Unapproved
No redactions required

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 93

Court of Appeal Record No 2020/91

Costello J.

Collins J.

Binchy J.

BETWEEN

PROMONTORIA (OYSTER) DAC

Plaintiff/Appellant

AND

DESMOND GREENE

Defendant/Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 26 March 2020

INTRODUCTION

1. In April 2018, the Appellant ("*Promontoria*") brought proceedings in the High Court for a well charging order and order for sale in default of payment in respect of lands owned by the Respondent ("*Mr Greene*") comprised in Folio 10081F of the Register County Westmeath. These lands do not include the family home of Mr Greene. Promontoria claimed that a total amount of €210,954 was due and owing to it by Mr Greene arising from three separate facilities which had been advanced by Ulster Bank Ireland Limited ("*Ulster Bank*") but which had subsequently been transferred to Promontoria.[1] The facilities were, it was said, secured by a lien registered in favour of Ulster Bank on Folio 10081F pursuant to section 73(3) of the Registration of Deeds and Title Act 2006 (*"the 2006 Act*") the benefit of which had also been transferred to Promontoria. That lien arose from an earlier equitable mortgage created by the deposit by Mr Greene of the land certificate relating to Folio 1008F with Ulster Bank.

2. This form of action – historically referred to as a "*mortgage suit*" – is familiar and long-established.[2] Order 3, Rule 15 RSC (read with Order 54, Rule 3) provides that it is to be commenced by special summons and Appendix B, Part III RSC helpfully sets out the standard form reliefs to be claimed in the special indorsement of claim. Order 51 RSC provides for the making of an order for sale. In general, the sole defendant is the

[1] No issue was taken by Mr Greene regarding the transfer from Ulster Bank to Promontoria.

[2] See, generally, Scanlon, *Practice and Procedure in Administration and Mortgage Suits in Ireland* (1963) ("*Scanlon*") at page 71 and following; Maddox, *Mortgages: Law and Practice* (2nd ed; 2017 ("*Maddox*"), chapter 12.

mortgagor. No other mortgagee or incumbrancer is required to be served unless they are in actual possession of, or in receipt of the rents and profits of, the lands in suit (Order 15, Rule 29). However, the Court has the power to permit or direct the joinder of additional parties. The action is normally heard on affidavit, subject to the general entitlement of each party, exercisable without leave, to cross-examine the other party's deponents (Order 38, Rule 3) and subject also to the power of the Court to direct an oral hearing in respect of any contentious questions of fact (Order 38, Rule 8).

3. The form of order to be made by the Court, where satisfied that the plaintiff is entitled to the relief sought, is also well-established. That order will (i) declare that the monies secured by the mortgage stand well charged on the defendant's interests in the lands; (ii) order that, in default of payment of those monies (along with any further interest that may accrue) within the period specified by the Court (and the Court has significant discretion in this respect), the lands should be sold on such conditions of sale as shall be settled by the Court and (iii) direct the Examiner's Office to take an account of all incumbrances subsequent to as well as prior to and contemporaneous with the plaintiff's demand and make an inquiry as to the respective priorities of all such demands.[3] An order in precisely such terms was in fact made by the High Court here.

4. Here, Promontoria's claim was only partly successful. For the reasons set out in his Judgment of 24 February 2020, Simons J held that Promontoria was entitled to the orders sought by it in respect of two of the relevant facilities (to which I will refer for

[3] See *Scanlon*, at page 72. Such accounts and inquiries are, according to *Maddox*, "*directed as a matter of course*" in mortgage enforcement proceedings: para 12-31.

convenience as the Second and Third Facilities) but refused relief in relation to the other facility (to which I shall refer as the First Facility). It will be necessary to examine the Judge's reasoning in more detail in due course but, briefly, he held that Promontoria had failed to establish that any sum was due and owing on foot of the First Facility at the time of the institution of the proceedings and, separately, he considered that Promontoria had failed in a necessary proof in that it had failed to establish clearly when the equitable mortgage by deposit had been created.

5. Promontoria appeals against that part of the Judgement and Order of the High Court. The appeal raises a number of issues, some procedural and/or evidential in nature but it also raises important issues concerning the interpretation and effect of section 73 of the 2006 Act. For that reason, this appeal was heard with two other appeals raising issues relating to that provision, *Promontoria (Oyster) DAC v McKenna* (also an appeal by Promontoria from a decision of Simons J) and *Promontoria (Oyster) DAC v McHale* (an appeal by Mr McHale from a decision of Barton J in the High Court). The Court also gives its decisions on those other appeals today.

6. For the reasons set out in this judgment, I would set aside the Judgment and Order of the High Court insofar as it relates to the First Facility and would remit that part of Promontoria's claim to the High Court for determination in accordance with this judgment.

THE HEARING IN THE HIGH COURT

AND THE JUDGMENT OF SIMONS J.

7. The proceedings were returnable to the Master and were in due course transferred into the Chancery Special Summons list for hearing, where they were adjourned from time to time. The Special Summons (dated 12 April 2018) was grounded on an affidavit of Albert Prendiville, a Director of Promontoria, sworn on 4 April 2018. A further affidavit was sworn by Mr Prendiville on 26 April 2019. So far as necessary, I will refer in more detail to these affidavits below. No affidavit was sworn by or on behalf of Mr Greene in reply to Mr Prendiville's affidavits.

8. The proceedings came on for hearing before Simons J on 25 November 2019. While Mr Greene did not consent to any of the orders sought, it appears that he did not contest Promontoria's claim insofar as it related to the Second and Third Facilities. However, his Counsel made submissions disputing its entitlement to relief in respect of the First Facility. The terms of that facility were set out in an Ulster Bank facility letter dated 23 June 2008 which was exhibited by Mr Prendiville. It was stated to be a "*committed loan facility"*, the principal amount was €116,000 and the term of the facility was 10 years, with monthly repayments. As regards security, the letter noted "*existing security to be held for this borrowing*" (along with a life policy). For present purposes, however, the most significant aspect of the facility letter was that it expressly incorporated *"the Bank's Standard Terms & Conditions Governing Business Lending to Companies – Business Banking (Ref 01/2007)"* (my emphasis). A copy of those general conditions seems to have enclosed with the letter. Mr Greene was not a company, of course, and

quite why the First Facility should have been governed by general conditions applicable to lending to companies is rather a mystery. However that may be, that is what the facility letter states. In his first affidavit, Mr Prendiville had stated – incorrectly – that all three facilities incorporated Ulster Bank's *"Standard Terms & Conditions Governing Business Lending to Individuals – Business Banking"* (again, my emphasis) and he had exhibited a copy of those general conditions. He did not advert to or exhibit Ulster Bank's "*Standard Terms & Conditions Governing Business Lending to Companies – Business Banking".* Both the averment and the failure to exhibit both documents were clear errors on the part of Mr Prendiville.

