



**THE COURT OF APPEAL
CIVIL**

Neutral Citation No. [2023] IECA 181

Court of Appeal Record No. 2022/252

High Court Record No. 2019/247 SP

**Unapproved
No Redactions Needed**

**Costello J.
Pilkington J.
Butler J.**

BETWEEN/

PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY

**PLAINTIFF/
APPELLANT**

- AND -

MICHAEL KEAN

**DEFENDANT/
RESPONDENT**

JUDGMENT of Ms. Justice Pilkington delivered on the 17th day of July 2023

Introduction

1. This appeal concerns the entitlement of the appellant, Promontoria (Oyster) DAC ('Promontoria') to maintain well charging proceedings in respect of lands registered in the name of the respondent.

2. It was agreed in the High Court (Simons J.) that this hearing proceeds on a modular basis and accordingly there are only two issues to be considered within this appeal.

3. The trial judge expressly relies upon his earlier judgment in *Promontoria (Oyster) DAC v. Fox* ('*Fox*')¹. This case, which I shall refer to as '*Kean*', and *Fox* are inextricably linked, for the reasons set out below.

4. In the High Court, in both the *Fox* and *Kean* proceedings, the respective respondents were successful. *Promontoria* appealed both decisions. Prior to hearing this appeal in *Kean*, this Court upheld *Promontoria*'s appeal in *Fox*.²

5. Within this appeal *Promontoria* also raises a separate ground of appeal, which did not arise within *Fox*.

Background

6. The respondent is registered as owner of the property comprised in Folio 15424³ of the Register of Freeholders County of Roscommon ('the folio'). As in *Fox*, this case deals with registered lands only.

7. Pursuant to an agreement between the appellant and respondent, the respondent agreed, in return for certain advances, to the deposit of his land certificate as security over the folio. From March 2005 this security was held by Ulster Bank (thereafter *Promontoria*) by way of a deposit of this land certificate.

¹ [2022] IEHC 97

² [2023] IECA 76

³ It is agreed that any reference to folio 15454F is a typographical error, it is folio 15424F

8. Thereafter, by a loan facility letter dated 17 February 2012, three additional loans were advanced to the respondent. Promontoria seeks to rely upon the security set out within that facility letter as ‘Lien registered over 77 acres of land atland cert folio no RN15454F’ [sic]. This 2012 loan facility is the factual premise underlying this appeal.

9. The issues that arise, both within *Fox* and this case, concern the implications of s.73 of the Registration of Deeds and Title Act 2006 (‘the 2006 Act’) in respect of the security previously held by the retention of land and charge certificates over registered lands.

The Legislation

10. S.73 of the 2006 Act concerns the previously well-established practice whereby security over registered lands could be created and maintained by the retention of a land certificate or certificate of charge by the holder of that interest. The holders of that security could rely upon it as production of these certificates was required in respect of any subsequent transaction affecting the lands, so they were therefore on notice of it and by withholding the certificate effectively could prevent the registered owner from disposing of or further charging his interest in the lands.

11. This practice was given statutory recognition, from the inception of the system of land registration in Ireland, within s. 81 of the Local Registration of Title (Ireland) Act, 1891 (‘the 1891 Act’) and thereafter s.105 of the Registration of Title Act 1964 (‘the 1964 Act’). That remained the position until the enactment of s.73 of the 2006 Act.

12. The pertinent portion of s.73 of the 2006 Act is as follows;

Section 73 of the 2006 Act

*PART 5
MISCELLANEOUS*

Abolition of land certificates and certificates of charge.

73.— (1) The Authority shall cease to issue land certificates and certificates of charge under the Act of 1964, and accordingly—

(a) sections 28, 32(2), 32(3), 51(3), 51(4), 62(5) and 64(3) of that Act are repealed, and

(b) section 105 (certificates) thereof—

(i) applies only in relation to land certificates and certificates of charge issued before the commencement of this subsection and not already cancelled, and

(ii) ceases to have effect 3 years after the commencement of subsection (2)⁴.

