered and whether it was to be treated, for the purposes of an onward sale, as a person entitled to be registered.

45. McGovern J. considered the question, but again tangentially, in his judgment in *Freeman v. Bank of Scotland plc.* [2014] IEHC 284, at para. 26, where he said the following:

> "The plaintiffs' argument depends on s. 64 and s. 90 of the Registration of Title Act 1964. But there is no requirement to execute an instrument of transfer in this case as the transfer occurred by operation of law. Section 90 of the Registration of Title Act 1964 is limited to circumstances where "by reason of an instrument of transfer" a transfer is made. As there is no such instrument of transfer, s. 90 has no application."

46. McGovern J. was not asked to, nor did he consider, whether s. 90 of the 1964 Act had the effect for which Tanager and BOS contend, that BOS is entitled to exercise the statutory power of a person entitled to be registered before it itself becomes registered. McGovern J. was answering a different question, namely whether, when the passing of title occurs by operation of law, an instrument of transfer is required. Insofar as Mr. Kane argues that the *dicta* of McGovern J. properly reflects the operation of s.90, and for the reasons that appear below I consider that the *obiter* comment is not correct.

47. In the Supreme Court, Dunne J. gave the judgment dismissing the appeal from the decision of McGovern J., *Freeman v. Bank of*

Scotland plc. [2016] IESC 14, although again the judgment did not require to consider the question raised in the present case regarding the rights to deal in a charge before registration.

48. With these principles in mind, I turn now to the questions raised in the case stated.

Question 1: May the defendant challenge the registration of Tanager?
49. The question is whether the defendant has an entitlement in the possession proceedings to challenge the registration of Tanager as owner of the charge registered on his folio having regard to the statutory provisions by which the Register is to be treated as conclusive.

50. The argument of Mr Kane is that Tanager was not entitled to be registered as owner as it did not, in turn, take the title or entitlement to be registered from a body which itself was registered, and because the 1964 Act prescribes and limits the means by which an as yet unregistered owner of a charge who has taken the interest in the charge may deal with its title pending registration.

51. This question is concerned with the procedural issue of whether, in proceedings seeking possession brought by a mortgagee, a court may or should entertain in those proceedings an argument, by way of defence or counterclaim, that the Register does not correctly reflect title to the charge or, in other words, whether the court may or should "look behind" the Register.

52. The owner of a registered charge is entitled to certain remedies, including the right to possession, as regulated by statute. These rights include the power under s.62(7) of the 1964 Act (repealed, but later restored by the Land and Conveyancing Law Reform Act 2013 ("the Act of 2013") for charges created prior to 1 December 2009), to seek summary possession:

> "When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession."

53. Section 97 of the Land and Conveyancing Law Reform Act 2009 Act ("the 2009 Act 2009") replaces s.62(7) of the 1964 Act and provides a similar mechanism for an application for possession by a mortgagee or owner of a charge (for the purposes of the Act, a "mortgagee") on registered land. Section 97(2) provides as follows:

> "A mortgagee may apply to the court for an order for possession of the mortgaged property and on such application the court may, if it thinks fit, order that possession be granted to the applicant on such terms and conditions, if any, as it thinks fit."

54. Order 5B of the Circuit Court Rules, as inserted by the Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2009, S.I. No. 264/2009, makes provision for the procedure for application by civil bill for possession grounded on affidavit. Order 5B, r. 6 of the Circuit Court Rules provides that no party shall have the right to produce evidence other than by affidavit, save by leave of the judge, where permitted in accordance with r. 7(4) or r. 8(1) of O. 5B of the Circuit Court Rules, or where the proceedings have been adjourned for plenary hearing.

55. The action for possession is envisaged as a form of summary proceeding, albeit O. 5B, r. 8(2) of the Circuit Court Rules provides the trial judge has power to direct a plenary hearing "as if the proceedings had been originated otherwise than in accordance with [O. 5B of the Circuit Court Rules]".

56. The civil bill in the present case issued on 15 January 2015 and concerned a charge registered before the repeal of s.62(7) of the 1964 Act by the 2009 Act and after the power was restored by the 2013 Act, and sought an order for possession *simpliciter* and such ancillary relief "as may arise within these proceedings." The schedule identified two affidavits to be used in support of the application. The matter ran in accordance with the Circuit Court Rules as an application for summary judgment grounded on affidavit and Mr Kane filed a replying affidavit. From the court order it appears that documentary evidence only was heard.