9. Counsel for Mr Greene submitted that, on its face, the facility letter indicated that the First Facility was for a 10 year term, expiring in *June* 2018. However, the proceedings had been instituted in *April* 2018. While Promontoria had demanded payment of the First Facility in February 2018, Counsel submitted that there was nothing on the face of the facility letter that permitted it to do so and, given that the relevant general conditions were not before the Court, he contended that Promontoria had failed to establish any event of default such as to entitle it to demand payment of the First Facility.

10. In response to this submission, Counsel for Promontoria explained that any evidential deficiency was inadvertent and made the point that, if the issue had been flagged in advance of the hearing, it could have been addressed. In the circumstances, he sought an opportunity to file a further affidavit. That would have necessitated an adjournment of the proceedings. However, even though the Judge in fact adjourned the proceedings

to 3 February 2020 (for the purpose of having the parties furnish written submissions on the extent of the Court's discretion in well-charging proceedings), he specifically directed that no further affidavit could be filed by Promontoria in the interim. That direction is challenged by Promontoria on this appeal. In any event, the hearing resumed on 3 February 2020 and at the conclusion of that resumed hearing, the Judge reserved his judgment.

11. One further point needs to be explained, though it seems not to have been the subject of any significant debate in the High Court. As I have mentioned, the well charging proceedings were brought in reliance on a lien registered pursuant to section 73(3) of the 2006 Act. That lien, and Promontoria's interest in it, was clearly shown in Part 3 of Folio 10081F. The lien was registered on the Folio on 19 March 2009 and Promontoria's interest in it noted on 9 March 2017. A copy of the Folio was exhibited by Mr Prendiville in his first affidavit and he referred to the relevant entry in it. In his second affidavit, Mr Prendiville noted that lien had been specifically referred to the second and third facility letters (which post-dated its registration in 2009),[4] whereas the first facility letter referred only to *"existing security".* That was, he said, a reference to the deposit of Mr Greene's title deeds with Ulster Bank. He then went on state his belief *"that the original land certificate to Folio WM10081F was deposited by the Defendant as security back in 1992"* (my emphasis) and exhibited what he described as "*the Forms*

[4] The facility letter relating to the Second Facility (dated 6 January 2010) identifies as security "*Lien over folio number 10081F Co Westmeath located at Killeen, Multyfarmham, Co Westmeath comprising of 82.920 acres*" and a similar formula is to be found in the facility letter relating to the Third Facility (dated 10 February 2011). Each of these facilities was a demand facility.

of Certificate evidencing the creation of an equitable mortgage by deposit of title deeds". As will become apparent, the reference by Mr Prendiville to the land certificate having been deposited by the Defendant as security *"back in 1992"* appears to be another error on his part.

12. One of the documents referred to by Mr Prendiville is a pre-printed Ulster Bank memorandum, headed Mullingar Branch (Mullingar being inserted by hand) and dated (by hand) 11 February 1993 which recites the deposit by Mr Greene of *"the undernoted Deeds and Documents as Security for all [his] individual liabilities, direct or collateral, present or future, including Letters of Guarantee".* There are a number of columns with the instruction to "*insert date of each document, the names (in full) of the parties to each and the nature of each*." In apparent compliance with that instruction, the form contains the following entries:

No	Date	Parties Names	Nature of Instrument
1	27.11.92	Desmond Greene	Original Land Certificate Folio No: 10081F Co Westmeath
2	11.02.93	Desmond Greene & Mrs Mairead Greene	Part 1 Certificate & Family Home Protection Act Declaration

The form recites that it was read to Mr Greene on 11 February 1993 and it was signed by an officer of Ulster Bank. It was not signed by Mr Greene.

13. The other document is headed "*Forms of Certificate in connection with Equitable Mortgages by Deposit of Title Deeds and/or Land Certificates*" which, in relevant part, comprises a certificate to the effect that the lands in Folio 10081F were not a family home for the purposes of the Family Home Protection 1976. This form is also dated 11 February 1993 and it is signed by Mr Greene and his wife. It appears to be the second of the items listed in the Ulster Bank memorandum referred to in the preceding paragraph.

14. In his Judgment, the Judge explained that Promontoria was "*in effect"* seeking to enforce an equitable mortgage arising from the deposit of the land certificate. That was so even though that equitable mortgage had since been registered as a burden on the title in the form of a lien.[5] Promontoria could not avail of the statutory power of sale given to mortgagees where the mortgage was made by deed[6] and the 2006 Act did not provide any express statutory remedy for enforcing such a lien. Thus the application for a well charging order and order for sale pursuant to the Court's inherent powers, as provided for in the Rules to which I have referred above.

15. It was, the Judge said, a "*necessary precondition*" to the making of such an application that the principal monies be due and owing at the time the proceedings are instituted.[7] In his view, that was not established on the evidence because, in the absence of the

[5] Judgment, para 23.

[6] Now found in Section 100 of the Land and Conveyancing Reform Act 2009 *("the 2009 Act*") which replaced Section 19 of the Conveyancing Act 1881.

[7] Judgment, para. 28.

relevant general conditions, it was not possible for the Court to conclude – and it could not simply assume – that there had been an event of default entitling Promontoria to demand payment of the First Facility before the expiry of its 10 year term. The condition precedent to the making of the well charging order and order for sale therefore had not been met with respect of the First Facility.[8]

16. The Judge went on to identify a further and distinct reason for refusing the reliefs sought with respect to the First Facility:

> *"32. Separately, it should be noted that there is an ambiguity as to when the land certificate is said to have been deposited, with the documents exhibited by Mr Prendiville referring to two possible dates, i.e. 27 November 1992 and 11 February 1993, respectively. This ambiguity is a further reason for refusing relief. It is essential that the date of creation of an equitable mortgage be established in evidence, as this date affects the priority between it and any competing mortgages or charges."* (my emphasis)

17. This reason for refusing relief appears to have been identified by the Judge himself, as Mr O'Connor BL (for Mr Greene) fairly acknowledged in the course of his helpful submissions and it appears not to have been featured to any significant extent (if at all) in argument. The Judge's analysis is strongly challenged by Promontoria on appeal. It says that there was no ambiguity in the evidence as to the date of deposit. It also

[8] At paragraphs 30-31.

observes that, as a matter of fact, there was no evidence of the existence of *"any competing mortgages or charges*" such as could give rise to any issue of priority in any event. Its fundamental contention, however, is that the Judge erred as a matter of principle in regarding the date of deposit as a necessary proof in proceedings such as this.

18. As regards the Second and Third Facilities, the Judge noted that Promontoria's claim in respect of those facilities had not been contested and he was satisfied that the reliefs claimed should be granted. The Judge allowed a period of 12 months to Mr Greene for payment of the amounts due and owing on those facilities. He declined to make any order for costs, reflecting the Court's disapproval of the fact that an incorrect averment had been made in the grounding affidavit as well as the fact that relief had been refused in respect of the First Facility. That aspect of his order is also the subject of appeal and I will refer to it at the conclusion of this judgment.

