APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/246

Haughton J. **Neutral Citation Number [2023] IECA 237**

Pilkington J.

Allen J.

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF/APPELLANT

AND

KEVIN GILROY

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 6th day of October, 2023

Introduction

1. This is an appeal by Promontoria (Aran) Limited *("Promontoria")* against the judgment and order of the High Court (Simons J.) delivered on 3rd October, 2022 dismissing Promontoria's application for a well charging order and an order for the sale of a property in

Dublin; and refusing an application – moved after judgment had been delivered – for leave to bring an application for amendment.

2. The defendant, Mr. Kevin Gilroy, took no part in the proceedings before the High Court, or in the appeal.

3. Promontoria is the assignee of Mr. Gilroy's borrowings from Ulster Bank Ireland Limited *("Ulster Bank")* and the security given for those borrowings. As far as the evidence goes, Promontaria appears to know little or nothing about the circumstances in which the security came to be given. As I will come to, the case made by Promontoria was not consistent with the evidence offered. In the High Court, as on the appeal, a number of alternative – and inconsistent – arguments were made.

4. There was a gaping hole in the proofs offered to the High Court. The affidavits filed on behalf of Promontoria and the title document exhibited showed that the property was co-owned by Mr. Gilroy and his wife, Mrs. Miriam Gilroy. On the face of the summons, Promontoria was seeking an order for the sale of a property which was co-owned by someone who was not a party to the proceedings. There was no suggestion that Mrs. Gilroy had been party to the security or the borrowings. If, inferentially, the property was one of a number of residential investment properties, there was no direct evidence to that effect.

5. On the hearing of the appeal, it was acknowledged by counsel that the orders sought could not be made by this Court – and so, it seems to me, could not have been made by the High Court – without notice to Mrs. Gilroy. However, this was not something which was brought to the attention of the High Court judge. Rather the discussion in the High Court focussed – and the decision turned – on a different point.

6. While it is now acknowledged that the High Court ought not to have been asked to make the orders sought, Promontoria seeks to set aside the conclusion of the judge on the

point which he decided and to have the summons remitted to the High Court, with leave to bring a motion to amend. However, the belated recognition of the need to join Mrs. Gilroy means that the proposed amendment to the summons now contemplated is different to that contemplated at the time of the High Court hearing.

The evidence

7. On 12th February, 2015 Promontoria took an assignment from Ulster Bank of several loans which had been made to Mr. Gilroy and the security held for those loans.

8. By special summons issued on 14th March, 2019 Promontoria claimed:-

> *"(a) A declaration that the sum due on foot of [two] loan agreements including interest accrued, together with costs, stands well-charged against the defendant's interest in the Mortgaged Property;*
>
> *(b) An order that in default of payment of the said sums due and owing, payment may be enforced by the sale of the Mortgaged Property or by the appointment of a receiver or by both;"*
>
> Promontoria claimed the usual ancillary orders for an inquiry and account, and
>
> *(f) If necessary, an order for the partition of the Mortgaged Property pursuant to s. 31 of the Land and Conveyancing Law Reform Act, 2009;"*

9. The Mortgaged Property was described in the schedule to the summons as a property in Dublin *"... referred to as 'The Premises' in the Third Schedule of the lease dated 15 December 1995 between Castlefin Properties Limited, [a management company] [a bank] and Kevin Gilroy and Miriam Gilroy."*

10. The special indorsement of claim identified eleven loan facilities – amounting in total to €4,983,300.00 – said to have been the subject of a letter of loan offer of 23rd November,

2010, accepted in writing by the defendant on or about 22nd December, 2010; and what was described as an additional loan facility in the sum of €6,250,000 for the purpose of restructuring existing drawn balances on foot of the first loan agreement, which was the subject of a facility letter of 17th January, 2013, accepted in writing by the defendant on or about 23rd January, 2013. A table of particulars set out the balances said to be due and owing on foot of twelve accounts, amounting in total to €5,337,631.45 as at 11th February, 2019.

