

APPROVED

[2022] IEHC 97



THE HIGH COURT

2019 No. 115 SP

BETWEEN

PROMONTORIA (OYSTER) DAC

PLAINTIFF

AND

JOHN FOX

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 7 March 2022

INTRODUCTION

1. The Registration of Deeds and Title Act 2006 brought to an end the practice whereby a debt could be secured on registered land by the expedient of depositing the land certificate with the lender. The Act not only precluded the creation of *new* equitable mortgages (otherwise, liens) by way of the deposit of a land certificate, it also extinguished all existing liens with effect from 31 December 2009. The holder of an existing lien by deposit was able to protect their interests by converting their lien into a registered lien during a three year transitional period. The principal issue for determination in the within

NO REDACTION REQUIRED

proceedings is whether a registered lien can be relied upon as security in respect of a further loan agreement entered into *after* 31 December 2009.

PROCEDURAL HISTORY

2. The ownership of the land the subject-matter of these proceedings has been registered under the Registration of Title Act 1964. Put colloquially, the land is “*registered land*”. The Defendant is registered as full owner of the land under Folio 14403 of County Westmeath (“*the folio*”).
3. A lien has been registered as a burden on the land. It appears from the folio that the lien had originally been in favour of Ulster Bank Ireland Ltd (“*Ulster Bank*”). The entry of the lien as a burden is dated 19 March 2009. Promontoria (Oyster) DAC (“*Promontoria*”) asserts that it has since succeeded to Ulster Bank’s interest. Promontoria’s interest in the lien is “*noted*” on the folio by reference to an instrument dated 9 March 2017.
4. The lien had been registered pursuant to section 73(3) of the Registration of Deeds and Title Act 2006. It can be inferred, therefore, that the land certificate had previously been deposited with Ulster Bank as security for an (earlier) loan to the Defendant. This deposit would, by virtue of the now defunct provisions of section 105(5) of the Registration of Title Act 1964, have created a lien by deposit. It can also be inferred that Ulster Bank subsequently applied to register that lien within the three year transitional period provided for under section 73 of the Registration of Deeds and Title Act 2006.
5. Had Ulster Bank wished to enforce its security subsequent to this registration, it could have done so by way of an application for a well charging order. It would have been unnecessary for Ulster Bank to adduce evidence in respect of the

creation of the lien by deposit. Ulster Bank could, instead, rely on the conclusiveness of the register. It would, however, have been necessary for Ulster Bank to establish that there were sums due and owing to it and that those sums were secured by the registered lien. (See, generally, *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93). Similarly, once Promontoria had succeeded to Ulster Bank's interest in the registered lien, it could have enforced the original debt in the same way.

6. The distinctive feature of the present case is that the application for the well charging order relates to further loans advanced *subsequent to* the registration of the former lien by deposit. More specifically, Promontoria seeks a well charging order in respect of two loans advanced to the Defendant by Ulster Bank in 2010. The letters of offer in each instance are dated 27 May 2010, and appear to have been accepted and signed by the Defendant on 23 June 2010. The first loan had been in an amount of €40,000; the second, in an amount of €100,000. The first loan is described in the letter of offer as a “*demand loan*” to be repaid in full by way of a single bullet payment on or before 27 June 2011. The second loan is described as an “*overdraft facility*”.
7. It should be emphasised that this is not a case where it is said that the intention of the parties at the time of the deposit of the land certificate had been that the deposit would create security in respect of present and future advances. (Counsel for Promontoria was careful to disavow the Defendant's characterisation of its case at paragraph 3 of the latter's written submissions.) Rather, Promontoria asserts as a general proposition that a registered lien may, by agreement of the parties, be relied upon as security for subsequent lending after 31 December 2009. As discussed shortly, this proposition necessitates treating a registered

lien as, in effect, the functional equivalent of a registered charge for present and future advances.

