Unapproved
No redactions required

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 94

Court of Appeal Record No 2020/180

Costello J.

Collins J.

Binchy J.

BETWEEN

PROMONTORIA (OYSTER) DAC

Plaintiff/Appellant

AND

DESMOND McKENNA

Defendant/Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 26 March 2020

INTRODUCTION

1. This appeal raises issues concerning the interpretation and effect of section 73 of the Registration of Deeds and Title Act 2006 ("*the 2006 Act*") and was heard with two other appeals raising similar issues, *Promontoria (Oyster) DAC v Greene* and *Promontoria (Oyster) DAC v McHale*. The Court also gives judgment on those other appeals today.

This judgment should be read with those judgments and in particular with my judgment in *Promontoria (Oyster) DAC v Greene.*

THE FACTS

2. The material facts may be stated shortly. By special summons dated 22 February 2019 Promontoria (Oyster) DAC ("*Promontoria*") brought proceedings against Mr McKenna seeking a declaration that monies alleged to be due and owing by Mr McKenna stood well charged on Mr McKenna's interest in the lands comprised in Folio 12302 County Monaghan. An order for the sale of the lands was also sought, as well as other reliefs to which it is not necessary to refer.

3. Mr McKenna is the sole registered owner of the lands in Folio 12302 County Monaghan. His family home is not on the lands.

4. As I noted in my judgment in *Promontoria (Oyster) DAC v Greene*, this form of action is familiar and long-established.

5. Promontoria's proceedings were grounded on an affidavit sworn by Albert Prendiville, one of its directors. Mr Prendiville stated that in 2005 Ulster Bank Ireland Limited ("*Ulster Bank*") had agreed to make credit facilities in the amount of €36,000 available to Mr McKenna and his wife on the terms and conditions set out in a Letter of Offer to which Mr Prendiville refers and which is exhibited by him. Mr Prendiville states that pursuant to that offer letter Mr McKenna *"agreed to give the property described in the Schedule hereto as the security for the Loan Facility*." The Schedule referred to appears

to be the Schedule to the Special Summons which refers to the lands in Folio 12302. Mr Prendiville goes on to explain that in December 2016 Ulster Bank had agreed to transfer to Promontoria a portfolio of loan facilities, including Mr McKenna's facility and exhibits a (redacted) copy of the Deed of Transfer. No issue regarding this transfer arises on this appeal. Mr Prendiville goes on to explain that Mr McKenna failed to make the required payments in accordance with the terms of the Letter of Offer. On 22 June 2018, Promontoria had issued a letter of demand but no payment had been made and, as of 20 December 2018, €38,930.05 was due and owing.

6. The Letter of Loan Offer exhibited by Mr Prendiville (dated 3 March 2005) states, under the heading of security, *"Held; Equitable deposit of Original Land Certificate folio no 12302 Co Monaghan."* Mr Prendiville states that this "*equitable mortgage*" was registered as a lien on the lands pursuant to section 73(3) of the 2006 Act on or about 31 December 2009 and, according to him, "*secured all monies due and owing by the Defendant to [Ulster Bank] as against the Property of the Defendant."*

7. Mr Prendiville also exhibits a copy of Folio 12302 Co Monaghan. It shows Mr McKenna as the sole registered owner of the lands in the Folio. Part 3 of the Folio set out a number of burdens, including (at item 4) a *"Lien pursuant to Section 73(3) of the Registration of Deeds and Title Act 2006, in favour of"* Ulster Bank. The date of registration is 31 December 2009. The entry is followed by a "*Note*" to the effect that "*The interest of [Promontoria] is noted*" by reference to an identified instrument dated 9 March 2017.

8. Two judgment mortgages are also registered in Part 3 of the Folio. The first of these, a judgment mortgage registered on 19 June 2013, appears to have been transferred to another folio, though it is not shown as cancelled. The second is a judgment mortgage registered on 19 September 2014.

9. Mr McKenna did not swear an affidavit in response to Mr Prendiville's affidavit.

10. The special summons was returned to the Master and was subsequently transferred to the High Court. It came on for hearing before Simons J. on 24 February 2020 (the date on which the Judge gave Judgment in *Promontoria (Oyster) DAC v Greene*). Promontoria was represented by solicitor and counsel while Mr McKenna represented himself. At the conclusion of the hearing, the Judge gave an *ex tempore* ruling dismissing the proceedings with measured costs in favour of Mr McKenna. Subsequently, in light of the potential implications of his ruling for other cases, the Judge decided that it would be of benefit to set out his rationale by way of written judgment and he did so in a Judgment of 14 July 2020.

