

**THE HIGH COURT**

**[2023] IEHC 445**

**[2018 569 SP]**

**BETWEEN**

**ULSTER BANK DESIGNATED ACTIVITY COMPANY**

**PLAINTIFF**

**AND**

**JOSEPH GREENE**

**DEFENDANT**

**JUDGMENT of Ms. Justice Emily Egan delivered on the 21<sup>st</sup> day of July, 2023**

**Introduction**

1. On 13<sup>th</sup> December 2018, Ulster Bank Designated Activity Company (“Ulster Bank DAC”) initiated proceedings by way of special summons seeking a declaration that, as of 26<sup>th</sup> September 2018, €347,385.59 is due and owing to it by the defendant. Ulster Bank DAC also seeks an order that the said amount, together with interest, stands well-charged on the interest of the defendant, a businessman, in a property at Lismurtagh, County Roscommon (“the property”), together with other associated reliefs.

**The grounding affidavit of Ted Mahon, Senior Manager of Ulster Bank DAC and the issues in dispute**

2. Ted Mahon, Senior Manager of Ulster Bank DAC, makes the affidavit following a perusal of the books and records of “*the plaintiff*”<sup>1</sup>, from matters within his own knowledge as to the relevant assets owned by “*the plaintiff*” and where so appearing on legal advice.
3. Mr. Mahon avers that the defendant is registered as full owner of the freehold interest in the property, which is comprised in Folio 22923 of the register of ownership of freehold land, County Roscommon (“the folio”). A copy of the folio is exhibited confirming this.
4. By way of a facility letter dated 20<sup>th</sup> February 2006 (“the facility letter”), Ulster Bank Ireland Ltd (“Ulster Bank”) offered the defendant a loan facility (“the loan facility”) in the amount of €300,000 for the purposes of facilitating the defendant’s investment in a property syndicate. The defendant signed the facility letter and accepted the loan facility on 20<sup>th</sup> February 2006. Security for the loan facility included a first legal charge over the property. Clause 12 of the general conditions of the loan facility provided that Ulster Bank had a right to assign, transfer or sub-participate the benefits or obligations of the facility to *inter alia* another bank or financial institution at no additional cost to the defendant. None of this is in dispute.
5. Nor is it disputed that the defendant drew down the sums advanced pursuant to the loan facility, that he has not repaid the sums advanced despite the expiry of the term thereof, or that on 19<sup>th</sup> January 2015 Ulster Bank formally demanded payment of the sum then outstanding on the overall loan, €321,73.39, including principal and interest, with further interest accruing thereon. However, the defendant maintains that Ulster Bank DAC has alienated its interest in the loan and the associated security to Promontoria (Oyster) DAC (“Promontoria”), such that it cannot enforce the security by way of the orders sought in these proceedings. This is the first main issue in dispute between the parties.

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<sup>1</sup>In 2016, Ulster Bank converted to a designated activity company, being the current plaintiff. Mr. Mahon’s affidavit makes no distinction between Ulster Bank DAC and Ulster Bank and refers to them collectively as “*the plaintiff*”

6. Mr. Mahon avers that the defendant did not, as required by the loan facility, register a first legal charge over the property and that “*the plaintiff*” sought the land certificate in respect of the lands and registered its security interest on the folio. The folio exhibited shows the registration pursuant to s. 73 (3) of the Registration of Deeds and Title Act, 2006, (“the 2006 Act”) of a lien in favour of Ulster Bank on 11<sup>th</sup> June 2006.

7. The 2006 Act brought to an end the practise whereby a debt could be secured on registered land by the expedient of depositing the land certificate with the lender. The 2006 Act thus precluded the creation of new equitable mortgages by way of deposit of a land certificate and extinguished all existing liens with effect from 31<sup>st</sup> December 2009. However, the holder of an existing lien by way of deposit was able to protect their interests by converting their lien into a registered lien during a three-year transitional period prior to 31<sup>st</sup> December 2009. In this particular instance, Ulster Bank DAC’s case is that Ulster Bank duly registered the lien in the three-year transitional period provided for under s. 73 (3) of the 2006 Act. The defendant contends that the s. 73 registration was invalid, and this is the second main issue in dispute.

8. None of the initial affidavits sworn on behalf of Ulster Bank DAC dealt with the change of status of Ulster Bank to a designated activity company. This gave rise to the third, and plainly subsidiary issue in dispute, being that the defendant maintains that the entitlement of Ulster Bank DAC (as opposed to Ulster Bank) to enforce the security has not been proven.