8. The primary reliefs sought in the within proceedings are, first, a well charging order, i.e. an order that the Defendant's interest in the land is well charged with the payment of all monies due and owing by the Defendant to Promontoria as evidenced by the two separate facility letters of 27 May 2010; and secondly, a declaration that there is due and owing to Promontoria a total sum of €145,918.80, together with continuing interest pursuant to contract and/or statute.
9. At an earlier stage in the procedural history, the Defendant had applied to have these proceedings remitted to the Circuit Court. This application was refused for the reasons set out in a reserved judgment delivered on 20 January 2020: *Promontoria (Oyster) DAC v. Fox* [2020] IEHC 12.
10. The hearing of the substantive application for the well charging order was delayed in consequence of the moratorium on possession proceedings imposed during the public health emergency presented by the coronavirus pandemic. The application ultimately came on for hearing before me on 7 February and 14 February 2022. (The hearing took approximately one hour in total, but had to be staggered because of the pressure of cases in the Monday Chancery Special Summons List). Both parties filed very helpful written legal submissions in advance of the hearing. Judgment was reserved until today's date.

POSITION OF THE PLAINTIFF (PROMONTORIA)

11. Promontoria's position is straightforward. It takes as its starting point the following two uncontroversial propositions. First, a lien by deposit of a land

certificate had the same effect as an equitable mortgage created by a deposit of the title deeds of unregistered land. Secondly, an equitable mortgage may serve as security for future advances, as well as for present indebtedness.

12. Promontoria seeks to build upon these two propositions by saying that a lien, which had initially been created by deposit, lost none of its powers or capabilities when subsequently registered in accordance with the provisions of section 73 of the Registration of Deeds and Title Act 2006. If a lien by deposit had been capable of securing future advances prior to its registration, then it is equally capable of doing so after registration. It is submitted that, by virtue of the statute's plain wording, what is registered and what therefore persists afterwards is the very same thing that existed beforehand, so nothing was lost.
13. It is further submitted that the legislative intent underlying the Registration of Deeds and Title Act 2006 is that the security of lien holders not be diluted or delimited. An equitable mortgage is not a static thing. Protecting or preserving it includes preserving its dynamic qualities too, one of which is its availability, during the currency of its existence, to the parties (mortgagor and mortgagee) to be pledged and accepted anew as security for fresh lending.
14. More generally, Promontoria observes that the Defendant had expressly agreed to secure his post-registration lending on the lien. The position now adopted by the Defendant is said to go against his express agreement. It is suggested on behalf of Promontoria that the signed letters of offer should be enough to underpin well charging relief on their own, without even having regard to the folio.

POSITION OF THE DEFENDANT

15. The Defendant opposed the application for a well charging order on the grounds that a registered lien is merely a mechanism for registering pre-existing security and cannot be used to create security for loans made after 31 December 2009. On this analysis, the monies advanced pursuant to the two loan agreements in 2010 represent an unsecured debt.
16. The principal arguments put forward in support of this proposition may be summarised as follows. First, it is said that to extend a registered lien to secure sums advanced subsequent to 31 December 2009 would be inconsistent with the legislative aim to abolish, prospectively, equitable mortgages as a form of security. In particular, it is said that it would make little sense for there to be two methods of providing security for lending under the amended Registration of Title Act 1964, i.e. liens and charges.
17. Secondly, attention is drawn to the use of the term “*lien*”—as opposed to “*charge*”—to describe the interest protected. It is said that a lien (in its many forms) refers to an entitlement to retain something as security for a debt already incurred. The other forms of lien recognised under the Registration of Title Act 1964, namely, the unpaid vendor’s lien and a right of residence under section 81, would not appear to cover a *future* debt or obligation.
18. Thirdly, attention is drawn to the fact that there is no express statutory power to secure the repayment of money against registered land by way of a lien. The statutory power under section 62 of the Registration of Title Act 1964 is confined to charges, and the legislative provisions governing priority in respect of future advances under section 75 of the same Act are, again, confined to charges.

19. Finally, the Defendant relies on case law in respect of the Family Home Protection Act 1976, citing, in particular, *Bank of Ireland v. Purcell* [1989] I.R. 327, in support of the proposition that each time a further advance is made pursuant to an equitable mortgage, the interest in the property being charged is altered.