11. The case pleaded was that:-

> *"5. The facilities advanced under the First Loan Agreement and the Second Loan Agreement ('the Loan Agreements') were secured, in part, [by] the equitable deposit of title deeds to a property owned by the defendant known as [the Mortgaged Property]. The defendant and his wife, Miriam Gilroy, are lessees of the Mortgaged Property pursuant to a lease dated 15 December 1995 for a term of 999 years ('the Lease')."*

12. The special endorsement of claim pleaded the assignment by Ulster Bank to Promontoria; demands for payment; and a failure to pay.

13. As I have said, on the face of the summons the plaintiff was seeking an order for the sale of a property which was co-owned by someone who was not party to the proceedings.

14. The summons was grounded on an affidavit of Mr. Albert Prendiville, then a director of Promontoria, who said that he made the affidavit from facts within his own knowledge save where otherwise appeared and where so otherwise appearing he believed the same to be true and accurate. The affidavit more or less mirrored the special indorsement of claim, save that Mr. Prendiville exhibited a copy of the lease; copies of the two loan agreements; a redacted copy of the deed of assignment; and copies of the letters of demand. Mr. Prendiville also deposed that notice of the assignment had been given to the defendant and he exhibited a

copy letter of 27th February, 2015. He deposed that the defendant's liabilities were – as set out in the table of particulars – on foot of twelve accounts and amounted in total to €5,337,631.45.

15. The critical averment, for present purposes, was that:-

> *"7. As can be seen therefrom, it was a term of each of the First Loan Agreement and the Second Loan Agreement ('the Loan Agreements') that the facilities advanced thereunder would be secured in part by the equitable deposit of title deeds to the Mortgaged Property with the Bank."*

16. Mr. Prendiville did not aver that the title deeds had in fact been deposited and did not disclose the provenance of the copy lease which he had exhibited to support his averment that the owners of the property were Mr. and Mrs. Gilroy. His evidence that Ulster Bank had advanced the sum of €6,250,000.00 on foot of the second loan agreement for the purpose of restructuring existing drawn balances on foot of the first loan agreement was not obviously consistent with the particulars of indebtedness. Nor was it apparent where the twelfth loan facility in the table of particulars had come from.

17. The Ulster Bank facility letter of 23rd November, 2010 set out the eleven facilities referred to in the special indorsement of claim and by Mr. Prendiville and, against the shoulder note ***"Security Held:"***, provided that:-

> *"It is understood that the following security, or any other security the Bank holds or may acquire, will be held as continuing security for all the borrower's liabilities to the Bank present and future whether contingent or direct.*
>
> *1. Assignment of Irish Life policy …*
>
> *2. Equitable Deposit over the title deeds to [the Mortgaged Property]*
>
> *3. First Legal Charge over [eight identified properties]"*

18. The Ulster Bank facility letter of 17th January, 2013 provided for a facility of €6,250,000 in two tranches: Tranche A, a facility of €6,200,000 to restructure existing drawn balances on thirteen identified accounts originally provided to assist with the purchase of various properties and/or as working capital for various purposes of the borrower, and Tranche B, a facility of €50,000 to cover any interest payment shortfall on the facility until maturity date, which was 31st December, 2013. Against the shoulder note ***"Security"*** it was provided that:-

> *"The Facility will be secured with the following:*
>
> *1. First Legal Mortgage over the following properties:*
>
> *[A number of identified properties, including the property the subject of the proceedings.]"*

19. The facility letter of 17th January, 2013 stipulated for a number of conditions precedent, including the placing on the market for sale of a number of the properties (not including the property the subject of these proceedings) as early as possible with an agreed estate agent, and the payment into an identified account of the rental income from a number of properties (including the property the subject of these proceedings) and provided that unless all of the conditions precedent were satisfied on or before 28th February, 2013, the facility should lapse.

20. The special summons was adjourned from time to time before the Master. There was difficulty in effecting personal service on Mr. Gilroy and an order for substituted service was made by Meenan J. on 24th June, 2019. On 23rd January, 2020 a supplemental affidavit of Mr. Donal O'Sullivan was filed on behalf of Promontoria and soon after the proceedings were adjourned generally by reason of the COVID-19 restrictions.