THE JUDGMENT OF THE HIGH COURT

11. The Judge noted that the facts set out in Mr Prendiville's affidavit did not appear to be disputed. The evidence established that Promontoria had an interest in a lien registered as a burden against Mr McKenna's interest in the lands in Folio 12302. Mr McKenna had not sought to dispute the correctness of the Folio and, as the Judge noted, if he wished to do so it would have been necessary to bring separate proceedings for that purpose, citing the decision of this Court in *Tanager DAC v Kane* [2018] IECA; [2019] 1 IR 385.[1]

12. The key question identified by the Judge was whether it was necessary for Promontoria to go further and to provide evidence of the *creation* of the equitable mortgage in the first place.[2] Having reviewed the position prior to the enactment of the 2006 Act, the Judge concluded that in an application for a well charging order and order for sale, "*it would have been a necessary proof for such an application to establish that the land certificate had been deposited as security for the relevant debt*."[3]

13. Turning to the position following the enactment of the 2006 Act, the Judge noted that the Act does not provide any express statutory remedy for enforcing such registered liens. Accordingly, if the holder of a registered lien wishes to enforce their security,

[1] Judgement, para 12.

[2] Judgement, para 14 (original emphasis).

[3] Judgment, para 18.

they had to apply for a well charging order and order for sale. [4] In such an application, it was a "*necessary precondition"* that the principal monies were due and owing. That is one of the proofs in an application to enforce a legal charge under section 62(7) of the Registration of Title Act 1964, as amended, ("*the 1964 Act*") and, the Judge observed, the mortgagee under an equitable mortgage could not be in a better position that the holder of a legal charge.[5] In the Judge's view, it followed that one of the "*proofs*" in such an application was that, in addition to establishing that the lien had been registered as a burden, the plaintiff "*must also establish the existence of a contractual arrangement whereby a debt has been secured on the lands and demonstrate that the principal monies are now due for repayment."*[6]

14. While Promontoria takes issue with certain aspects of this part of the Judge's analysis, it is what follows that gives rise to its appeal and, as it is relatively brief, I shall set it out in full:

> *"25. It seems to me that, as part of these "proofs", a plaintiff must lead evidence in respect of the deposit of the land certificate. This is the event which is relied upon as creating the equitable mortgage (which has since been registered as a lien pursuant to the 2006 Act). In particular, the plaintiff must provide evidence as to the date upon which the equitable mortgage was first created, as this date will be crucial in determining priority between any competing mortgages.*

[4] Judgment, para 21.

[5] Judgment, para 23.

[6] Judgment, para 24.

26. More generally, the approach contended for by Promontoria seeks to attach too great a significance to the registration of the lien by the Property Registration Authority ("the PRA"). The registration of the lien is merely an administrative function. There can be no suggestion that the PRA has adjudicated upon the question of whether monies have been well charged against the lands. This is a function reserved to the High Court, and to the Circuit Court in certain instances. It is not a function of the PRA.

CONCLUSION

27. Promontoria has not put before the court any evidence in respect of the creation of the equitable mortgage by the deposit of the land certificate. The only reference to a deposit is in the letter of offer, but this is documentary hearsay. I am not satisfied that proof of the registration of a lien, on its own, is sufficient to give Promontoria an entitlement to the reliefs which it seeks. The lien is, in effect, merely a statutory registration of an earlier event, namely the creation of the equitable mortgage by way of the deposit of the land certificate. One of the proofs required for a well charging order is proof of the date of the creation of the equitable mortgage. This date is of significance in that it determines the priorities as between any competing mortgages. For example, on the facts of this case, it seems that a number of judgment mortgages have been registered against the property, albeit at a later date. It is not simply an academic exercise to identify the date upon which the equitable mortgage had

been created. In the circumstances, therefore, I am satisfied that the bank has not come up to proof in relation to its claim."

15. The Order made by the High Court recites as the basis for the dismissal of the summons the Court's finding "*that the Plaintiff has not put before the court any evidence in respect of the creation of the equitable mortgage by the deposit of the land certificate herein."*

THE APPEAL

16. As already noted, this appeal was heard at the same time as *Promontoria (Oyster) DAC v Greene* and *Promontoria (Oyster) v McHale*. While Mr McKenna did not participate in the appeal, it was agreed that the arguments made by Counsel for Mr Greene would, so far as relevant, be considered by the Court in this appeal also. Those arguments are summarised in my judgment in *Promontoria (Oyster) DAC v Greene.*

