

KAVANAGH

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IN THE MATTER OF THE TRUSTEE ACT, 1893

JOHN KAVANAGH AND BARBARA CANTWELL

Applicants

JUDGMENT OF Mr. Justice Costello delivered the 23rd day of
November 1984

Trustee Act, 1893, section 26. Mortgagee company entitled to fee simple of mortgaged property. Liquidator of mortgagee company agrees to transfer mortgage debt and mortgaged property to purchasing company. Failure to transfer the mortgaged property prior to dissolution of mortgagee company but transfer of mortgage debt effected. No claim to the fee simple by the State as bona vacantia. Vesting order made under section 26 vesting the legal estate in a purchaser from the original mortgagor, the mortgage debt having been discharged.

This is an application to appoint new trustees under section 25 of the Trustee Act, 1893 and to make a consequential vesting order under section 26, or, alternatively, for an order vesting directly in the applicants the property referred to in these proceedings. Clearly, the applicants' are entitled to relief under the Act; the only question is the form of order which should be made. I can outline briefly the unfortunate set of circumstances which has given rise to these proceedings (and no doubt caused the applicants some not inconsiderable financial loss). They are as follows.

Mr. and Mrs. George Silk mortgaged their fee simple interest in a dwellinghouse at 24, Sharavogue, Glenageary, County Dublin, to a company called Moore Paragon Ireland Ltd. as security for a loan of £45,000. On the 2nd March, 1983 the company went into voluntary liquidation. Its liquidator agreed to transfer the mortgage property and the right to sue for the mortgage debt to another company called Moore Business Forms Ltd. in consideration for the sum of £42,875. This sum was duly paid on or about the 2nd June 1983 but by an extraordinary piece of inadvertence the mortgage debt only, but not the mortgaged property, was transferred to the purchasing company. It is quite clear that certainly from that date Moore Paragon Ireland Ltd. held the legal estate in the fee simple of the property in trust for Moore Business Forms Ltd. Its Liquidation having been completed Moore Paragon Ireland Ltd. was dissolved pursuant to section 263 of the Companies Act, 1963 on the 28th October, 1983 without having divested itself of its fee simple interest.

The error that had occurred did not come to light until recently after Mr. and Mrs. Silk had agreed to sell their dwellinghouse to the applicants by a contract of the 6th July, 1984. Paragraph (G) of the Special Conditions of this contract provided that:-

"The purchaser shall not be entitled to delay the closing of the sale herein by reason of the fact that the Mortgage

by the Vendors in favour of Moore Paragan (sic) Ireland Ltd. on security of the premises in sale has been discharged (sic) but shall accept on (sic) undertaking from the Vendors' Solicitors (a) to discharge the amount necessary to redeem the Mortgage and (b) to hand over a duly executed Release of the Mortgage as soon as same comes to hand."

On or about the 20th July, 1984 the applicants paid £56,000 to Mr. and Mrs. Silk who by a conveyance of that date purported to convey to them the fee simple interest in the premises. Mr. and Mrs. Silk, of course, did not have the fee simple interest at that time; their estate was an equitable one. By an Indenture of the 20th September, 1984 and in consideration of the payment by Mr. and Mrs. Silk of all the monies due under the mortgage Moore Business Forms Ltd. purported to release and convey to Mr. and Mrs. Silk the legal estate in the fee simple in the premises which, unfortunately, they did not possess. I have no doubt that the result of these developments is that firstly the Silks and then the applicants became entitled to the beneficial interest (previously enjoyed by Moore Business Forms Ltd.) in the trust to which I have referred.

Obviously, the dissolution of Moore Paragon Ireland Ltd. raised the question whether the outstanding legal estate vested in the State as bona vacantia, but the Attorney General has written on the 19th November, 1984 stating that the State does not claim it. On this basis I can then proceed to consider sections 25 and 26 of the Trustee Act, 1893.

This Court, whenever it is expedient to appoint a new trustee, and if it is found impracticable to do so without its assistance, may make an order for the appointment of a new trustee under section 25 of the Trustee Act, 1893. In re No. 9 Bromore Road (1906 1 Ch. 359) was a case in which a company entitled to a leasehold interest in premises went into liquidation. Its liquidator agreed to transfer all its assets to a new company which duly went into possession.

Inadvertently the leasehold interest was never assigned to the new company prior to the dissolution of the old company. The Court appointed trustees under section 25 and made a consequential vesting order holding that the property was vested in the new company in equity with the legal estate outstanding and that it was impossible to get the estate vested where it ought to be - namely in the purchaser - except by exercising its section 25 powers.

But the Court has additional powers under section 26 of the Act. Where a trustee entitled to any land "cannot be found" (subsection (ii) (c) the Court may make a vesting order vesting the land in "any such person in any such manner and for any estate as the Court may direct". In a case very similar to the present one (In re General Accident Assurance Corporation Ltd. (1904 1 Ch. 147) a company went into voluntary liquidation and sold its property to a new company. The Liquidator received the purchase price for the company's assets but by inadvertence no deed transferring a mortgage of the 13th April, 1899 was executed prior to the company's dissolution. The purchasing company applied to the Crown inquiring whether the Crown would execute an assignment of the outstanding legal estate as "bona vacantia" but were informed that the Crown was not able to admit that that legal estate was vested in the Crown. The purchasing Company then petitioned the Court under the subsection of the section 26 to which I have referred and the Court made an order vesting in that company not only the right to sue for and recover the mortgage debt but also the leasehold premises comprised in the mortgage of April 13th, 1899 for such estate and interest as vested in the corporation at the date of its dissolution on the basis that this was a case in which the trustee could not be found.

But judicial opinion in England is not unanimous on the interpretation of section 26. In In re Taylors Agreement Trusts

(1904) 2 Ch. 737) Buckley, J. declined to follow the decision of Farwell, J. but Farwell, J. (In In re Bernard Mills and Co. Ltd. 1905 W.N. 36) in another case in which a trustee company was dissolved without having transferred a legal estate again made a vesting order under section 26 pointing out:-

"With great respect to Buckley, J. I do not think the difficulty exists that he raises, on the section. If you know where a trustee is, you can locate him. If you do not know where he is then whether it is an individual or a company that has been dissolved, it is the case of trustee "who cannot be found". There will be an order vesting in the purchaser the freeholds" (p. 37).

I find myself in agreement with this interpretation of the section. It seems to me that in the circumstances which I am considering it can properly be said that this is a case in which the trustees cannot be found within the meaning of the section so that the Court can vest the property directly in the purchasers, the present applicants, and I propose to do so.

I think, then, that I should declare that Moore Paragon Ireland Ltd. was at and immediately before the date of its dissolution possessed of an estate in fee simple in the premises the subject matter of these proceedings as trustees for Moore Business Forms Ltd. upon a trust within the meaning of the Trustee Act, 1893; that in the events that have happened the applicants are now entitled to the beneficial interest under the said trust; that the Attorney General having stated that no claim to the said premises is being made by the State, the trustees of the said trust cannot now be found. I will then order, pursuant to section 26 of the Act, that the fee simple or other the estate or interest vested in Moore Paragon Ireland Ltd. at the date of its dissolution do vest in the applicants.

Approved

J.L.

11-2-95