21. The affidavit of Mr. O'Sullivan appears to have been filed because Mr. Prendiville had retired. Although described as a supplemental affidavit, it does not appear to me to have added anything. Mr. O'Sullivan, a director of Promontoria, deposed that he made his affidavit from information contained in the books and records of Promontoria and from facts within his own knowledge save where otherwise appeared. His affidavit more or less mirrored that of Mr. Prendiville, including the averment that it was a term of each of the first and second loan agreements – which on the face of those agreements, it was not – that the facilities would be secured in part by the equitable deposit of the title deeds to the Mortgaged Property. Mr. O'Sullivan updated the table of particulars of indebtedness to show a combined balance as at 4th December, 2019 of €5,449,618.92, and added an averment that to the best of his knowledge and belief there was no *"party"* other that the defendant and his wife, Miriam Gilroy, in possession of the property or in receipt of the rents or profits therefrom.

22. When the COVID-19 restrictions were lifted, the summons was re-entered before the High Court. Mr. Gilroy, who, in accordance with the order of Meenan J., had been served with the papers and given notice of the various listings by ordinary pre-paid post, never appeared.

23. On 20th July, 2022 a supplemental affidavit of Ms. Adrienne Fitzgibbon was filed on behalf of Promontoria. Ms. Fitzgibbon is not an employee or officer of Promontoria but a senior manager employed by BCMGlobal ASI, a company which – so far as appears to me to be material – acts as the custodian of Promontoria's loan, security, and title documentation. Ms. Fitzgibbon deposed that:-

> *"I say and believe that the defendant deposited the title deed to the Mortgaged Property (as hereinbefore defined) with the Bank (as hereinbefore defined), thereby*

giving rise to an equitable mortgage in the Bank's favour over the Mortgaged Property."

24. She said that after the transfer to Promontoria, *"the Servicer"* – this is, BCMGlobal ASI – accepted delivery from the Bank of a number of physical documents pertaining to the loans and security purchased by Promontoria, including the original title deeds to the Mortgaged Property which, she said, *"had been deposited with the Bank as security for the defendant's loans."*

25. While Ms. Fitzgibbon said that she has access to Promontoria's books and records, she did not say what they were, or that she had read them, or what they disclosed. She did not suggest when the title deeds might have been deposited with Ulster Bank, or by whom, or which of the defendant's loans any such deposit might have been intended to secure.

Promontoria's submissions to the High Court

26. The summons appears to have been listed for hearing before Simons J. on 25th July, 2022 and then adjourned until 3rd October, 2022. When the case came back into the list, the judge had read the papers.

27. The transcript shows that the judge first identified the fact that Promontoria was not in a position to give direct evidence as to the deposit and asked whether this could be inferred from the fact that it had the title documents and that the [first] letter of loan offer had referred to the deposit. Counsel referred the judge to *Scanlon Administration and Mortgage Suits* (1963) and *O'Neill The Law of Mortgages in Northern Ireland* (2008). It was immediately recognised that having regard to the decision of this Court in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93, the first of the necessary proofs identified in *O'Neill* – the date of deposit of the deeds – was not a necessary proof in this jurisdiction.

28. There appears to have been some confusion in counsel's submission between the proofs necessary in an application to the court for a well-charging order and the proofs necessary on an inquiry before the examiner as to incumbrances.

29. The judge sought assistance of counsel as to the necessary proofs for an equitable mortgage. He – the judge – recalled the reference in the judgment of Collins J. in *Promontoria (Oyster) DAC v. Greene* to *Babington's County Court Practice* (2nd Edition, 1910). Counsel thought that he had looked at *Babington* at some stage and – correctly – recalled that it *"said that one has to prove the purpose for which the deposit was given."*

30. The judge then invited counsel to identify the proofs which he said he had. Counsel pointed to the stipulation in the facility letter of 23rd November, 2010 that the security listed would be held as continuing security for all of the borrower's liabilities and to the inclusion in that list of the equitable deposit of the title deeds to the Mortgaged Property; and confirmed that this was the first indication of proof offered. Counsel then moved to the stipulated security for the facility the subject of the letter of 17th January, 2013.

