

## THE HIGH COURT

CIRCUIT RECORD No. 2013/00053

[2013 No. 126 C.A.]

BETWEEN

ULSTER BANK LIMITED

PLAINTIFF

AND

PETER REANEY AND TERESA REANEY

DEFENDANTS

**JUDGMENT of Mr. Justice McDermott delivered on the 29th day of January, 2018 (No.3)**

1. The plaintiff seeks a well charging order and the sale of lands described in Folio No. 271959F, Co. Roscommon carved from Folio 23852, Co. Roscommon on foot of Instrument D2005CR006535W which are lands jointly owned by the defendants. The plaintiff's claim is based on the liability of the first named defendant, Mr. Peter Reaney for monies due on foot of loan facilities described in the special indorsement of claim on the Civil Bill herein in respect of which demand for payment was made and which was the subject of a judgment by this Court on the 15th February, 2017. The court determined that the plaintiff was entitled to recover the sum of €1,056,698.48 against the first named defendant. The plaintiff seeks relief against the second named defendant, Mrs. Teresa Reaney on the basis of a guarantee to discharge the first defendant's obligations to the plaintiff now in the amount of €751,000.00 dated 26th June, 2006.

2. The plaintiff relies upon an undertaking dated 22nd July, 2005 by Messrs. Patrick J. McEllin and Son solicitors, Claremorris, Co. Mayo given on behalf of both defendants to hold the title documentation in respect of the lands and premises comprised in part of Folio 23852 Co. Roscommon as outlined in the map attached thereto and containing 1.318 acres in trust for the plaintiff which the plaintiff claims thereby created an equitable mortgage in the said premises in favour of the plaintiff. A Folio 27159F Co. Roscommon was subsequently carved from Folio 23852 Co. Roscommon on 8th June, 2005 which are the lands and premises the subject of the undertaking dated 22nd July, 2005 in respect of which the relief is now sought.

3. On 14th October, 2009 a lien was registered on the lands comprised in Folio 27159F of the Register of Freeholders Co. Roscommon pursuant to s. 73(3) of the Registration of Deeds and Title Act 2006 in favour of the plaintiff.

**Procedural History**

4. A civil bill issued in these proceedings on 11th February, 2013. On the 28th April an appearance said to be on behalf of both defendants was entered. Mr. Peter Reaney represented himself at all stages of these proceedings. Mrs. Reaney has not engaged with the proceedings at all and has not attended court though she has been duly served and notified of each adjourned date on which the matter has been listed.

5. An affidavit was delivered by Mr. Reaney on the 10th May in reply to the plaintiff's claim. In that affidavit Mr. Reaney sets out a number of allegations of breach of contract in respect of the loan facilities and what he states is the history of the Bank's involvement with him and the development of the lands the subject of these proceedings. The factual and legal issues set out in this affidavit are the same as those set out in his defence and counterclaim to the High Court proceedings in which judgment has already been delivered.

6. An affidavit from Mrs. Teresa Reaney was also submitted, sworn 7th June, 2013. In her affidavit she states that she never received any lien or notice of lien or any mention of a lien on the property until receipt of the civil bill. She also states that she never signed any agreement offering the development lands as security against the money borrowed in 2008.

7. A short affidavit of the same date from Mr. Peter Reaney also states that he:-

"never heard of a lien being put on the property in question until I received the bill for well charging relief a few weeks ago for the Circuit Court. I never received any notice of this before nor knew what it meant until I inquired as what it was following receipt of the bills."

8. On 11th June, 2013 her Honour Judge Flanagan made an order in the Circuit Court. The learned judge considered the pleadings and received submissions from the plaintiff's solicitors and Mr. Reaney who appeared on behalf of the defendants and directed that the affidavit dated the 10th May sworn by him would be treated as the defence of both defendants and that the proceedings would be adjourned to the call over list "not to be listed for hearing until the High Court proceedings listed for the 14th June, 2013 are completed." The High Court proceedings referred to are those in which judgment was delivered on 15th February, 2017 (Record No. 2012 507 S.).