(2) Subject to subsection (3), land certificates and certificates of charge issued before the commencement of subsection (1) and not already cancelled cease to have any force or effect on the expiration of the period of 3 years after the commencement of this subsection (my emphasis).

(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 certificates or certificates of charge have been issued and for any others who may be affected, including persons holding a

⁴ Pursuant to S.I. No. 511 of 2006 cited as the Registration of Deeds and Title Act (Commencement) (No 2) Order 2006, 1 January 2007 was appointed the day upon which s.73 of the 2006 Act came into operation, so the three year period expired on 31 December 2009.

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.'

13. In my view s.73 is therefore straightforward in its terms;

(a) The Land Certificates and Certificates of Charge which were previously held as security ceased to have effect after 31 December 2009, with a grace period of three years provided to those who held such certificates to register their interest(s), up to the same date. (Section 73 (1)(b)).

(b) Pursuant to s.73(3)(b) “the holder of such a lien may apply to the authority for registration of the lien....”

(c) The means of registration of the lien is as a burden pursuant to s.69 of the 1964 Act – s. 73(3)(d).

14. In summary therefore, s.73 of the 2006 Act ensures that, rather than a creditor relying upon possession of a certificate of charge or land certificate (both of which cease to have effect after 31 December 2009) as evidence of their lien as a secured interest, s.73 introduced the simple device of requiring the registration of the (pre-existing) lien as a burden on the folio pursuant to s.69 of the 1964 Act ('the s. 73 lien').

15. On the facts of this case, pursuant to the terms of s.73(3) of the 2006 Act this lien, previously held by way of the deposit of the land certificate, was registered as a burden on the folio on 31 December 2009 in favour of Ulster Bank Ireland Limited, with the entry also noting the interest of Promontoria since 9 March 2017⁵.

16. The issue that arose both within *Fox* and this case concerns the implications of advances by Promontoria to the respective respondents, post 31 December 2009, and its seeking to secure that lending against the s. 73 lien.

Authorities

17. S.73 has been considered by the Supreme Court in *Promontoria (Oyster) DAC v. Hannon* [2020] 1 IR 364 (*Hannon*). In that case the liens had not been registered within the period ending 31 December 2009, which differs from the factual position in both *Fox* and *Kean*. The Supreme Court held that a lien held over registered land by means of holding a land or charge certificate ceased to exist after 31 December 2009.

18. Clarke C.J. (as he then was), in considering the three year transitional period within s.73 and the requirement for registration, stated (paragraph 68)

“Rather, it is appropriate to say that the existing interests of a holder of a lien in respect of registered land by deposit of a land certificate continue beyond the relevant three year period but subject only to registration as a lien. Viewed against that characterisation, I do not consider that the retrospectivity argument carries significant weight. It is not, in my judgment, sufficient to outweigh the clear statutory intent that

⁵ Reflecting the Global Deed of Transfer from Ulster Bank Ltd to Promontoria of 19 December 2016

the land certificate is to cease to have any legal effect for any purpose which, in my view, carries with it a clear implication that a lien by deposit of such certificates can no longer, in the absence of registration, give security over the lands concerned”

19. In considering s.73 and the system of land registration in general Clarke C.J. also comments as follows;

“7. What does the 2006 Act do?

[48] There can be little doubt but that the 2006 Act is designed to represent a further move towards a universal system of land registration in which all, or almost all, interests in land or entitlements which run with land can be definitively determined by consulting the register. For example, it is now necessary to register for the first time any property, not previously registered, which is the subject of a transfer of ownership. While much agricultural property, or land which was once in agricultural use, has long since been registered because of the requirements of Victorian land legislation, the registry of deeds system has remained prevalent in respect of urban land. However, the fact that even urban land will gradually become registered, as the obligation for first registration on transfer comes into play, will greatly extend the proportion of land within the State which is registered”

This passage is relied upon by the respondents to this appeal and the trial judge in both cases.

