

LYNCH v. Bradley

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THE HIGH COURT

Record No. 1979 No. 2980P

BETWEEN:

EDWARD LYNCH

PLAINTIFF

AND

NICHOLAS BRADLEY AND MARY

JOSEPHINE KIRBY

DEFENDANTS

Judgment of Mr. Justice Barrington delivered the 22nd day of August 1984.

The plaintiff is a mechanical fitter and is the occupier of premises known as 33 Somerton Park, Ballinlough in the City of Cork. The plaintiff claims to hold these premises as a weekly tenant and as successor in title to one Edward Lynch to whom the premises were let by memorandum of agreement dated the 17th day of July 1968 and made between the Lee Utility Society Limited of the one part and the said Edward Lynch of the other part.

The first named defendant Nicholas Bradley claims to be entitled to the interest of the landlord in the said tenancy agreement as successor in title to the said Lee Utility Society Limited. In pursuance of such claim the first named defendant by notice dated the

21st October 1977 purported to raise the plaintiff's rent, and, when the plaintiff refused to pay the increased rent, by notice to quit dated the 1st March 1978, purported to terminate the plaintiff's tenancy.

The first named defendant subsequently instituted ejectment proceedings in the Cork Circuit Court against the plaintiff in these proceedings and succeeded in recovering a decree for possession against him (see Southern Circuit, County of Cork, Record No. P41/1978 Nicholas Bradley, plaintiff and Edward Lynch, defendant). The plaintiff in these proceedings appealed to the High Court against the order for possession, and the appeal in the ejectment proceedings has been adjourned, on terms, pending determination of the matters at issue in these proceedings.

BACKGROUND AND PLEADINGS

The plaintiff in these proceedings claims that the first named defendant in these proceedings has no title to the premises.

The premises number 33 Somerton Park were constructed by the said Lee Utility Society Limited, and let by that Society, pursuant to and under the provisions of a scheme provided for by section 20 of the Housing (Amendment) Act 1948 and the Regulations made thereunder

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including, in particular, Statutory Instrument No. 90 of 1948. The said Society received a grant of £250 from the Minister for Local Government towards the cost of building the said house. In return for the said grant the said Society gave to the Minister an undertaking pursuant to the said Act and Regulations not to sell the said house. It is this undertaking which has given rise to the present proceedings.

The principal person in the Lee Utility Society Limited was a builder called William Bradley, an uncle of the first named defendant. In or about the year 1975 the said Lee Utility Society Limited by special resolution, duly passed in accordance with the provisions of section 54 of the Industrial and Provident Societies' Act 1893, converted itself into a limited liability company called "Lee Estates Company Limited".

On the 2nd April 1976 the members of Lee Estates Company Limited, at an extraordinary general meeting, passed a special resolution that Lee Estates Company Limited be wound up voluntarily and that Mr. William Kirby F.C.A. be appointed liquidator. The second-named Defendant is the widow and Legal Personal Representative of the late Mr. Kirby and no order is sought against her in these proceedings.

By transfer registered on the 6th day of September 1976 the said William Kirby, in his capacity as Liquidator of Lee Estates Company

Limited, purported to transfer the landlord's interest in number 33 Somerton Park to the first named defendant Nicholas Bradley. It does not appear that the approval of the Minister was given or sought in respect of this transfer.

Meanwhile, the plaintiff, Mr. Lynch, had, with the consent of Mr. William Bradley, acquired the tenant's interest in the house. After he had acquired the tenant's interest the plaintiff approached Mr. William Bradley and asked him if he could buy out the landlord's interest in the house. Mr. William Bradley said he could not sell the house but that if the house was ever on the market he (the plaintiff) would be offered it first. At a later stage the plaintiff spoke to the first named defendant, Mr. Nicholas Bradley, who was then Secretary of the Utility Society, to get some landlord's repairs done. Mr. Nicholas Bradley got some repairs done but said the Society could not afford to do the remainder. At this stage he told the plaintiff that the plaintiff would be offered the house shortly. Relying on these assurances the plaintiff says that he, himself, carried out the repairs, laid down certain concrete paths, painted the house and generally kept it in good order. The plaintiff complains that, in spite of these assurances, he was never given an

opportunity to buy the house.

The plaintiff's evidence on these points was not challenged.