9. By notice of motion dated 20th June, 2013 the plaintiff appealed this order "and in particular that part of the order which provides that the within proceedings are not to be heard until the conclusion of the High Court proceedings Record No. 2012/507S.

10. On the 28th July, 2014 this appeal was allowed (MacEochaidh J.). The order stated:-

"The court doth allow the appeal in these proceedings of the order of the Circuit Court judge dated 11th June, 2013 under Circuit Court Record No. 2013/00053 – adjourning that part of the order regarding an application for well charging relief by way of civil bill dated 12th February, 2013 and the application for an order for sale to this Court for mention only on the 8th October, 2014".

The court also ordered "by consent" that the Circuit Court proceedings and the High Court proceedings Record No. 507S "be consolidated and do proceed as one action". The court also ordered that the plenary proceedings be case managed and gave directions that the defendant in those proceedings deliver a defence within fourteen days and made certain other orders in respect of discovery and notices of particulars.

11. The well charging proceedings and the plenary High Court proceedings were listed in the non-jury list for the 24th November, 2015. However, the Circuit Court proceedings had never formally been transferred to the High Court. This was brought to the attention of the High Court on 4th November, 2015 by the plaintiff. On 16th November, 2015 the Circuit Court transferred the civil bill proceedings to the High Court for hearing. On the 18th November the High Court (MacEochaidh J.) ordered that the Circuit Court proceedings be adopted and proceeded with in the High Court as if the action had been commenced by plenary summons. At an earlier stage the Circuit Court had already directed that the affidavit filed by Mr. Reaney should be treated as the defence of both defendants in the order made on 12th February, 2013.

12. On the 15th April, 2015 an *ex parte* application made by Mr. Reaney for an order directing that because of his religious beliefs he, as defendant in the High Court proceedings was entitled to have the action tried before a judge sitting with a jury was refused. Directions had already been given by order made on 24th June, 2013 (O'Malley J.) adjourning the High Court proceedings for plenary hearing as if commenced by plenary summons and setting time-limits within which a statement of claim and defence ought to be delivered. The court (MacEochaidh J.) case managed both sets of proceedings which came on for hearing together in the non-jury list before this Court.

13. The court heard extensive evidence from witnesses called on behalf of the plaintiff in relation to the sums claimed by the Bank and in respect of the defence and counterclaim brought by Mr. Reaney in the High Court proceedings and in respect of the same issues raised in the Circuit Court proceedings as set out in the particular in the affidavit of the 10th May, 2013 as the defence to the plaintiff's claim for the well charging order and sale of the lands the subject of these proceedings. Mr. Reaney gave extensive evidence on these matters also and cross-examined the plaintiff's witnesses in respect thereof. The court also received a large amount of documentation in the course of the hearing.

14. The court delivered its judgment in respect of the Bank's claim seeking judgment in the amount of €1,056,698.48 on the 15th February, 2017. Judgment was granted in respect of monies said to be due and owing in respect of the same loan facilities which are the subject matter of the Circuit Court proceedings. The court stated at para. 46 of the judgment:-

"The court has considered all issues of fact relating to the loans raised in both sets of proceedings and is satisfied that its findings of fact are equally applicable to both cases. The court will hear further submissions in relation to the orders now sought in the light of those findings in respect of the matters raised by Mr. Reaney in the well charging proceedings."

15. Before judgment was delivered in the High Court proceedings (Record No. 2012 507 S.), Mr. Reaney issued proceedings entitled "The High Court Record No. 2017 830 P. Between/ Peter Reaney, Plaintiff and Ulster Bank Limited, Defendant" by plenary summons dated 30th January, 2017 in which he sought various reliefs related to the issues which had already been the subject of a reserved judgment which was later delivered by this Court on 15th February.

16. It should also be noted that rather than pursue the appeal procedure available to him Mr. Reaney issued civil proceedings against the presiding judge in the trial. He then sought that I recuse myself from this case because he had initiated these proceedings. I refused the application.