It is considered later in this judgment.

20. In her concurring judgment Dunne J. focused upon the history of this form of security over registered lands, focusing initially upon the 1891 and 1964 Acts. In considering the 1891 Act she stated as follows (she subsequently confirmed that the same applied in respect of the 1964 Act);

“[82] In other words the Act of 1891 recognised the importance of the creation of equitable mortgages by the deposit of title deeds and made similar provision for the creation of equitable mortgages by deposit of the land certificate”

21. The point is elaborated upon within paragraph 84 where she provides a description of the creation of an equitable mortgage over registered lands;

“[84] It is evident from the provisions of the statutes referred to above that the fact that land was registered land did not deprive the owner of that land of the opportunity to create an equitable mortgage. The owner could do so by depositing the land certificate, being the document showing title, in the same way as the owner of unregistered lands could create an equitable mortgage by deposit of the title deeds.

In the course of submissions the court was referred to Coote’s Treatise on the Law of Mortgages (8th ed., Stevens and sons, 1912), at p. 68, where it was stated:

“A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit, operates as an equitable mortgage or charge, by virtue of which the depositor acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown; and the delivery would be sufficient part-performance of such agreement to take the case out of the statute.

(The reference to the statute is a reference to the Statute of Frauds (Ireland) Act 1695.)”

22. In a decision of this Court in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93 (*'Greene'*) the Court was considering whether the date of deposit of the land certificate was a necessary proof that had to be established in well charging proceedings by the holder of a s.73 lien. This issue does not arise in this case.

23. Within his judgment Collins J. considered s.73 and *Hannon* and stated;

'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. 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'. (my emphasis).

The Appeal

Modular Hearing

24. The two issues before this Court are as follows:

- A. Was the trial judge correct in holding that a lien registered pursuant to s.73(3) of the 2006 Act cannot secure lending which occurs after the commencement of that section (31 December 2009)?.
- B. The second issue, not raised in *Fox*, is whether security sufficient to ground well charging relief arises, or could arise, by any contractual mechanism distinct from the lien registered on the folio, also described as a form of contractual promise. In short

whether Promontoria can argue, on the facts of this case, that an action may lie in the enforcement of an equitable charge.

Counsel for Promontoria was careful to limit this second issue to seeking confirmation as to whether, on the facts of this case, it is available as a potential route to the creation of security notwithstanding s.73 of the 2006 Act. He does so on the basis that the trial judge has expressly found that such an argument cannot be advanced based upon his interpretation of s73.

Whilst the argument is framed as the possible enforcement of a contractual promise it might be described more broadly as the entitlement to seek equitable relief.

25. The first issue is identical to the one that arose in *Fox* and therefore requires consideration of this judgment. The second issue is, for the reasons set out below, linked to the first.

The First Issue – The Application of S.73

26. The question in *Fox*, as in this case, is whether a lien registered pursuant to s.73 of the 2006 Act can be relied upon as security for further loan agreements entered into after 31 December 2009.

27. It was clear, on the facts of both *Fox* and *Kean*, that the land certificates formerly held by Promontoria were registered pursuant to the terms of s. 73 and appear as burdens on their respective folios.

28. The issue in both cases is the status of advances made by Promontoria after 31 December 2009. Do they form part of the security represented by the lien registered as a burden on the respective folios or are they unsecured advances?

Judgments of the High Court in *Fox & Kean*

29. The High Court held, in both *Fox* and *Kean*, that the proper interpretation of s.73 precluded the entitlement of a creditor holding security as a registered lien, to rely upon any advances as security if they occurred after 31 December 2009. The trial judge found that the only form of registered security that can be relied upon to create security after that date is by way of charge.

