

THE HIGH COURT

[2022] IEHC 581

[2019 27 SP]

BETWEEN

PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

OLIVER O'SULLIVAN AND EDMUND HEAPHY

DEFENDANTS

JUDGMENT of Ms. Justice Emily Egan delivered on the 19th day of October, 2022

Introduction/factual background

1. The plaintiff ("Promontoria") initiated these proceedings by way of special summons dated 22nd January, 2019 seeking a declaration that there is due and owing monies by the defendants to Promontoria in the amount of €255,163.68 as of 24th August, 2018. Promontoria also seek an order that the said amount, together with interest from that date, stands well-charged on the interest of the defendants in the property at 43 Dubh Carraig, Ardmore, County Waterford (Apartment No. 43), together with other associated reliefs.
2. In so far as concerns the first of these reliefs, I am quite satisfied that the special summons entirely fails to comply with the requirements of O. 4, r. 4 of the Rules of the Superior Courts to the effect that all necessary particulars be provided. The requirements of the equivalent provision in respect of summary proceedings have been explained by the Supreme Court in *Bank of Ireland v O'Malley* [2019] IESC 84. In the present case, the special endorsement of claim contains insufficient details as to how the sum sought to be well-charged is calculated so as to meet these requirements. In addition, there is insufficient detail in the evidence to provide the court with the ability to assess whether the precise claim to the debt alleged has been established on a *prima facie* basis. Rather, the special summons and verifying affidavit merely make a bald assertion that this is the amount due and owing after all just credit and allowances. In this regard, the affidavit evidence does not provide any further details as to how the sum alleged to be outstanding has been calculated. Rather, Promontoria has simply exhibited a two line "statement" dated 18th August, 2018 which sets out an "opening balance" as of 9th March, 2018 of €252, 627.94, which with interest accruing at the "current rate" of 2% produces the total amount claimed. No information is provided as to how the original opening balance was calculated or as to the relevant interest calculations. I will deal with the consequences of this insufficient particularisation after considering the claim to a well-charging order.
3. Promontoria aver that it is entitled to the well-charging order on two separate grounds; first, on the basis of a solicitor's undertaking ("the solicitor's undertaking") to Promontoria's predecessor in title - Ulster Bank Ireland, now known as Ulster Bank Ireland DAC, ("the Bank") in respect of Apartment No. 43; and, second on the basis of an agreement between

the Bank and the defendants to create such security in a letter of loan offer of 10th September, 2007 ("the facility letter").

The solicitor's undertaking

4. On 23rd August, 2002 Coakley Maloney, previous solicitors for the defendants, gave an undertaking on behalf of the defendants in favour of the Bank to hold title deeds in trust for the Bank and, after all necessary stamping and registration had been completed, to deliver them to the Bank. The solicitor's undertaking appears to have been in consideration of the Bank advancing monies to the defendants to discharge previous third-party mortgages and incumbrances. The relevant third-party mortgages and incumbrances and the advances to which they relate are not specified in the solicitor's undertaking (nor in Promontoria's pleadings or affidavits). The solicitor's undertaking describes the property, the subject matter of the undertaking as "*office/apartment at Dubh Carraig, Ardmore, County Waterford.*" The solicitor's undertaking exhibited in Promontoria's affidavits includes an annotated copy of the land registry map of the overall development of which Apartment No. 43 forms part of. This map is in reasonably small scale. Written in hand on this copy of the land registry map is "*Scheme Map for Dubh Carraig, Ardmore, County Waterford Nos. 1 to 42 inclusive*". Apartment No. 43 is therefore not identified in the handwritten note on the map as being subject to the undertaking. On the other hand, this copy of the land registry map shows the entire Dubh Carraig development and six of the units mapped appear to have been circled. When this copy of the land registry map is cross referenced with the full-scale map now held by the Property Registration Authority for Apartment No. 43, Folio 32284 F ("the Folio"), which is also exhibited, one can see that one of the properties circled may be Apartment No. 43. One can therefore, by a process of deduction discern that it might have been intended that Apartment No. 43 would be among the properties the subject matter of the solicitor's undertaking. However, this is anything but crystal clear.
5. No information is provided in Promontoria's affidavit as to what funds were advanced by the Bank on foot of, or in consideration of, the solicitor's undertaking. The court also has no information as to whether or not the prior third-party mortgages and incumbrances were paid off as contemplated by the undertaking.