### **The Remaining Issues**

17. The balance of the issues to be determined by the court were adjourned from time to time but ultimately listed for hearing on the 16th January, 2018. In the meantime, the plaintiff brought a motion seeking the dismissal of the proceedings initiated by Mr. Reaney by plenary summons dated 30th January, 2017. That motion was also listed by the court for hearing on the 16th January. Having considered the papers relevant to that motion and the submissions made by counsel on behalf of the plaintiff and Mr. Reaney, the court dismissed the plaintiff's claim against the Bank (*Peter Reaney and Ulster Bank Limited (No.2) ex tempore* unreported 16th January, 2018, McDermott J.). Immediately thereafter the court embarked on a hearing of the remaining substantive issues in these proceedings in respect of the well charging order and an order for sale.

18. The court was satisfied to receive the evidence by way of affidavit as it appeared from the papers that the only real and substantive issues remaining related to issues of law which could be determined on the affidavits submitted and the submissions made by and behalf of each party. I was satisfied to receive evidence on affidavit on behalf of the plaintiff and the defendant.

19. The affidavit of Michael Boland, senior manager with the plaintiff at Cavan Business Centre sets out the main evidence in relation to the respective liabilities of each defendant upon which the Plaintiff relies.

20. The first defendant Mr. Reaney was provided with a number of credit facilities which were said to be payable on demand:-

(a) The continuation of an overdraft facility in the sum of €35,000.00 (Current Account No. 08417141).

(b) A continuation of a loan facility of €50,000.00 (Account No. 084172240) and

(c) A loan facility of €797,620.00 (which had an existing loan balance of €625,620.00 together with an additional approved sum of €172,000.00) (Account No. 08417307).

The facility letter and agreement are dated 28th March, 2008.

By letter dated 28th June, 2011 the plaintiff sought repayment of these monies.

21. The Equity Civil Bill sought an order declaring that the sum of €1,105,155.80 together with ongoing interest on the 2nd February, 2015 was due by the first defendant to the plaintiff. The court has delivered judgment in relation to the Bank's claims including claims for interest in relation to the matter and granted judgment in the amount of €1,056,698.48 against the first defendant arising on foot of these loan facilities on 15th February, 2017. The court is satisfied that that is the sum now due and owing in respect of the three loan facilities in circumstances in which further interest has been waived by the plaintiff.

22. The second defendant Mrs. Teresa Reaney is said to be liable to the plaintiff on foot of a guarantee entered into by her with the plaintiff on the 26th June, 2006. This guarantee was given in consideration of the plaintiff providing loan facilities or other accommodations to Mr. Reaney and constituted a guarantee to discharge on demand Mr. Reaney's obligations to the plaintiff with interest from the date of demand. The total amount of the guarantee was €751,000.00. Mr. Boland stated that the interest due up to 2nd February, 2013 amounted to €36,313.15.

23. Mrs. Reaney in an affidavit sworn 7th June, 2013 stated that she never signed any agreement in respect of the development

lands the subject matter of the application or gave any security against any money borrowed in 2008. She does not deny in the affidavit that she signed the guarantee which was exhibited by Mr. Boland. The guarantee was originally in the amount of €571,000.00. It was signed by Mrs. Reaney in the presence of a bank official. The full statement of the liabilities on the account relied upon by the plaintiff in these proceedings against the second defendant is set out in Mr. Boland's affidavit Exhibit MB6. Mrs. Reaney has not disputed the execution of the guarantee or liability under its terms to the Bank. She has not disputed that she is indebted to the Bank on foot of the guarantee. There is no plea and no reality to a claim of *non est factum*.

24. It was suggested in the "defence" (affidavit/defence) said to be on behalf of both defendants that the money on foot of the loan facilities was not due and owing by Mr. Reaney for all of the reasons set out therein and considered by this Court in the judgment of the 15th February, 2017. All of the issues raised therein are identical to those raised by way of defence and counterclaim in the High Court proceedings addressed in that judgment.