The plaintiff served on the first named defendant a notice to admit that the Lee Utility Society Limited had received a grant of £250 in respect of number 33 Somerton Park from the Minister. The defendant, in his reply dated the 15th June 1984, admitted that it had received such a grant and added the following words:-

"And it is further noted that the plaintiff admits that the grant of £250 was repaid in its entirety to Lee Utility Society prior to its conversion to the Lee Estates Company Limited."

This is intended to record an alleged admission by the plaintiff's solicitor that the grant of £250 had been repaid by the Lee Utility Society to the Minister. Mr. Blayney, who appeared for the plaintiff in the hearing before me, agreed that his solicitor had made such an admission.

The case was opened to me on the basis that this grant of £250 had been paid by the Minister to the Society and repaid by the Society to the Minister. In the course of the hearing Mr. O'Driscoll, who appeared for the first named defendant, expressed doubts as to

whether the admission that the Society had received a grant of £250 had been correctly made. It appeared that the Society had received a loan from the Housing Authority as well as a grant from the Minister. The loan had been paid off but a possibility existed of confusion between the loan and the grant. I allowed Mr. O'Driscoll an opportunity to check on the true position. On this investigation it transpired that the Society had indeed, received a grant of £250. Mr. Blayney then expressed doubts as to whether the admission made by his solicitor that the Society had repaid a grant of £250 had been correctly made. Again I considered it fair to give Mr. Blayney an opportunity to check on the true position, notwithstanding the admission made by his solicitor. Mr. Blayney's investigations, however, were inconclusive as apparently the Department of the Environment had no records from which it could establish whether the grant had been repaid or not.

Under these circumstances it appeared to me that the only safe course open to me was to consider the case on the basis of the formal admissions made by the parties. I therefore approach my decision on the basis that the Minister did make a grant of £250 towards the cost of building the house and that this grant was repaid in its entirety by the Utility Society prior to its conversion into a limited liability company.

THE LAW

The grant in the present case was made under section 20 of the Housing (Amendment) Act 1948, which provided that the Minister for Local Government could, in certain circumstances, make a grant to any public utility society erecting one or more than one house for occupation by a person of the working classes or an agricultural labourer.

Certain statutory conditions had to be fulfilled before a grant could be made. Erection of the house or houses had to be commenced on or after the 1st November 1947 and to be completed on or before the 1st day of April 1950. The house had to comply with rules set out in the First Schedule of the Housing (Financial and Miscellaneous Provisions) Act 1932 (No. 19 of 1932). Finally, section 20, subsection (1), paragraph (c) of the 1948 Act provides as follows:-

"Such public utility society undertakes with the Minister that such a society will not sell such house or houses and will let such house or houses only at such rent and subject to such conditions as may be approved by the Minister."

Mr. Blayney points out that the undertaking given by the Public Utility Society appears to be indefinite in point of time in that there is no statutory provision for the repayment of the grant or for the

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Minister releasing the Society from its undertaking. Mr. Blayney further submits that the undertaking is given, not for the benefit of the Minister only, but for the benefit of those persons, being members of working classes or agricultural labourers, housing of whom the Act seeks to assist.

Mr. Blayney contrasts the wording of section 20 subsection (1) paragraph (c) with the wording of section 19 subsection (2) paragraph () Section 19 provides for grants being made by Housing Authorities. Under section 19, subsection (2) paragraph (c) the builder who accepts a grant must also give an undertaking but the wording of the relevant paragraph is significantly different. It reads as follows:-

"The person erecting the house undertakes with the housing authority that, subject to such conditions as may be prescribed by regulations made under this section,* he will not sell the house and that he will let the house subject to such conditions as may be so prescribed."

Regulations under sections 19 and 20 of the Housing (Amendment) Act 1948 are contained in Statutory Instrument No. 90 of 1948. Part IV of the Regulations applies to new houses in respect of which grants were given by a Housing Authority under section 19 of the 1948 Act.

*Emphasis added

Regulation 22, paragraph 8, provides as follows:-

"The title deed of a house to which this part of these Regulations applies shall have endorsed thereon a note of the effect that an undertaking has been given in pursuance of section 19 of the Act of 1948, that, subject to the provisions of these Regulations, the house will not be sold and that it will be let subject to the provisions of these Regulations."

