# THE COURT OF APPEAL

**APPROVED**

**NO REDACTION NEEDED**

**Neutral Citation: [2023] IECA 198**

**Record Number: 2023/76**

**High Court Record Number: 2022/90COS**

**Haughton J.**

**Pilkington J.**

**Allen J.**

**BETWEEN/**

**GERARD MURPHY**

**LIQUIDATOR OF DIAMOND ROCK DEVELOPMENTS LIMITED (IN LIQUIDATION)**

**RESPONDENT/PLAINTIFF**

**-AND-**

**JOSEPH LEDDIN**

**APPELLANT/DEFENDANT**

**Judgment of Mr. Justice Haughton delivered *ex tempore* the 27th day of July, 2023**

1. The primary legal issue raised in this appeal is a net one. It is straightforward, and has been authoritatively decided. The issue is whether the charge, contained in a Deed of Mortgage dated 8 June 2018 whereby the company charged as a first charge certain lands at Belgooly, County Cork to the appellant as security for payment of a loan of €400,000 and interest, is void as against the liquidator and other creditors pursuant to s. 409(1) of the Companies Act, 2014 because of non-registration of the charge with the Registrar of Companies.

2. The Deed of Mortgage was registered as a burden on the lands, which became registered in Folio CK178864F of the Register of Freeholders.

3. Section 409 (1) of the Companies Act, 2014 provides that –

> "(1) Every charge created, after the commencement of this section, by a company shall be void against the liquidator and any creditor of the company unless the procedure…with respect to the charge's registration is complied with."

Section 409 then sets out two alternative procedures under which the charge can be registered with the Registrar of Companies by the Registrar receiving *"not later than 21 days after the date of the charge's creation"* particulars in the prescribed form.

4. The particulars of the charge in the prescribed form required to be received by the Registrar of Companies were not delivered or received by that Registrar, and accordingly the charge was not registered in the CRO.

5. The company went into voluntary liquidation following special resolution passed on 14 February 2022, on the basis that it was insolvent, and Mr. Gerard Murphy was appointed liquidator.

6. It is not disputed that the Mortgage was not registered with the Registrar within the 21 days or at all. Section 417 empowers a court to grant an extension of time where it is '*just and equitable'* but that section was not invoked in the present case before the company went into liquidation,

presumably because an extension can only be granted where it would not *"prejudice the position of creditors or shareholders of the company".*

7. I am satisfied that as a matter of statutory interpretation, the plain and ordinary meaning of the words used in s. 409(1) means that if a charge such as the one at issue is not registered within the 21 day period (or any extended period) it is void and therefore unenforceable as against a liquidator and any creditor. The wording in this regard is unambiguous.

8. This is supported by authority, particularly the decision in *Re Monolithic Building Company* [1915] 1 Ch 643. That was a unanimous decision of the Court of Appeal, in relation to a similar statutory provision namely s.93 of the Companies Consolidation Act, 1908, which, importantly, applied to England and Ireland. Accordingly the law as interpreted in *Re Monolithic* was binding on Irish companies and on the Irish courts at least until the founding of the State. S. 93 continued to be part of Irish law until 1963.

9. Section 93(1) of the 1908 Act, so far as relevant read:

> "93.(1) Every mortgage or charge created after the first day of July [1908] by a company registered in England or Ireland and being either –
>
> (d) a mortgage or charge on any land, wherever situate, or any interest therein;
>
> shall, so far as any security on the company's property or undertaking is thereby conferred, *be void against the liquidator and any creditor of the company*, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidences, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable."

10. It is in respect of that section that Phillimore L.J. in the Court of Appeal in *Re Monolithic*, agreeing with Lord Cozens-Hardy M.R., stated:

> "…We have to construe s.93 of the statute. It makes void a security; not the debt, not the cause of action, but the security, and not as against everybody, not as against the company grantor, but against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company."

And at the end of his judgment Phillimore L.J. said –

> "On all these grounds it seems to me that the best thing is to go on the plain words of the statute. This document as against any creditor is void. The defendant here is a creditor, and therefore as against him it is as if it did not exist. Let us not import considerations that may be applicable, or which it might be desirable to make applicable, where there is dolus malus, but which in any other case neither are applicable, nor should be made applicable."

11. The relevant wording in s. 93 of the 1908 Act was re-enacted in section 99 of the (Irish) Companies Act, 1963 Act. So far as relevant s.99 provided –

> "99.-(1) Subject to the provisions of this Part, every charge created after the fixed date by a comp[any, and being a charge to which this section applies, shall, so far as any security on the company's property or undertaking is conferred thereby, *be void against the liquidator and any creditor of the company*, unless the prescribed particular of the charge, verified in the prescribed manner, are delivered to and received by the registrar of companies for registration in the manner required by this Act within 21 days after its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section, the money secured thereby shall immediately become payable."

12. Accordingly, so far as the net issue in this appeal is concerned there was no material difference in the critical wording adopted in s.99 to that used in s.93 of the 1908 Act.

