APPROVED **[2020] IEHC 337**

THE HIGH COURT

2019 No. 24 SP

BETWEEN

PROMONTORIA (OYSTER) DAC

PLAINTIFF

AND

KIERAN MCKENNA

DEFENDANT

JUDGMENT of Mr Justice Garrett Simons delivered electronically on 14 July 2020

INTRODUCTION

1. These proceedings present a short point of law in respect of the proofs required for an application for a well charging order and order for sale. The plaintiff asserts that it has succeeded to the mortgagee's interest in an equitable mortgage which had been created by way of the deposit of a land certificate. The plaintiff's predecessor in title is said to have relied upon this equitable mortgage in order to register a lien as a burden against the title of the lands, pursuant to section 73 of the Registration of Deeds and Title Act 2006. The folio has since been updated to note the plaintiff's interest in the lien. A copy of the folio has been exhibited in these proceedings.

2. The plaintiff is thus in a position to establish its interest in the lien. The question which arises for consideration in this judgment is whether it is necessary for the plaintiff to go further, and to provide evidence as to the *creation* of the equitable mortgage in the first instance.

3. The application came before me as part of the regular Chancery Special Summons List on Monday 24 February 2020. The plaintiff was represented by solicitor and counsel, and the defendant, Mr Kieran McKenna, appeared as a litigant in person.

4. I delivered a short *ex tempore* ruling on that date, dismissing the application for a well charging order and order for sale. The application was dismissed on the basis that the plaintiff had not put before the court any evidence of the creation of the equitable mortgage, and that proof of the registration of a lien on its own is not sufficient.

5. The rationale underlying the *ex tempore* ruling is broadly similar to that set out in a written judgment which I had delivered earlier on the same day in other proceedings, *Promontoria (Oyster) DAC v. Greene* [2020] IEHC 85.

6. In circumstances where the ruling in these proceedings has potential implications for a number of other cases pending in the Chancery Special Summons List, it may be of some assistance to set out my rationale by way of written judgment. A written judgment may also be of benefit to the parties to the proceedings in deciding whether or not to bring an appeal to the Court of Appeal. (The order of the court has not been perfected pending the preparation of this written judgment, and thus the time for bringing an appeal has not yet begun to run).

FACTS ESTABLISHED IN EVIDENCE

7. The following facts have been set out in the grounding affidavit and do not appear to be disputed. The defendant, Mr Kieran McKenna, and his wife, Mrs Bridget McKenna, entered into a loan agreement with Ulster Bank Ireland Ltd ("***Ulster Bank***") on 22 March 2005. The terms and conditions of the loan agreement are set out in a letter of 3 March 2005, a copy of which has been signed by the borrowers as indicating their acceptance of same.

8. The principal sum borrowed was €36,000. The letter of offer refers to the security in the following terms.

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

9. The benefit of the loan agreement and the asserted equitable mortgage appear to have been transferred to the plaintiff, Promontoria (Oyster) DAC ("***Promontoria***"), as part of a larger transaction involving the transfer of assets to the latter. An extract from the "global deed of transfer" has been exhibited as part of these proceedings.

10. A copy of the folio has also been exhibited. This indicates that a lien has been registered as a burden against Mr McKenna's interest in the lands. The original entry is dated 31 December 2009, but it has since been updated to reflect Promontoria's interest. The entry now reads as follows.

> "Lien pursuant to Section 73(3) of the Registration of Deeds and Title Act, 2006, in favour of ULSTER BANK IRELAND LTD.
>
> Note: The interest of PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY is noted on Inst. No. D2017LRO031227D 9th March 2017."

DISCUSSION

11. The discussion which follows is directed to the legal position obtaining prior to the expiration of the three-year transitional period under the Registration of Deeds and Title Act 2006, and prior to the coming into force and effect of the Land and Conveyancing Law Reform Act 2009. This is because this is the time period relevant to the asserted equitable mortgage. As explained presently, however, it is no longer possible to create an equitable mortgage or lien, in the case of registered land, by way of the deposit of a land certificate.

12. The evidence before the court establishes that Promontoria has an interest in a lien registered as a burden against Mr McKenna's interest in the relevant lands. Mr McKenna

has not sought to dispute the correctness of the folio in this regard. Indeed, had Mr McKenna wished to do so, it would have been necessary for him to issue separate proceedings: see *Tanager DAC v. Kane* [2018] IECA 352; [2019] 1 I.R. 385.