THE APPEAL

19. On Promontoria's behalf, Mr Fitzpatrick SC said that the Judge was wrong not to permit it to file a further affidavit (as it is put in Promontoria's Notice of appeal, a "*corrective*" affidavit) to address the issue regarding the general conditions. To do so would not have prejudiced Mr Greene, particularly in circumstances where the Judge proceeded to adjourn the proceedings in any event. If the Court upheld this argument, it should remit the proceedings back to the High Court.

20. However, Mr Fitzpatrick went on to submit that, in any event, there was sufficient evidence before the High Court to establish that the balance on the First Facility was due and owing at the time of the institution of proceedings. Furthermore, even if that was not so, it was clear (so Mr Fitzpatrick said) that the monies were due and owing by the time of the High Court hearing as by then the term of the First Facility had clearly expired and the unpaid balance had become payable without the need for any demand. If the Court agreed with that analysis, it was said, no remittal would be necessary. These alternative arguments are not flagged in Promontoria's Notice of appeal nor were they advanced in its written submissions.

21. As regards the Judge's second reason for refusing relief, Promontoria submits that the Judge fundamentally erred in requiring proof of the date of the creation of the equitable mortgage. While there might be (limited) circumstances in which the date could be relevant, it was not an issue for the Court on an application for a well charging order and order for sale. As was demonstrated by the form of order made in such applications

(illustrated by the order actually made here) any question of whether there were other incumbrances, and the respective priorities of such incumbrances, were matters for the Examiner's Office. In any event, the evidence before the High Court clearly established that the land certificate here had been deposited on 11 February 1993. There was no ambiguity about that fact.

22. For Mr Greene, Mr O' Connor defended the Judge's decision to refuse to allow a further affidavit to be filed. The Judge was entitled to take the view that Promontoria should be held to the evidence that it had put before the Court. The onus of proof was on it, it had made an error and there was no injustice in the outcome. Mr O' Connor fairly accepted that proceedings in the Chancery Special Summons list were frequently adjourned and did not suggest that Mr Greene would have suffered any particular prejudice if an adjournment had been granted for the purpose of allowing Promontoria to file a further affidavit. Nonetheless, he said, the Judge's decision was within his reasonable discretion. He pointed out that Promontoria had not applied to have further evidence adduced in the appeal, so it remained unclear what it might have said in any further affidavit if it had been permitted to file one. Mr O' Connor objected to any suggestion of remittal to the High Court as no order to that effect was sought in Promontoria's Notice of Appeal. While the Court might declare that the Judge had erred (an order to that effect having been sought in the Notice of Appeal), the Court should not remit. Mr O' Connor accepted that such an approach might not fully vindicate Promontoria's rights but if so that followed from its failure to seek remittal in its notice of appeal. Mr O' Connor also took issue with the alternative arguments advanced by Promontoria.

23. As regards the issue relating to the date of deposit, Mr O' Connor explained that this was not a point taken by him. Nevertheless, he argued that the Judge was entitled, in the exercise of his discretion, to require proof of that date. He accepted that there was nothing in section 73 of the 2006 Act that imposed such a requirement but, he said, the equitable discretion of the Court extended to requiring such proof, in the same way as the Court required proof that the debt was due and owing, even though there was no express statutory requirement to that effect either.

ANALYSIS

24. Even though it was the Judge's second reason for refusing relief in relation to the First Facility, I propose to consider first the issue of what the holder of a section 73 lien must establish in order to establish an entitlement to a well charging order and order for sale and, in particular, whether (as the Judge concluded here) proof of the date of deposit of the land certificate is a necessary proof in such an application. That is the common legal issue arising across the three appeals heard together by the Court and it is clearly one that transcends the particular facts of the individual appeals.

WHAT THE HOLDER OF A SECTION 73 LIEN MUST PROVE

The Position Prior to the 2006 Act

25. Section 73 of the 2006 Act cannot properly be understood without understanding the position prior to its enactment.

26. A statutory system of registration of title was first introduced in Ireland by the Local Registration of Title (Ireland) Act 1891 ("*the 1891 Act*"). It is evident that, as of its enactment, the practice of giving security over land by deposit of the title deeds was well-established; so much so that the 1891 Act contained, in section 81(5), an express saver for its continued operation in relation to registered land, even though that represented an obvious and significant departure from the basic animating principle of

title registration, namely that the register should reflect (or "*mirror*") the actual title and disclose all interests in and burdens affecting registered land.

27. Of course, as the Supreme Court explained in *Promontoria (Oyster) DAC v Hannon* [2019] IESC 49, the "*mirroring*" principle has never been absolute. Section 47 of the 1891 Act provided for other forms of unregistered burdens to affect registered land and that remains the case pursuant to section 72 of the Registration of Title Act 1964 (to which, as amended, I shall refer as "*the 1964 Act*"). Nevertheless section 81(5) of the 1891 Act was an especially significant departure from registration principles, and must be taken to reflect a legislative judgment as to the social and commercial importance of having an informal and inexpensive (and private) mechanism for the creation of security over land in Ireland. This point was eloquently made by one commentator on the 1891 Act in a paper published a few years after its enactment:

> *"The Land Certificate which every registered owner is entitled to receive may be deposited by way of equitable mortgage in the same manner, and with the same effect, as title deeds (ss. 31, 81). Notwithstanding the anomalous character of this class of security when viewed from a juristic standpoint, it holds an unassailable position in our commercial system, and one which the mercantile community in this, as in other countries, have shown their determination to maintain. While abstract principles of jurisprudence are entirely opposed to the existing law of equitable mortgage by deposit of deeds, commercial convenience and the requirements of trade absolutely demand its continuance. … It is a good*

> *feature in this Act, then, that in this important particular it harmonizes with the requirements of trade and the existing law."*[9]

28. Section 81(5) of the 1893 Act was re-enacted by section 105(5) of the 1964 Act. It is useful to set it out:

> *"Subject to any registered rights, the deposit of a land certificate or certificate of charge shall, for the purpose of creating a lien on the land or charge to which the certificate relates, have the same effect as a deposit of the title deeds of unregistered land or of a charge thereon."*

29. As the High Court (Kenny J) explained in *Allied Irish Banks v Glynn* [1973] IR 188, the deposit, as security, of the title deeds of unregistered land "*gives the person with whom it is made an equitable estate in the lands until the money secured by it is repaid*" and *"is not limited to keeping the deeds until the money has been paid*." [10] The "*lien*" that arises is thus "*a lien on the land*" (and that was the language used in section 81(5) of the 1891 Act and again in section 105(5), not a lien over the title deeds only. As *Wylie* observes, the conceptual basis for giving such an effect to the deposit of title deeds is unclear[11] but it is now too entrenched to be questioned.

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[9] Maguire, "Land transfer and local registration of title" - Dublin: *Journal of the Statistical and Social Inquiry Society of Ireland*, Vol. X Part. LXXV, 1894/1895, Pages 63-84.

[10] At pages 191-192.

[11] At para 12.45. See also the observations of Dunne J in *Promontoria v Hannon*, at para 9.