13. The 1963 Act was repealed by the Companies Act, 2014, but so far as the critical wording used in s.93 of the 1908 Act and in s.99 of the 1963 Act is concerned this was continued in s.409(1) - "*Every charge created, after the commencement of this section, by a company shall be void against the liquidator and any creditor of the company unless…"* the required particulars are registered with the Registrar not later than 21 days after the charge's creation.

14. Given that s.93 of the 1908 Act applied to Ireland, and that the Court of Appeal decision in *Re Monolithic* was binding on Irish companies and the Irish courts, and was reasoned, and was unanimous, it seems to me that we must treat it as a strongly persuasive authority as to the correct construction of s.409(1). The reasoning in *Re Monolithic* was based firmly on a 'plain and ordinary meaning' interpretation of the relevant words in s.93, and it is reasoning that applies equally to the relevant words in s.409(1), and I adopt it.

15. In *Smith v Bridgend County Borough Council* [2001] UKHL 58 Lord Hoffman (with whom Lord Justices Bingham and Browne-Wilkinson agreed) at para. 21 quoted the first passage from Phillimore LJ in *Re Monolithic* that I have quoted above, and commented:

> *" The last sentence shows some degree of confusion because of course the liquidator is not a successor of the company. But Phillimore LJ was quite right in saying that section 395* [the equivalent provision in the UK Companies Act, 1986, which Lord Hoffman said in para.19 "can be traced back to the Companies Act, 1900, (63 & 64 Vict, c.48)] *does not invalidate a charge against a company while it is a going concern, that is to say, when it is not in liquidation. On the other hand, once the company is in liquidation and can act only by its liquidator, there seems to me little value in a distinction between whether the charge is void against the liquidator or void against the company. It is void against the company in liquidation."*

So the House of Lords in recent times has again found that this point must be decided against the appellant, and that is also a persuasive authority.

16. I have also looked at the decision of the House of Lords in *Wright v Horton* (1887) 12 App. Cas. 371. It seems to me that it does not assist the appellant, or this court, as it concerned a failure to register debentures *in the company's own register* contrary to s.43 of the Companies Act, 1862. Overruling a series of earlier decisions the House of Lords held that, while the non-registration gave rise to fines on company officers/directors, it did not have the effect of inflicting *"a forfeiture which the statute does not impose, in addition to the penalty which is does."* (per Fitzgerald L.J.). *Wright v Horton* is misleadingly cited by Courtney as authority for the broad proposition "*that non-registration of a registrable charge will not entirely vitiate that charge, which will still be enforceable against the company*" – however, in fairness to the learned author, Courtney correctly goes on to refer to *Re Monolithic* and *Smith*.

17. The appellant's argument as I understand it is that following default on the loan, the appellant's right to enforcement, and in particular the statutory rights to possession and to sale arising under the Land and Conveyancing Law Reform Act, 2009, arose – at some point in time at or after registration of the Deed of Mortgage on the Folio in July 2019. The appellant's solicitor Mr. O'Callaghan then argues that these stand-alone statutory rights were exercised and that the appellant was, before the liquidator was appointed, in possession and actively seeking a sale of the lands. He argued that this "*transformed"* or *"metamorphosed"* the security, such that the charge contained within the Deed of Mortgage no longer existed, and such that s.409(1) had no application. This are startling propositions.

18. Firstly, this argument is entirely undermined by the clear terms of s.408(1) of the 2014 Act which makes it expressly clear that 'charge' *"means a mortgage or a charge in an agreement (written or oral), that is created over an interest in any property…"*. The combination of this definition with the terms of s.409(1) make it clear that where a charge is contained in a written

agreement and creates an interest over property then particulars of the charge must be registered in the CRO, and failure to do so makes it void as against a later appointed liquidator and creditors.

19. Secondly I agree with the submission of counsel for the liquidator that if what the appellant argues is correct there would have been a derogation from the clear terms of s.409(1), but there is no such derogation.

20. Thirdly, counsel further submitted, in my view correctly, that the appellant, in seeking to take enforcement measures does so in reliance on and further to the provisions of the Deed of Mortgage and the charge thereby created. The appellant cannot on the one hand seek to rely on the charge and on the other deny its continued existence.

21. The appellant goes on to submit that s.409 did not render the charge void as against the company. That is correct, but in practical terms is only so provided the company has not gone into liquidation. Phillimore L.J. in *Re Monolithic* is clear that the charge can only be relied on against the company "*as a going concern*" – that authority is entirely against the appellant. Moreover, as Lord Hoffmann said in *Smith* once the company goes into liquidation there is "*little value in a distinction between whether the charge is void against the liquidator or void against the company. It is void against the company in liquidation."*

22. In the Submission at para. 40 the appellant refers to the rationale of registration of charges as being to afford protection to creditors of the company (or putative creditors or lenders). Be that as it may – and it is not necessary in this appeal to consider whether there may be other reasons why successive legislatures have adopted compulsory registration of company charges with the Registrar – neither a purposive approach to construction nor the nature of the particulars to be furnished to the Registrar can have any relevance where the plain and ordinary meaning of s.409(1) is clear and unambiguous, and such ordinary meaning is not said to give rise to any absurdity.