DISCUSSION AND DECISION

20. The Registration of Deeds and Title Act 2006 has brought to an end the practice of issuing land certificates. This necessitated a number of consequential amendments to the Registration of Title Act 1964. This judgment is principally concerned with the amendments affecting the creation of liens by deposit.
21. To put these amendments in context, it may be helpful to outline the original legislative framework. Section 105(5) of the Registration of Title Act 1964 had allowed for the creation of a lien on registered land by the deposit of the land certificate relating to that land ("*lien by deposit*"). The section provided that such a lien had the same effect as a deposit of the title deeds of unregistered land. It followed that in circumstances where the registered owner had deposited the land certificate with an intention to create security in respect of a debt, then the creditor holding the land certificate obtained a lien over the land. This lien would have been capable of enforcement by way of a well charging order and order for sale.
22. Relevantly, the security created by a lien by deposit was not necessarily confined to an existing debt: the parties could have agreed that the lien should extend to future advances made by the creditor to the debtor. As observed by Wylie, it will be a matter of construction as to what is the extent of the indebtedness

covered by an equitable mortgage by deposit in any particular case (*Wylie on Irish Land Law*, 6th ed., 2020, Bloomsbury Professional, at §12.47). These observations were made in the context of an equitable mortgage of *unregistered* land, but apply by analogy to a lien by deposit, given that same had been modelled on a deposit of the title deeds of unregistered land.

23. A lien by deposit had not been capable of registration as a burden on the land for the purposes of the Registration of Title Act 1964. The creditor's position was protected, however, by dint of their having custody of the land certificate. Prior to the legislative amendments discussed below, the production of the land certificate would have been a prerequisite to most forms of dealing in the land. Thus, in the absence of the land certificate, the owner of the land would not normally be able to register any subsequent transactions in respect of the land.
24. Of course, this informal process of creating a lien by deposit presupposes the existence of a practice whereby land certificates are issued, and whereby a land certificate must normally be produced to register any dealings in land. The Registration of Deeds and Title Act 2006 has now brought these practices to an end. The legislative intent, as identified by the Supreme Court in *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49; [2020] 1 I.R. 364 ("**Hannon**"), had been to bring a complete end to the system of lien by deposit of a land certificate in respect of registered land.
25. Land certificates ceased to have any force or effect after 31 December 2009. It follows that custody of the land certificate no longer confers any protection on a creditor: the certificate is a dead letter and is not needed for the purpose of any dealing in respect of the land. As put by the Supreme Court in *Hannon*, a land

certificate becomes what might reasonably be characterised as a piece of paper with no legal effect and only of historical interest.

26. The Legislature chose to put in place an alternative mechanism to protect the rights of existing lien holders. As explained by the Supreme Court in *Hannon*, section 73 of the Registration of Deeds and Title Act 2006 is designed to allow for the orderly transposition of liens by deposit of land certificates into registered liens. All liens by deposit in respect of registered land ceased to have effect at the end of 2009, but an appropriate system to protect the interests of those holding such liens had been put in place by giving adequate time to allow for the registration of such liens over the land.
27. The position was summarised as follows by Dunne J. in *Hannon* (at paragraph 98 of the reported judgment):

“[...] The whole point of effectiveness of the deposit of a land certificate was that without the land certificate no further transactions could be carried out in relation to the land. Thus the creditor of the landowner was in a position to stop the landowner from carrying out any transactions that would affect the creditor’s security. With the abolition of a land certificate the creditor no longer has a means of stopping such transactions. The provisions of s. 73 of the 2006 Act enabled the holder of an equitable deposit to register a lien over the land in the three-year period concerned and in that way to preserve their security. Thus, even if it is no longer possible to rely on the land certificate and the lien effectively provided for by the deposit on the land, the creditor had the option during the three-year period immediately following the commencement of s. 73 of the 2006 Act to register the equitable mortgage created by the deposit of the land certificate as a lien on the register. A lien thus registered will appear as a burden affecting the land.”

28. The practical effect of the legislative amendments is to counterbalance the loss of the safeguard inherent in having custody of the land certificate under the original legislative regime with a new safeguard, namely, the ability to register a lien as a burden on the land. Whereas the lien holder can no longer block

subsequent dealings in the land, the registration of a lien should ensure that it has some priority over any subsequent transactions.