57. In my view, a court hearing an application for possession may not determine a challenge to the correctness or conclusiveness of the Register in these proceedings for the following reasons.

58. The provisions of s. 31(1) of the 1964 Act that make the entry on the Register conclusive evidence of title are subject to the jurisdiction of the court to direct the rectification of the Register on the ground of actual fraud or mistake.

59. McCracken J. explained the purpose of s. 31(1) of the 1964 Act in *Tomkin Estates Ltd. v. O'Callaghan* (Unreported, High Court, 16 March 1995), at p. 5 of his judgment:

> "This section provides for the conclusiveness of the register in relation to the title to the lands comprised in the folio, but of course nobody is disputing the Defendant's title to the lands in folio 77887, County Dublin. What is in dispute is the extent or boundary of those lands at the rear of No. 1 Merrion Square."

60. The principles of conclusiveness do not prevent rectification in that sense, but such rectification is not engaged in the action for possession. The first observation to be made with regard to the power of rectification is that the jurisdiction is limited to rectification in the case of actual fraud or mistake, and s. 31(1) of the 1964 Act expressly excludes from the power of rectification any argument that might derive from the knowledge of the registered owner of any "deed, document, or matter relating to the land". The purpose of that restrictive power is to remove from registered title the vexed question of express or implied notice of any equities that might affect the ownership of land, precisely the type of issue that made and continues to make the conveyancing of unregistered land complex and, at times, uncertain.

61. The nature of this equitable jurisdiction to rectify was considered by Holmes L.J. in the old Irish Court of Appeal in *In re Patrick Leonard's Estate* [1912] 1 IR 212, at p. 226, where he described the intention of the broadly similar provisions in the 1891 Act as "[…] to preserve the jurisdiction of the Chancery Courts to set aside or reform an instrument upon the grounds that it was entered into by what is known as fraud or mistake in equity." The jurisdiction to rectify is exercisable in an *inter partes* action grounded on alleged mistake or fraud, and not in a summary action on affidavit.

62. Tanager argues that, as Mr Kane is a third party to the transfer from BOSI to BOS, he has no standing to challenge the Register, as the challenge would be confined to a challenge of either Tanager or BOS on account of a fraud or mistake in the transaction or

instrument on foot of which Tanager became registered, and I agree. The argument could not be raised in the action between Tanager and Mr. Kane.

63. Allied to this is the other jurisdiction of the court to correct an error that occurred in registration of an instrument or transaction, explained by Madden J. in *In re Walsh* [1916] 1 IR 40, at p. 47, where such is necessary "to bring the register into conformity" with the instrument or transaction which is the subject of registration.

64. This statutory power to rectify is contained in s. 32 of the 1964 Act, as substituted by s. 55 of the Registration of Deeds and Title Act 2006 (12/2006), S.I. No. 511 of 2006, and provides for the correction of errors "originating in the Land Registry" as follows:

> "(1) Where any error originating in the Land Registry (whether of misstatement, misdescription, omission or otherwise, and whether in a register or registry map) occurs in registration —
>
> (a) the Authority may, with the consent of the registered owner of the land and of such other persons as may appear to be interested, rectify the error upon such terms as may be agreed to in writing by the parties,
>
> (b) the Authority may, if of opinion that the error can be rectified without loss to any person, rectify the error after giving such notices as may be prescribed,
>
> (c) the court, if of opinion that the error can be rectified without injustice to any person, may order the error to be rectified upon such terms as to costs or otherwise as it thinks just."

65. Murray J. reviewed the authorities concerning the limited power of the court to rectify the Register in *In re Skelton* [1976] NI 132, at p.144:

> "(a) that the court's jurisdiction to rectify an error under section 34 (2) is only exercisable against a person who was a party to the instrument or transaction in relation to which the application to rectify the register is made, or who is a voluntary transferee from such party: *In re Michael Walsh* [1916] 1 I.R. 40 and section 36 (1) of the 1891 Act;
>
> (b) that the jurisdiction is exercisable notwithstanding that the proposed rectification will cause loss or damage if the loss or damage will be caused *only* to such a party or transferee".