23. Nor in my view can the 2009 Act alter matters. It deals with the creation of mortgages generally, and powers of sale etc., and does not address the particular and additional requirement for registration of charges over company property with the Registrar of Companies to ensure validity *vis a vis* liquidators and other creditors. The 2009 Act applies only insofar as the Mortgage is valid and subsisting as against a particular party. It is not the case that once the statutory rights under the 2009 Act arise the right of enforcement under the Mortgage is *"irreversible",* as the appellant suggests at para.67 of the written Submission. Where the charge is rendered void by reason of non-registration pursuant to s.409 of the 2014 Act such statutory rights or powers as might be vested in the mortgagee under the 2009 Act cannot be enjoyed or exercised as against a liquidator or other creditors simply because, as against those parties, the charge is void. This does not have the consequence that the appellant's power of sale under the Mortgage or the 2009 Act is void – it means that *vis a vis* the liquidator and creditors there is no valid mortgage, and hence no rights or powers of enforcement or power of sale can arise.

24. Nor can the fact that the charge is entered as a burden on the Land Registry folio alter matters. That <u>does</u> put on notice any person searching in the Land Registry, but that is not necessarily the port of call of the person intending to do business with the company; such a person may decide only to search the Register maintained by the CRO to ascertain the extent to which company assets are subject to prior charges, and if so they are entitled to see there any charge against land or other assets duly registered under s.409.

25. Finally, I agree with counsel that the appellant has not adduced any authority that actually supports his contentions. The appellant relied on *Mercantile Bank of India Ltd v Chartered Bank of India and ors.* [1937] 1 AER 231 but that case did not concern land – it concerned unregistered floating charges which were the subject of a seizure which Porter J. held perfected the charge, and in my view the trial judge correctly distinguished it from the present case.

26. In his judgment Porter J. cites the authority of *Wrightson v McArthur & Hutchinson (19190 Ltd* (1921) 2 KBD 807 for the proposition that "*…once a seizure has taken place, at a time before liquidation, at any rate, of the company, the security, even if it were originally a floating security, has ceased to be so describable.*" – and this is cited by the appellant in his written submissions in support of the argument that the charge ceased to exist before the liquidator was appointed.

27. *Wrightson* concerned a pledge of goods as security, which the second defendant's liquidator argued was void as the correspondence referring to the pledge was not registered as a charge under s.93 of the 1908 Act. In that case the goods pledged were kept in a room where the pledgor gave a licence to entered the house and delivered the key to the room. At p. 815 Rowlatt J. held that -

> "The special property of a pledgee, as shown by Bowen L.J. in the judgement already referred to, exists by virtue of the act of delivery, not by virtue of the document….What is accurate is that where the passing of property, special or general, is effected by actual delivery of possession (as truly enough it usually but not invariably is in cases of pledge) any accompanying document does not have the effect of any such instrument as is described by the section."

It is abundantly clear from the two authorities relied on by the appellant that different considerations apply to a pledge over property or goods capable of actual delivery, and where delivery completes the pledge or there is actual seizure of the goods, and where, unlike here, there is no reliance on a document of charge that requires to be registered in the CRO.

28. Accordingly I agree with Mr. Justice Allen that the trial judge did not err in law and that the orders made should be affirmed.

29. It follows that the appellant's entry into possession and continued possession (if that is what it was) of the property based on the validity of the charge was unlawful *vis a vis* the other creditors

of the company *ab initio.* More importantly it also follows that upon the appointment of the liquidator the appellant's continued occupation (if that it was) was unlawful *vis a vis* the liquidator, as the charge was not registered and was void as against the liquidator under s.409 and there ceased to be any legal basis upon which the appellant was entitled to be in possession or to sell the property. As the trial judge correctly found it is irrelevant that steps were taken by the appellant to enforce the Mortgage before the appointment of the liquidator.

30. For the sake of completeness I should add that it is not in issue on this appeal that the purported second charge of the lands, signed by the appellant purportedly on behalf of the company on 1 February 2022 *"done solely for the purpose of regularising the position in respect of the Companies Registration Office"* (para.17 of the appellant's Affidavit sworn on 1 July, 2022), and registered on 8 February 2022 with the Registrar of Companies, was void as against the liquidator as an unfair preference as defined in s.604 of the 2014 Act. That issue was abandoned by the appellant in the High Court.

31. I also agree, for the reasons given by the trial judge and addressed by Mr. Justice Allen in his judgment, that having decided the legal issue in relation to s.409(1) against the appellant it was not necessary to remit any aspect of the matter for plenary hearing, and it was appropriate to give the declarations and injunctions that she did.