30. By virtue of section 105(3) (and section 81(5) before it) the deposit of a land certificate as security had "*the same effect"* as the deposit of title deeds of unregistered land and thus gave the holder "*an equitable estate in the lands"* or "*lien on the land".* No formality or documentary record was necessary: the act of depositing the title deeds or land certificate (as the case may be) as security was sufficient.

31. *Wylie on Irish Land Law* (6th ed, 2020) ("*Wylie*") suggests that *"a mere deposit of the title deeds will be regarded as prima facie evidence of an equitable mortgage, unless the deposit is otherwise accounted for, e.g. deposit with a bank for safe keeping."* The same point is made by the High Court (McMahon J) in *Bank of Ireland Finance Ltd v Daly Ltd* [1978] IR 79, at 82.[12] However, where there was dispute as to whether deeds had been deposited as security or merely for safekeeping, it appears that the onus lay on the mortgagee to give evidence as to the circumstances in which the deeds came into its possession. This sometimes gave rise to difficulties in practice, as is illustrated by *Northern Bank v Carpenter* [1931] IR 268 and *National Bank v McGovern* [1931] IR 368.[13]

32. As well as addressing any issue as to the purpose of the deposit, the mortgagee had to establish that the security thus created extended to the particular liability or liabilities

[12] See also the old Irish case of *Bulfin v Dunne* (1861) 12 Ir Ch R 67, as well as the extract from *Coote's Treatise on the Law of Mortgages* (8th ed) cited by Dunne J at para 8 of her concurring judgment in *Promontoria v Hannon.*

[13] There was also a dispute as to the purpose of the deposit in *Ulster Bank Ireland Limited v Hannon* [2014] IEHC 670. These were the proceedings that ultimately were determined by the Supreme Court *sub nom Promontoria v Hannon* (the relevant facilities having been transferred to Promontoria in the course of the proceedings). *Ulster Bank Ireland Limited v Hannon* was heard on oral evidence and the evidence given by Ulster Bank persuaded the High Court (White J) that the land certificates had indeed been deposited as security.

sought to be enforced. That could obviously involve evidence of the circumstances in which the deeds were deposited.

33. The proofs required of a mortgagee are usefully summarised in *Babington's Country Court Practice* (2nd ed; 1910). The author states that an equitable mortgagee by deposit of title-deeds "*must prove the deposit and the agreement as to the amount to be secured; and the relation of the debt to the deposit must be supported by proper evidence."* (at page 109)

34. It seems that a practice developed of the mortgagee preparing a memorandum recording the deposit of title deeds/land certificate by the mortgagor as security for stated liabilities (typically all present and future liabilities). The purpose of such a document was to have a record in the event of subsequent dispute. However, as *Wylie* explains, if such a memorandum was signed by the mortgagor, problems could arise as regards enforceability and/or priority.[14] The practice was therefore to prepare a memorandum which was read to (or by) the mortgagor in the presence of a bank officer and then signed by the bank officer (only) as a record of the transaction.[15] Such a document featured in *Northern Bank v Carpenter* (though in the event it did not avail the bank in the particular circumstances there) and, of course, is also a feature of these proceedings.

[14] *Wylie*, para 12.48. See also *Maddox*, at para 2-32, as well as the judgment of White J in *Ulster Bank v Hannon*, at para 26, where he observes that the preparation of such a memorandum, signed by the bank but not by the customer, "*was common banking practice*" prior to the enactment of the 2006 Act. It is not necessary to consider whether these concerns applied, or applied to the same extent, in the case of registered land, a topic addressed (in the context of the 1891 Act) in Glover, *A Treatise on the Registration of Ownership of Land in Ireland* (1933), at pages 262-263.

[15] *Wylie*, para 12.48, at footnote 233.

35. The lien created by the equitable deposit of a land certificate was not capable of being registered in the land registry and therefore could not be protected by registration. In practice, however, the provisions of section 105 of the 1964 Act (and before it section 81 of the 1891 Act) provided significant protection for equitable mortgagees. The land certificate had to be produced for any transaction in relation to the land or charge requiring registration: section 105(1) and, while the Registrar (now the Property Registration Authority) could direct production of a land certificate, that did not affect any lien: section 105(4). As Clarke CJ noted in *Promontoria v Hannon*, without the land certificate the owner of registered land would have found it almost impossible to effect a *bona fide* transfer of an interest in that land.[16]

36. As already noted, of course, certain burdens can affect registered land without registration (and these are now set out in section 72 of the 1964 Act) and (prior to the abolition of land certificates by the 2006 Act) certain registerable burdens could be registered without the production of a land certificate, including judgement mortgages. However, it has long been clear that the charge obtained by the judgment creditor on registration of a judgment mortgage is subject to *"all unregistered rights subject to which the judgment debtor held that interest at the time of registration":* section 71 of the 1964 Act. That position is copper-fastened by section 117 of the 2009 Act. Thus registration of a judgment mortgage gives no priority over a previously created lien by deposit of a land certificate. Other issues of priority fall to be resolved by reference to

[16] At para 7.2

the provisions of the 1964 Act and/or general equitable rules: *Wylie*, at para 13.87 and following. As Mr Fitzpatrick emphasised in his submissions, to the extent that these rules require consideration of whether the equities of competing claims are equal, the issue does not permit of abstract determination; rather a factual inquiry is required and that, he submitted, is a matter for the Examiner and not for the Court on an application for a well charging order.

37. As a matter of fact, there appear to be few reported instances where any issue of priority arose in relation to a lien arising from the deposit of title deeds. One is a decision referred to by Clarke CJ in his judgment in *Promontoria v Hannon, In Re Driscoll's Estate* (1867) 1 IR Eq 285. The specifics of the dispute are a little difficult to follow as what is referred to in the judgment as a "*registered mortgage*" appears to have been a mere judgment mortgage. In any event, it is notable that that decision was given on an argument of objections to a schedule of incumbrancers, equivalent to a review by the High Court of a Certificate of the Examiner pursuant to the provisions of Order 55.

Section 73 of the 2006 Act

38. Section 73 of the 2006 Act was closely considered by the Supreme Court in *Promontoria v Hannon*. For the reasons set out in the principal judgment of Clarke CJ and the concurring judgement of Dunne J, that Court concluded that, from 31 December 2009 (on the expiry of the 3 year period referred to in section 73(1)(ii) and (2)) all existing liens created by deposit of land certificates had been extinguished and section 73 had brought *"a complete end to the system of lien by deposit of a land certificate in*

respect of registered land" per Clarke CJ at paras 7.24 & 8.2. After that date, "*an equitable deposit of a land certificate could no longer be enforced as an equitable mortgage*": per Dunne J at para 21. In the vivid language of the Chief Justice, *"with effect from the end of 2009, a land certificate becomes what might reasonably be characterised as a piece of paper with no legal effect and only of historical interest."*

39. However, section 73 enabled holders of liens by deposit to register, and thereby protect, their liens. It provided "*a coherent scheme .. for the conversion of a lien by deposit into a registered lien"*: per Clarke CJ at para 7.5.[17] Registration of an existing lien by deposit enabled the holder "*to protect their interests*" (per Clarke CJ at para 7.24) and "*to preserve their security*": per Dunne J at para 21. The Court considered that requiring the holders of such liens to apply for registration simply regulated their entitlements in a *"light touch way"*. It is clear from the Court's analysis that it did not consider registration to involve any diminution of the entitlements of lien holders.

