

APPROVED

[2022] IEHC 99



THE HIGH COURT

2019 No. 129 SP

BETWEEN

PROMONTORIA (OYSTER) DAC

PLAINTIFF

AND

TOMAS LYNN

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 March 2022

INTRODUCTION

1. It is a common feature of commercial lending that the financial institution advancing the loan will reserve onto itself the right to assign the benefit of the debt to a third-party. The borrower will not ordinarily have any entitlement to object to such an assignment. Importantly, however, the borrower is entitled to notice of the assignment. The purpose of such notice is to ensure that the borrower knows to whom the debt is now due, and from what date they are obliged to direct repayments of the debt to the assignee. Insofar as relevant to these proceedings, this entitlement to notice is provided for under section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877.

NO REDACTION REQUIRED

2. The two principal issues which fall for determination in this judgment are as follows. First, whether notice of assignment must be given separately from, and in advance of, any demand for payment by the assignee. Secondly, whether the notice must not only specify that the debt has been assigned but must also expressly state that the security (on the facts, a registered lien) purportedly held in respect of the debt has been assigned too. As explained shortly, this second issue exposes a more fundamental difficulty with the Plaintiff's claim.

PROCEDURAL HISTORY

3. These proceedings seek to recover a debt said to be owed by the Defendant to the Plaintiff, Promontoria (Oyster) DAC ("**Promontoria**"). The debt is said to be owed pursuant to three loan agreements entered into between the Defendant and Ulster Bank Ireland Ltd ("**Ulster Bank**"). The letters of offer in respect of these loan agreements are dated 21 October 2010, 16 September 2013 and 28 July 2014, respectively. Promontoria asserts that it has succeeded to Ulster Bank's interest in the three loan agreements. In support of this assertion, Promontoria has exhibited redacted extracts from what are described as a "*Global Deed of Transfer*" and an "*Irish Law Deed of Transfer*" said to have been entered into between Ulster Bank and Promontoria.
4. The debt advanced pursuant to the three loan agreements is, in each instance, said to be secured by way of a lien which has been registered as a burden against lands in the Defendant's ownership in County Westmeath. The three relevant folios have been exhibited as part of the affidavit grounding the proceedings: Folios 4913, 9121 and 11280 F.

5. It appears from each of the three folios that the liens had originally been in favour of Ulster Bank. The entry of each of the three liens as a burden is dated 10 December 2009. Promontoria's interest in each of the liens is "*noted*" on the folio by reference to instruments dated 9 March 2017.
6. The liens had been registered pursuant to section 73 of the Registration of Deeds and Title Act 2006. It can be inferred, therefore, that the relevant land certificates 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 those liens within the three year transitional period provided for under section 73 of the Registration of Deeds and Title Act 2006.
7. As explained under the next heading below, there is a statutory obligation to give "*express notice in writing*" to a debtor of any assignment of a debt or legal chose in action. Promontoria relies on the following correspondence as complying with this statutory obligation.
8. The first letter relied upon is a letter dated 12 January 2017 from Capita Asset Services (Ireland) Ltd to the Defendant. This letter, in turn, refers to an earlier letter of 6 January 2017 from Ulster Bank which has not been exhibited. The letter of 12 January 2017 does not specifically refer to the three loan agreements; rather, it merely refers to what is described as a "*Borrower ID*".
9. It is stated in the letter that the loan facilities will continue to be serviced by Ulster Bank for a number of weeks following the date of sale (19 December 2016). It is then stated as follows:

“At the end of the Transitional Period, Ulster Bank will no longer provide those services in relation to your Facility/ies

and those services will be provided by Capita Asset Services (Ireland) Limited (and its affiliates) as Promontoria's servicing agent. We will contact you following the expiry of the Transitional Period to confirm the date on which the Transitional Period expired and to provide you with appropriate instructions and contact details relating to future payments and servicing arrangements in respect of your Facilities."