Regulation 23 deals with the circumstances in which a house may be sold and is as follows:-

"A house to which this part of these Regulations applies may, with the consent of the housing authority, be sold if the following conditions are fulfilled;

- (a) the consent of the housing authority shall not be given before the first instalment of the grant has been paid by the housing authority;
- (b) the house shall not be sold while it is untenanted and shall be sold subject to the tenancy existing at the time of sale;
- (c) the house shall not be sold to the tenant thereof;
- (d) the vendor shall assign to the purchaser his interest in any instalments of the grant that have not been paid at the time of sale;
- (e) the purchaser shall give to the housing authority an undertaking that subject to the provisions of these Regulations, he will not sell the house and that he will let the house subject to the provisions of these Regulations and particulars of such undertaking shall be endorsed on the title deed of the house."

Part V of the Regulations deals with applications for grants

under section 20 of the 1948 Act. Regulation 27 contemplates that a public utility society seeking a grant or grants must submit a scheme to the Minister. This scheme must be accompanied by detailed plans, specifications and detailed estimates of the cost of the work; a statement of the total all-in cost of the scheme; a statement showing the rent proposed to be charged for the house and the estimated annual income and expenditure under the scheme; and such evidence as the Minister may require to satisfy himself that the public utility society is a public utility society within the meaning of the Acts. Most important, however, for the purposes of the present case is that Regulation 27 contemplates that the scheme submitted to the Minister shall be accompanied by:-

"An undertaking in writing signed by a responsible officer of the Society that the house when completed will not be sold and will be let only on a monthly or lesser tenancy to a person of the working classes or an agricultural labourer as defined in the Labourers Acts, 1883 to 1948, at a rent not exceeding such rent as may be approved by the Minister."

Under Regulation 28 if the Minister is satisfied that the public utility society is a public utility society within the meaning of the Acts, and that the scheme and the house to be erected thereunder

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comply with the requirements of the Acts and of the Regulations, and as to the rent proposed to be charged for the house, he may approve of the scheme and of the rent.

Regulation 28, paragraph 2, provides as follows:-

"At any time before a house erected under the scheme is let the Minister may, on the application of the public utility society erecting the house, approve of an alteration of the rent to be charged under the scheme for that house."

Regulation 30 contemplates that when a scheme has been approved by the Minister the public utility society is to keep separate accounts relating to the scheme and shall furnish audited accounts to the Minister. It also provides that the public utility society shall, if required by the Minister, permit any auditor nominated by him to have access to any books, deeds and accounts relating to the scheme.

It seems clear that the purpose of section 20 is to enable the Minister to help, financially, in the provision of houses at a low rent for persons of the working classes and agricultural labourers. Section 20 appears to contemplate that such houses shall be let at a rent to be approved by the Minister but, in marked contrast to section 19 of the Act, there is no provision whereby the sale of any

such house can be approved and the undertaking required of the public utility society not to sell any such house appears to be absolute.

Needless to say the difficulties of this situation are made more acute by the great rise in the value of property which has taken place over the past 35 years and the fall in the value of money. Mr. O'Driscoll, on behalf of the first named defendant, submits that it is absurd that a public utility society should be debarred forever from selling one of its houses even though the house was vacant or the society itself had become insolvent and was in the course of being wound up.

Mr. Blayney, on the other hand, submits that it is wrong that a public utility society should be allowed, by turning itself into a limited liability company, to avoid its obligations to the Minister and to treat as a normal commercial investment, houses built with State aid to provide rented accommodation for members of the working classes.

The plaintiff in the present case is a mechanical fitter and would appear to fall within the category of persons for whom this house was provided. The defendant did not give evidence at the

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hearing before me and, apart from the admission by the plaintiff's solicitor that the grant of £250 was repaid to the Minister, there is no evidence that the Minister waived the undertaking of the Society nor is it clear that the Minister had power to accept the return of the grant or to waive the undertaking. In fact the defendants have formally admitted that the Minister did not approve of the transfer of the landlord interest in the house to the first named defendant. Indeed, the conversion of the Society into a limited liability company and the subsequent transfer of the property to the builder's nephew have all the marks of a device designed to evade the Society's undertaking to the Minister.

Mr. O'Driscoll submits that the Society, once converted into a limited liability company, became a different legal entity and was no longer bound by the undertaking given to the Minister. In support of this proposition he relies upon certain dicta of Farwell, J. in Moreland -v- Woodward (1940) 3 All England Reports, page 665. I cannot accept this proposition nor do I believe that the case cited supports it. In Moreland -v- Woodward a society registered under the Industrial and Provident Societies Act 1893 had entered into trust deeds whereby certain sums were transferred to trustees for the establishment of a pension fund for the benefit of employees of the society, past and present. Subsequently, the society was

converted into a limited company in pursuance of section 54 of the 1893 Act. Farwell, J. held that the society and the company were in substance the same thing and the trustees held the trust funds in their hands on exactly the same trust, as they had held them before the conversion.