40. Section 73(3) provides for the registration process and I shall set it out in full:

> *"(3) The following provisions have effect during the period referred to in subsection (2) :*
>
> *(a) the Authority shall cause adequate notice to be published of the coming into operation of subsection (2) and of its implications for persons to whom land*

[17] Deeney, *Registration of Deeds and Title in Ireland* (2014) also speaks of *"the conversion of .. equitable mortgages which arose from the deposit of certificates into registerable liens*" (para 46.04)

certificates or certificates of charge have been issued and for any others who may be affected, including persons holding a lien on registered land or a registered charge through deposit or possession of those certificates;

(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;

(d) the lien is deemed for the purposes of section 69 of the 1964 Act to be a burden which may be registered as affecting registered land;

(e) the Authority shall register the lien without charging any fee or duty for doing so."

41. The application for registration was required to be on notice to the registered owner, a point emphasised by Mr Fitzpatrick in his submissions. If the registered owner had any basis for objecting to registration – if, for instance, it was said that the applicant for registration simply held the land certificate for safe keeping or had otherwise come into possession of it other than way of deposit as security – they would have an opportunity to raise any such objection and the objection would have been determined by the

Property Registration Authority, subject to any appeal to the High Court.[18] By analogy with *Guckian v Brennan* [1981] IR 481 (at 489) the Authority had to satisfy itself it was appropriate to register the lien (and, it was said, it was clearly so satisfied here).

42. Upon registration, section 31 of the 1964 Act applies to the lien. In other words, the register is "*conclusive evidence*" that the title of the registered owner is subject to such lien. In his judgment in *Promontoria (Oyster) DAC v McKenna* [2020] IEHC 337, Simons J characterised the registration of the lien as "*merely an administrative function."* Obviously, the functions of the Authority in relation to the registration of title generally, and the registration of burdens specifically, are not judicial functions. However, I do not consider that it is entirely accurate to characterise them as "*merely administrative*". While the label is not determinative, such a characterisation does not in my view accord sufficient weight to the statutory role of the Registrar (now the Property Registration Authority) in maintaining the register, the statutory effect of registration under the 1964 Act and the conclusive effect of the register pursuant to section 31.

43. 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

[18] Section 19 of the 1964 Act.

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 potentially significant issues unaddressed 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.

Discussion

44. Again this backdrop, the issues come into sharper focus. Promontoria here was entitled to rely on the register to establish conclusively that it was the holder of a section 73 lien registered as a burden on Folio 10081F. It was not necessary for it to adduce any further evidence on that point. Neither was it necessary for Promontoria to establish that Ulster Bank was entitled to have that lien registered in 2009 i.e. that, as of that time, it was the holder of a lien by deposit created by the deposit with it of the relevant land certificate by Mr Greene. Registration of the lien in accordance with section 73 of the 2006 Act provides *conclusive* evidence of that fact. That follows from the conclusiveness of the register as provided for by section 31 of the 1964 Act, as explained (*inter alia*) in the recent decisions of this Court in *Tanager DAC v Kane* [2018] IECA 352 [2019] 1 IR 385 and *ADM Mersey Plc v Allied Irish Banks Plc* [2020] IECA 260.

45. Having regard to the Supreme Court's analysis in *Promontoria v Hannon*, I respectfully disagree with the Judge's observation at paragraph 23 of the Judgment that Promontoria is seeking, in effect, to enforce an equitable mortgage. The equitable mortgage no longer exists: it has been converted into the lien registered as a burden on Folio 10881F. It is on that registered lien that Promontoria necessarily must rely, even if (as is clearly the case) it is not enough, in itself, to establish an entitlement to the reliefs claimed by it.

46. However, that only brings Promontoria so far. It had to establish that there were sums due and owing to it by Mr Greene and also had to establish – because the registered lien does not speak to this point – that those sums were secured by the lien. That was an essential proof: as stated in *Babington's County Practice* "*the relation of the debt to the deposit must be supported by proper evidence"*. What will constitute such *"proper evidence*" will vary from case to case. It may (but will not necessarily) involve evidence going to the circumstances in which the original lien by deposit took place but even where such evidence is put before the court, its purpose is not to prove the *lien by deposit* but to prove that the *registered lien* secures the sums claimed.

47. This is usefully illustrated by the material put before the High Court here. The facility letters relating to the Second and Third Facilities expressly identified the registered lien as security for those facilities. Once those letters were in evidence (and their admissibility was not disputed by Mr Greene), the "*relation of the debt to the deposit*" was sufficiently established, without any need to look back to the circumstances of the initial deposit of the land certificate. That appears to have the view of the Judge also,

given that he was satisfied to grant the reliefs sought in relation to these facilities notwithstanding his view that Promontoria's evidence had not established the date of deposit with sufficient clarity. In my view, *Promontoria (Oyster) DAC v McKenna* provides a further example of a case where the lien holder's entitlement to relief can be demonstrated even in the absence of any evidence as to the date of deposit or indeed, evidence as to the circumstances in which the deposit occurred.

48. In contrast, something further was clearly required in relation to the First Facility, given the materially different terms of the facility letter. The registered lien and the facility letter are not sufficient to establish that the monies advanced on foot of that letter were secured by the lien. It was, presumably, in recognition of that fact that Mr Prendiville swore his second affidavit and exhibited the documents discussed above. While the form completed by Ulster Bank in fact records the date of deposit – in terms which, as I will explain, I consider to be clear and unambiguous – arguably its primary significance in this context is the fact that the deposit recorded by it extended to all of Mr Greene's *"liabilities, direct or collateral, present or future."*

49. I cannot identify any cogent basis for regarding the date of deposit as a necessary proof in proceedings such as this. In practice, it can be anticipated that in many if not most cases evidence of that date will be given by the plaintiff (as it was given here) but it is another matter to characterise such evidence as a *necessary* proof in all cases, absent which the proceedings must fail. The Judge's rationale for finding that there is such a requirement is that the date of deposit affects priority. However, on an application for a well-charging order and order for sale in default, the High Court is not normally

concerned with any issue of priority between competing mortgages or charges. As is reflected in the standard form of order made in such proceedings, that is a matter for the Examiner (with the assistance of the High Court if appropriate). The Court that hears an application for a well charging order does not normally adjudicate on any issue of priority and could not properly do so for the simple reason that the holders of competing mortgages or charges, or other incumbrances, will generally not be before it.[19] The forum in which such claims are made and determined is the Examiner's Office. The potential for issues to arise regarding priority of competing mortgages or charges therefore does not provide any basis for imposing an *a priori* requirement for proof of the date of deposit on an application for a well charging order.