31. The judge asked counsel to comment on the provision in that letter that:-

> *"This Facility Letter supersedes all prior agreements, arrangements or correspondence between the Bank and the Borrower in relation to the Facility including Facility Letter dated 23rd November 2010."*

32. Specifically, the judge asked how Promontoria could rely on the letter of 23rd November, 2010 if it had been superseded by the letter of 17th January, 2013: in response to which counsel submitted that it updated the contract between the Bank and the defendant by requiring an improvement in the security which the Bank was to have.

33. The judge then turned to the plea at para. 5 of the special indorsement of claim that both loan agreements were secured by an actual deposit – which, as I have said, was

obviously at variance with what the letter of 17th January, 2013 said – and to the letter of 23rd November, 2010 which – the judge suggested – appeared to contemplate a later physical deposit, but which had been superseded by the later letter. This – at least with the benefit of hindsight – was the pinch point.

34. Counsel argued that the security created by the deposit of the title deeds already existed and had a life independent of the contractual loan arrangements. I pause to observe that if this was so, it potentially opened the issue as to the terms on which the deposit of the title deeds had previously been made.

35. It was then submitted that Mr. Gilroy's agreement in the letter of 23rd January, 2013 to give a first legal mortgage itself gave rise to an equitable mortgage. This, the judge observed – and counsel agreed –was not the case pleaded. Further, it was submitted, in the absence of any suggestion of an agreement to release the security which the Bank had, and in the context of the continued possession by the Bank of the title deeds, the equitable mortgage continued in existence. Counsel submitted that:-

> *"I say that the equitable mortgage by deposit didn't rely on the 2010 facility letter in the first instance for its existence. It is, I am offering that facility letter as evidence of what I say is a pre-existing or at least legally coterminous – oh, sorry, whatever the word for beginning at the same [time] is, deposit or agreement to create a security instrument by deposit [sic.]"*

36. Having opened the relevant paragraph of Ms. Fitzgibbon's affidavit, counsel acknowledged that she had no better basis for saying what she did than was apparent from the documents before the court.

The High Court judgment

37. Having first enquired of counsel whether he wanted to say anything else, and having been told that he did not, the judge gave his ruling.

38. The judge identified the central issue as being whether the plaintiff had made out its proofs. In circumstances in which the defendant had been duly served and had not participated, the threshold which the plaintiff was required to meet was to make out a *prima facie* case or to adduce circumstantial evidence which established its entitlement to the reliefs claimed.

39. The judge found that had the case rested with the facility letter of 23rd November, 2020 he would have been satisfied to infer that an equitable mortgage had been created. However, he said, matters were complicated by the facility letter of 17th January, 2013 which evidenced an intention that there would be a first legal mortgage rather than an equitable mortgage. The judge accepted the submission of counsel that what was contemplated by the second letter was that the security would be upgraded but said that the difficulty with that argument was that it was expressly stated in the letter of 17th January, 2013 – which had been signed by both parties – that it superseded all previous agreements, arrangements or correspondence between the Bank and the borrower in relation to the facility, including the facility letter of 23rd November, 2010. That, he said, affected the basis or status on which the Bank was holding the title deeds.

40. The case pleaded, said the judge, specifically relied on what he referred to as both the original loan and the restructured loan. Contrary to what had been pleaded, the 2013 facility letter showed that the parties intended that there would be a legal mortgage created. Promontoria, he said, had not been able to make out the case pleaded that there was an ongoing intention that the Bank would hold the title deeds to create an equitable mortgage in relation to the restructuring or refinancing that occurred in 2013.

41. The judge looked at the textbooks to which he had been referred: which he thought – quite rightly – were not directly in point. He briefly referenced the judgment of the Court of Appeal in *Greene*. He recalled that counsel had accepted that the mere fact that a lender had custody of title deeds did not by itself establish an equitable mortgage and that something more was required. He said that he would have been prepared to infer from the possession of the title deeds and the terms of the facility letter of 23rd November, 2010 that they were held by way of equitable mortgage but that the use of the word *"supersede"* in the later letter had the effect that Promontoria could no longer rely on the original deposit as creating a continuing mortgage which was intended to secure the refinanced loan. He held that the case pleaded had not been made out and that he must dismiss the application.