17. In his submissions, Mr Fitzpatrick SC for Promontoria brought the Court through the Judgement. He accepted that Promontoria had to satisfy the Court that the principal sum was due and owing (para 23 of the Judgment) but said that there had been no issue about the debt here. He also accepted that Promontoria had to establish that the debt was secured on the lands (para 24 of the Judgement). That had been established here by the terms of the Letter of Loan Offer which had been signed by Mr McKenna. Thereafter, he departed sharply from the Judge's analysis. Consistent with his submissions in *Promontoria (Oyster) DAC v Greene*, Mr Fitzpatrick argued that, having regard to the status and effect of the registered burden on the Folio, there was no basis for requiring Promontoria to lead evidence of the deposit of the land certificate by Mr McKenna (paragraph 25 of the Judgement). In registering the lien pursuant to section 73, the Property Registration Authority clearly had been satisfied of the existence of a prior lien by deposit in favour of Ulster Bank over the lands and the registration of the lien as a burden on the Folio was conclusive evidence of that. Furthermore, Promontoria's entitlement to rely on the lien was also evident on the face of the Folio. Promontoria

was entitled to rely on the registered lien. It was not relying on the equitable mortgage, which no longer existed. Insofar as any issue of priority might arise (and none did, in his submission as the judgment mortgages clearly ranked after the registered lien) that was a matter for the Examiner in due course and was not a matter that could be addressed on an application for a well-charging order.

DISCUSSION

The Effect of the Section 73 Lien

18. I considered this issue in some detail in my judgment in *Promontoria (Oyster) DAC v Greene.* The registration mechanism provided for by section 73(3) effected the conversion of a lien by deposit of a land certificate (or equitable mortgage) into a registered lien: *Promontoria (Oyster) DAC v Hannon* [2019] IESC 49. Thereafter the lien-holder's security comprises the registered lien. Registration of the lien constitutes *"conclusive evidence*" that the title of the registered owner is subject to such lien: section 31 of the 1964 Act.

19. Promontoria 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 12302. Its interest in the lien is shown on the Folio. It was not required 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 McKenna. 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.

20. I fully agree with the Judge that proof of the registration of the lien was not, in itself, sufficient to entitle Promontoria to the relief. However, I respectfully disagree with his

view that, as a part of its proofs in these proceedings, Promontoria was required to lead evidence in respect of the deposit of the land certificate. While that was, indeed, the event that created the equitable mortgage, that equitable mortgage had been converted into the section 73 registered lien and, as the registered holder of that lien, Promontoria was entitled to rely on it without having to lead evidence as to the circumstances in which and/or the date on which the prior lien by deposit was created by the deposit of the land certificate.

21. As I explained in *Promontoria v Greene*, it will often be the case that evidence in respect of the deposit of a land certificate will be led by the lien holder so to establish that the principal debt(s) is secured by it. That was the case in *Promontoria v Greene* itself, at least in respect of the first of the three facilities at issue there. But in other cases – and the present appeal is such a case in my opinion – the necessary proofs (proof that the principal is due and owing and that it is secured by the registered lien) can be satisfied without any requirement to adduce evidence regarding the initial deposit (which evidence may not always be available in any event).

22. For the reasons set out in my judgment in *Promontoria v Greene,* I also respectfully disagree with the Judge's view that the date of on which the equitable mortgage was created is a necessary proof in an application for a well-charging order and order for sale because it *"will be crucial in determining priority between any competing mortgages"* (Judgement, para 25). No issue of priority was before the Court for determination here. No other party was before the Court claiming priority over the section 73 lien. While the Judge refers in this context to the fact that a number of

judgment mortgages had been registered against the lands, those judgment mortgages were registered later and it is, therefore, very difficult to see how any actual issue might arise as to their relative priorities or how, in the circumstances, identifying the date of the deposit would be anything other than an "*academic exercise*". But, even on the hypothesis that the date of deposit could, in certain scenarios, be relevant to the issue of priority, as I said in *Promontoria v Greene*, the possibility that the date of deposit might be relevant in the event of a hypothetical 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 (at para 50).

The Evidence here

23. Mr McKenna did not swear an affidavit and it does not appear that he disputed anything in Mr Prendiville's affidavit. There is no suggestion in the Judgment that Mr McKenna raised any issue as to the fact that Ulster Bank had advanced a loan to him in 2005 on the terms of the exhibited Letter of Offer, that the loan and the associated lien had been transferred to Promontoria in 2016 and that Promontoria had demanded payment in June 2018. That the amount averred to by Mr Prendiville was indeed due and owing to Promontoria appears not to have been disputed and there is nothing in the Judgment to indicate that the Judge had any doubt regarding the debt claimed.

24. As to proof that the debt was secured on the lands in Folio 12302, Promontoria relied on the terms of the Letter of Offer. That, it will be recalled, identified the following as security for the loan:

> *"Held; Equitable deposit of Original Land Certificate folio no 12302 Co Monaghan."*

25. While the Judge characterised this as "*documentary hearsay"* (Judgement, para 27) that observation appears to have been directed to the fact that the Letter of Offer did not, in the Judge's view, constitute evidence of the creation of the equitable mortgage and, in particular, the date of deposit of the land certificate. That is certainly so: the letter is silent on the date of deposit save that it is clear that it predated 3 March 2005 (the date of the Letter of Offer).