66. Rule 7 of the Land Registration Rules provides the mechanism for such applications. Application is brought by originating notice of motion under O. 96 of the Rules of the Superior Courts ("RSC"). None such has been commenced in the present case, and indeed, Mr Kane's argument is not that an error of the type envisaged in s.32(1) has occurred, but rather, that the registration of Tanager as owner of the charge was wrongly made, not on account of an error of interpretation of any instrument lodged for registration, but arising from an error in the interpretation of s. 90 of the 1964 Act by which the PRA permitted Tanager to become registered on an instrument of transfer under Land Registry Form 56, executed on 14 April 2014. Section 32 of the 1964 Act cannot, therefore, provide an answer to this question.

67. A plaintiff seeking an order for possession must adduce proof, *inter alia*, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification.

68. The challenge to registration is brought by other types of proceedings *inter partes*, or where the PRA is respondent, and in the manner I have described.

69. I agree with the observations of Noonan J. where he recognised the limitations of the summary procedure, at para. 21 of his judgment:

> "Needless to say, an order for rectification could not be made within the scope of the present proceedings which are brought pursuant to s. 62(7) of the 1964 Act for possession in a summary manner and certainly not in the absence of the PRA as a party. I note that in the course of the hearing of the appeal, the defendant indicated to the court that he intends bringing or has brought such proceedings."

70. The answer to the first question raised in the case stated must be that the Circuit Court judge hearing an application for recovery of possession by the owner of a legal charge on foot of a civil bill for possession is to hear the proceedings in a summary manner in which evidence is adduced by affidavit. The judge may adjourn the proceedings to plenary hearing, but what is remitted or adjourned to plenary hearing is the claim for possession and not a claim by a defendant to challenge the title to the charge.

71. The answer to the first question must be in the negative, but the question, to some extent, overlaps with question 2, to which I now turn.

Question 2: Joinder of PRA to the proceedings

72. PRA was joined as *amicus curiae* in the case stated, but the question raised by Noonan J. is whether a court may join the PRA as a notice party to the proceedings for possession for the purpose of hearing further argument on the questions raised by Mr Kane. The question raised by Noonan J., therefore, is a procedural question as to whether the court has jurisdiction, in proceedings for possession, to join the PRA. Noonan J. clearly did have jurisdiction to join the PRA to the hearing of the case stated to assist in the clarification of the issues to be stated, and he was correct to do so.

73. The answer to this question may illuminate the question raised and answer given at question 1, and for that reason I propose answering it notwithstanding the formulation of this question as arsing only if the answer to question 1 was in the affirmative.

74. It is clear that, under s. 31 of the 1964 Act, the conclusiveness of the Register is not absolute and a court of competent jurisdiction may direct the rectification of the Register in such manner and on such terms as it thinks just, based on the ground of "actual fraud or mistake". Section 32 of the 1964 Act, in addition, provides for the rectification of any errors in registration originating in the Land Registry, and the PRA has a broad power to rectify the Register by agreement, or if it is satisfied that the error can be rectified without loss to any person.

75. In essence, then, the Register remains conclusive, notwithstanding the power of both the PRA or the court, as the case may be, to rectify the Register to correctly reflect the title of the registered owner.

76. Proceedings for an order that the Register be rectified by the court under s. 31 of the 1964 Act will usually be *inter partes* proceedings between the person who claims an entitlement to be registered and the person actually registered. Where rectification is sought under s. 31 of the Act of 1964, it does not appear to me to be necessary or appropriate that the PRA be joined as a party. The position under s. 32 of the 1964 Act is different and as rectification is sought on the basis of an alleged error originating in the Land Registry, the PRA would clearly be a party to the proceedings in order that it be bound by any finding of error on its part and because such finding may, in turn, lead to a claim for compensation against the PRA arising from the making of the error. Indeed, Mr Kane has instituted proceedings in the High Court seeking rectification of the Register in which the PRA is named as a party.

77. Mr Kane argues that the answer to question 2 must bear in mind what Noonan J. described as the "unprecedented" process which resulted in BOS becoming entitled as owner of the charge and the fact that, as he noted, Mr Kane had no right to participate in that process. At para. 20 of his judgment, Noonan J. said the following:

> "To that extent, this might be seen as giving rise to a potential unfairness in the plaintiff now being precluded from raising that issue by s. 31, if indeed that is its effect, in proceedings where his family home is at stake."

78. Mr Kane relies on this observation of Noonan J. as amounting to a finding that the registration of BOS under the Irish Regulations did, in fact, amount to an unfairness to Mr Kane. In my view, this is not a correct characterisation of the observation of Noonan J., who was reciting the argument of Mr Kane and not, at that point in the proceedings, taking a view as to the correctness of his argument.