10. The next letter relied upon is dated 16 November 2017. The opening paragraph defines the debt by reference to (i) the principal amounts, i.e. €148,000, €10,000 and €342,000; and (ii) the dates of the letters of offer, i.e. 21 October 2010, 16 September 2013 and 28 July 2014. The term "*Security*" is defined, somewhat circuitously, as the "*security provided as security for the repayment of the Facilities*".
11. The letter contains the following reference to the assignment from Ulster Bank to Promontoria:

"By a Global Deed of Transfer Dated 19th December 2016 between the Ulster Bank Ireland Designated Activity Company (the 'Bank') and, inter alia, Promontoria (Oyster) DAC ('PODAC'), PODAC acquired the right, title and interest of the Bank in the Facility, the Security and all other rights connected therewith.

Pursuant to the terms of the Facility Agreements the Facilities are repayable on demand.

As of 14th November 2017 the amount due and owing by you is €464,966.53 with a daily rate of interest accruing at €34.25 per day [I]n accordance with our rights under the terms of the Facility Agreements, we hereby formally demand immediate repayment within 10 days from the date of this letter of the above sums".

12. The letter then goes on to provide details of the bank account held with Barclays Bank Ireland to which the sum is to be paid by electronic transfer. The letter is signed for and on behalf of Promontoria (Oyster) DAC.

13. The next letter relied upon is dated 4 September 2018. Its content is broadly similar to that of the previous letter above.
14. The final letter relied upon is dated 20 September 2018. This letter is from the solicitors acting on behalf of Promontoria, namely, O'Brien Lynam Solicitors. The letter contains the following reference to the assignment from Ulster Bank to Promontoria:

“We refer you to our client’s letter to you dated 4th day of September 2018 wherein our client advised you that it had acquired all rights, title, interest and benefit of Ulster Bank Ireland DAC (formerly Ulster Bank Ireland Limited in and under the Facilities and the securities provided to secure the repayment of the Facilities.”
15. The solicitors’ letter goes on to call upon the Defendant to discharge a sum of €454,042.80 within seven days of the date of the letter.
16. A number of months later, the within proceedings were instituted by way of Special Summons on 26 March 2019. Promontoria seeks declarations to the effect that each of the three folio lands is well charged with all monies due and owing by the Defendant to Promontoria pursuant to the three loan agreements.
17. There were difficulties serving the proceedings initially, and the High Court (Murphy J.) made an order for substituted service on 13 January 2020. An appearance was entered to the proceedings on 7 February 2020. A replying affidavit was belatedly filed on 2 December 2021. This affidavit raises an objection to the notice of the assignment. A short supplemental affidavit was filed by Promontoria. The proceedings ultimately came on for hearing before me on 21 February 2022. Judgment was reserved until today’s date.

STATUTORY ENTITLEMENT TO NOTICE OF ASSIGNMENT

18. Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 provides as follows:

“Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.”

19. As appears, the section provides that an absolute assignment of a debt or other legal chose in action is “*effectual in law*” if certain requirements are met. In particular, the assignee (i) will be entitled to pursue all legal remedies without the concurrence of the assignor; and (ii) will have the power to give a good discharge for the debt or legal chose in action. In practical terms, this means that the assignee can pursue proceedings in their own name, without having to join the assignor as a party; and that the debtor may make payments to the assignee safe in the knowledge that such payments go towards reducing the debt and that the assignor no longer has any interest in the debt.
20. The controversy in the present case centres on the statutory requirement to give “*express notice in writing*” to the debtor of the assignment. The nature of the

notification required by section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 has been discussed in detail in *AIB Mortgage Bank v. Thompson* [2017] IEHC 515; [2018] 3 I.R. 172. The High Court (Baker J.) summarised the principles as follows (at paragraphs 48 to 50, and paragraph 53, of the reported judgment):

“The authorities suggest that a court will look to the substance and not the form of a notice.