**Evidence in relation to issue 1: Whether Ulster Bank DAC has alienated its right to enforce the security**

9. Ulster Bank DAC’s primary response to this argument is that the folio showing the registration of the lien in favour of Ulster Bank is conclusive evidence of the ownership of the lien and that this court may not look behind that registration. For reasons set out later in this

judgement, I accept that this is correct and that the defendant's argument must fail. Notwithstanding this legal argument however, both parties presented extensive affidavit evidence to the court on this issue. Accordingly, in deference to the parties, I will now set out that evidence and will consider the relevance of same at paras. 50-55 below.

**10.** The grounding affidavit of Mr. Mahon of Ulster Bank DAC avers that Ulster Bank DAC and Promontoria entered into a commercial transaction in relation to the defendant's loan facilities pursuant to which the beneficial interest in the loans and underlying security is now held by Promontoria but the legal interest remains vested in Ulster Bank DAC. Mr. Mahon confirms that it was understood and agreed between Ulster Bank DAC and Promontoria that as legal owner of the loans, the former will bring and prosecute any claim such as the one herein. Mr. Mahon avers that therefore, as legal owner of the relevant loans, Ulster Bank DAC has good standing to seek the relief s pleaded against the defendant. He further avers that he makes these particular averments from his own knowledge of the relevant transactions between Ulster Bank DAC and Promontoria.

**11.** A supplemental affidavit was sworn by Andrew Harris, Senior Asset Manager of Link ASI Ltd ("Link") (formerly known as Capita Assets Services (Ireland) Ltd) ("Capita") which provides loan administration and asset management services in respect of the loans and related security of the defendant owned by Ulster Bank DAC. The said affidavit is sworn from a perusal of the books and records of Ulster Bank DAC having relevance to the proceedings and exhibits a letter from Capita to the defendant dated 30<sup>th</sup> March 2017. This letter informs the defendant that Capita had been retained to provide relationship management services in respect of the loan facility and, by reference to the defendant's two old Ulster Bank loan account numbers, informs the defendant of the relevant new loan account numbers. The letter also states, at its foot:

*“The loan facilities referred to in this written correspondence are managed by Capita as service provider for and on behalf of Ulster Bank DAC and in accordance with the instructions of Promontoria (Oyster) DAC.”*

**12.** This affidavit also exhibits an up-to-date statement of account showing the amount outstanding as of 7<sup>th</sup> March 2019 on the defendant’s two accounts as €347,385.59 with further interest accruing.

**13.** The defendant swore two replying affidavits on 2<sup>nd</sup> May 2019 and 29<sup>th</sup> October 2019 respectively. The first affidavit exhibits a letter of 11<sup>th</sup> November 2016 (“the 11/11/16 letter”) from Pat Smith of SME Recoveries, Ulster Bank. The 11/11/16 letter states that “in response” to the defendant’s letter (which is not exhibited), it encloses a signed copy of the facility letter and refers in particular to two clauses thereof pursuant to which the borrower consents to Ulster Bank assigning the benefit of the loan and security. The 11/11/16 letter informed the defendant that “... *your debt has been legally sold to Cerberus and the loan is scheduled to transfer in late December 2016*”. The defendant’s interpretation of this letter is that Ulster Bank’s intention was to sell the whole debt (comprising both the legal and beneficial interest therein) to Cerberus. The defendant argues that as this letter does not suggest that Ulster Bank retained any interest in the debt, Ulster Bank DAC therefore has no further interest in the loan such as might entitle it to enforce the security by means of a well-charging order.

**14.** In his second affidavit the defendant expresses doubt that Ulster Bank DAC has transferred only the beneficial interest in the loan to Promontoria. The defendant observes that Promontoria has over the past number of years initiated litigation relating to former Ulster Bank loans such as his own. He notes that it would be “*strange in the extreme*” if there was a different agreement in respect of his debt and observes that there was no evidence before the court of same.

15. This point is responded to by two separate affidavits sworn on behalf of Ulster Bank DAC.

16. The first responding affidavit is sworn by John Burke, Director of Promontoria. This affidavit avers that only the beneficial interest in the defendant's loan was transferred to Promontoria and that the legal interest remained fully with Ulster Bank DAC. Mr. Burke further avers that it was agreed between Promontoria and Ulster Bank DAC, that as legal owner, the latter would maintain these proceedings and that Promontoria will not advance any duplicate claim in relation to the defendant's loan facility and security. Mr. Burke states that the reference in the 11/11/16 letter to the debt being "*legally sold*" is incorrect as the disposition was of the beneficial and not the legal interest. He further points out that the transfer to Promontoria was yet to take place at the time of the 11/11/16 letter and that the author could not have then known the final form of the commercial transaction.