50. Furthermore, there is no reason whatever to think that the precise date of deposit is of any significance here. The Folio does not identify *any* other charges or burdens on the lands here. It is, of course, possible that the Folio 10081F lands are subject to an interest or burden that affects them without registration and, in that event, it may be that a question of priority might arise as between the section 73 lien and such unregistered interest or burden. It is not entirely clear from the 1964 Act and/or section 73 how such a question should be resolved. However, it seems reasonable to assume that, in such a hypothetical scenario, the date of deposit might well be significant. However, the possibility that the date of deposit might be relevant in the event of a hypothetical

[19] The position would be different where the competing charge-holders are parties to the proceedings – as was the case in *Larianov Foundation v Leo Prendergast and Sons (Engineering) Limited* [2017] IEHC 192. The High Court (Keane J) was therefore in a position to determine priorities, at least as between the parties represented before him.

dispute as to priority before the Examiner could not justify requiring *a priori* proof of that date in an application for a well charging order.

51. There might well also be other circumstances in which the holder of a registered lien would want to establish the date on which the original lien by deposit was created in order to give full effect to their security. By way of hypothetical illustration, say that customer A deposited a land certificate with bank B to secure present and future liabilities in 2000. That would have created an unregistrable interest in the land. In 2005, creditor C registers a judgment mortgage on the folio. As a volunteer, C's interest is subject to unregistrable burdens affecting the interest of A in the land (a position confirmed by section 71 of the 1964 Act) In 2008, B registers its lien pursuant to section 73 of the 2006 Act. In order to establish the priority of its security over the judgment mortgage, B would need to establish that it was in existence at the time of registration of the judgment mortgage in 2005. This might appear somewhat anomalous in that it could be said to involve going behind the statutory registration. But it seems very doubtful that the Oireachtas intended that the priority of registered liens should be determined by the date of their registration. That is so notwithstanding the provisions of section 74 of the 1964 Act, which enshrines the rule that registered interests *"rank according to the order in which they are entered on the register."* Determining the priority of a section 73 registered lien by reference to the date of registration might result in significant impairment of the security held by the lienholder. There does not appear to be anything in section 73, as interpreted by the Supreme Court in *Promontoria v Hannon*, that suggests any intention on the part of the Oireachtas to dilute or delimit the security of lien-holders. It would perhaps have been helpful if this issue had been

addressed by the Oireachtas in the 2006 Act. However, no such issue arises here in any event and was not the subject of any argument. Accordingly, it would not be appropriate to express any firm view on the point. But even where such an issue arose – and no such issue arose here because there are no judgment mortgages registered on Folio 18001F – it would not appear necessary or appropriate that it should be determined in an application for a well charging order, where the judgment mortgagee will not normally be before the Court.

52. It follows that I consider that the Judge erred in taking the view that the date of deposit was a necessary proof. The only necessary proofs here were (a) that the monies were due and owing and (b) that the monies were secured by the registered lien. The existence of the security – the registered lien – was established by the register and by the Folio and did not require further proof. The basis on which the lien had been registered did not require proof. While it might be anticipated that the evidence as to (b) would, in practice, address the circumstances (including the date) in which the lien by deposit originally arose, provided that (b) could be demonstrated sufficiently without such evidence, its absence would not be a basis for refusing relief.

53. Mr O' Connor argued that, as the High Court was exercising a discretionary jurisdiction here, it was entitled to require a particular proof, even if it was not expressly required by statute. I do not agree. I do not exclude the possibility that there may be particular circumstances in which the High Court might, in its discretion, require an applicant for a well charging order to address issues of priority in its evidence – as for instance where the material before the Court indicated that the orders sought, if made, would be of no

practical benefit to the applicant. But that was not the position here and it was not the basis for the Judge's conclusions. Rather, as is evident from paragraph 32 of his Judgment, the Judge was of the view that proof of the date of deposit was a necessary proof in *all* proceedings of this kind. The Judge's conclusion to that effect was, it is clear from his Judgment, one reached by him as a matter of law, not as a result of any discretionary judgment. [20]

54. I would add that, in my opinion, it is not at all clear that, even before the enactment of section 73 of the 2006 Act, the date on which a lien by deposit was created was an essential proof in proceedings for a well-charging order. Obviously, the existence of the lien had to be established (without the - limited - assistance of being able to point to the burden registered on the folio) as had the fact that the lien secured the liabilities at issue. In the ordinary way, the evidence necessary to establish that as a fact would, no doubt, establish the date and circumstances of the deposit also. But one can readily imagine cases where, although a bank might not be in a position to establish the date or circumstances of the deposit (which might have taken place many years previously) it would nonetheless be able to demonstrate, through oral or documentary evidence or a combination of the two, that specific advances had been made on the security of the land certificate deposited with it qua security. Such proof would, according to *Babington*, be sufficient and, in such circumstances, it is difficult indeed to identify any

[20] In the circumstances, it is not necessary to consider the nature and extent of the High Court's discretion on an application for a well-charging order and order for sale and, in particular, whether and to what extent the Court is entitled to refuse relief where the essential elements (an outstanding debt due to the plaintiff that is secured on the lands of the defendant) have been established in evidence.

just ground for withholding relief because the date of deposit was beyond the power of the bank to prove.

55. Here, in any event, there was evidence of the date of deposit before the High Court here. In his second affidavit, Mr Prendiville averred that the deposit of the land certificate occurred "*back in 1992."* The basis for that averment was, one assumes, the documentary material that he goes on to exhibit, rather than any direct knowledge on his part. However, it is clear from the documents that they record a deposit on 11 February 1993 and that the reference by Mr Prendiville to 1992 is an error. The documents to which he refers are, in my view, clear in their effect. Ulster Bank's memorandum records in express terms that the land certificate was deposited on 11 February 1993. There are, in fact, two references to that date in the document. There is also, as the Judge noted, a reference to 27 November 1992 but that date is, as the document explains, the date of the land certificate, rather than the date of deposit. The second document – the Family Home Protection Act certificate – is entirely consistent with 11 February 1993 being the date of deposit.

56. No point was taken in the High Court or before this Court on appeal as to the admissibility of these documents. Absent any evidence to the contrary from Mr Greene – and there was none – they were sufficient to establish that the land certificate had been deposited with Ulster Bank on 11 February 1993. Thus, even if the date of deposit was a necessary proof – and, in my opinion, it was not – Promontoria satisfied that proof. But even if the Judge was right to regard the evidence as ambiguous, it did not provide a basis for refusing the relief sought. There was no material significance as

between the different dates. If it had been the case that a charge or other burden had been registered in January 1993, then it would have necessary to resolve that ambiguity for the purposes of determining priority but there was no evidence of any such burden and, in any event, the task of determining priority in such circumstances would have fallen to the Examiner.

57. For these reasons, the Judge's second basis for refusing relief in relation to the First Facility cannot, in my view, be sustained and must be set aside.