The loan facility

6. Some five years later, by way of a facility letter of 10th September, 2007 the Bank offered to make available credit facilities in the amount of €190,000 ("the loan facility"). The facility letter provided that the loan facility was "*for the sole purpose of top up on original 100k term loan to develop property.*" The loan facility would be available for drawdown until 10th November, 2007. The term of the loan was four years commencing on the date of the drawdown. The facility letter states that from the date of drawdown, repayments would be on an interest only basis for an unspecified number of years. The interest rate applicable to the loan facility is also stated to be the Bank's cost of funds plus 1.3% per annum. The facility letter also identified the relevant "*security*" as "*first legal charge over property at 43 Dubh Carraig, Ardmore, County Waterford.*" The facility letter is signed by the commercial manager of the Bank and by the defendants. The schedule to the facility letter includes the standard terms of the Bank's loan facility. These provide, *inter alia* that the Bank would

have the right to assign or transfer the benefits and obligations under the loan facility to another entity without prior consent of the borrower.

7. The summons pleads that the loan facility was drawn down by or on behalf of the defendants and this is not in dispute. Nor is it in dispute that repayments have not been made in accordance with the loan facility, although no information has been put before the court as to when such repayments ceased or how the amount supposedly currently outstanding has been calculated.
8. On 1st July, 2016 the Bank registered a caution over the Folio.
9. The defendants have not executed a mortgage over the property and Promontoria maintains that this is in breach of both the solicitor's undertaking and the facility letter/loan offer.
10. Promontoria's grounding affidavit (and legal submissions) assert that the solicitor's undertaking (of 23rd August, 2002) was "*given in consideration of the Bank agreeing to the drawdown of the loan facility*". However, the solicitor's undertaking preceded the loan facility by several years. Furthermore, the solicitor's undertaking was in respect of the advance of monies for the discharge of third-party loans/incumbrances and it is not at all clear that the funds advanced by the Bank in 2002 had not been repaid prior to the new loan facility in 2007. It is therefore not established that the 2002 loan to which the solicitor's undertaking was connected was still outstanding by 2007 when the loan facility was concluded or indeed, whether it is still outstanding at the present time. In short, it is unclear whether the loan advance which apparently provided consideration for the solicitor's undertaking in 2002 is currently outstanding either in whole or in part.

The transfer to Promontoria

11. By Global Deed of Transfer ("GDT") of 19th December, 2016, the Bank conveyed to Promontoria its rights, title and interest in *inter alia* the defendant's loan facility and security documents as set out in a schedule thereto. The relevant schedule to the GDT lists the caution registered on 1st July, 2016 and also lists the 2002 solicitor's undertaking under the heading "*Loan Assets*". In addition, the relevant schedule to the GDT lists the 2007 loan facility under the heading "*Underlying Loan Agreements*". Finally, under the heading "*Properties*", the relevant schedule to the GDT lists "*office block incorporating two apartments Dubh Carraig, Ardmore, County Waterford, Republic of Ireland*" and cross refers to the two defendants by name.
12. As I was not initially satisfied as to the formalities pertaining to the execution of the GDT, the proceedings were re-listed before me to enable Promontoria swear a further affidavit in relation to same. I am satisfied that the supplementary affidavit filed demonstrates that the signatories to the relevant documents had the necessary authority so to do and that the GDT is validly executed.