25. By the 1st February, 2013 the sum of €787,318.15 was said to be due and owing to the plaintiff by Mrs. Reaney. That sum consisted of the principal amount of €751,000.00 together with interest thereon of €36,318.15. This was the amount then due on foot of the guarantee given in respect of the loan facility provided to the first defendant.

26. A form of security was provided to the plaintiff by way of equitable mortgage. The defendants were full owners of the lands and premises comprised in Folio 27159F of the Register of Freeholders, Co. Roscommon. On 22nd July, 2005 Patrick J. McEllin and Sons solicitors, Claremorris, Co. Mayo gave an undertaking to hold the title documentation of all that and those the lands and premises comprised in part of Folio 23852 Co. Roscommon as outlined on a map attached thereto and containing 1.31 acres in trust for the plaintiff. On 8th June, 2005 a Folio 27159F Co. Roscommon was carved from Folio 23852 on foot of instrument D2005CR006535W which comprised the lands and premises the subject matter of the undertaking dated the 22nd July, 2005. On 14th October, 2009 a lien was registered on the lands and premises comprised in Folio 27159F pursuant to s. 73(3) of the Registration of Deeds and Title Act 2008 in favour of the plaintiff.

27. The undertaking given by the solicitors is in the form agreed between the Incorporated Law Society of Ireland and the Irish Bankers Federation. It is signed by the solicitors. The certificate contained therein that the property is not a "family home" within the meaning of the Family Home Protection Act 1976 is signed by both the defendants as is an irrevocable authority directing the solicitors to give the undertaking set out in the documents.

28. The defendants have not and did not seek to adduce any evidence that this undertaking was not given or that they did not sign the undertaking set out above on the 22nd July, 2005. Mr. Reaney sought to rely on correspondence between his solicitor at the time and the plaintiff as evidence that no such undertaking had been given. In fact, the correspondence indicates that an undertaking had been given. However, the defendants' solicitors in an exchange of letters with the Bank that continued into 2009 did not accept that they as solicitors for the defendants had undertaken to register the equitable mortgage as a charge on the property and insisted that this was the plaintiff's responsibility. The plaintiff acknowledged this fact and duly registered the lien.

29. The lien was registered by the plaintiff on the 14th October, 2009 under s. 73(3) of the Registration of Deeds and Title Act 2006. Previously an equitable mortgage over registered property could be created by the deposit of the land certificate or certificate of charge with the mortgagee pursuant to s. 105 of the Registration of Title Act 1964. It provided:-

"Subject to any registered rights, the deposit of a land certificate or certificate of charge shall, for the purpose of creating a lien on the land or charge to which the certificate relates, have the same effect as a deposit of the title deeds of unregistered land or of a charge thereon."

30. Section 73(1) of the 2006 Act provided for the abolition of land certificates and certificates of charge. Section 73(1)(b)(ii) stated that s. 105 of the 1964 Act would cease to have effect three years after the commencement of subs.(2) of the Act. Section 73(2) provided that land certificates and certificates of charge issued before the commencement of subs.(1) and which had not already been cancelled would cease to have any force or effect on the expiration of the period of three years after the commencement of the subsection. Section 73(3) concerned the three year transitional period within which the certificates would continue to have force and effect and provides as follows:-

"(a) the [Property Registration 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 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."

31. Ms. Margaret Rowley, solicitor in an affidavit of 26th April, 2016 deposed that she caused the lien to be registered with effect from 14th October, 2009 on foot of the undertaking of 22nd July, 2005. She completed the necessary forms and submitted the application form with necessary documentation on 14th October, 2009. By letter dated 27th October, 2009 she was advised by the Property Registration Authority that the application had been completed and that the lien had been duly registered as against the property. Enclosed with that documentation were copies of the notices of intention to register the lien served on each defendant on 16th September, 2009. Section 73 of the 2006 Act came into operation on the 1st January, 2007 pursuant to the Registration of Deeds and Title Act 2006 (Commencement No. 2) Order 2006 (S.I. No. 511 of 2006). This Court is therefore satisfied that the plaintiff's security was duly registered within the period of three years provided in the section and at the time of the initiation of these proceedings was in full force and effect.