The proposed motion for liberty to amend.

42. The judge having pronounced his judgment, counsel immediately asked whether, rather than dismissing the proceedings, the court would give liberty to bring a motion to amend *"based on what the court has said about the case as pleaded."* The judge said that ordinarily he would be sympathetic to any application to amend pleadings and that the courts tend to lean in favour of allowing amendments where difficulties can be overcome. However, he said, the application was mooted for the first time after he had ruled on the matter. He said that he was dismissing the proceedings and that he could not *ex post facto* entertain an application to amend. Anticipating that the matter might go further, the judge *suo moto* gave liberty to Promontoria to take up a transcript of the DAR, on the usual terms.

43. I pause here to say that while the precise nature of the proposed amendment was not spelled out, it seems to me that it could only have been to plead the wholly new case that the defendant's agreement in the facility letter of 17th January, 2013 to provide a legal mortgage gave rise to an equitable mortgage. The logical premise of any such plea could only have

been that the later agreement for a legal mortgage vacated the existing equitable mortgage by deposit. Since Promontoria had not at that stage identified the need to join or give notice to Mrs. Gilroy before any order for sale of the property could be made, that cannot have been part of the then proposed amendment.

The appeal

44. By notice of appeal dated 27th October, 2022 Promontoria appealed against the judgment and order of the High Court on nine grounds: in substance – in five iterations – that the judge erred in his conclusion that the effect of the facility letter of 17th January, 2013 was to bring to an end the equitable mortgage which he had found subsisted until then; that the judge erred in *"not giving due weight to the written contractual promise of the defendant that the said loan would be secured with a first legal mortgage over … the property and, in particular, the creation of an equitable mortgage over the property that this written promise caused"*; and that the judge erred in law in not granting leave to bring an application to amend pleadings.

45. I pause here to observe that the proposition that the judge erred in failing to find that the promise in the second facility letter to provide a legal mortgage gave rise to an equitable mortgage was a case which counsel had acknowledged had not been pleaded.

46. The orders sought by the notice of appeal were first, an order in the terms of the special summons – that is to say a well charging order and an order for sale of the property – and, alternatively, an order remitting the proceedings to the High Court with liberty to bring a motion seeking liberty to amend the summons.

47. The primary argument in the written submissions filed on the appeal was that the High Court judge ought to have made the orders and that this Court should do so but on the oral hearing of the appeal it was accepted that the substantive orders could not be made

without notice to Mrs. Gilroy and so more or less conceded that the judge was right not to have made the orders sought, albeit for a reason other than that given.

48. As to the refusal of the judge to afford Promontoria the opportunity to attempt to mend its hand, the submission on the appeal did not engage with the fact that the amendment application now contemplated was necessarily different to that proposed to the High Court.

49. It would be an understatement to say that the case pleaded and the evidence adduced before the High Court was less than ideal. That may very well have been, to some extent, an unavoidable hazard of the terms on which the loan(s) and security were acquired by Promontoria from Ulster Bank but by reference to the plain terms of the facility letter of 17th January, 2013, it was not – as pleaded, and as averred to first by Mr. Prendiville and then by Mr. O'Sullivan – a term of that agreement that the facility to be advanced thereunder would bs secured by the equitable deposit of the title deeds. The letter of 17th January, 2013 shows that it was then agreed – or at least contemplated – that the Bank would have a legal mortgage over the property. If it was to be inferred from the action to well-charge an equitable mortgage that the legal mortgage was never put in place, it would have been a simple matter for someone to have said so.

50. The heavily redacted deed of assignment from Ulster Bank to Promontoria shows, in Schedule 1, the two loan agreements of 17th January, 2013 and 23rd November, 2010 and, under the heading *"Security (including guarantees)"* two documents referred to as *"mortgage/charge"*, dated 28th February, 2006 and 25th September, 2007. By clause 1.10 of the deed of assignment, there was transferred to Promontoria *"all rights of the Sellers [including Ulster Bank] under any undertakings given in favour of the Sellers in respect of the registration of, or the holding of, any deeds or other property documents relating to any properties listed in Schedule 2."* If there were headings in Schedule 2, they were redacted.