79. Mr Kane relies on his constitutional rights to be heard in any proceedings or process by which he could be impacted, especially when what may be at stake are rights in property, but the question posed at number 2 in the case stated has a narrower focus than that for which Mr Kane contends. The provisions of ss. 31 and 32 of the 1964 Act permit a court in a suitable case to direct the rectification of the Register on the statutory grounds of fraud or mistake or error originating in the Land Registry. In such proceedings, the persons entitled or claiming to be entitled to the land have every right to be heard, and as I have said above, the proceedings will, in essence, be between those parties. In proceedings under s. 32 of the 1964 Act, the PRA is a necessary party. But the question for this Court is whether the PRA may be joined to the proceedings in which possession is claimed and the answer must be in the negative.

80. The court hearing the claim for possession may stay or adjourn the proceedings under its statutory and general inherent jurisdiction, but the court does not, for that purpose, reconstitute the proceedings so that the PRA becomes a party to what is, in essence, a claim on foot of the statutory right of the registered holder of a charge to seek possession, and in those proceedings the court is concerned with ascertaining whether the statutory proofs of registration and default is met, not whether the charge is wrongly entered on the relevant folio.

81. The answer to question 2 is, therefore, in the negative.

Question 3: Is the court entitled to the have regard to the circumstances in which the plaintiff became the registered owner of the charge?
82. Having regard to questions 1 and 2, this question does not arise.

Question 4: Can the defendant argue there was a "s. 31 mistake"?
83. Again, this is a procedural question which asks whether the defendant in these proceedings may argue that the registration of Tanager as owner of the charge is a "mistake" within the meaning of s. 31 of the 1964 Act. The answers to questions number 1 and 2 above provide part of the answer to this question.

84. Insofar as the question may be formulated as asking whether, in the present proceedings, the court must have regard to the circumstances in which the plaintiff became registered owner of the charge, the answer must be in the negative. The civil bill for possession is one brought by a person or body who claims as registered owner of the charge, and the conclusiveness of the Register means, for the purposes of those proceedings at least, that the court may not hear argument that the registration was wrongly made. The court, in other words, may not, in possession proceedings, "look behind" the Register.

85. The ascertainment of what might be called the "true beneficial interest" in a registered title is a matter that may be determined only in equity proceedings brought in accordance with the relevant procedural rules of the Circuit Court or the High Court, as the case may be.

86. The answer to this question is in the negative.

87. But I consider that, in addition to the statutory power under s.101(1) of the 2009 Act, as amended, the court hearing the proceedings for possession must be considered to have the inherent jurisdiction, in a suitable case, to adjourn the proceedings or stay the enforcement or implementation of an order for possession, or to postpone the date of delivery of possession, pending the determination of rectification proceedings, if it considered that those proceedings are reasonably likely to offer a defence to the claim for possession.

88. Whether the Circuit Court or the High Court on appeal should postpone the granting of relief pending an application for the rectification of the Register of Mr Kane's proceedings will depend, to a large extent, on the answer to question number 5, to which I now turn.

Question 5: The entitlement of Tanager to be registered as owner
89. Tanager, the PRA, and BOS, each for broadly similar reasons, contend that the answer to this question should be in the affirmative. Mr Kane argues that the registration was done in error and that the PRA wrongly applied the provisions of s. 90 of the 1964 Act.

90. Tanager applied to be registered as owner on foot of its application under Instrument D2014LR042896W. It had acquired for value the interest of BOS and became registered in circumstances where BOSI, and not BOS, was registered as owner of the charge. BOS had sold its rights under that charge, and the answer to this question concerns the means by which title to a charge may be assured, or, to put it another way, the entitlement of BOS to transfer its title to Tanager.

91. As a result of the judgment of Laffoy J. in *Kavanagh v. McLaughlin*, there can be "no doubt", as she said, that BOS had an entitlement to be registered as owner of the charges it acquired from BOSI. Mr Kane does not argue that BOS is not entitled to be registered, nor that Tanager could not, in due course, have become registered, but rather, that the means by which registration was done failed to respect the statutory provisions. In essence, Mr Kane says that a step was missed, or bypassed, and that BOS ought to have become registered before it, in turn, could avail of the statutory power to pass title.