29. Crucially, the effect of section 73 of the Registration of Deeds and Title Act 2006 is not simply to allow for the registration of the existing lien by deposit. Rather, the equitable interest—to use a neutral term—which had been created by the deposit of the land certificate is converted or transposed into a different statutory creature, namely a registered lien. The equitable interest no longer exists: it has been converted into a registered lien, which is registerable as a burden on the land (*Promontoria (Oyster) DAC v. Greene* [2021] IECA 93, at paragraphs 38 and 45) (“*Greene*”).
30. The specific question for determination in the present proceedings is whether a creditor can rely on a registered lien as security for future advances to the debtor, i.e. as security for additional loans advanced after 31 December 2009. The legislation is silent on this point. Indeed, as observed by the Court of Appeal in *Greene* (at paragraph 43), the terms of the legislative provisions in respect of liens are very brief:

“On any view, however, the registration provisions in section 73(3) are very brief. The lien may be registered as a burden and that is all. No power of sale is conferred on the lien holder by section 73(3). Only the fact of the lien and the identity of the holder (as well as the date of registration) is registered; registration does not extend to the date on which the lien was created or the liabilities to which it relates. As the Judge observed in his judgment in *Promontoria (Oyster) DAC v McKenna*, there can be no question that registration involves any adjudication by the Property Registration Authority that particular monies are secured on the lands in the folio. In simply deeming the lien to be a registerable burden for the purposes of section 69, section 73 does not acknowledge and/or address the specific characteristics of such liens and leaves unaddressed potentially significant issues as to their priority once registered (arising from the abrupt conversion of such liens from unregistrable interests to registerable (and registered) burdens). I will touch briefly

on some of those issues below but – fortunately – they do not require to resolved here.”

31. In the absence of an express statutory prescription of the characteristics of a registered lien, it is necessary to ascertain the legislative intent by reference to the overall scheme of the legislation. The most obvious indication of the legislative intent is the conversion of the former equitable interest created by the deposit of a land certificate into a registered “*lien*” rather than a “*charge*”. The concept of a “*lien*” is narrower than that of a “*charge*”. In particular, a lien does not normally confer a right to possession, and can only be enforced by way of an application for a well charging order. Relevantly, a lien is ordinarily understood as intended to secure monies which are due and owing.
32. This legislative choice to convert the former equitable interest to a “*lien*”, rather than a “*charge*”, reflects the underlying objective of the Registration of Deeds and Title Act 2006, namely to move towards a universal system of land registration in which all, or almost all, interests in land or entitlements which run with land can be definitively determined by consulting the register (*Hannon*, paragraph 48). The continuation of the former practice whereby debt could be secured against registered land without the existence of same being disclosed on the register was inimical to this objective. The scheme of the amended legislation is that the prescribed method of creating security for the repayment of a debt is by way of a charge. The introduction of the concept of a registered lien, as part of the transitional provisions, is not intended to displace the primacy of a charge. Rather, a registered lien represents a lesser form of security which had been put in place to protect the *existing* property rights of the holders of liens by deposit. The legislative intent underlying section 73 of the Registration of Deeds and Title Act 2006 had been to provide a mechanism whereby, by the

simple expedient of registration, the existing property rights of the holder of a lien by deposit would be respected, notwithstanding the extinguishment of such liens with effect from 31 December 2009. It is sufficient to this purpose that the lien be confined to the principal debt due as of the date of registration (together with accruing interest). It is not necessary that the holder of the newly fashioned registered lien have the right to rely on same as security for additional loan facilities granted *after* 31 December 2009. Any such loan facilities would, by definition, have been granted against the backdrop of the new legislative regime which excluded the creation of security other than by way of charge. The provisions of section 62 of the Registration of Title Act 1964, which allow for the payment of money to be secured against the ownership of land, are confined to charges; and the provisions of section 105(5) ceased to have effect after 31 December 2009.