30. In *Fox* the trial judge, noting the comments of Clarke C.J. in *Hannon* regarding the role of s.73 in moving towards a universal system of land registration (quoted at paragraph 19 above) then summarised his analysis of s.73 within paragraph 32 in the following terms;

“The scheme of the amended legislation is that the prescribed method of creating security for the repayment of debts is by way of charge. The introduction of the concept of a registered lien, as part of the transitional provisions, is not intended to displace the primacy of a charge. Rather a registered lien represents a lesser form of security which has been put in place to protect the existing property rights of the holders of liens by deposit.”

31. The trial judge in *Kean* took the same approach as follows;

“19. The logic of the judgment in Fox is that the legislative intent underlying Section 73 of the Registration of Deeds and Title Act 2006 is to provide a mechanism to safeguard the existing property rights of the holder of a lien by deposit. It was sufficient for that

purpose for the transitional provisions to confine the registered lien to the principal debt due as of the date of registration (together with accruing interest). It was not necessary to provide that the holder of the newly fashioned registered lien have the right to rely on same as security for additional loan facilities granted after 31 December 2009.

...

21. In summary, the argument here is indistinguishable from that rejected in Fox”.

Fox - The Court of Appeal Judgment

32. This Court considered that its initial focus should be to consider the interests previously affecting registered lands by the deposit of land and charge certificates and thereafter to consider the position post the enactment of s.73. It considered that the reference to interests existing prior to the enactment of s.73 is itself reflected within s.73(2)(b) which refers to ‘*a holder of such a lien may apply to the Authority for registration of the lien in such manner as the Authority may determine*’ (my emphasis).

33. The Court considered the intention of s.73 to be straightforward; to provide a mechanism for the continuance of existing liens after the abolition of the security afforded by the deposit of a land certificate or certificate of charge (paragraph 61). All s.73 sought to do was to require registration of those liens that were previously unregistered, as clearly recognised within both the 1891 Act⁶ and then the 1964 Act.⁷ It does so by providing for the registration of those pre-existing liens as a burden on the folio. So the interest that was previously recognised whilst

⁶ s.81(3) and (5)

⁷ s.105(3) and (5)

remaining unregistered must now be registered. The nature of a s.73 lien must therefore be seen by reference to its predecessors within the legislation and considered in that context.

34. In the opinion of the Court two consequences flow from its interpretation of s.73; the designated time limit within which such (pre-existing) liens must be registered is expressly specified, coupled with the fact that no new liens can be created thereafter. These were the two changes notified to all holders of existing liens; at no point was any notice given that, after 31 December 2009, they could no longer rely upon their existing liens as security for any further advances to the borrower.

35. It was also noted that further advances could be secured in respect of an existing lien. As paragraph 67 points out;

'After 2009 the only way to create security is by charge as it is no longer possible to create a lien. But it does not follow that existing liens cannot secure advances after 2009'.

36. The Court considered that there was nothing within the judgments in *Hannon* which confirmed that s.73 lien has retrospective effect only. On the contrary, the holder of a lien prior to the enactment of s.73 is, upon registration on the relevant folio, entitled to exercise the rights formerly available to it, in utilising the s.73 lien to secure further advances.

37. The Court agreed with Collins J. in *Greene* where he confirmed that s.73 is to be construed as ensuring that there is to be no diminution in the rights of lien holders. It follows therefore that their entitlement to enforce their security must have been retained upon registration.

38. In upholding Promontoria's appeal from the *Fox* judgment, this Court held, in summary, that liens properly registered pursuant to s.73(3) of the 2006 Act (prior to 31 December 2009) are capable of securing loan agreements or advances made after that date.

39. As quoted above, at paragraph 21 of his judgment in *Kean*, the trial judge held that the argument advanced by Promontoria is indistinguishable from that rejected in *Fox*.

40. I agree that the argument is indistinguishable, but this Court has reached a different conclusion. In *Fox* this Court upheld the appeal of Promontoria and for the same reasons this Court can see no reason to depart from its reasoning in that judgment in confirming that a s.73 lien may secure advances after 31 December 2009. Accordingly this Court upholds Promontoria's appeal in respect of the s.73 lien.