There is a listing in Schedule 2, in four columns, of a number – presumably an account number – the names of Mr. and Mrs. Gilroy, the identity of the property, and – in a column presumably intended to identify some important information in relation to the entry – the word *"Unknown."*

51. I have observed earlier that the plea in the special indorsement of claim – and the averments of Messrs. Prendiville and O'Sullivan – that the Bank advanced what was said to have been an additional loan facility in the sum of €6,250,000.00 for the purpose of restructuring existing drawn balances sits uneasily with the particulars of the claimed indebtedness on foot of the eleven (or twelve) accounts which the facility letter of 17th January, 2013 appears to have contemplated would be consolidated by a single advance on Tranche A: but that was the case advanced. I have observed earlier that the facility letter of 17th January, 2013 was subject to a number of conditions precedent – including the provision of a first legal charge over the subject property – which is not satisfied on or before 28th February, 2013 that facility would lapse: but that argument was not unequivocally advanced, either in the High Court or on the appeal.

52. It seems to me that the ground of appeal that the judge erred in his finding that the facility letter of 17th January, 2013 superseded the facility letter of 23rd November, 2010 and that the effect of the later letter was that Promontoria could no longer rely on the equitable deposit, sits uneasily with the thrust of the argument made in the High Court that the equitable deposit predated the first facility letter and was not dependent on the first facility letter for its existence.

Discussion and decision

53. The foundation of the analysis and conclusion of the judge was that Mr. Gilroy's promise to procure a legal charge destroyed the then existing equitable mortgage. I find that I

cannot agree. The practical effect of such a construction would have been, at best – if the legal charge had been provided – that the Bank's priority might have been in jeopardy; and otherwise, that if Mr. Gilroy had called for the redelivery of the title deeds, the Bank would have had to rely on the later unfulfilled contract for a legal charge rather than the previous deposit by way of equitable mortgage. The facility letter of 17th January, 2013 did say that it superseded all prior agreements and arrangements including the facility letter of 23rd November, 2020, but taking the letter as a whole, I cannot believe that it could have been the intention of the parties that the equitable mortgage by deposit of the title deeds which the Bank already held would be immediately dissolved or vacated and – until such time as the borrower might or might not honour his promise to create a legal mortgage – replaced by a new equitable mortgage arising from the promise of a legal mortgage.

54. *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93 was immediately concerned with equitable liens registered under s. 73 of the Registration of Deeds and Title Act, 2006 but Collins J. (with whom Costello and Binchy JJ. agreed) undertook a detailed analysis of the law as it applied to equitable deposits of land certificates prior to the commencement of the Act of 2006: which was the same as applied to deposits of the title deeds to unregistered land.

55. At para. 31, Collins J. cited with approval the statement in *Wylie Irish Land Law* (6th Ed., 2020) to the effect that:-

> *"a mere deposit of the title deeds will be regarded as prima facie evidence of an equitable mortgage, unless the deposit is otherwise accounted for, e.g. deposit with a bank for safe keeping."*

56. He went on to say that in the event of a dispute as to whether the deeds had been deposited as security or merely for safekeeping, the onus lay on the mortgagee to prove the circumstances in which the deeds came into its possession.

57. In this case, Promontoria had the title deeds to the property, which it acquired from Ulster Bank in the context of its purchase of the loans and security. If – by reference to what they said as to the security which Ulster Bank was to have had for the facility the subject of the letter of 17th January, 2013 – the evidence of Messrs. Prendiville and O'Sullivan as to the security held by the Bank for the facilities the subject of the letter of 23rd November, 2010 needed to be approached with circumspection, that evidence was uncontested.

58. As Collins J. said in *Greene* at para. 32:-

> *"As well as addressing any issue as to the purpose of the deposit, the mortgagee had to establish that the security thus created extended to the particular liability or liabilities sought to be enforced. That could obviously involve evidence of the circumstances in which the deeds were deposited."*

59. In this case there is no direct evidence as to the circumstances in which the deeds were deposited but it is evident from the letter of 23rd November, 2010 that the title deeds, if they had not by then been deposited and were already held, then were later to be deposited and held, or if already deposited thenceforth to be held, as continuing security for all of the Mr. Gilroy's liabilities to Ulster Bank, present and future and whether contingent or direct. The action having been entirely undefended, there was no issue as to the extent of the liabilities secured. In the absence of objection or contest, the High Court judge was satisfied to infer from the evidence that an equitable mortgage had been created. If he did not spell it out, the judge was clearly prepared to find that the security extended to all sums which then were, or which might thereafter become due by the defendant to the Bank.