92. Mr Kane argues that the *dictum* of Laffoy J., which he accepts was *obiter*, in *Kavanagh v. McLaughlin*, correctly identifies the legal position that, in order, as he puts it, "to make a lawful transfer from one legal entity to the other, it must be entered on the property folio first" in accordance with the requirements of s. 90 of the 1964 Act and r. 19(2) of the Irish Regulations.

93. The question requires consideration of the provisions of ss. 64 and 90 of the 1964 Act, as amended.

Section 64 of the 1964 Act: Transfer of charge by registered owner
94. Section 64 creates the means by which title to a charge is to be passed or assured by the registered owner thereof:

> "(1) The registered owner of a charge may transfer the charge to another person as owner thereof, and the transferee shall be registered as owner of the charge.
>
> (2) There shall be executed on the transfer of a charge an instrument of transfer in the prescribed form, but until the transferee is registered as owner of the charge, that instrument shall not confer on the transferee any interest in the charge."

95. The balance of s. 64 provides for the rights which are conferred following registration and do not fall for consideration here.

96. As is apparent from its express language, subs. (1) of s. 64 identifies the means by which the registered owner of a charge may pass title to that charge. Subsection (2) provides the means by which the assurances are to be effected, and the relevant forms are prescribed by statute.

97. Subsection (2) of s. 64 expressly provides that, until the transferee (the person to whom the title is passed) is registered as owner, the instrument does not confer in the transferee any interest in the charge. It is registration that confers that interest. This provision is central to the operation of the principle of the conclusiveness of the Register, and while the instrument of transfer may, as between the parties, effect the passing of an interest, the instrument does not assure the title to the registered right, which is only perfected on registration.

98. There could therefore, in certain circumstances, be a *lacuna* between the passing of the interest in a registered charge and the conferring by the instrument of transfer of that interest on the person to whom the interest has passed, whether for value or otherwise.

Section 90 of the 1964 Act: Dealing before registration
99. Section 90 fills what would otherwise be a *lacuna* in the registration process and entitles a person to whom that section applies to deal with his or her interest in the charge before the registration process is completed. Section 64 taken alone, and because it expressly provides that the transferee does not take any interest in the charge until the instrument by which the charge is assured is registered, would create a limitation in the manner by which a person entitled to be registered could deal with his or her interest. This taken alone would contain a significant limitation in the power of the owner to deal with land or a charge. Section 90 allows, in some circumstances, dealings in the land or charge before registration has been completed and provides the means by which this may be done, so that the dealing can be recognised in the registration of ownership.

100. Section 90, in its relevant provisions, states as follows:

> "(1) This section applies to a person —
>
> (a) on whom the right to be registered as owner of registered land *or a registered charge* has devolved by reason of the death of the owner *or the defeasance* of the owner' s estate or interest or by reason of a transfer made in accordance with this Act or under a lease, and
>
> (b) who, before being registered as such owner, wishes to take any of the following actions in relation to the land or charge:
>
> (i) in the case of registered land
>
> (I) transferring or charging it or any part of it,
>
> (II) – (V) […]
>
> or
>
> (ii) *in the case of a registered charge* —
>
> (I) *transferring* or charging it, […]".
>
> (2) A person to whom this section applies may take any of the actions mentioned in subsection (1) in the like manner and with the same effect as if the person were the registered owner at the date of the action concerned, but subject to any burdens or rights affecting the person ' s interest which would have been entered on the register if the person had become the registered owner and subject also to the provisions of this Act with regard to registered dealings for valuable consideration" (Emphasis added).

101. Section 90 does not, in its terms, have the effect of setting at naught the express statutory provisions in s. 64(2) by which title to the interest in the charge does not pass until the instrument is registered, but rather, permits a dealing with the rights in the charge prior to registration.

102. It should be noted that s. 90 does not entitle the person not yet registered as owner of a charge to avail of any of the statutory rights available to a registered owner of a charge such as the right to seek possession or to overreach *puisne* rights. The powers conferred by s. 62 subs. (2), (6), (7), (9) and (10) of the 1964 Act are statutory powers that may be exercised by the registered owner of a charge, and not by a person entitled to be registered. Thus, the powers under s. 62(6) vested in the registered owner of a charge for the purpose of enforcing the charge including the power of sale may be exercised only by the registered owner. Similarly, the power under s. 62(10) of the registered owner of a charge to sell free from all "estates, interests, burdens and entries *puisne* to the charge" is also one that may be exercised only by a registered owner.