THE JUDGE'S REFUSAL OF LEAVE TO FILE A "*CORRECTIVE*" AFFIDAVIT

58. The issue of whether to permit Promontoria to file any further affidavit, and to grant any adjournment necessary for that purpose, was, at least in the first instance, a matter for the discretionary decision of the Judge.

59. Neither party opened any authority as to how this Court should exercise its appellate jurisdiction in relation to such a decision.

60. As a matter of general principle, it is clear that significant weight must be given to the decision of the Judge. On the other hand, albeit that it was discretionary, the decision is not immune from appellate review: *Vella v Morelli* [1968] IR 11.

61. In *O' Callaghan v District Judge Clifford* [1993] 3 IR 603, the refusal of a District Judge to allow an adjournment in a criminal prosecution was challenged by way of judicial review. Giving the only judgment in the Supreme Court, Denham J stated that:

> *"The adjournment of a case is a matter for the discretion of the District Court Judge. It must be exercised as a judicial discretion within constitutional parameters. It is a matter on which appellate courts should intervene cautiously."* (at 611).

The facts in *O' Callaghan* were quite different to the facts here and it was, of course, a judicial review of a decision of the District Court rather than – as here – an appeal from the High Court. However, it appears to follow from *O' Callaghan* that, in making decisions regarding adjournment (and decisions as to whether to permit a party to adduce further affidavit evidence) the High Court is bound to exercise its discretion judicially and within constitutional parameters.

62. *O' Callaghan v Clifford* was cited by the High Court (Kearns P) in *Lawlor v Geraghty* [2011] 4 IR 486, a challenge to the refusal by a coroner to adjourn an inquest. After noting that a court on review should be cautious about interfering with a decision to grant or refuse an adjournment, Kearns P nonetheless indicated that intervention would be warranted where the decision-maker had not acted judicially, had failed to employ fair procedures or "*where there is a real, manifest or potential prejudice to the applicant."*[21] While this statement was made in the different context of a coroner's inquest, it appears to me to be of more general application and to be relevant to this Court's review of the Judge's decision here.

63. In England and Wales, it has been said that *"the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair"*: per Sedley LJ in *Terluk v Berezovsky* [2010] EWCA 1345, at para 18. That appears to me to be an apt formulation of the test and one that is consistent with the Irish authorities to which

[21] At para 52(4).

I have referred, subject to the caveat that, for appellate intervention to be warranted, any unfairness must be significant and that any assessment of unfairness must not focus narrowly on the interests of the party seeking the adjournment but must also be sensitive to the interests of the other party or parties and wider considerations of the proper administration of justice.

64. In assessing the Judge's decision to refuse to permit Promontoria to file a "*corrective*" affidavit, the following matters appear relevant:

- The need for a further affidavit arose from an error made by Promontoria. Mr Prendiville's first affidavit had wrongly identified the general conditions governing the First Facility and, as a result, had failed to advert to or exhibit the relevant conditions. The responsibility for this error lay with Promontoria, not with Mr Greene.

- Having said that, no issue had been taken by Mr Greene, in correspondence or by way of affidavit, with anything said by Mr Prendiville, including his averment that, on 28 March 2018, Mr Greene was indebted to Promontoria in the sum of €211,229.42 (an amount which included the First Facility).[22] Arguably, if Mr Greene wished to take issue with that averment, he ought to have done so by way of affidavit. In any event, the fact is that the issue regarding the conditions applicable to the First Facility was raised for the first time in the

[22] At paragraph 12 of Mr Prendiville's first affidavit.

course of the hearing. This was not a case where Promontoria had failed to respond, or respond in a timely way, to an issue raised in advance of the hearing.

- The error in Mr Prendiville's affidavit was not one that, in my view, could aptly be described as obvious or glaring (though it was, of course, picked up by Mr Greene's legal team) and there appears to have been no dispute but that it took Promontoria's legal team by surprise. As I have already noted, it is difficult to see why the First Facility should have been stated to be subject to general conditions governing lending to companies which perhaps helps to explain the error even if does not excuse it entirely.

- The implications of the error were potentially very significant. On Mr Greene's argument – one that the Judge ultimately accepted – it was fatal to Promontoria's claim for relief in relation to the largest of the three facilities. Thus, refusing permission to deliver a further affidavit had the potential to cause significant prejudice to Promontoria.

- On the other hand, it was not suggested that granting an adjournment to Promontoria for the purpose of putting in a further affidavit would give rise to any tangible prejudice to Mr Greene. He would continue to enjoy the possession of his lands pending any adjourned hearing Mr Greene had, of course, incurred legal costs in being represented on 25 November 2019 but those costs could have been addressed by the Judge by granting an adjournment on terms that Promontoria had to discharge the costs thrown away by Mr Greene.. In my view,

the absence of any material prejudice to Mr Greene was a significant factor weighing in favour of granting the adjournment sought.

- The fact that the proceedings had been listed for hearing on 25 November 2019 was obviously a factor that the Judge was entitled to give weight to. Any adjournment of the proceedings had the potential to undermine the Judge's management of the list and have an adverse impact on court resources. However, a particular feature here – and one which in my view is particularly significant – is that the proceedings were adjourned in any event. The adjournment to the following 3 February 2020 (a period of 10 weeks) gave ample time for Promontoria to file a further affidavit (and for Mr Greene to deliver a response to it, if he considered it appropriate) without giving rise to any additional delay in the determination of the proceedings

65. I fully accept that this Court should be cautious about intervening to review the Judge's decision here. However, in the very specific circumstances – and, as I have indicated, the final two factors set out above are ones which I consider to be especially significant – I consider that the Judge erred in refusing Promontoria's application to be allowed to file a "*corrective*" affidavit and refusing to adjourn the proceedings for that purpose. The ultimate effect of that refusal was that a significant part of Promontoria's claim failed. It might, of course, have failed in any event. However. in my view, fairness dictated that Promontoria should have been afforded an opportunity to address the issue that had been raised, for the first time, during the hearing. Doing so would not have caused any material prejudice to Mr Greene – in the event, it would not even have

delayed the determination of the proceedings – but the refusal to do so caused significant and identifiable prejudice to Promontoria which, in the circumstances, was disproportionate and unfair.

66. I would, accordingly, also uphold this aspect of Promontoria's appeal. It would seem to follow – subject to considering the alternative arguments advanced on appeal by Promontoria – that the decision of the High Court relating to the First Facility ought to be set aside and the proceedings as they relate to that Facility remitted to the High Court for rehearing. The fact that remittal has not been expressly sought in Promontoria's notice of appeal does not affect the power of the Court to make such an order – see Order 86A, Rule 2 and (particularly) Rule 3 – and, in my view, such an order here is necessary to vindicate the rights of Promontoria. It would be an entirely hollow exercise for the Court to declare that the Judge erred in not allowing a corrective affidavit to be delivered and nothing more.