I consider that in order to be a valid notice under s. 28(6) the debtor must be given express notice in writing of an assignment of his debt to another, that other must be identified, and the notice must contain sufficient information to enable the debtor to know with reasonable certainty that the assignment did assign the debt so that he may without acting at his peril pay the debt to the identified assignee. The absence of a date is relevant, and this must be so because s. 28(6) expressly provides in its terms that the date of the notice to the debtor is the effective date of the assignment for the purposes of the assignment at law.

The 1877 Act does not make provision for who is to give the notice in writing of the assignment.

[...]

While a notice does not have to be sent with the intention of constituting a statutory notice, a notice must be sufficiently clear as the legislation requires that the notice be express. This precludes the argument advanced by the plaintiff that it is sufficient that documents sent to a debtor by implication identify an assignment, and I do not consider that s. 28(6) leaves open an argument that a notice which impliedly identifies an assignment can be sufficient, or that a prior general consent performs the statutory function of a notice. A notice must be given, it need not be formal, it need not refer to the statute, but it must be an express notice of an assignment and not merely a claim to the debt by another party. The existence of a prior assignment ought not to be implied. There is nothing in the statute to my mind which suggests that the notice must be contained in one document and for that reason the joinder of documents may be sufficient to constitute a notice of assignment.”

21. In applying these principles to the facts of the case before it, the High Court in *Thompson* ruled that the correspondence sought to be relied upon by the assignee did not constitute adequate notice of the assignment. Whereas it was apparent from the correspondence that the assignee claimed to own the benefit of the relevant loan agreement, the correspondence did not identify when and by what means this had happened. The debtor was not expressly told that the benefit had been transferred from the original creditor to the related company now claiming the benefit of the debt. The High Court held that a person receiving such a letter would be perfectly entitled to ask how or by what means he or she ceased to have an obligation to the original creditor from whom the money had been borrowed.
22. The judgment in *AIB Mortgage Bank v. Thompson* confirms that the making of a demand for payment by an assignee will not, without more, constitute adequate notice. However, it does not necessarily follow as a corollary that notice of an assignment cannot be included *as part of* a letter of demand. I return to this point at paragraph 26 below.

DISCUSSION AND DECISION

23. The principal issue for determination in these proceedings is whether the statutory requirement to give “*express notice in writing*” to the debtor of the assignment of their debt has been complied with. The assignee, Promontoria, seeks to rely on a series of correspondence as fulfilling this requirement. The content of this correspondence has been summarised at paragraphs 8 to 15 above.
24. Certain of these letters can immediately be discounted. The letter of 12 January 2017 from Capita Asset Services (Ireland) Ltd cannot constitute adequate notice

in circumstances where it has been issued by neither the assignor nor the assignee. This letter, in any event, does not adequately identify the debt and does not specify the date after which repayments are to be made to the assignee. It merely refers to an undefined transitional period.

25. The letters of 16 November 2017 and 4 September 2018 do provide a greater level of detail. However, the Defendant puts forward two objections as to why these letters do not fulfil the notice requirement.
26. The first objection is that the two letters entail a demand for payment. It is said that notice of assignment must be given separately from, and in advance of, any demand for payment by the assignee. With respect, there is no authority for such a proposition. The case law is all concerned with whether notice had been provided to the debtor prior to the date of the institution of proceedings. The date of institution of proceedings represents a solemn step. If notice had not been provided by that date, then in some instances it would have been necessary to join the assignor to the proceedings. In other instances, such as on the facts of *AIB Mortgage Bank v. Thompson*, the joinder of the assignor will be unnecessary—notwithstanding the absence of notice to the debtor—because there will be no risk of a separate claim by the assignor.
27. There is nothing in the case law which suggests that the giving of notice, on a separate and standalone basis, is a condition precedent to the assignee making a formal demand for payment of the debt. Nor is there any rationale for imposing such a condition precedent. One of the principal purposes of the notice requirement is to inform a debtor that the assignee is in a position to give a good discharge for the debt. Thereafter, the debtor is obliged to make payment to the assignee (rather than the assignor), and can do so safe in the knowledge that such

payments go towards reducing the debt and that the assignor no longer has any interest in the debt.