17. I pause here to observe that it is difficult to discern Mr. Burke's means of knowledge as to what was in the mind of the author of a letter from Ulster Bank to one of its customers. I also note that the documents pursuant to which Ulster Bank DAC transferred the beneficial interest in the defendant's loans and security to Promontoria are not exhibited. Nor does Mr. Burke state that he has read the documents.

18. However, there is weight to be afforded to a sworn averment from the very entity that the defendant contends owns the legal interest in the loan to the effect that it owns only the beneficial interest. The mischief intended to be avoided in cases of loan transfer-namely that the debtor does not know to whom he must repay the loan-is significantly ameliorated by Mr. Burke's averments.

19. The second responding affidavit is sworn by Mr. Mahon of Ulster Bank DAC following a perusal of the books and records of "*the plaintiff*" (which books and records are in the custody and control of "*the plaintiff*" and have been kept in the usual and ordinary course of its

business). He avers that the title to the loan agreement remains vested in Ulster Bank DAC and that no legal assignment thereof was intended to or did occur. With reference to the 11/11/16 letter upon which the defendant relies, Mr. Mahon accepts that its contents are incorrect and apt to be misleading. He states that that letter was sent before the intended transfer, and that the transaction did not proceed as initially intended or anticipated at the time of this letter. Mr. Mahon also confirms that no repayments whatsoever have been made to Ulster Bank DAC in the period December 2016 to July 2019 and further observes that the defendant has not averred that he made repayments to any other party in reliance upon his apprehension that the loan had been transferred.

**20.** Mr. Mahon states that full details of the legal nature of the loan transfer were communicated to the defendant in three separate letters. Although these letters were not then exhibited, this was an oversight which was subsequently corrected, and I will therefore now consider same:

- By letter of 14<sup>th</sup> October 2016 from Ulster Bank DAC informed the defendant that on 8<sup>th</sup> October 2016 Ulster Bank DAC agreed to dispose of part of its loan book to a purchaser who was ultimately owned by investment funds managed by or on behalf of Capital Management Services LP or its related affiliates. From the completion date of the disposal, all amounts owing in respect of the facility documents would continue to be owed to Ulster Bank which would continue to owe all obligations arising under the facility documents to its customers.
- By letter of 24<sup>th</sup> November 2016 Ulster Bank DAC informed the defendant that it is entered into a legally binding agreement to dispose of the economic benefit in the defendant's facilities to a purchaser owned by investment funds that are managed by or on behalf of Cerberus Capital Management LP or its affiliates. Disposal of the economic benefit meant that the purchaser now has the right to receive the economic

benefit of the payments in line with the terms of the facility documents as well as to receive the economic benefit of realisations/payments for any assets used as security for the facilities. The letter stated that whilst Ulster Bank DAC had agreed to dispose of the economic benefit in the facilities to the purchaser, the legal interest in the facilities and in the facility documents remained with it. Accordingly, Ulster Bank DAC remained the lender of record in respect of the loan facilities. The letter stated that in practical terms, the defendant's relationship would continue with Ulster Bank DAC but that Ulster Bank DAC could make any decisions in relation to the facilities, as all such decisions were to be made by the purchaser. The letter specifically states that if the defendant wishes to deal exclusively with the purchaser, he could provide his consent to the transfer and/or assignment of the legal interest in the facilities from Ulster Bank DAC. Should this option not be taken, the legal interest in the facilities would remain with Ulster Bank DAC. A form for signature was included should the defendant wish to consent to the transfer of the legal interest to the purchaser.

- By letter of 14<sup>th</sup> March 2017 and further to the earlier letter, Ulster Bank DAC confirmed that the purchaser of the economic benefit of the facilities was Promontoria. The purpose of the letter was to inform the defendant that as part of the transaction, Ulster Bank DAC had appointed Capita to provide loan administration and relationship management services in respect of his facilities. Repayment collections would be managed by the servicer on behalf of Ulster Bank DAC. This was the precursor to the letter from Capita to the defendant dated 30<sup>th</sup> March 2017 referred to at para. 11 above.

**21.** The defendant swore a further affidavit on 21<sup>st</sup> June 2022 observing that Ulster Bank DAC does not exhibit the loan sale agreement to enable the court to satisfy itself that it retained legal interest in the loan facilities.