26. Notwithstanding the Judge's reference to "*documentary hearsay*", no issue appears to have arisen in the High Court concerning the admissibility of the Letter of Offer or Promontoria's entitlement to rely on it and there is nothing in the Judge's Judgment to indicate that he considered it to be inadmissible (as opposed to it not being probative of the date of deposit of the land certificate).

27. The significance of the Letter of Offer, Promontoria argues, is not that it establishes the circumstances in which the lien by deposit arose, or the date of that deposit. These were not matters that it was required to establish, given the existence of the registered lien in Folio 12302. Rather, Promontoria says, the Letter of Offer evidences the fact that the loan had been advanced on the security of the lien on the lands in Folio 12302 and that, accordingly, it is now covered by the registered lien.

28. As I have said, no point appears to have been taken in the High Court regarding the admissibility of the Letter of Offer, notwithstanding the Judge's observation that it was documentary hearsay. The Letter purported to be signed by Mr McKenna and it is notable that he did not dispute that he had signed it or otherwise take issue with it. Mr McKenna did not participate in the appeal and thus no arguments were directed to this issue before this Court. In these circumstances, it is, in my opinion, appropriate therefore for this Court to proceed on the premise that the Letter of Offer is admissible in evidence. On that basis, is it sufficient proof that the monies due are secured by the lien? The Letter of Offer predates the registration of the lien, and therefore does not refer to it (in contrast to the second and third facility letters in *Promontoria v Greene* and the letter of loan offer in *Promontoria v McHale*). Nevertheless, it seems to me that the Letter of Offer clearly establishes the necessary link between the debt and the security here. Whatever the date of deposit, and whatever the precise circumstances in which it occurred, the Letter of Offer demonstrates Mr McKenna's agreement that the loan to be advanced would be secured by the lien by deposit, which in due course was converted into the registered lien pursuant to section 73. That is, of course, subject to any contrary evidence that might be adduced, but there is no such evidence here. In my view, therefore, the Letter of Offer does establish the necessary *"contractual arrangement whereby a debt has been secured on the lands"* (Judgment, at para 24).

29. There is now a recent and substantial body of jurisprudence on the application of the hearsay rules in debt enforcement proceedings (mainly summary judgment proceedings), many of which were referred to in this Court's decision in *Promontoria (Aran) Limited v Burns* [2020] IECA 87. Since that decision, the Oireachtas has enacted

the Civil Law and Criminal Law (Miscellaneous Provision) Act 2020, Part 3, Chapter 3 of which contains far-reaching reforms concerning the admissibility of business records. None of this material was opened to the Court in this appeal and in the circumstances it is neither necessary or appropriate to address it here.

CONCLUSIONS AND ORDERS

30. For the reasons set out above, I am of the view that the Judge erred in concluding that evidence of the creation of the equitable mortgage by deposit of the land certificate was an essential proof and proceeding to dismiss the proceedings on the basis of Promontoria's failure to put such evidence before him.

31. In my opinion, the undisputed evidence before the High Court was sufficient to establish that the principal sum was due and owing and that it was secured on the lands comprised in Folio 12302F. These are the necessary proofs for the reliefs sought by Promontoria.

32. I would therefore set aside the Judgment and Order of the High Court. Promontoria is entitled to a well-charging order and an order for sale in default. However, before finalising the terms of that order, I would give the parties an opportunity to be heard. In particular, even though he has not participated in the appeal to date, I would be anxious that Mr McKenna should have an opportunity to be heard as to the period of time that should be permitted for the payment of the debt before any order for sale takes effect. As I understand the position, the order that is usually made provides for a period of 3 months for payment and, in the absence of any submission to the contrary, I would propose that an order be made in those terms. However, the parties may have grounds for seeking a different order.

33. The Judge made an order for measured costs in favour of Mr McKenna. It appears to follow from the above that that order should be set aside and Promontoria would appear to be entitled to an order for its costs. As regards the costs of the appeal, given that Mr McKenna did not participate in it, it appears to me that appropriate order is to make no order for those costs.

34. The observations on costs above are provisional only and the parties will be free to address the costs further at the same time as addressing the terms of the substantive order to be made in light of this judgment.

35. If either party wishes to be heard on the terms of the order to be made by this Court (including as regards costs) they will have liberty to apply to the Court of Appeal Office within 21 days for a brief supplemental hearing. However the parties should be aware that, if they request such a hearing and the Court proceeds nonetheless to make orders in the terms I have provisionally indicated above, they 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.