

THE HIGH COURT

[2009 No. 1143 S.P.]

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

GERARD HANNON

DEFENDANT

JUDGMENT of Mr. Justice Michael White delivered on the 18th December, 2014

1. This matter comes before the court by way of full plenary hearing where the Plaintiff is seeking a well charging order on agricultural lands in Co. Sligo comprised in Folios 2289, 2288, 2286, 2285 and 10734 of the Register Co. Sligo. The Defendant contests the right of the Plaintiff to seek a well charging order. There are some disputed issues of fact and also distinct submissions on the law applicable.

2. Apart from the affidavits filed, Notice to Cross Examine was served on a number of witnesses. John Lane the former Commercial Manager in the Ulster Bank branch in Ballymote, Co. Sligo was cross examined on his affidavit of 28th November 2012.

3. Damien Devlin an official from the Head Office of Ulster Bank Limited in Belfast was cross examined on his affidavits of the 22nd January 2010 and 26th October 2012.

4. The Defendant Gerard Hannon was cross examined on his affidavit of the 11th March, 2011.

5. In the course of the proceedings on Thursday, 23rd October, 2014 the court gave an interim ruling on the status of Mr. Devlin's evidence. The Defendant had made submissions that his evidence was incapable of being considered by the court because he was not an official of the Plaintiff and was not entitled to give evidence in accordance with statutory enactments of the Oireachtas. The court ruled that Mr. Devlin's evidence was not required by the court as the primary dispute between the parties was the status of an alleged equitable deposit of the Land Certificates of the relevant folios with the Ulster Bank branch in Ballymote, and the relevant evidence was the evidence of John Lane, the Commercial Manager and the Defendant Gerard Hannon.

6. The conflict of fact between the Plaintiff and Defendant related to the status of the deposit of the Land Certificates in the Ulster Bank branch in Ballymote. The plaintiff contends that there was an equitable deposit of the Land Certificates in accordance with facility letters issued to the Defendant and signed by him. The Defendant contended that the Land Certificates were lodged in the branch for safe keeping only, and at no stage was an equitable deposit of the Land Certificates ever contemplated by the Defendant or agreed by him.

7. A separate booklet of papers was prepared for the benefit of the court which contained a number of facility letters and correspondence between the Plaintiff and the Defendant and an undertaking submitted to the bank by Rochford, Gallagher & Co., Solicitors who acted in the perfection of title for the Defendant.

8. The first facility letter of 12th February, 2004 was directed to the Defendant at his address at Lissananny, Ballymote, Co. Sligo. It approved three separate types of finance facility (a) overdraft €15,000, (b) term loan €130,000, (c) bridging loan €30,000.

9. Under the heading 'Security' the facility letter states:-

"It is understood that as security the bank will hold and/or continue to hold the following and these securities will continue to be available for all the borrower's liability to the bank:-

(i) Equitable deposit of Title Deeds comprised in Land Certificate Folio 2286 Co. Sligo undertaking of Rochford Gallagher, Solicitors dated 21st March, 2002 held.

(ii) Equitable deposit of Land Certificates covering Folios 2285 and 10734 Co. Sligo.

(iii) All monies assignment of life policy to provide full cover for the amount of facility (b) on your death. That facility letter was signed by the Defendant on the 18th February, 2004. "

10. The next facility letter is dated the 7th June, 2005. The amounts covered are facility (a) overdraft €50,000, (b) term loan €825,000, (c) bridging loan €40,000. Under the heading security the facility letter states:-

"It is understood that as security the bank will hold and/or continue to hold the following and that these securities will continue to be available for all the borrower's liabilities to the bank:-

(i) All monies mortgage over lands comprised in Folios 2286, 2285, 10734, 2283, 2289 and 2288 all Co. Sligo totalling 125 acres approximately at Lissananny, Co. Sligo.

(ii) All monies assignment of Life Policy to provide full cover on death of Gerard Hannon. This facility letter was signed by Mr. Hannon on the 17th July, 2005.

11. The next facility letter was dated the 29th March, 2006. The loan was stated to be for the sum of €100,000 for the purchase of cattle, under the heading security it stated:-

"all monies mortgage over lands comprised in Folios 2286, 2285, 10734, 2273 and 2288 all Co. Sligo totally 100 acres at Lissananny, Co. Sligo".

12. That facility letter was signed by Mr. Hannon but left undated.

13. The next facility letter is dated the 12th January, 2007 and it relates to overdraft facilities of €150,000 and the security is set out in the facility letter and it states:-

"Equitable deposit (with legal mortgage to be taken) over the following property:-

(i) Land Certificate Folio 2286 Co. Sligo.

(ii) Land Certificate Folio 10734 Co. Sligo.

(iii) Land Certificate Folio 2285 Co. Sligo.

(iv) Land Certificate Folio 2288 Co. Sligo.

(v) Land Certificate Folio 2289 Co. Sligo.

(vi) Policy on the life of Gerard Hannon for €750,000.

(vii) Policy on the life of Gerard Hannon for €120,000. "

14. That facility letter was signed by the Defendant on the 15th January, 2007.

15. The final facility letter is dated the 24th October, 2007. It relates to an overdraft facility of €127,000, under the heading of security the facility letter states:-

"As security the bank holds/requires a first legal charge over the following lands contained in Land Certificate Folios 2286, 10734, 2285, 2288 and 2289 all Co. Sligo. At present the bank is relying on an equitable deposit of these documents dated the 7th June, 2006. It is understood that charge documentation will be executed without delay. Completion of this security is a condition of the arrangement detailed in this letter. Assignment of policies on the life of Gerard Hannon to provide a cover to a level of €870,000 is held."