The Second Issue - Equitable Relief

41. To reiterate; it was agreed by both parties that it is not for this Court to determine whether, on the facts of this case, a contractual promise is made out. Rather it is for this Court to consider if such an argument is open to this appellant on the facts of this case. Whether such an argument would ultimately succeed is a matter for the judge who considers the well charging proceedings.

42. It is also agreed that, on the facts of this case, issue has been taken by the respondent as to whether the terms of the facility letter, properly construed, provide that the monies secured by the lien covers the entirety of the loan facilities. If that argument is upheld, then is this alternative argument available to the appellant?

43. The trial judge sets out the argument as follows (para. 15):

“More specifically, it is said that an agreement to provide security represents a “separate route” to the creation of an equitable mortgage which is distinct from the deposit of the land certificate. The gist of the submission is that equity looks to intent, rather than form, and that it must follow, therefore, that equity will treat the contractual promise or pledge as effective, notwithstanding that the equitable mortgage by deposit created by the actual deposit of the land certificate has since been extinguished by operation of the Registration of Deeds and Title Act 2006.”

44. The trial judge reiterated his view as expressed within his *Fox* judgment that contractual intention of the parties cannot prevail over the statutory scheme (as he interpreted it). The Court continued (para. 18):

“In each instance, the gravamen of the argument is that the intention of the parties should be treated as bringing about the very thing which the legislation has abolished. It is artificial to suggest that there is a standalone agreement to provide a form of security, separate and distinct from the agreement to create an equitable mortgage by deposit. This agreement was fulfilled. Crucially, however, the equitable mortgage so created was subsequently extinguished by operation of the Registration of Title and Deeds Act 2006. The loan agreements entered into by Ulster Bank in 2012 were governed by the new statutory regime and any earlier agreement between the parties as to the creation of security by equitable mortgage by deposit was spent.”

45. In concluding that this argument is indistinguishable from that rejected by the trial judge in *Fox*, the Court concluded (para. 20):

“20.The correct legal position is that an equitable mortgage was created in 2005 but subsequently extinguished by operation of the Registration of Deeds and Title Act 2006.”

46. These quotations clearly show that the trial judge rejected any suggestion that an equitable remedy could exist independently of the equitable mortgage which, upon his construction of s.73 was ‘extinguished’ after 31 December 2009. He considered any suggestion of a ‘standalone agreement’ to create security outside of an equitable mortgage to be artificial.

47. However this Court, as in *Fox*, considers the question raised from an entirely different perspective, resulting in its conclusion that a s.73 lien is capable of enforcement in respect of advances after 31 December 2009. The potential consequence of such a finding is considered by the trial judge in *Kean* at paragraph 14 where he stated;

“It is only in the event that the judgment in Fox were held to be inapplicable that it would then become necessary to consider the alternative grounds of defence advanced”.

48. In this case the question is as to whether there is an interest, equitable in nature, upon which Promontoria might rely in seeking a well charging order.

49. The appellant contends that, on the facts of this case, the agreement by the defendant to pledge his lands as security for his borrowings is sufficient to raise an equitable charge (not an equitable mortgage).

50. The appellant does not assert that the respondent promised in his 2012 Facility Letter to give the bank a legal mortgage over the folio lands but his understanding/intention was that, in return for specified borrowings, he had agreed that the folio lands would be secured against those borrowings.

51. The appellant places reliance upon *Wylie's*⁸ definition of an equitable charge as follows:

“An owner of property may appropriate it as security for a debt so as to give the creditor an equitable charge on the property. We have already explained that such a charge is to be distinguished from a mortgage in that it confers only a lien on the land and no legal or equitable estate in the land nor any right to possession. Such a charge may be created by written agreement or by will. Apart from that, no special words are necessary so long as the intention is clear.”

52. The appellant contends the contractual promise does not concern a lien by deposit of charge or land certificate, where such security had been superseded by the 2006 Act. The 2012 Facility Letter is clear that the mode of security is by way of a registered lien and the folio reflects its registration. The judgment of this Court confirms that the holder of s. 73 lien is entitled to rely upon its security.