33. The point can be illustrated by reference to the circumstances of the present case as follows. It can be inferred from the fact of the registration of a lien as a burden on the folio on 19 March 2009 that the land certificate had previously been deposited with Ulster Bank as security for an earlier loan to the Defendant. Ulster Bank would thereby have obtained an equitable interest over the land, capable of enforcement by an application for a well charging order. Moreover, their having custody of the land certificate would have represented a valuable right to Ulster Bank in that it precluded further dealings in the land occurring without their approval.
34. Had the Registration of Deeds and Title Act 2006 simply extinguished all equitable interests created by the deposit of land certificates, without any saver, then entities such as Ulster Bank who had lent monies in reliance on the then

applicable legislation might well have had legitimate grounds for complaint. The saver actually put in place, namely the facility to register a lien as a burden on the land during a three year transitional period, ensured that monies which had been lent out in reliance on the pre- 31 December 2009 version of the legislation were protected. There is nothing in the amending legislation which indicates that the Oireachtas intended to go further, and to enable a lien holder to secure future lending other than by way of a charge.

35. The rival interpretation put forward on behalf of Promontoria necessitates treating a registered lien as, in effect, the functional equivalent of a registered charge for present and future advances. The fundamental difficulty with this interpretation is that it cannot be reconciled with the legislative choice to convert the pre- 31 December 2009 equitable interests to a registered lien (as opposed to a charge). It would also be inconsistent with the move towards a universal system of land registration to permit the creation of security post- 2009 on the strength of the brief notation of a burden on the folio with no registered instrument.
36. More generally, as appears from the summary set out at paragraphs 12 and 13 above, the case made on behalf of Promontoria is predicated on the erroneous proposition that what is registered and what therefore persists afterwards is the very same thing: it is the same lien before and after. With respect, this overly literal interpretation of section 73 of the Registration of Deeds and Title Act 2006 is irreconcilable with the approach of the Supreme Court in *Hannon* and the Court of Appeal in *Greene*. This case law clearly establishes that the pre- 31 December 2009 equitable interest is extinguished and has been converted into something different, namely a registered lien.

37. The remaining arguments on behalf of Promontoria may be disposed of shortly as follows. The argument that, prior to the coming into effect of the legislative amendments, a creditor and debtor could agree that the deposit of a land certificate would create security for present and future advances, does not assist Promontoria. First, and as already discussed, all former equitable interests created by the deposit of a land certificate have been extinguished. Secondly, and in any event, it has not been suggested by Promontoria—still less proved—that the aggregate sum of €140,000 lent to the Defendant in 2010 had been advanced pursuant to a pre- 31 December 2009 agreement that the deposit of the land certificate was intended to cover future advances. Rather, Promontoria’s entire case is predicated on the two loan agreements of 2010.
38. The next argument made by Promontoria is that the Defendant should not be permitted to resile from his contractual commitment to secure his post-registration lending on the lien. With respect, this argument is, again, inconsistent with the logic of the judgment of the Supreme Court in *Hannon*. Contractual intention cannot prevail over the statutory scheme. The fact—if fact it be—that the parties intended to put in place a particular form of security does not bring about that result where it would be inconsistent with the amended statutory scheme. The effect of the Registration of Deeds and Title Act 2006 was to bring to an end the informal mechanism for creating security other than by way of charge.

CONCLUSION AND FORM OF ORDER

39. For the reasons explained herein, a registered lien pursuant to section 73 of the Registration of Deeds and Title Act 2006 cannot be relied upon as security in

respect of a further loan agreement entered into *after* 31 December 2009. It follows, therefore, that the loans advanced to the Defendant by Ulster Bank pursuant to the loan agreements entered into on 23 June 2010 are not secured against the relevant land. The application for a well charging order is, accordingly, refused.

40. As to costs, my provisional view is that the Defendant, having been entirely successful in his opposition to the proceedings, is entitled to recover his costs as against the Plaintiff. This would reflect the default position under Part 11 of the Legal Services Regulation Act 2015.
41. This matter will be listed before me, remotely, on Monday, 21 March 2022 at 2 pm for final orders. If either party wishes to contend for a different form of order than that proposed above, they will have an opportunity to do so on that occasion.

Appearances

Eoghan Casey for the Plaintiff instructed by O'Brien Lynam

Dermot Francis Sheehan for the Defendant instructed by Larkin Tynan Nohilly

Approved
Gareth S. Mans