22. The defendant also exhibits statements of account dated 23<sup>rd</sup> March 2017 showing a balance of €19,709.83 and €300,274.06 on his two accounts. He points out that the statements of account for the period January 2016 to April 2017 show a nil balance for these particular accounts.<sup>2</sup>

**Evidence in relation to issue 2: the alleged invalidity of the registration of the lien**

23. The second main ground of defence relates to the alleged invalidity of the registration of the lien pursuant to s. 73 (3) of the 2006 Act. This ground has two separate objections; lack of notice of the application for registration to the Property Registration Authority of Ireland (“the PRAI”) and want of authority on the part of the person making the application for registration.

24. The first of these objections, lack of notice, was first raised in an affidavit sworn by the defendant on 24<sup>th</sup> February 2020 pursuant to which he avers that the lien over his property was registered “*without notice*” to him despite notification comprising a mandatory statutory obligation.

25. In this respect s. 73 (3) of the 2006 Act provides in material part:

*“(b) a holder of such a lien may apply to the Authority for registration of the lien in such manner as the Authority may determine;*

*(c) the application shall be on notice by the applicant to the registered owner of the land or charge and be accompanied by the certificate concerned;”*

26. The defendant avers that in breach of this provision, Ulster Bank DAC “*failed, refused or neglected to inform him or to adhere to their mandatory statutory obligation and as such cannot rely upon the lien*”.

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<sup>2</sup> It is clear that the explanation for this is that, on transfer of the beneficial interest in the loans to Promontoria, the old Ulster Bank accounts were zeroed out and new accounts opened to represent the loan amounts. This was an essentially administrative exercise upon which nothing turns.

27. This averment is responded to by way of two affidavits from Mr. Eoin Pentony of O'Brien Lynam Solicitors, solicitors for Ulster Bank DAC. Mr. Pentony states that this is the first occasion on which the defendant advanced this line of defence, and that no explanation has been offered as to why this point was not made before. This appears to be factually incorrect as the defendant first raised this point in an unsuccessful application to the PRAI to cancel the lien on 6<sup>th</sup> November 2018.

28. O'Brien Lynam evidently wrote to the PRAI seeking a copy of the instrument by which the lien was registered on the folio. The documents furnished include copies of a form ("the form") (on which is entered, *inter alia*, the details of the applicant for registration and the signature of the applicant), which form annexes the application for registration (Form A) and the Notice of Intention (of the application) as sent to the registered owner of the lands (Form B). I will detail each in turn.

#### The form

29. The form specifies the application type ("*Lien – Section 73 (3)*") and the folio number. Under the heading "*Applicant Details*" is pre-printed: "*I, solicitor for the applicant, apply for registration of the undernamed as full owner ... of the property the subject of the application herein*" and thereafter enters "*Ulster Bank*". Under the heading "*Signature*", the form states "*all applications must be signed either by an individual Solicitor or, if no Solicitor is acting, by the applicant.*" The form is signed by Gillian Griffin, Ulster Bank, DEMAT team. It is not clear whether Ms. Griffin intends to sign the form as a solicitor or as applicant (either of which appear to be permissible).

#### The application for registration - Form A

**30.** Ms. Griffin's signature also appears on Form A in which she is described as a project analyst with the Ulster Bank DEMAT team. Form A states, "*We enclose a copy of the Notice of Intention (Form B ...) served on the registered owner(s) at the address shown on the register or served personally, on the 30 April 2009*" and states "*We have not received any reply to the notice*".

#### The Notice of Intention - Form B

**31.** Form B is also signed by Ms. Griffin. It is directed to "*Joe Green*". This is a misspelling of the defendant's surname, Greene. In addition, the defendant contends that his given name is Joseph not Joe. Form B does not refer to a specific address but to "*the registered owner of the lands comprised in (the relevant folio)*". Form B states that "*(the PRAI) has determined that the Notice must be served... by registered post to the address of the registered owner appearing on the register*". Form B, which is dated 30<sup>th</sup> April 2009, states that it would be deemed to have been received by the registered owner within five days of the date thereof. Form B includes a space for acknowledgment by the registered owner "*if applicable*" which in this instance is blank.