This conclusion appears to be supported by the wording of section 54 itself. Subsection (1) provides that a registered society may, by special resolution, determine to convert itself into a company under the Companies Acts. Subsection (2) provides that if the special resolution for converting the registered society contains the particulars required by the Companies Acts to be contained in the Memorandum of Association of a company and a copy thereof has been registered at the Central Office, a copy of such resolution under the seal or stamp of the Central Office shall have the same effect as a Memorandum of Association duly signed and attested under the Companies Acts. Subsection (3) however, goes on to provide as follows:-

"If a registered society is registered as, or amalgamates with, or transfers all its engagements to, a company, the registry of such society under this Act shall thereupon become void, and the same shall be cancelled by the

Chief Registrar or by the Assistant Registrar for Scotland or Ireland under his direction; but the registration of a society as a company shall not affect any right or claim for the time being subsisting against such society, or any penalty for the time being incurred by such society; and, for the purpose of enforcing any such right, claim, or penalty, the society may be sued and proceeded against in the same manner as if it had not become registered as a company; and every such right or claim or the liability to such penalty, shall have priority, as against the property of such company, over all other rights or claims against or liabilities of such company."

It therefore appears to me that the new company may wear different corporate clothing and may have a different corporate structure but that it is the same legal entity as the old society and is fixed with all the liabilities of the old society.

The point which has caused me most difficulty in the present case is the point of whether the undertaking given by the Society to the Minister under section 20 of the 1948 Act was a matter of covenant only and affected only the rights of the Society and the Minister or whether it was a matter of title on which it is competent for the plaintiff to rely. Counsel have failed to find any case on section 20 of the 1948 Act relevant to this issue.

However, in the case of McQuaid .v. Lynam Mr. Justice Kenny had

to discuss the effect of an undertaking given to a Housing Authority under section 19 of the 1948 Act. In that case a builder had, in breach of his undertaking to the Housing Authority, agreed to sell a house to the plaintiff. The defendants later concluded that they could not sell the house because of their undertaking to the Housing Authority. The plaintiff then sued the defendants for damages in lieu of specific performance of the contract. The principal defence raised by the defendants was that there was not a sufficient note or memorandum of the alleged agreement for the purposes of the Statute of Frauds. But the defendants also raised the defence that the alleged agreement was illegal.

Mr. Justice Kenny held that the agreement was not illegal but clearly took the view that the defendants, being in breach of their undertaking to the Housing Authority under section 19, could not give a good title to the house.

The following passage appears at page 568 of the Report:-

"At the time when the agreement between the plaintiff and the defendant was made, No. 1 Kinvara Road was untenanted and the defendants could not therefore, give the purchaser a good title to the house. This conclusion is supported by sub-article 8 of Article 22 of the Regulations which provided that the title deed of a house to which the Regulations applied should, when

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"the title was not registered under the Registration of Title Acts 1891 and 1942, have endorsed thereon a note to the effect that an undertaking had been given under section 19 of the Act of 1948 by the person erecting the house that, subject to the provisions of the Regulations he would not sell the house within a period of 15 years from the date of the undertaking. Although the defendants could not give a good title to the house,* the contract which they made with the plaintiff was not, in my opinion, illegal."

If a person who had given the limited undertaking required under section 19 of the Act could not, in breach of his undertaking, give a good title to the property it appears to me that a person who had given the much more stringent undertaking required under section 20 of the Act could not give a good title either. The first named defendant in the present case was, at one time, an officer of the Public Utility Society. Even assuming that what took place in the present case was not a device to evade the undertaking, no attempt has been made to show that the first named defendant was a bona fide purchaser for value without notice of the undertaking. It would be surprising, therefore, if he could hold the lands on terms more favourable than those on which the Public Utility Society held them.

I accept that the Liquidator of the Company, once appointed, had no choice but to realise the assets of the Company, but it does not follow that he had power to convey the property, freed from the undertaking, to

*Emphasis added

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a person not shown to be a bona fide purchaser for value without notice of the undertaking.

Under these circumstances it appears to me that the first named defendant cannot hold the property on terms any more favourable than those on which it was held by the Public Utility Society.

Approved.

John J. [Signature]

17/10/84