60. The case pleaded by Promontoria was that the facilities advanced under the first loan agreement of 23rd November, 2010 and the second loan agreement of 17th January, 2013 were secured by the equitable mortgage by way of deposit of the title deeds to the property. If expressed collectively, nevertheless I am of the view that the plea would have accommodated a claim in respect of either. When the question first arose on the High Court, it was accepted by counsel that the pleading could not accommodate a claim for an equitable mortgage arising from the promise of a legal mortgage. By the way, and with the caveat that the point was not addressed in argument, my understanding of the law is that the equitable mortgage which arises on a promise to create a legal mortgage depends on the advance on foot of the promise rather than the mere promise.

61. The appeal being uncontested, there is no challenge to the judge's conclusion that Promontoria had sufficiently established its case that until the date of the second facility letter of 17th January, 2013 (or perhaps 23rd January, 2013 when that letter was accepted by Mr. Gilroy) Ulster Bank had an equitable mortgage by deposit of the title deeds to the property to secure all sums due or which might become due.

62. If the argument was not advanced precisely in those terms, the agreement comprised in the facility letter of 17th January, 2013 was conditional upon a number of steps being taken by no later than 28th February, 2018, failing which the facility would lapse. One of those steps was the provision by the defendant of a first legal mortgage over the property the subject of these proceedings. There is no direct evidence that the conditions stipulated for in the facility letter of 17th January, 2013 were not met but to my mind the inference is irresistible from the fact that Promontoria is relying on the equitable mortgage by deposit that it does not have a legal mortgage. If that is so, the agreement comprised in the second facility letter lapsed.

63. I find myself persuaded that the High Court judge erred in his conclusion – on what was the only question explored – that the agreement between the parties that there should be upgraded security changed the basis on which the title deeds were held.

64. That, it seems to me, disposes of the question whether the judge erred in refusing Promontoria permission to bring an application to amend to plead a wholly new case based on the second facility letter. As counsel put it in the High Court, the application was for leave to bring a motion to amend *"based on what the court has said about the case pleaded ..."*: which was that the pleadings could not accommodate an argument based on an equitable mortgage other than an equitable mortgage by way of deposit of the title deeds. It was obviously a fallback position and, it seems to me, was inconsistent with the appeal against the judge's finding as to the intention and effect of the second facility letter. If, as it was, the real issue was whether the equitable mortgage by way of deposit of the title deeds survived the second facility letter, the amendment contemplated was not one directed to the determination of that issue but to allowing Promontoria to seek to make an entirely new case.

65. The basis of the appeal against the refusal of the judge to permit the amendment application was solely and simply that it would have caused no prejudice to Mr. Gilroy and *"no injury to the Court."* As I understood the argument, it was accepted by counsel that the adjournment application was a matter within the discretion of the judge but – more or less – that he was obliged to exercise his discretion in favour of the application because it would not have prejudiced the defendant.

66. I cannot accept that. In the first place, a High Court judge is not in the business of advising a plaintiff's proofs. No less to the point, immediately before the adjournment application the judge had said that he must dismiss the application and the whole point of the adjournment application was to facilitate an application for amendment by which the case

might be revived. I fail utterly to understand how it can sensibly be said that the defendant could not have been prejudiced if the plaintiff were allowed a second bite – or at least the prospect of a second bite – of the cherry.