The defendant's affidavits and arguments

13. The proceedings were personally served on both defendants. Since that time, Promontoria has written to both defendants on numerous occasions informing them of all relevant return dates in the proceedings.
14. The first named defendant, Oliver O'Sullivan, appears to have played no active part in the proceedings. I was, however, satisfied that he had been properly served with the proceedings and had been appropriately notified of all relevant return dates.
15. The second named defendant, Edward Heaphy, swore a replying affidavit on 28th March, 2019. This asserts that the claim for payment in these proceedings is statute barred. The enforcement of an equitable mortgage is subject to a twelve-year limitation period and on the basis that the facility letter is dated 10th September, 2007, proceedings commenced in January 2019 were commenced within twelve years thereof. The same could not be said in respect of a claim based on the 2002 solicitor's undertaking.
16. Mr. Heaphy also raises certain issues in relation to what he calls the "*loan sale agreement*", i.e. the GDT transfer. He avers that it is heavily redacted and that it is difficult to determine whether the deed addresses the issue of the release of previous or existing charges over the relevant assets purportedly sold. However, there is nothing to suggest the subsistence of such previous or existing charges. In any event, this would not prevent the granting of a well-charging order as the issue of priorities is surely a matter for the Examiner.
17. Mr. Heaphy also avers that the GDT does not provide any details of whether the Bank's own financial obligations in relation to the relevant assets transferred to Promontoria. I do not fully understand the point made here by Mr. Heaphy. However, as he refers expressly to clause 11.29 of the Bank's General Conditions, (which in turn refers to the Bank's right of set off), I assume that Mr. Heaphy intends to raise the possibility that the Bank previously owed him sums which ought to be set off against the amounts outstanding by him. However, no details whatsoever have been furnished as to the nature or even existence of any such sums. I do not therefore accept that anything turns on the issue of set off.
18. Although Mr. Heaphy does not deny that monies were advanced pursuant to the loan facility, that same fell into arrears or that same remain outstanding, he avers that he never received demand letters from the Bank. However, Promontoria exhibits the certified post slips in respect of the demand letters, and I am therefore satisfied in this respect.
19. Mr. Heaphy swore a second replying affidavit on 26th June, 2019. This affidavit is extremely difficult to interpret. Mr. Heaphy exhibits a judgment of the Court of Appeal of England and Wales, *RBS v. Highland Financial Partners LTD and Others* [2013] EWCA Civ. 328. The underlying case concerned a collateralised debt obligation transaction entered into in 2007 as between various entities in the Highland group (a hedge fund based in the United States) and Royal Bank of Scotland ("RBS"), pursuant to which RBS provided Highland with funding for the latter to purchase, through a special purpose vehicle, a portfolio of loans out of which Highland would issue securities. As the financial crisis hit, there was no market for the securities and so RBS terminated the transaction. The agreement required that the

loans in the portfolio would be offered for sale by auction. However, for approximately one third of the loans, RBS instead transferred the loans from their trading book to their banking book, thereby taking advantage of a change in international accounting standards rules, permitting it to use a historical valuation calculation method. This left RBS with a shortfall between the value realised on the sale of the loans and the original finance it had provided to Highland, for which RBS sued Highland. Highland contended that if RBS had followed the termination provisions properly, the value it would have received for the loans would have been much higher and no shortfall would have been present. At first instance, RBS was granted summary judgment. The Court of Appeal set aside this judgment on the basis that RBS had, through the actions of its employee, fraudulently misrepresented the events surrounding the sale of the loans to the lower court.

20. In essence, it appears that Mr. Heaphy maintains that the Bank took account of the same change in international accounting standards rules as RBS had, and was thereby guilty of fraud. Mr. Heaphy maintains that because the GDT is heavily redacted, it is not possible to ascertain whether or not the Bank sold its loan portfolio using the same historical valuation calculation method as RBS.