28. There is no logical reason for saying that the statutory purpose cannot be achieved by the giving of notice of the assignment as part and parcel of a comprehensive letter of demand. Put otherwise, there is no logical reason that a single document may not serve the twofold objective of giving notice of the assignment of the debt and making demand for payment. The debtor would not be in any way prejudiced by such an approach. The debtor would understand the basis upon which the assignee claims to enforce the debt, and if the debtor had any doubts in this regard, he would be entitled to satisfy himself that there has been an assignment. The most obvious method of doing this would be to seek confirmation from the assignor that the latter has no further claims in respect of the debt. Alternatively, the debtor could request sight of the assignment (*Van Lynn Developments Ltd v. Pelias Construction Co Ltd* [1969] 1 Q.B. 607 at 613). These steps could be attended to promptly, prior to making any payment to the assignee.
29. If the assignment is disputed by the assignor, then there is a procedure provided under section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 whereby the dispute can be resolved by interpleading or by the payment of monies into court.
30. The objection put forward on behalf of the Defendant, *reductio ad absurdum*, is that an assignee is precluded from relying on an omnibus document containing notice of the assignment and a demand for payment, but can legitimately make a demand for payment the day immediately following the giving of notice of the assignment. There is no logical reason that the legislation should be interpreted

as making it essential that there be a sliver of time between the two. Certainly, from the debtor's perspective, there is no prejudice caused by an omnibus document.

31. I turn now to apply these principles to the circumstances of the present case. As appears from the content of the letters of 16 November 2017 and 4 September 2018, the basis upon which Promontoria asserts a right to the payment of the debt has been explained by reference to the "*Global Deed of Transfer*" dated 19 December 2016. A formal demand for payment is then made, and details are supplied as to the bank account to which the payment is to be directed.
32. The content of these two letters can be contrasted with the documentation unsuccessfully relied upon by the assignee in *AIB Mortgage Bank v. Thompson*. Here, the correspondence does identify when and by what means Promontoria claims to have been assigned the benefit of the relevant loan agreements. It is made explicit that the debt is now to be paid to Promontoria. The loan agreements are adequately described by reference to the principal amounts and the dates of the letters of offer. All three letters of offer had been signed by the Defendant, and, presumably, he had retained copies of same. If not, the Defendant could have requested that copies of same be provided to him. Similarly, had the Defendant any concerns as to the entitlement of Promontoria to enforce the debt or as to Promontoria's ability to give a good discharge, then he could have raised these matters. In the event, the Defendant took no steps to interrogate matters further: he did not, for example, seek copies of any documentation nor did he seek confirmation from Ulster Bank that it had no further claims in respect of the debt.

33. For all of these reasons, then, the first ground of objection on behalf of the Defendant is not well founded.
34. The second ground of objection is to the effect that the notice of assignment must not only specify that the debt has been assigned, but must also expressly state that the security purportedly held in respect of the debt has been assigned too. In advancing this objection, counsel on behalf of the Defendant emphasised that the claim as pleaded by Promontoria is predicated on three liens registered pursuant to section 73 of the Registration of Deeds and Title Act 2006. Counsel submits that these liens represent a “*legal chose in action*” within the meaning of section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. It is further submitted that, as such, the assignment of the liens should have been expressly addressed as part of the notice of assignment. In fact, the letters of 16 November 2017 and 4 September 2018 simply refer to unidentified “*security*”.
35. Promontoria’s short answer to this objection is that the nature of the security is readily identifiable from the letters of offer which are expressly referenced in the letters of 16 November 2017 and 4 September 2018. Put otherwise, it is submitted that it is sufficient to cross-refer in the notice of assignment to the documentation underlying the loan.
36. There is much force in these submissions: a person reading the letters relied upon as constituting the notice of assignment in conjunction with the earlier letters of offer would be made aware that Promontoria was asserting that it had been assigned not only the debt but also the “*Security*”, and could readily identify the nature of that security by reading the letters of offer. In assessing the adequacy of a notice of assignment, it is reasonable to impute some level of knowledge to

the recipient. The debtor is not a stranger to the events but an informed reader, and it can be assumed that they will have access to the documentation underlying the debt or will request copies from the assignor or assignee.