**32.** It is clear that these documents were received by the PRAI on 11<sup>th</sup> June 2009.

**33.** Mr. Pentony's affidavit also refers to two unsuccessful applications made by the defendant to the PRAI to cancel the lien the subject matter of these proceedings. I have already referred to the first unsuccessful application which was in November 2018. In the context of the second such application, Messrs. O'Brien, Lynam wrote to the PRAI on 17<sup>th</sup> December 2018 referring to the well-charging proceedings and objecting to the cancellation of the lien on the basis that same would prejudice these proceedings. The letter also stated that the appropriate forum to challenge the lien was in the High Court as part of the well-charging proceedings. Ulster Bank DAC fully accept-and indeed contend-that this latter statement is legally incorrect.

34. Mr. Pentony's affidavit emphasises that, subsequent to the registration of the lien, certain other encumbrances were also registered on the folio. This suggests that the defendant as registered owner was active in relation to the folio and yet had taken no court action to query, challenge or cancel the registered lien until shortly after the demand was made of him on 19<sup>th</sup> January 2015 for repayment of the loan the subject matter of these proceedings.

35. Mr. Pentony's affidavit does not exhibit an affidavit of service of Form B on the defendant. This is hardly surprising, as the registration of the lien occurred over twelve years ago.

36. The defendant had represented himself up to this point in the proceedings, but solicitors came on record for him in March of 2020. After this, he swore a further affidavit observing that the Property Registration Authority Rules ("the PRAI Rules") require the service of Form B by registered post to the registered owner as appearing on the register. He states the documentation exhibited by Ulster Bank DAC does not include an affidavit of service by registered post of Form B. He also observes that the notice of intention does not set out an address for service. That it misspells his own name and that it does not include his signature in the acknowledgment section.

37. This affidavit also raises the second objection to the validity of the s. 73 registration, being that there is no evidence that Ms. Griffin, who signed the form either had authority to sign on behalf of Ulster Bank or, alternatively was a solicitor. On these grounds, the defendant avers that the registration is null and void and of no effect.

38. No further affidavit has been filed by Ulster Bank DAC in response to these particular issues.

**Evidence in relation to issue 3: the entitlement of Ulster Bank DAC as opposed to Ulster Bank to enforce the security**

39. By affidavit sworn on 13<sup>th</sup> January 2023, Adrienne Fitzgibbon, Senior Manager with BCM Global ASI Limited (formerly Link), which provides loan administration and asset management services to Ulster Bank DAC in respect of the defendant's loans, details the computation of the amount due and owing by the defendant to Ulster Bank DAC. She explains that an amount of interest was initially overcharged on the defendant's account but that this overcharge has now been corrected. Ms. Fitzgibbon also exhibited what she refers to as an "*instrument of conversion of an existing private limited company limited by shares to a designated activity company limited by shares*", specifically Ulster Bank to Ulster Bank DAC. In fact, what is exhibited here appears to be an application to re-register the company as a designated activity company rather than the "*instrument of conversion*" or indeed the certificate of incorporation of Ulster Bank DAC. Ms. Fitzgibbon states that she is advised by the solicitors acting for Ulster Bank DAC that by the process in question the company adopted a new constitution, a new form and a new name but remained the same legal person.

40. In his final affidavit, the defendant queries Ms. Fitzgibbon's means of knowledge and states that it is not clear when Ulster Bank was in fact converted to a designated activity company, or if indeed it was converted.

### **Analysis**

#### **Issue 1: Analysis in relation to the entitlement of Ulster Bank DAC to enforce the security**

41. The defendant submits that he has raised an arguable case that Ulster Bank DAC has alienated its interest in the loan and the associated security to Promontoria, such that it cannot enforce the security by way of the orders sought in these proceedings.

42. The fundamental difficulty with the defendant's argument is that, in determining an application such as the present, the High Court may not entertain a challenge to the correctness or conclusiveness of the register.

43. In this respect, s. 31(1) of the Registration of Title Act 1964 (“the 1964 Act”) provides as follows:

*“31.— (1) 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; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.”*

44. In *Tanager DAC v Kane* [2018] IECA 352, [2019] 1 I.R. 385, Baker J. (with whom Peart and Whelan JJ agreed) stated that:

*“A plaintiff seeking an order for possession must adduce proof, inter alia, that he or she is the registered owner of the charge. It is registration that triggers the entitlement to seek possession. In those proceedings, the court may not be asked to go behind the Register and consider whether the registration is, in some manner, defective. In the possession proceedings, the court must accept the correctness of the particulars of registration as they appear on the folio, because the statutory basis for the action for possession is registration. This is one consequence of the statutory conclusiveness of the Register, and of the statutory limits to rectification.”*

45. Accordingly, in consequence of the statutory conclusiveness of the register, and of the statutory limits to its rectification, the court may not, in possession proceedings, “look behind” the register.