103. Section 90 is not concerned with those rights. It is concerned, rather, with the question of how, by whom, and when the interest in a charge may be assured or passed to another.

To whom does s. 90 of the 1964 Act apply?
104. Section 90 applies to three classes of persons entitled to be registered as owners of lands or of a charge, as follows:

> (a) a person to whom the right has devolved by reason of the death of the owner;
>
> (b) a person on whom the right to be registered has devolved on the defeasance of the owner's estate or interest;
>
> (c) a person on whom the right to be registered as owner has arisen by reason of a transfer made in accordance with this Act or under a lease.

105. On the plain reading of s. 90(1)(b)(ii), in the case of a registered charge, the person to whom the section applies may pass an interest in ("transfer") the charge. Section 90(2) provides, in its plain terms, that any person to whom the section applies may take such action including, for the purposes of the present case stated, the action of assuring or passing the interest in the charge in like manner and with the same effect as if that person was registered as owner of the charge. This is a statutory exception which recognises certain rights which can exist before registration.

106. The PRA, BOS, and Tanager, in broadly similar terms, argue that the entitlement of BOS to be registered as owner of the charge arises by a defeasance of the owner's estate. There is no definition in s.90 of "defeasance", but this can be found in s.60 of the 1964 Act which, *inter alia*, identifies a number of means by which title to registered land can pass other than by instrument of transfer.

Section 60 of the 1964 Act: "Defeasance"
107. Section 60 of the 1964 Act contains the definition of "defeasance" as follows:

> "(1) In case of the defeasance of the estate or interest of a registered owner of land, that is to say, where—
>
> (a) under a power of sale conferred by a mortgage effected before the first registration of the land, or
>
> (b) under a deed poll executed in pursuance of the Lands Clauses Acts or in pursuance of any statutory provision to the same effect, or
>
> (c) under a sale in execution of any judgment or order of a court, or
>
> (d) under a power of appointment, or
>
> (e) under a vesting order, or
>
> (f) *under any enactment*, or
>
> (g) in any other case not provided for by this Act, and which may be prescribed,
>
> the ownership of the land passes to another person otherwise than by transfer from the registered owner or from his personal representatives, then, subject to general rules, the Authority shall, on the application of that person and on production of the prescribed evidence, register him as owner of the land "(Emphasis added).

108. The purpose of s. 60 is to recognise that, when ownership of land may pass to another person other than by transfer from the registered owner or his personal representative, the PRA is required, on production of evidence of the happening of one of the events contained in s. 60(1)(a) to (g), to register the person as owner of the land, to register BOS, on the production of the "prescribed evidence", as owner of the charge. What amounts to "prescribed evidence" is contained in r. 75 of the Land Registration Rules.

109. For present purposes, "land" includes the interest in a charge as is apparent from s. 66 of the 1964 Act, which expressly provides for the application with any proscribed modification of the legislative provisions concerning defeasance of an estate or interest of the registered owner:

> "The provisions of this Act with respect to the transmission of registered land and the defeasance of the estate or interest of the registered owner shall apply, with the prescribed modifications, to transmissions and defeasances in the case of registered charges on land."

110. Tanager, BOS, and PRA argue that BOS is to be treated as having become entitled by defeasance *under an enactment* to the interest of BOSI in the registered charge pursuant to s. 60(1)(f) of the 1964 Act, and therefore, had the rights contained in s.90(1) of the 1964 Act to make title without itself becoming registered.

111. The question, then, is whether BOS became entitled by an "enactment" to the estate or interest of the registered owner.

The meaning of "enactment" in s. 60(1)(f) of the 1964 Act
112. There is no express definition of the word "enactment" in the 1964 Act and the question for determination in the present case is whether the Irish Regulations can properly be described as an "enactment" for the purposes of that statutory provision. As counsel for the PRA illustrated, in all legislation passed since the enactment of the European Communities Act 1972 ("the European Communities Act"), the definition of "enactment" includes statutory instruments. The examples given include s. 2 of the Health Act 2004, s. 2 of the Freedom of Information Act 1997 and s. 2 of the Court of Appeal Act 2014. But there is nothing express within the

1964 Act that assists in the interpretation of the word "enactment" in that Act.

113. The Interpretation Act 2005 does contain a definition of the word "enactment" in s. 2(1), but while it does include within the term all statutory instruments, the definition is for the purposes of that Act, and not for the general purposes of statutory interpretation.