37. There is, however, a more principled answer to this second objection. The underlying premiss of the objection is that if the notification is found to be inadequate then the assignment was not legally effective. This premiss cuts against a fundamental principle of land law, namely that the register maintained under the Registration of Title Act 1964 is conclusive. Section 31 of that Act provides that 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. In the present case, the folio in each instance contains, first, an entry registering a lien pursuant to section 73 of the Registration of Deeds and Title Act 2006 as a burden on the relevant land; and, secondly, a subsequent entry noting the interest of Promontoria in the lien. Recent case law from the Court of Appeal confirms that in such circumstances the entity whose interest in a registered lien is noted is entitled to rely on the conclusiveness of the register (*Promontoria (Oyster) DAC v. Greene* [2021] IECA 93).
38. The same principle applies in the present case. Promontoria is entitled to rely on the register as establishing conclusively that Ulster Bank's interest in each of the three liens has been assigned to it. This is so irrespective of any alleged inadequacies in the notification of the assignment to the Defendant.
39. It is not necessary for the resolution of the present proceedings to attempt a definitive analysis of the interaction between section 31 of the Registration of Title Act 1964 and section 28(6) of the Supreme Court of Judicature Act

(Ireland) 1877. It may be that the specific statutory provisions governing registered land prevail over the more general provisions of the Act of 1877, by reference to the principle *generalia specialibus non derogant*. Alternatively, it may be that a registered lien under section 73 of the Registration of Deeds and Title Act 2006 does not constitute a mere “*legal chose in action*”. Whatever the precise analysis, a debtor cannot rely on alleged non-notification of an assignment to circumvent the conclusiveness of the register.

40. The objection in respect of the assignment of the liens does, however, expose a more fundamental difficulty with Promontoria’s case. The claim for well charging relief is predicated on the assumption that the three liens extend to loan agreements entered into *subsequent* to the expiration of the transitional provisions under section 73 of the Registration of Deeds and Title Act 2006. For the reasons explained in my recent judgment in *Promontoria (Oyster) DAC v. Fox* [2022] IEHC 97, I have held that 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 would seem to follow, therefore, that the loans advanced to the Defendant by Ulster Bank pursuant to the three loan agreements are not secured against the relevant lands. I will hear the parties further on the implications of the judgment in *Fox* for the present proceedings.

CONCLUSION

41. The statutory requirement to give “*express notice in writing*” to the Defendant of the assignment of his debt from Ulster Bank to Promontoria has been

complied with. More specifically, the letters of 16 November 2017 and 4 September 2018 provide the requisite level of detail.

42. If and insofar as such notice might be required in respect of the assignment of the three liens registered pursuant to section 73 of the Registration of Deeds and Title Act 2006, the letters of 16 November 2017 and 4 September 2018 provide the requisite level of detail in this connection also. In any event, for the reasons explained at paragraphs 37 to 40 above, Promontoria is entitled to rely on the register as establishing conclusively that Ulster Bank's interest in the liens has been assigned to it. This is so irrespective of any alleged inadequacies in the notification of the assignment to the Defendant.
43. I will hear the parties further on the implications for the Plaintiff's claim of the recent judgment in *Promontoria (Oyster) DAC v. Fox* [2022] IEHC 97.
44. This matter will be listed before me remotely, for mention, on Monday 28 March 2022 at 2.15 pm (or such other time as is convenient to counsel).

Appearances

Eoghan Casey for the plaintiff instructed by O'Brien Lynam Solicitors

Louis McEntagart, SC for the defendant instructed by Tom Casey Solicitors

Approved
Gemma S. Moss