46. Further, although *Tanager v Kane* was decided in the context of an action for possession, its ratio applies more broadly. In particular, it undoubtedly applies to proceedings

such as the present in which a well-charging order is sought. This much is clear from the judgments of the Court of Appeal in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93 and *Promontoria (Oyster) DAC v. McKenna* [2021] IECA 94 and from the judgment of Simons J. in *Promontoria (Oyster) DAC v. Lynn* [2022] IEHC 99.

47. In the present case, the folio in respect of the property contains an entry registering a lien pursuant to s. 73 of the 2006 Act as a burden on the relevant land and noting that Ulster Bank is the owner of the lien. This registration has not been disturbed by any order of the court in rectification proceedings. In these circumstances, the defendant has no entitlement in the present proceedings, to challenge the registration of Ulster Bank DAC.

48. Further, Ulster Bank DAC correctly relies upon the decision of the Court of Appeal (Allen J.) in *Pepper Finance Corporation (Ireland) DAC v Moloney* [2023] IECA 161 overruling this court's decision in the case at first instance. It is clear from the Court of Appeal judgment that there is no obligation on a creditor seeking an order for possession on foot of a lien duly registered on the folio to prove that it has retained the legal interest in the lien (or to rebut evidence suggesting to the contrary). In such proceedings, the creditor may rely upon the folio as conclusive evidence of their ownership of the lien. The same logic applies to a creditor seeking a well charging order.

49. I view the above as providing a complete answer at law to the defendant's submission on this issue. I will nevertheless turn to briefly consider the evidence of the parties.

50. The defendant's argument is based entirely on the letter of 11/11/16, which he contends raises an arguable case that his loan facility and security have been "*legally sold*" to Cerberus. It is evident that this letter is no more than a statement of intent at the time it was written, namely in November 2016. At that point, it may well have been intended that the defendant's loan facility would be "*legally sold*" to Cerberus. However, the evidence before the court is that, as matters transpired, this did not occur and a transfer of the beneficial interest only to

Promontoria took place. It is true that the letter does not differentiate between the legal and beneficial interest and could communicate that the entire loan had been sold. However, any such impression is wholly inconsistent with and corrected by the more formal letters from Ulster Bank DAC written both immediately before and immediately afterwards on 14<sup>th</sup> October, 24<sup>th</sup> November 2016, and 14<sup>th</sup> March 2017.

**51.** Any inference raised or uncertainty created by the 11/11/16 letter as to the nature of the transfer to Promontoria is comprehensively corrected in the sworn averments of a senior manager of Ulster Bank DAC and a director of Promontoria confirming that the legal interest remains with Ulster Bank DAC. The party who advanced the loan to the defendant is the same party as that appearing on the register as owner of the lien and that party is, to all intents and purposes, the plaintiff in these proceedings.<sup>3</sup>

**52.** Irrespective altogether of the conclusiveness of the register, (as to which see further below), there is simply no evidence in this case that Ulster Bank DAC has disposed of the legal interest in the loan portfolio or indeed of its legal interest in the lien. The defendant's argument that the legal interest in the security has not been retained is no more than a bare assertion for which there is no evidence. This cannot form the basis for an arguable defence or for the remittal of the proceedings to plenary hearing.

**53.** The defendant also argued that the various affidavits sworn by or on behalf of Ulster Bank DAC and certain of the exhibits thereto contain hearsay evidence and are inadmissible. However the principal factual evidence upon which the Ulster Bank DAC relies is not in fact the affidavit evidence or the exhibits thereto but the folio showing the registration of the lien in favour of Ulster Bank. The relevance of the affidavit evidence of Ulster Bank DAC on this issue is merely to rebut the defendant's arguments which are themselves based wholly upon

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<sup>3</sup>Although the registered owner of the lien is Ulster Bank Ireland Ltd and not Ulster Bank DAC, as I explain below, nothing turns on this distinction.



the 11/11/16 letter. If therefore the evidence tendered by Ulster Bank DAC were to be adjudged inadmissible as hearsay, then the 11/11/16 letter is evidence of the same kind.