114. The Irish Regulations were made under Directive 2005/65/EC. Insofar as the UK Regulations are relevant to the passing of title, those too were made under Directive 2005/65/EC. Accordingly, counsel for the PRA argues that, as s. 4(1)(a) of the European Communities Act, as amended, provides that "Regulations under this Act shall have statutory effect", the Regulations must be treated as having "statutory effect".

115. Counsel for the PRA submits that the proper construction of the word "enactment" for the purposes of the 1964 Act inescapably, therefore, leads to a conclusion that, at least in the case of a statutory instrument made under the European Communities Act, an "enactment" must be read as including a statutory instrument.

116. Counsel also relies on the general proposition that, in the interpretation of any Act of the Oireachtas, a court must "make allowances for any changes in the law" in construing the meaning of words used in an Act, as provided in s. 6 of the Interpretation Act 2005:

> "In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit."

117. I find that argument compelling and consider that the European Communities Act created a "material change in the law" in regard, at least, to regulations made under EU provisions.

118. I am also persuaded by the argument of counsel for BOS which made reference, *inter alia*, to the decision of the CJEU in *Marleasing SA v. La Comercial Internacional de Alimentacion* SA ECLI:EU:C:1990:395 and the decision of the High Court in *Eircom Ltd. v. Commission for Communications Regulation* [2006] IEHC 138, [2007] 1 IR 1, that in interpreting a provision in national law derived from EU law, the interpretation must ensure consistency with EU law, and as stated by McKechnie J. in *Eircom Ltd v. Commission for Communications Regulation*, at para. 35:

> "National courts are required to have regard to the purpose of the directive so as to ensure that its objectives are fully effective within the national system, if that is interpretively achievable."

119. I am less persuaded by the argument made by Tanager that the term "defeasance" in s. 60 of the 1964 Act must be taken as intending to refer to any and all circumstances where the interest of a party is lost other than by voluntary act of the owner. The difficulty with that analysis is that the express terms of s. 60 seems, in its plain meaning and because the list is preceded by the phrase "that is to say", to intend the list that follows thereafter to be exhaustive. Because of the view that I take that the argument from EU law is compelling, it is not necessary for me to decide whether, in a suitable case, a court might take the view that a defeasance might occur in all circumstances where title passes by operation of law.

120. Thus, the argument from statutory interpretation does, in my view, mean that BOS became entitled by defeasance under an enactment to the interest of BOSI under the charge, and accordingly, it is entitled to deal with the charge by virtue of s. 90 of the 1964 Act. The PRA was, therefore, entitled to register a transferee from BOS as owner of the charge without first requiring that BOS be registered as owner.

121. But Mr Kane also argues that the provisions of r 19(1) of the Irish Regulations preclude such a construction, and I turn now to examine this proposition.

Regulation 19(1) of the Cross-Border Mergers Regulations 2008

122. Mr Kane argues that the PRA unlawfully relaxed the requirements of its own Regulations and failed to have regard to the express provisions of r. 19(1) of the Irish Regulations which provides as follows:

> "The successor company shall comply with filing requirements and any other special formalities required by law (including the law of another EEA State) (for the transfer of the assets and liabilities of the transfer companies to be effective in relation to other persons)."

123. Laffoy J. expressly noted that provision in her judgment in *Kavanagh v. McLaughlin* as did Clarke J. at para. 6.7 of his.

124. Mr Kane argues that "special formalities" as is defined in r. 19(2) of the Irish Regulations does require that BOS become registered as owner of the BOSI charge before it proceeded to pass its title to Tanager:

> "Where, in the case of a cross-border merger of companies covered by this Directive, the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies become effective against their third parties, these formalities shall be carried out by the company resulting in the cross-border merger."

125. Mr Kane argues that, while the decision of the Supreme Court in *Kavanagh v. McLaughlin* is clear with regard to the passing of the contractual rights of BOSI to BOS, and even, perhaps, the right of BOS to pass those contractual rights to Tanager, the decision in *Kavanagh v. McLaughlin* is "specific to contract only", and that "special formalities" within the meaning of r. 19(2) were required to be taken before Tanager could be registered as owner, i.e., that BOS had to apply for registration, and be registered, before it could pass its rights to be registered, or more especially, before the PRA could register Tanager.