New evidence, discovery and adjournment application

21. When these proceedings opened, Mr. Heaphy sought an adjournment in order to advance the above arguments based on *RBS v. Highland*. In particular, Mr. Heaphy sought to rely upon an affidavit sworn a couple of days before the hearing which, he said, exhibited an opinion from a barrister based in London dealing with the RBS case and exhibited minutes from directors' meetings of Ulster Bank to demonstrate that the Bank had used the historical valuation calculation method in order to value its loan portfolio, including his own loans. Promontoria objected to both the adjournment and the admission of the affidavit.
22. It did not appear to me that the additional evidence which Mr. Heaphy wished to place before the court was relevant. As stated, this additional evidence comprised a legal opinion by a barrister dealing with the impact of the *RBS v. Highland* decision. This court does not rely upon expert evidence on matters of Irish law which is a matter uniquely for this court.
23. In addition, the *RBS v. Highland* decision relates to a different financial institution, RBS as opposed to Ulster Bank. It is certainly not appropriate, merely because RBS is Ulster Bank's parent, to assume that any wrongdoing found on behalf of RBS can also be levelled as against Ulster Bank. Even if such an assumption could be made, the *RBS v. Highland* judgment concerned a dispute between RBS and Highland which was ultimately resolved in Highland's favour. There is no suggestion that this had any impact whatsoever upon the borrowers of the underlying loans. Accordingly, I fail to see how the *RBS v. Highland* decision could be of any assistance to the defendants. It would be a significant leap for this court to conclude that any fraud was committed in relation to the manner in which Ulster Bank's loans were valued for the purposes of collateralisation. Further even if there was some deficit in the manner in which the loans were so valued, it is impossible to understand how this could inure to the benefit of Mr. Heaphy rather than the counterparty to any such collateralisation agreement.

24. Likewise, I did not see any valid basis upon which to grant Mr. Heaphy the adjournment sought. Although Mr. Heaphy stated that the adjournment was necessary because discovery was urgently required in order to advance this possible defence, no letter seeking voluntary discovery had issued prior to the hearing date and no motion for discovery had issued. Furthermore, there is no matter in issue on the face of the proceedings which could be advanced by the discovery Mr. Heaphy wishes to seek. Rather, Mr. Heaphy's request for discovery appears to relate to a finding of wrongdoing against another financial institution. At risk of repetition, even if it could be said that the same wrongdoing could be attributed to Ulster Bank, it is not at all clear how this could impact upon Promontoria's right to the relief sought.
25. I note here in passing that neither party drew the court's attention to *Governor Company of the Bank of Ireland v Heaphy* [2018] IESC 46, in which the Supreme Court, per Finlay Geoghegan J., found that a not entirely dissimilar argument advanced by Mr. Heaphy did not make out an arguable defence to the bank's application for summary judgment.
26. For all of these reasons, it does not appear to me that the discovery sought could in any way advance matters in these proceedings and that there was no purpose to be served in adjourning these proceedings to enable such discovery to be sought.
27. Accordingly, after hearing Mr. Heaphy in full, I declined to admit the affidavit or to grant the adjournment sought.

Analysis of entitlement to well-charging order

28. Promontoria claims that it is entitled to a well-charging order on the grounds that the letter of undertaking of Coakley Moloney solicitors of 23rd August, 2002 and the loan facility of 10th September, 2007 each created an equitable mortgage in respect of the subject property. I will consider the solicitor's undertaking and the loan facility in turn.
29. The only authority relied upon by Promontoria in this regard was *ACC v. Malocco* [2000] 3 IR 191. In *Malocco*, during the course of loan negotiations, the defendant's solicitors gave an undertaking to the bank in standard form in which they undertook to execute a deed of mortgage, have it registered and complete all other formalities. They also undertook to furnish the title deeds of the property to the bank and pending compliance with formalities, to hold such deeds in trust for them. The above was held by Laffoy J. to be sufficient to create an equitable mortgage. However, the undertaking in *Malocco* was far more specific in its terms than the undertaking sought to be relied upon in this case. In my view, the terms of the undertaking in this case do not adequately demonstrate that the solicitor undertook to secure the execution of a charge over Apartment No. 43, as opposed to merely undertaking to hold the title deeds on accountable receipt and to return them to the Bank.
30. The solicitor's undertaking is not sufficiently clear to create an equitable mortgage over the property. Quite apart from the difficulty referred to at paragraph 28, other reasons why this is so have already been alluded to at paragraphs 4 and 5 above:

- a. In brief, it is not clear that any of the funds advanced pursuant to the solicitor's undertaking remain outstanding. Those funds were advanced to pay off third party loans, but there is no averment that any of the funds advanced at the time of the 2002 undertaking remain outstanding. There is therefore no evidence to relate the debt now said to be outstanding and sought to be declared well-charged to the equitable mortgage said to have been created by the solicitor's undertaking. This is an essential proof in any application for a well-charging order.
 - b. Nor does the solicitor's undertaking clearly identify the property, the subject of this well-charging order. The property is identified in the body of the solicitor's undertaking as merely office/apartment at Dubh Carraig, Ardmore, County Waterford. Further, the map attached to the solicitor's undertaking appears to identify five or six different properties in schematic form one of which might well be Apartment No. 43. However, as the handwriting on the scheme map refers to Nos. 1 to 42 Dubh Carraig inclusive, one certainly could not conclude that Apartment No. 43 is clearly included. Further, as indicated, the property is identified in the body of the solicitor's undertaking as merely office/apartment at Dubh Carraig, Ardmore, County Waterford. The solicitor's undertaking does not therefore sufficiently identify the property the subject matter of this application for a well-charging order
31. In addition, of course, there is a difficulty with the limitation period as the proceedings were not commenced within twelve years of the solicitor's undertaking.
32. There are therefore multiple reasons why reliance cannot be placed upon the solicitor's undertaking for the purposes of creating an equitable mortgage or obtaining a well-charging order.
33. As I have decided that Promontoria is not entitled to rely upon the solicitor's undertaking, it is not necessary to address arguments made for the first time at trial by Mr. Heaphy in relation thereto. In this regard, Mr. Heaphy stated that he doubted the authenticity of this undertaking as the funds for the original purchase of the property had been advanced by Anglo Irish Bank and not by Ulster Bank. It strikes me that this might arise from a misunderstanding as to the nature of the undertaking and more particularly of the loan facility subtending the undertaking. Thus, it appears the loan facility was to discharge unrelated third-party loans to the defendants. These loans might well have been advanced by Anglo Irish Bank. However, as I find that Promontoria may not in any event rely upon the solicitor's undertaking for the purposes of obtaining a well-charging order, it is not necessary to deal with this issue.
34. It is a well-established principle in equity that a contract to create a legal mortgage can create an equitable interest in the property. An advance of money on foot of a letter of offer/facility letter stipulating for a legal mortgage over a property can therefore itself create an equitable mortgage. In this case, the agreement to advance funds and to secure same by way of a first legal charge or legal mortgage over Apartment No. 43 is evidenced in writing by the facility letter of 10th September, 2007. This displays an unambiguous

agreement to create a legal mortgage over the property, which, particularly when accompanied by acts of part performance, is sufficient to create an equitable mortgage. There is no dispute in this case but that monies were advanced pursuant to the said facility letter, that there was default in repayment and that the principal sum is due and owing; this much is accepted by Mr. Heaphy.

35. This court is not however satisfied that the full amount sought to be well-charged is due and owing. In this regard, there is a complete lack of detail as to how the interest claimed is calculated and, as stated, the special summons does not comply with the requirements of O. 4, r. 4 (by analogy with the *O'Malley* judgment). As the defendants did not at any stage raise this objection, I think it would be unjust to Promontoria to decline to grant any relief on that basis. On the evidence before me, and in particular in light of Mr Heaphy's failure to deny (on affidavit or in submissions) that the principal amount set out in the facility letter of 10th September, 2007 had been advanced by the date specified (10th November, 2007) or to assert that any sum advanced had been repaid, I am satisfied that there is no dispute but that the principal amount of €190,000 was advanced and remains outstanding. I am however far from being satisfied as to Promontoria's entitlement to the interest claimed. Although these proceedings were commenced before the *O'Malley* judgment, they came on for hearing thereafter. It is therefore somewhat surprising that Promontoria did not seek to amend their special summons to comply with the requirements of O. 4, r. 4 or indeed to put any evidence before the court as to how the amount claimed has been calculated. Not having elected to amend their summons or to place further evidence before the court, Promontoria can have no legitimate objection to an order which excludes interest.
36. I will therefore grant a declaration that €190,000, is well-charged in favour of Promontoria in respect of the defendants' interests in Apartment No. 43, Dubh Carraig, Ardmore, County Waterford.