32. Section 31(1) of the 1964 Act provides a register of freeholders shall be deemed to be conclusive evidence of title and insofar as it is relevant states:-

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

33. Section 45 of the 2006 Act provides that:-

"Without prejudice to s. 9(6), a document purporting—

(a) to be a copy or reproduction of any entry in the register or of any other record maintained, made or issued under this Part, including any document produced by the conversion into legible form of information kept in electronic or other non-legible form, and

(b) to be certified by a member of the staff of the Authority to be such a copy or reproduction is admissible in any proceedings, without further proof, as evidence of the matters mentioned therein."

Section 9(6) provides that:-

"In any proceedings a document purporting to be a document made or issued by, and to be sealed with the seal of, the [Property Registration Authority] and any copy so sealed of such a document is admissible, without further proof, as evidence of the document and the matters mentioned in it."

34. The court is therefore satisfied on the evidence adduced that the plaintiff has complied with all of the proofs necessary to establish the equitable mortgage held by the plaintiff in respect of the said lands pursuant to the solicitors undertaking has been duly registered as a lien and recorded as such in the appropriate folio.

35. Mr. Reaney raised a number of points in respect of the validity of the registration of the equitable mortgage as a charge. It is clear that following the registration of the equitable mortgage as a lien, no application was made to correct the register on the basis of fraud or mistake. Thus the suggestion that the signatures of the defendants were not appended to the undertaking by them has never been the subject of an application to alter the register quite apart from the fact that no evidence was advanced in the affidavit submitted making any such allegation. Furthermore, the contention in the two short affidavits submitted that the defendants had no notice of the intention to register the lien is not being pursued by Mrs. Reaney and was never the subject of any application by either defendant to rectify the register based on same.

36. It is submitted that the plaintiff's proofs are defective because in an affidavit originally grounding the application Mr. Boland attached as an exhibit a copy of Folio 23852F for the County of Roscommon said to be the property of a Sean Callaghan rather than the appropriate folio which was Folio 23852 of the County of Roscommon. The original affidavit was sworn on the 14th May, 2013. On 9th May, 2014 a supplemental affidavit by Mr. Langan was filed in these proceedings pointing out this error which he explained as a clerical error. He stated that the incorrect folio had been attached as Exhibit MB9 of Mr. Michael Boland's affidavit. The error was corrected and the appropriate Folio 23852 was exhibited as Exhibit "DL1" in that affidavit. It is clear from that exhibit that on the 8th June, 2005 Folio 27159F Co. Roscommon was carved from that folio on foot of Instrument D2005CR006535W which were the lands and premises the subject matter of the undertaking of 22nd July, 2005 and of these proceedings. I am satisfied that the appropriate folio has been produced and proved to the court in the course of these proceedings in respect of the lands which are the subject matter of these proceedings. I accept that the folio previously exhibited was exhibited in error and that no prejudice has been caused to the defendants by this error which was corrected well in advance of the hearing of this matter and I do not accept the defendants' submission in this respect.

37. The point was also taken that since there was no rateable valuation in respect of the said lands that there was no jurisdiction in the Circuit Court originally in this matter and that consequently the proceedings should be struck out or dismissed for want of jurisdiction. The plaintiff relied on certified extracts from the valuation lists in respect of the said lands. The court is satisfied that the jurisdiction of the court has been duly established. The court is satisfied that the rateable valuations of the lands does not exceed €253.95. If the lands did not have a rateable valuation or a deemed rateable valuation the Circuit Court would still have had jurisdiction to entertain the proceedings (See *Permanent TSB plc. v. Langan and the Attorney General* [2017] IESC 71).

38. I am not satisfied that any of the points or submissions raised by Mr. Reaney are sustainable and I am satisfied that the plaintiff is entitled to the relief claimed.