67. In the course of his submission, counsel had identified the possibility that Promontoria might have had a case to make that it was entitled to an equitable mortgage by reference to the second facility letter and had acknowledged that any such claim was outside the pleadings. In his oral presentation on the appeal, counsel observed that the observations or questions of the judge often prompt applications for adjournment or the withdrawal of applications to allow the judge's concerns to be addressed. That is perfectly true, but it is not what happened in this case. Having identified a possible fallback position that was not available on the pleadings as they stood, counsel did not then seek to mount a rear-guard action but pressed the offensive. That, it seems to me, was a tactical decision. There was nothing wrong with it. It might have worked. Or, if it did not work in the High Court, it might have been vindicated on appeal. I accept that the judge, although he had pronounced his decision, had a residual discretion to allow Promontoria to try to re-open its case but I do not accept that he was obliged to do so or that he was wrong to be sceptical of the attempt to do so.

68. While I am satisfied that the judge erred in his conclusion as to the intention and effect of the facility letter of 17th January, 2013, it does not automatically follow that the appeal should be allowed. The pleadings and the evidence were unsatisfactory to the point of suggesting a lack of sufficient care. The averments that the Bank advanced the single facility of €6,250,000 on foot of the second facility appear to me to be inconsistent with the averments as to the defendant's combined total indebtedness on foot of twelve identified individual accounts but that, I suppose, is something that might have been addressed in the taking of an account of the defendant's liabilities.

69. Most of all, the belated recognition and acknowledgement that Mrs. Gilroy was a necessary and proper party is an effective concession that at the very least the High Court ought not to have been asked to make an order for sale in lieu of partition in her absence. It occurs to me, indeed, that Mrs. Gilroy might have had something to say as to the circumstances in which the title deeds to a property co-owned by her came to be in the possession of the Bank. If it had been adverted to, the fact that Mrs. Gilroy was not party to the proceedings might by itself have warranted or even required that the action be dismissed.

70. After careful consideration – and not without some misgivings – I think that the justice of the case requires that the appeal should be allowed and the case remitted to the High Court. Mr. Gilroy has taken no part on the proceedings. He has not been prejudiced by the manner in which the case has been advanced. There was no order as to the costs of the application before the High Court and if there is no order as to the costs of the appeal, Mr. Gilroy will not be prejudiced by the omission of Promontoria to join the co-owner as a party to the partition action.

71. Mrs. Gilroy may very well have something to say about it but all appearances are that the property the subject of the proceedings – if it was not in fact – was certainly treated by Mr. Gilroy as having been, part of a large portfolio of investments properties the acquisition of which was funded by very substantial borrowings. The practical effect of dismissing the appeal would be to put the property – or at least Mr. Gilroy's interest in the property – forever beyond the reach of Promontoria.

72. It is now – however belatedly – accepted that the case can go no further without the joinder of Mrs. Gilroy. It is not obvious to me that Mrs. Gilroy might have been prejudiced by the fact that she was not joined as a party from the outset. If it should come to it, Mrs. Gilroy will be entitled to be heard on all issues which may properly be of concern to her.

Conclusion

73. Strictly without prejudice to any argument that may later be advanced by or on behalf of Mrs. Gilroy, I would allow the appeal against so much of the judgment and order of the High Court as refused the application for a well charging order by reference to the terms of the Ulster Bank facility letter of 17th January, 2013 and remit the matter to the High Court.

74. The appeal against the refusal of the High Court judge to permit an application to amend the pleadings has been overtaken by the recognition that the amendment required is not that previously contemplated but for the reasons given, I would formally refuse the appeal on that ground.

75. I would decline to make any order in relation to the further progress of the proceedings in the High Court. When the summons is restored to the High Court list, it will be a matter for the High Court judge to determine how – if at all – the proceedings are to be progressed.

76. While it might be said that Promontoria has achieved a degree of success on the appeal it has been by no means entirely successful. If the High Court judge erred in the view he took of the effect of the second facility letter, the action was not properly constituted and the orders sought could never properly have been made. I have considered whether Promontoria should be afforded an opportunity to contend otherwise but concluded that to contemplate an order that Mr. Gilroy should pay the costs of the appeal would upset the delicate balance of my judgment that the summons should be remitted. For that reason, I would affirm the order of the High Court that there should be no order as to the costs of the proceedings to date in the High Court, and make no order as to the costs of the appeal.

77. As this judgment is being delivered electronically, Haughton and Pilkington JJ. have authorised me to say that they agree with it and with the orders proposed.