13. The question which arises for consideration in this judgment is whether it is necessary for the plaintiff to go further, and to provide evidence as to the *creation* of the equitable mortgage in the first instance.

14. It may be of assistance in answering this question to consider first what the legal position would have been *prior to* the requirement for registration introduced under the Registration of Deeds and Title Act 2006. This exercise may help in identifying the precise consequences of the Act.

15. Prior to the Registration of Deeds and Title Act 2006, it had been possible to create an equitable mortgage over registered land by the deposit of a land certificate. Section 105(5) of the Registration of Title Act 1964 expressly provided that the deposit of a land certificate for the purpose of creating a lien on the land had the same effect as a deposit of the title deeds of *unregistered* land. See *Allied Irish Banks Ltd v. Glynn* [1973] I.R. 188 (at 191/2) as follows.

> "The deposit, as security, of documents of title to land which is not registered gives the person with whom it is made an equitable estate in the lands until the money secured by it is repaid: the remedy for securing payment is to apply to the court for a declaration that the deposit has given a charge on the lands. The right created by the deposit is not limited to keeping the deeds until the money has been paid but gives an equitable estate in the lands. […]"

16. On the facts of *Glynn*, the High Court (Kenny J.) made a declaration that the sum secured by the equitable mortgage by deposit of the land certificate relating to the relevant lands was well charged on the interest of the defendants in the lands.

17. This informal procedure for the creation of a lien over registered lands represented an exception to the general principle that the statutory register should mirror the actual

ownership of the land. The existence of the lien would not be evident from the statutory register. Nevertheless, the position of the equitable mortgagee was protected in practice by the fact that the registered owner would be unable to deal with the land in the absence of the land certificate.

18. The informal nature of the creation of the equitable mortgage meant that there would not be an instrument of charge which would attract the statutory power of sale under the Conveyancing Act 1881 (as applied by section 62(6) of the Registration of Title Act 1964). Accordingly, the procedure for enforcing an equitable mortgage was to apply for a well charging order and an order for sale. It would have been a necessary proof for such an application to establish that the land certificate had been deposited as security for the relevant debt.

19. I turn next to consider the legal position *subsequent to* the enactment of the Registration of Deeds and Title Act 2006 ("***the 2006 Act***"). Land certificates are no longer issued, and, as a consequence, the possibility of the creation of a lien by way of the deposit of a land certificate has been abolished.

20. The position of the holders of *existing* security by way of deposit of a land certificate was protected by affording them a three-year period within which to register the security as a lien pursuant to section 73 of the 2006 Act. See, generally, *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49. In the absence of registration, the deposit of a land certificate cannot now be relied upon as security over the lands concerned.

21. The Registration of Deeds and Title Act 2006 did not provide an express statutory remedy for enforcing such registered liens. (The remedy under section 31 of the Land and Conveyancing Law Reform Act 2009, which is cited in the endorsement of claim, is properly confined to cases where *partition* is being sought). If, therefore, the holder of a registered lien wishes to enforce their security, then they must do so by way of an

application for a well charging order and an order for sale pursuant to the inherent jurisdiction of the court.

22. The standard form of order is that, in default of payment by the mortgagor of the principal sum (together with interest) within a period of three months, then the mortgaged lands will be sold pursuant to court order. The making of such applications is governed by Order 51 and Order 54 of the Rules of the Superior Courts.

23. It is a necessary precondition to the making of such an application that the principal monies be due and owing. This is one of the "proofs" for an application to enforce a legal charge under section 62(7) of the Registration of Title Act 1964. The mortgagee under an equitable mortgage created by the deposit of title deeds cannot be in a better position than the holder of a legal charge, and it would seem to follow that, at a minimum, they too must establish that the principal monies secured by the lien are due and owing.

24. It follows that one of the "proofs" for an application to enforce a registered lien is that a plaintiff must not only establish that the lien has been registered as a burden, they must also establish the existence of a contractual arrangement whereby a debt has been secured on the lands and demonstrate that the principal monies are now due for repayment.

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

26. More generally, the approach contended for by Promontoria seeks to attach too great a significance to the registration of the lien by the Property Registration Authority ("***the PRA***"). The registration of the lien is merely an administrative function. There can be

no suggestion that the PRA has adjudicated upon the question of whether monies have been well charged against the lands. This is a function reserved to the High Court, and to the Circuit Court in certain instances. It is not a function of the PRA.

CONCLUSION

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

28. The application is therefore refused. Mr McKenna, as a litigant in person, is entitled to his expenses. These expenses have been measured in the sum of €500.

Approved