54. In any event, with one exception (with which I will deal at para. 72 below), I am satisfied as to the means of knowledge of the deponents who have sworn the affidavits on behalf of Ulster Bank DAC. I am also satisfied that the key documents relied upon by Ulster Bank DAC in these proceedings comprise business records within the meaning of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. In the main, these documents comprise agreements with the defendant (for example, the facility letter and the loan facility), correspondence with the defendant and statements of account. Each such document was provided to the defendant (in the form of exhibits to the affidavits sworn by Ulster Bank DAC) sufficiently far in advance of the hearing before me. Having regard to the contents and source of these documents and to the circumstances in which they were compiled and exhibited before the court, I am satisfied as to their reliability. The admission of these business records will therefore cause no unfairness to the defendant.

55. In all the circumstances, the first argument made by the defendant cannot succeed.

### **Issue 2: Analysis in relation to the alleged invalidity of registration**

56. The defendant's second argument is that there are certain defects in the registration of the lien. He submits that these proceedings ought to be remitted to plenary hearing for determination of that issue. Ulster Bank DAC relies once again on *Tanager DAC v Kane* and submit that its registration as owner of the lien provides a complete answer to the defendant's arguments on the alleged invalidity of the registration.

57. Although it is clear that the court retains power to rectify the register in appropriate proceedings, this jurisdiction is limited to rectification in case of actual fraud or mistake. Allied to this is the jurisdiction of the court to correct an error that occurred in the registration of the

instrument or transaction on foot of proceedings brought in accordance with the relevant procedural rules of the Circuit Court or High Court, as the case may be.

**58.** In many respects, the question posed in *Tanager v Kane* was essentially procedural: whether, having regard to the statutory provisions by which the register is to be treated as conclusive, the court could in those proceedings entertain an argument, by way of defence or counterclaim, that the register does not correctly reflect title to the lien or, in other words, whether the court should “*look behind*” the register.

**59.** Further, Baker J. observed that albeit obiter, that:

*“..... the court hearing the proceedings for possession must be considered to have the inherent jurisdiction, in a suitable case, to adjourn the proceedings or stay the enforcement or implementation of an order for possession, or to postpone the date of delivery of possession, pending the determination of rectification proceedings, if it considered that those proceedings are reasonably likely to offer a defence to the claim for possession.”*

**60.** Therefore, although a defendant cannot challenge the registration of a lien in the context of proceedings for possession or for a well-charging order, the court hearing such an application might be prepared to adjourn such proceedings, particularly where a challenge to the registration of a lien is ongoing and/or at a reasonably advanced stage. Alternatively the court might be prepared to direct that the two sets of proceedings travel together.

**61.** However, the defendant has not to date initiated proceedings seeking to rectify the register and nor has he intimated any intention so to do. It is not clear when the defendant became aware of the registration of the lien. However, given his dealings with the register in 2015 (after the Bank’s formal letter of demand) one would expect him to have been fully aware of the registration of the lien by then. Certainly, he was aware of it by 2018 when he brought the first of two unsuccessful applications to the PRAI to cancel the registration.

Notwithstanding this, no explanation has been tendered for the non-initiation of rectification proceedings.

**62.** The defendant argues that Ulster Bank DAC is estopped from relying on his inactivity because he was misled by the contention in the letter of 17<sup>th</sup> December 2018 to the PRAI (see para. 33 above) that the appropriate forum to challenge the lien was in the High Court as part of the well-charging proceedings. This statement was undoubtedly legally incorrect and inconsistent with the position now adopted by Ulster Bank DAC. However, there is no evidence that the defendant relied upon this letter in desisting from commencing rectification proceedings. The defendant neither avers nor submits that he even received this letter, still less relied upon it in desisting from proceedings. No estoppel therefore arises.

**63.** In any event, no specific allegation of fraud, mistake or error such as might suggest that he would be successful in rectification proceedings is even sketched out by the defendant in these proceedings. Further, although he alleged that the legal interest in the loan and security was subsequently transferred to Promontoria, the defendant advances no challenge whatsoever to the entitlement of Ulster Bank to be registered as owner of the lien at the time of registration.

**64.** Rather the defendant simply submits that these proceedings are distinguishable from *Tanager v. Kane*, *Promontoria (Oyster) DAC v. Greene* and *Promontoria (Oyster) DAC v. McKenna* because in the present case there is documentary evidence raising an inference that the lien was not properly registered. However, for reasons I will now explain, I do not believe that this is so.

