

THE HIGH COURT

[Record No. 2020/279 SP]

IN THE MATTER OF THE TRUSTEE ACT 1893

ON THE APPLICATION OF
BÁRR NA FARRAIGE OWNER'S MANAGEMENT COMPANY LIMITED BY GUARANTEE
APPLICANT

EX TEMPORE JUDGMENT of Ms. Justice Leonie Reynolds delivered on the 2nd day of February, 2021.

Introduction

1. This is an application by Bárr na Farraigne Owner's Management Company, having its registered address at 13 Bárr na Farraigne, Achill Sound, Co. Mayo for an order pursuant to s.25 of the Trustee Act 1893 ('the Act') appointing it as trustee with respect of lands comprised in Folios MY36027F and MY22219F of the Register of Freeholders, County Mayo, together with an order pursuant to s.26 of the Act vesting the said lands in the applicant herein.

Background

2. The development known as 'Bárr na Farraigne' is situate at Achill Sound, Co. Mayo and consists of twenty five dwelling houses. It was developed by Vairex Limited in or about 1999.
3. Orenwell Limited was subsequently incorporated as a management company to own and manage the common areas. The common areas of the development form the lands, the subject matter of these proceedings.
4. Pursuant to a management company agreement dated 8th March, 1999, Vairex Limited agreed to vest the common areas in Orenwell Limited for the benefit of the unit owners in the development. The common areas are burdened with a lease of easements in respect of the unit owners.
5. Folios MY36027F and MY22219F were updated with Vairex Limited registered as owner of the folios on 5th March, 1999. Vairex Limited held title to those lands as trustee for the benefit of the unit owners in the development and was obliged pursuant to the aforesaid management company agreement of 8th March, 1999 to transfer the common areas to Orenwell Limited as trustee for the unit owners of the development.
6. Vairex Limited was dissolved on 9th December, 2011 for failure to file accounts. Orenwell Limited was dissolved on 2nd July, 2014, again for failure to file accounts. The applicant contends that the lands are held on trust in circumstances where the trustee cannot be found.
7. The residents of the development procured the incorporation of the applicant on the 13th of October, 2020 for the purposes of, *inter alia*, acquiring the common areas of the development and holding same for the benefit exclusively of the unit owners in the development.

8. In the circumstances, the applicant seeks an order pursuant to s.25 of the Trustee Act 1893 appointing it as trustee with respect of the lands and an order pursuant to s.26 of the Trustee Act 1893 vesting the lands in the applicant to hold on trust for the unit owners of the B arr na Farraige development.
9. The applicant gave notice of the proceedings to the Chief State Solicitor and furnished a copy of the special summons, grounding affidavits and exhibits.
10. Arising from an exchange of correspondence between the applicant's solicitor and the Chief State Solicitor's Office, it was necessary to amend the special summons to regularise a number of administrative issues. The Court has acceded to that application.
11. By letter dated 22nd December, 2020 the Chief State Solicitor's Office confirmed that there was no objection to the within application and confirmed that no claim was being made pursuant to s.28(2)(a) of the State Property Act 1954.
12. In addition, the applicant gave notice of the proceedings to the Revenue Commissioners in circumstances where there were Revenue judgment mortgages registered on the folios.
13. Following interparty correspondence, an agreed position has been reached wherein the Revenue judgment mortgages will be vacated subject to an agreed solicitor's undertaking being provided.
14. In the circumstances, the application proceeds without objection from any State authority.

The evidence

15. The facts on which the applicant relies are set out in the grounding affidavit of Aoife Moynihan and her subsequent affidavits.
16. Ms. Moynihan, a practising solicitor and owner of one of the units in the development, sets out in considerable detail the factual background together with the history of ownership of the property.
17. Further, she avers that she was approached by a number of the unit owners within the development with a view to rectifying the title to the common areas. Thereafter, the applicant was incorporated with its membership limited to the unit owners and in compliance with the provisions of the Multi-Unit Development Act, 2011. Its objects are to own, manage and maintain the common areas.
18. An affidavit of suitability of the applicant as the proposed trustee has been furnished to the court.

Appointment of new or additional trustees by the court

19. Section 25 of the Trustee Act 1893 gives the court extensive powers to appoint new or additional trustees including power to appoint a trustee where there is no trustee at all.
20. Section 25(1) provides as follows:

"The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee."

21. Section 26 of the Act confers a further power on the High Court to make a vesting order where a trustee entitled to possession of any lands "cannot be found".
22. In the instant case, it is clear that as part of the development of the units the developer/vendor Vairex Limited procured the incorporation of a management company Orenwell Limited for the purposes of owning, managing and maintaining the common areas. In this way, the unit owners, through the medium of the management company, would eventually become the owners of the common areas. Because of the dissolution of the vendor company and the management company, the title of the unit owners remains incomplete.
23. The applicant herein seeks to remedy that difficulty by way of relief pursuant to s.25 and s.26 of the Act.
24. In *Re Heidelberg Company Limited and Courtview Management Limited* [2006] IEHC 408, a similar set of circumstances arose where both the vendor company and the management company had been struck off the register of companies for failing to make returns and were dissolved. The applicants sought relief for an order pursuant to s.26 of the Trustee Act 1893 vesting the interest of the vendor company and/or the management company in a new management company which had been incorporated by the applicants.
25. Laffoy J. in her decision referred to the unreported judgment of Costello J. delivered on 23rd November, 1984 in a matter entitled *In the matter of the Trustee Act, 1893, John Kavanagh and Barbara Cantwell*, wherein he followed the English line of authorities cited therein in which it was held that a dissolved company is a trustee "who cannot be found" within the meaning of s.26 of the Act. In so doing, he laid particular emphasis on the fact that the Attorney General had stated that no claim was being made by the State in respect of the property.
26. Laffoy J. concluded that a similar approach be adopted to resolve the problem that had arisen in the *Heidelberg* case, again noting that the State was making no claim by virtue of s.28(2)(a) of the State Property Act 1954.
27. Counsel for the applicant in the instant case has submitted that the facts in the *Heidelberg* case are on all fours with the facts in the within application and I accept that proposition.
28. In the circumstances, I find as follows:

- (a) By virtue of the Management Company Agreement dated 8th March, 1999 made between Vairex Limited of the one part and Orenwell Limited on the other part, the lands were held in trust by the parties to the said agreement.
 - (b) Accordingly, by virtue of s.28(2)(a) of the State Property Act 1954, the lands in the property did not vest in the State on the dissolution of Vairex Limited on 9th December, 2011 and dissolution of Orenwell Limited on 2nd July, 2014.
 - (c) At and immediately before the date of its dissolution, Vairex Limited held its beneficial interest in the lands for the benefit of the unit owners.
 - (d) I accept that the dissolved company is a trustee who "cannot be found" within the meaning of s.26 of the Trustee Act 1893 as per the decision of Costello J. in *Re Kavanagh and Cantwell*.
29. The beneficial interest of the unit owners in the lands, by their consensus, is now to be held by the applicant herein and regulated by it.
30. In view of the foregoing findings, and having regard to the fact that the State has no claim pursuant to the provisions of the Act of 1954, I am satisfied that the court has power to make a vesting order under s.26 of the Act.
31. Accordingly, I will grant the relief sought and hear from the applicant's counsel in respect of the form of order to be made.