53. The appellant therefore contends that a promise to give such security over the land in return for the monies advanced, is sufficient to raise an argument that an equitable charge arises in favour of Promontoria.

54. The respondent points to and relies upon the comments of Clarke C. J. in *Hannon*, where he points to the role of the 2006 Act in moving towards a universal system of land registration.⁹ Arising from this the respondent contends that a reliance upon equity in such circumstances must be seen as a retrograde step and contrary to the intent of the legislation. Counsel also submitted and the trial judge emphasised this point, that the appellant's argument is inimical to

⁸ *Irish Land Law* (6th Edition, Bloomsbury Professional, 2020) at para. 12.49.

⁹ paragraph 48

the intention of the 2006 Act, given its intent to move towards a universal system of land registration.

55. At a minimum the respondent contends that registered liens should not, in the circumstances of this case, occasion an entitlement of this appellant to rely upon an equitable mortgage or charge for enforcement of all or a portion of its security.

56. On the basis of the facility letter itself, three separate loans were advanced to the respondent and the appellant contends that in receiving those amounts pursuant to the terms of the facility letter that the respondent at all material times intended that the security to be furnished was either to be on foot of the registered lien itself or an equitable charge arising from the agreement between the parties.

57. Megarry and Wade¹⁰ defines (at para. 24 – 042) an equitable charge as follows:

“An equitable charge is created by appropriating specific property to the discharge of some debt or other obligation without there being any change in ownership either at law or in equity. No special form of words is required: it is sufficient that the parties have made plain their intention that the property should constitute a security. Thus, if A signs a written contract agreeing that he thereby charges his land with the payment of £500 to B, an equitable charge is created.”

58. It is, of course, for the judge ultimately determining the well charging proceedings to determine whether an equitable charge arises on the facts of this case. As reiterated above, this

¹⁰ The Law of Real Property (8th Edition)

Court is required to determine merely whether an argument can be advanced by Promontoria in such terms.

59. The appellant cites *Bank of Ireland Finance v. Daly Limited*¹¹ to illustrate that an agreement, however informal can attract equitable relief. On the facts of the case the plaintiff agreed to lend a sum of money to the defendant company in return for the deposit of title deeds to that property as security for the loan. The monies were paid but the defendant failed to deposit the title deeds with the plaintiff, failed to repay the loan and the plaintiff claimed a lien on the property that had been bought by the defendant with the sums advanced.

60. McMahon J., in considering whether the bank was entitled to an equitable charge by virtue of its agreement with the defendant stated as follows:

“The deposit of title deeds by a debtor is prima facie evidence of an agreement for a mortgage of the estate. A company submitted that the solicitor’s letter of 10 October, 1969, was a written memorandum of an agreement by the company to lodge the title deeds with the bank on the completion of the sale so as to create an equitable mortgage, and that agreement was sufficient in itself, without an actual deposit of the title deeds, to create an equitable charge on the principle that an agreement in writing, however informal, by which any property is to be security for a debt creates an equitable charge: ex parte Crossfield.¹²”

61. In my view both the quotation above and those from the learned authors disclose the parameters of an equitable charge. Those parameters are now against the background of this

¹¹ [1978] I.R. 79 – also cited in *Greene* at para. 31

¹² In the matter of John Henry a Bankrupt ex parte Crossfield (1840) 3 Ir. Eq. R. 67

judgment and that in *Fox* which make clear that a s.73 lien can be relied upon in respect of advances made after 31 December 2009.

62. On the basis of a reliance upon the 2012 facility letter and noting the respondent's contention that an issue arises as to the extent to which, properly construed, a s.73 lien cannot be relied upon in respect of the entirety of the loan facilities, I can see no basis for precluding the appellant from advancing an argument for reliefs based upon the criteria of an equitable charge to ground well charging relief.