**65.** The first of the defendant's two arguments alleges non-compliance with the statutory requirement under s. 73 to give notice to him of the intention to register the lien. The defendant avers that the lien was filed "*without notice to him*". By way of evidence, the defendant points to the fact that Form B does not contain his address. However, Form B is laid out such that it is addressed to "*the registered owner of the lands comprised in*" the relevant folio. Form B

contemplates the entry thereon of the folio number, which is correctly entered. The postal address would in usual course be written on the envelope rather than on the face of Form B and there is no evidence that the envelope was incorrectly addressed. The defendant also states that Form B mis-spells his surname and that his given name is wrong. However, precisely the same spelling and given name appear on the facility letter which is signed by the defendant. As to service, although there is no affidavit of service of Form B, Form A states that Form B was served on the registered owner at the address shown on the register or served personally on 30<sup>th</sup> April 2009. It is not clear which of these two methods of service was adopted. However, the printed text on Form B states that it will be deemed to have been received within five days from the date thereof (i.e. within five days of 30<sup>th</sup> April 2009). There is no suggestion on the face of the various forms that an affidavit of service is required. Nor does the 2006 Act mandate a particular method of service or proof of service. Save for bare assertion on the part of the defendant, there is therefore no evidence that the relevant forms were not appropriately served. In the circumstances, I do not find the above is sufficient to raise any inference that the notice of intention was not notified to the defendant.

**66.** The second argument is that the application forms failed to comply with the PRAI Rules (which PRAI Rules have not been put before the court). This arises because the defendant questions the authority of Ms. Griffin to complete the PRAI application for registration of the lien. It is correct to say that there is no particular evidence that Ms. Griffin is a solicitor. However, the forms exhibited do not on their face require the relevant application to be made by a solicitor. It can alternatively be made by "*the applicant*". The form itself does not specify any particular formalities or set out any specific requirements in relation to the authority of persons to make applications on behalf of corporate entities. There is no requirement that such applications must be made by directors, secretaries or other specific authorised officers. In such circumstances there may be no reason in principle why the relevant application could not be

made by any official of the bank. There is no suggestion that Ms. Griffin was not an official of the bank at the time she completed the application for registration.

67. In short, the documentary evidence does not raise an inference that the lien was not properly registered. As such, the defendant has failed to put forward evidence which might support an arguable basis for departing from the *Tanager v. Kane* line of authority or for holding that Ulster Bank DAC may not rely on the conclusiveness afforded by s. 31.

68. The defendant argues that the court ought to either decline the reliefs sought by Ulster Bank DAC or send this matter forward for plenary hearing so that the issues raised concerning the validity of the registration can be determined after a full trial. The difficulty with this is that, as *Tanager v Kane* makes clear, the matters raised are not for determination in these proceedings. Although the court clearly has power to adjourn these proceedings for plenary hearing, for example to determine factual disputes, the issues outlined above as they pertain to the validity of the registration, are not for determination in the context of these proceedings.

**Issue 3: Analysis in relation to the entitlement of Ulster Bank DAC as opposed to Ulster Bank to enforce the security**

69. Section 63 (12) of the Companies Act, 2014 confirms that the re-registration of an existing private company as a designated activity company shall not affect any rights or obligations of that company or render defective legal proceedings and further that such proceedings may be continued by the company in its new status.

70. If therefore Ulster Bank converted to a designated activity company, being Ulster Bank DAC, then no issue arises in relation to the entitlement of the latter to the reliefs sought.

71. The evidence of Ms. Fitzgibbon was intended to address this issue but did not fully do so. Ms. Fitzgibbon is with the company providing loan administration and asset management services to Ulster Bank DAC and not with Ulster Bank DAC itself. In addition, as appears from

para. 39 above, she has apparently exhibited the wrong document. I am fully satisfied that the failure to exhibit the relevant certificate of incorporation issued in respect of the conversion was a genuine oversight. Accordingly, as there can be no real doubt that Ulster Bank has in fact converted to a designated activity company, being Ulster Bank DAC, I will permit this matter to be addressed in a further affidavit to be sworn by an appropriate deponent.

### **Conclusion**

72. For all of the reasons set out above, I am prepared to grant the well-charging order sought. However, I will defer final orders pending a further affidavit to be sworn by Mr. Mahon, or another manager from Ulster Bank DAC, exhibiting the certificate of incorporation on conversion of Ulster Bank to a designated activity company. It is then my intention to grant a declaration that €19,709.83 plus €300,274.06, totalling €319,983.89 is well-charged in favour of Ulster Bank DAC in respect of the defendant's interests in Apartment No. 43, Dubh Carraig, Ardmore, County Waterford.

73. I will list this matter before me for mention only on Tuesday 25<sup>th</sup> July 2023 at 11 am.