67. I should add, in deference to the submissions of Mr O' Connor, that I do not consider the fact that Promontoria has not put before this Court the further evidence that it wishes to rely on to constitute a ground for refusing relief on this aspect of its appeal. Having regard to the provisions of Order 86A, Rule 4, and the relevant jurisprudence, it is difficult to see how such evidence could properly have been put before the Court. In any event, it seems reasonable to infer that Promontoria wishes to correct the erroneous averments of Mr Prendiville, prove the general conditions governing the First Facility and establish by reference to those conditions that Promontoria was entitled to demand payment of that facility, as well as of the Second and Third Facilities, when it issued

the letter of demand of 14 February 2018. It should be afforded an opportunity to do so.

The Alternative Arguments advanced by Promontoria

68. However, as already noted, Mr Fitzpatrick argued that the material before the High Court was in any event sufficient to establish Promontoria's entitlement to the reliefs claimed in relation to the First Facility. It was said that Mr Prendiville's affidavit established that the First Facility monies were in fact due and owing at the time the proceedings were instituted and, in any event, those monies were on any view due and owing by the time that the proceedings came on for hearing.

69. No such arguments are referred to by the Judge in his Judgment and it is not at all clear whether and/or to what extent they were made before him. What is clear, however, is that they do not feature at all in Promontoria's notice of appeal or written submissions.

70. I see no reason why Promontoria should, in these circumstances, be permitted to advance these arguments or why the Court should adjudicate on them. In its notice of appeal, Promontoria hung its hat on the proposition that Judge had erred in not affording it an opportunity to file a "*corrective*" affidavit. Having done so, I see no reason to allow it belatedly to make the apparently inconsistent argument that, in fact, there was and is no need for any such affidavit. . There is an error in Mr Prendiville's affidavit (in fact more than one) and it is right that it should be corrected. As for the argument that it was enough that that Facility had expired by the time of the hearing, that was not the

basis on which the proceedings were pleaded and no amendment to the Special Summons has been sought by Promontoria. Furthermore, if Promontoria was not entitled to demand payment of the First Facility when it did, and the First Facility became due and owing only on the expiry of the its term (and, of course, that may not be the case), it would seem to follow that Promontoria's cause of action in relation to the First Facility arose after the institution of the proceedings. In such circumstances, an issue may arise as to whether the proceedings can be amended to advance such a claim (assuming always that an amendment is necessary): *Moorview Developments Limited v First Active plc* [2008] IEHC 274, [2009] 2 ILRM 262, at para 7.12. In my opinion, it would be inappropriate for this Court to address these issues as if it were a court of first instance, especially so when they were not addressed in argument.

71. For these reasons, Promontoria should not be permitted to advance these alternative arguments in my view. The merits of those arguments can be addressed by the High Court in due course should that be necessary.

CONCLUSIONS AND ORDERS

72. For the reasons set out above, I have concluded that the Judge erred insofar as he held (at para 32 of his Judgement) that the date of the creation of an equitable mortgage is a necessary proof that has to be established in evidence in well-charging proceedings. As I have explained, I am of the view that that is not a necessary proof. In any event, there was uncontested evidence of that date before the High Court here.

73. I have also concluded that the Judge erred in refusing leave to Promontoria to file a "*corrective affidavit*" to address the error made by Mr Prendiville regarding the general conditions governing the First Facility.

74. On the basis of these conclusions, I would allow Promontoria's appeal, set aside the Judge's order declining relief in relation to the First Facility and remit that aspect of Promontoria's claim to the High Court for rehearing. The management of the remitted proceedings will be a matter for the High Court but it follows from this judgment that Promontoria should be afforded an opportunity to deliver its "*corrective affidavit*" and Mr Greene should obviously have an opportunity to respond to it. Any further directions will be a matter for the High Court.

75. The Judge refused Promontoria its costs in the High Court. That order, the Judge explained, was intended to reflect the Court's disapproval of the fact that an incorrect averment had been made in the Mr Prendiville's grounding affidavit, as well as the fact

that relief had been refused in relation to the First Facility (Judgment, para 37). As regards the second of those factors, it is clearly affected by the fact that Promontoria has succeeded in having that part of the Judge's order set aside and its claim remitted for rehearing. As regards the first factor, there is no doubt that there were errors in the affidavits sworn by Mr Prendiville. In no circumstances should errors in sworn evidence tendered to a court be regarded as trivial or unimportant. Having said that, there is clearly a spectrum of potential situations where errors arise. There is no suggestion here that Mr Prendiville sought to mislead the High Court or that the errors made by him were other than inadvertent, I have already expressed the view that the errors were not obvious or glaring. Furthermore, as soon as the errors came to light, Promontoria immediately sought an opportunity to correct them but were not permitted to do so.

76. In circumstances where the Judge's refusal of relief in relation to the First Facility is being set aside and remitted for rehearing by the High Court, I consider that the appropriate order to make in relation to the costs of the High Court to date is to set aside the order made by the Judge and to reserve those costs to the High Court judge that ultimately hears the remitted proceedings. That judge will be in a position to make a better assessment of where those costs should fall, having regard to the ultimate outcome. He or she will, no doubt, have proper regard to all the circumstances, including the errors made in Mr Prendiville's affidavit evidence and the impact of those errors on the course of these proceedings. In the event that the further affidavit Promontoria intends to deliver sufficiently establishes that the Promontoria was entitled to demand payment of the First Facility when it did and that, accordingly, those monies

were indeed due and owing at the time the proceedings were instituted, it may be that Mr Greene will take the view that he has no basis for continuing to oppose the granting of relief in relation to the First Facility. That would, no doubt, be a proper factor to be considered in the context of costs. If, on the other hand, Mr Greene opposes the application unsuccessfully, it is likely to have consequences for him in costs. If Promontoria's application should fail, a quite different situation will present itself. These will be matters for the High Court to assess and it will no doubt be astute to avoid a situation where either party has to bear a disproportionate burden in costs.

77. As regards the costs of this appeal, while Promontoria has been successful, the Court cannot disregard the fact that, to a significant extent, the appeal was necessitated by its errors. Although I have concluded that the Judge ought to have given Promontoria an opportunity to correct those errors, the Court is nonetheless entitled to have regard to the fact that, if appropriate care had been exercised by Promontoria, the High Court would not have been put in the position that it was and it may be that there would have been no substantive contest concerning the First Facility (as was the position in relation to the Second and Third Facilities). It is also relevant that the second ground for the Judge's decision on the First Facility – the failure to prove the date of deposit – did not arise from any submission made by Mr Greene. Finally, some weight must be given to the fact that, at the hearing of this appeal, Promontoria sought to advance further arguments outside the scope of its notice of appeal which I have held should not be entertained.

78. Having regard to all of these matters, my provisional view is that Promontoria should get 50% only of the costs of this appeal, subject to a stay pending the final determination of these proceedings.

79. If either party wishes to contend for a different costs orders, they will have liberty to apply to the Court of Appeal Office within 21 days for a brief supplemental hearing on the issue of costs. If such hearing is requested by either party and results in an order in the terms I have provisionally indicated above, that party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Costello and Binchy JJ have authorised me to record their agreement with it.