Concluding thoughts

63. The quotation of Clarke C.J. in *Hannon*, set out at paragraph 19 above, where he points to a move towards a universal system of land registration, is relied upon by the trial judge and the respondent, in seeking to interpret s.73 and to resist the entitlement of the appellant to invoke equitable relief. In my view Clarke C.J. is correct. However, it is a move towards this goal rather than its attainment that we see with the enactment of s. 73. Within the same judgment, at paragraph 2 he points to the concept of a lien over registered land as having '*a long history and even more ancient antecedents*'. The same could be said for many aspects of land law within this jurisdiction. That long history has given rise to a series of interests in land which, in my view, can only be unravelled with care¹³. That in turn leads to my conclusion that, in having proper regard to such interests in land, reaching this goal can only proceed in an incremental manner. Section 73 is undoubtedly one of those incremental steps. The former security reflected within the 1891 and 1964 Acts has ceased to exist. That is clear from the

¹³ At paragraph 26 of *Hannon* Clarke C.J. points to other unregistered interests that affect registered land. Indeed there is an entire section of the 1964 Act (s.72) which is headed '*Burdens which are without registration to affect registered lands*'

legislation itself and the judgment in *Hannon*. However that is also not to say that those interests which are now registered are no longer capable of enforcement.

64. *Hannon*, as endorsed in *Greene*, describes the enactment of s.73 lien as ‘light touch’ regulation. I agree with that characterisation. It undoubtedly abolishes the security created by the retention of land and charge certificates and requires that such security was to be registered by 31 December 2009. Thereafter *Hannon* is clear that such a form of security ceased to exist. Now we have the registered lien or what I have described as the s.73 lien.

65. This Court has held that a s.73 lien may secure advances after 31 December 2009. That is the change wrought by s.73. Existing liens will remain (in a different form), no new liens will be created but any rights attaching to them remain. The entitlement to invoke equitable relief(s) arises from any argument open to the appellant that, aside from the s.73 lien, it may seek to enforce an equitable charge. This court has held, for the reasons set out above, that such an argument can be advanced.

66. That a s.73 lien can be relied upon on the facts of this case thereafter ensures, in my view, that in light of the respondent’s contention that the security may not cover the entirety of the facilities set out within the 2012 facility letter, the appellant can invoke equity and specifically the entitlement to rely upon an equitable charge, in seeking well charging reliefs within its proceedings.

67. In such circumstances I endorse the comments of Dunne J. in *Hannon*¹⁴ with regard to the recognition that certain equitable interests may remain in existence notwithstanding s.73.

¹⁴ [2020] 1 IR 364 – Dunne J. at para. 101.

In doing so she made express reference to an express mortgage, in my view we can extend this recognition to the concept of an equitable charge.

68. That the doctrine of an equitable charge exists is in my view beyond doubt. There is nothing within the 2006 Act that impugns that doctrine and accordingly on the facts of this case Promontoria is entitled to advance it as an argument in seeking reliefs within its well charging order.

Outcome of this Appeal

For the reasons given therefore, I would allow the appeal and answer the issues raised as follows;

- (a) A lien registered pursuant to s.73(3) of the 2006 Act can secure lending which occurs after the commencement of that section (31 December 2009).
- (b) The appellant (Promontoria) is entitled to advance its argument, in its proceedings seeking well charging reliefs, that an action may lie in the enforcement of an equitable charge.

Costs

As the appellant has been entirely successful, my provisional view is that it should be entitled to the costs of this appeal. As this is a modular hearing and the remaining issues within this appeal will require remittal to the High Court for the ultimate determination of these proceedings, this Court will grant a stay on its order of costs pending final adjudication by the High Court.

If the respondent wishes to contend for an alternative order, they have liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the

appellant will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made. Any party seeking such a hearing should be aware that they may incur further costs if unsuccessful in persuading the court to depart from the provisional order suggested above.

As this judgment is being delivered electronically, Costello and Butler JJ. have indicated their agreement with it and the orders I have proposed.