126. Counsel for Tanager, and in a different way counsel for the PRA, argues that r. 19(2) does not impose any mandatory requirement on BOS that it be registered as owner of the charge before it could transfer its rights to Tanager. That proposition is correct and is perfectly consistent with s. 90 of the 1964 Act, but it is r. 19(1) that is the focus of Mr Kane's argument, viz. that, on the plain reading of r. 19(1), the charge shall not be effective against him unless the filing requirements and any other "special formalities required by law" are satisfied.

127. Those persons to whom s. 90 of the 1964 Act applies are not obliged to complete the formalities of registration before dealing in the charge. But the purchaser from BOS did require to register to take the proceedings for possession under the statutory power.

128. It is useful to set out the sequence of events:

129. On 31 December 2010 all the assets and liabilities of BOSI were transferred to BOS, and these included the title of BOSI to the charge, and amounted to a passing of the title from BOSI to BOS "under an enactment".

130. BOS, therefore, became a person on whom the right to be registered as owner of the charge devolved by defeasance under s. 90(1)(a) of the 1964 Act. The interest to BOS being clear, therefore, BOS was entitled to avail of the procedural powers conferred by s. 90(2) of the 1964 Act, and this includes the right to transfer the relevant charge: the combined effect of ss. 90(2) and 90(1)(b)(ii)(I) of the 1964 Act.

131. Therefore, the deed of 14 April 2014 from BOS to Tanager is effective as a matter of statute and must be treated as being an assurance permitted by s. 90 of the 1964 Act, and which the PRA was entitled to register.

132. But Tanager, having taken its title by transfer from a person entitled to be registered, was obliged to register and, by s.64(2) of the 1964 Act, Tanager did not acquire the interest in the charge until registration.

133. I reject the argument of Mr Kane that "special formalities" or "filing requirements" were required as a matter of law under r. 19(2) of the Irish Regulations for the passing of title from BOSI to BOS. Mr Kane's argument fails in that it does not have regard to the fact that, as a matter of statute, BOS was entitled to avail of s. 90(2) of the 1964 Act and to act in all manner as a person entitled to be registered as owner of the charge. Tanager did require to register, and Tanager did apply for registration on 25 April 2014, and duly became registered. The charge is registered and is "effective in relation to other persons", including Mr Kane.

134. The PRA was entitled to accept for registration the deed of transfer to Tanager from BOS, and to register Tanager as owner of the charge. Notwithstanding the complexity of the statutory provisions which led to the passing of title from BOSI to BOS, the process is no different from the registration as owner of a person which had taken title either to land or to a charge from a person entitled to be registered but not yet registered as owner of such land or charge.

135. For completeness, I reject the argument of Mr Kane that he was entitled to be consulted before Tanager became registered as owner of the charge. Tanager took the interest in the charge, and no new charge or charging instrument was created. Mr Kane's rights as registered owner of the folio and as mortgagor are not changed. The creation of a new charge or of a new or different burden on the folio would, of its nature, require not merely the consent of Mr Kane but also his active engagement having regard to the means by which a charge is created under the 1964 Act and the Land Registration Rules, viz by execution of an instrument of charge. No charge was created by the registration of Tanager nor by the passing of the interest of BOSI to BOS by operation of law.

136. For all of the above reasons the answer to this question must be in the affirmative.

Conclusion

137. I propose answering the question posed as follows:

> 1. does the defendant have an entitlement to challenge the registration of the plaintiff as owner of the charge at entry no. 7 on the defendant's folio in these proceedings having regard to the conclusiveness of the Register pursuant to s. 31 of the 1964 Act? NO;
>
> 2. if the answer to the foregoing question is in the affirmative, is it open to this court to join the PRA as a notice party for the purpose of hearing further argument from it on this issue? NO;
>
> 3. if the answer to (i) is in the affirmative, is this court entitled to have regard to the circumstances in which the plaintiff became the registered owner of the charge on the defendant's folio? DOES NOT ARISE;
>
> 4. is it open to the defendant to argue that those circumstances amounted to a "mistake" within the meaning of s. 31 of the 1964 Act? NO;
>
> 5. in considering the validity of the registration of the plaintiff as owner of the charge, do the provisions of s. 90 of the 1964 Act apply to the transfer of the charge by BOS to the plaintiff as the party entitled to be registered as owner of the charge? YES.