16. John Lane, the then Commercial Manager of the Plaintiff's Ballymote branch in his affidavit stated:-

"I say that at the time that I received the said Title Deeds from the Defendant that I read out to him the Memorandum of Deposit which I then signed. It is my belief that Mr. Hannon fully understood the purpose for which the Title Deeds were being deposited. I beg to refer to a copy of the Memorandum of Deposit dated the 7th June, 2006 which bears my signature upon which marked with the letter "A" I have signed my name prior to the swearing hereof."

17. During the course of his cross examination, Mr. Lane maintained that he was in possession of five Land Certificates and that it was a different process from that of safe keeping. Mr. Lane described the Defendant as a very capable young man and he full understood why the Land Certificates were being deposited. It was explained to him that he was being lent money on security of lands which he owned. Mr. Lane said that he remembered the day and the meeting was noted in his notebook.

18. In addition to the facility letters there were a number of different items of correspondence and an undertaking of the 21st March, 2002 opened to the court and put to the Defendant on cross examination.

19. A Solicitor's undertaking dated the 21st day of March, 2002 demonstrated that the Defendant gave instructions to his then Solicitors Rochford Gallagher & Co. of Ballymote, to furnish by way of deposit the Land Certificate of Folio 2286 Co. Sligo which was being transferred to him voluntarily by his father Patrick J. Hannon.

20. The form of undertaking which was signed by the Defendant Mr. Hannon on the 21st March 2002, anticipated that the deposit of the Land Certificate was for monies advanced by the bank. The wording of the last page of the client's authority and retainer states:-

"We hereby irrevocably authorise and direct you to give an undertaking in the form and containing the information set out overleaf to the bank and in consideration of your giving the foregoing undertaking, I/we hereby undertake that I/we will not discharge the retainer as my/our Solicitors in connection with the foregoing transaction unless and until I/we have procured from the bank your effective release from the obligations imposed by such undertaking and I/we hereby indemnify you and all your partners and your and their executors, administrators and assigns against any loss arising from my/our act or default. "

21. Separately by letter of the 10th February, 2004 Rochford Gallagher & Co. sent to the Manager, Ulster Bank Limited, Ballymote two original Land Certificates Folio 10734 and 228F Co. Sligo. This letter was put in cross examination to the Defendant and he accepted that these were sent to get a loan from the bank. The court is satisfied that Rochford Gallagher & Co., Solicitors would not have sent such a letter with the Land Certificates to the bank except on the express instructions of the Defendant.

22. This is borne out by the subsequent letter of the 12th February, 2004 from the Plaintiff to the Defendant:-

"The offer now reflects the bridging loan and the revised security requirements. Rochford Gallagher sent me in the Land Certificates yesterday. I look forward to receipt of our accepted copy letter in due course so that we can finalise the matter quickly."

23. The court can only assume that the copy letter referred to is the facility letter of the 12th February, 2004 from which I have already quoted extracts.

24. A further letter was sent to the Defendant on the 7th June, 2005 which stated:-

"You will have noted from our letter that because of the amounts now involved the bank requires a written mortgage over the lands comprised in our security rather than an equitable mortgage as before. We will make arrangements with our security section to progress this with your Solicitors. I note from the valuation that Folio numbers are quoted. I have received Folio 2288F this date, received 10734F and 2285F February last year and held 2286F previously. It would appear that I am outstanding 2283F and 2289F and you might chase up the whereabouts of those. "

25. In respect of the conflicting evidence between Mr. Lane and the Defendant as to the events of the 7th August, 2006 I prefer the evidence of Mr. Lane. I am satisfied that the Defendant attended at the Ballymote branch of the Ulster Bank Limited on the 7th June, 2006. On that date the bank already held the Land Certificates of Folios 2289, 2288, 2286, 2285 and 10734, I am satisfied that Mr. Lane read to the Defendant a memorandum which Mr. Lane signed in the presence of the Defendant.

26. This was normal banking procedure at the time, as it would not have been appropriate to have the Defendant sign the memorandum as it would acquire the status of an agreement for mortgage to which the Statute of Frauds Act applied requiring a lien or burden to be registered in the Land Registry. There was nothing unusual about this, as it was common banking practice at the time prior to the enactment of the Registration of Deeds and Title Act 2006.

27. The Land Certificates were not held by the Plaintiff for safe keeping. The Court is satisfied from the facility letters, other letters furnished and evidence that the Defendant had no doubt that the Certificates lodged with Ulster Bank Limited were there for the purposes of security on very substantial borrowings advanced to the Defendant.

28. I accept the evidence of the Defendant that from September 2009 his relationship with his father had deteriorated and that he had moved to an apartment in October 2009 and then moved to Derry to study for three years. The Defendant has advanced the opinion that his father must have refused a registered letter. He stated that he did not become aware of the registration of the lien until 2011 and that he never actually received the letter of the 29th March, 2010 enclosing the Notice.

The Legal Principles

29. The consequences of a deposit of Land Certificates are set out in *Allied Irish Banks Limited v. Patrick Glynn and Michael Glynn* [1973] I.R.p188:-at p191 a judgment of Kenny J,

"The plaintiffs have now sued the defendants for a declaration that they are entitled to a charge on the lands arising out of the deposit of the land certificate with them, and for a sale of the lands. At the time when the deposit was made, the Registration of Title (Ireland) Act, 1891, was in force and s. 81, sub-s. 5, of that Act provided that, subject to any registered rights, the deposit of a land certificate or certificate of charge should, for the purpose of creating a lien on the land or charge to which the certificate related, have the same effect as the deposit of the title deeds of land or of a charge thereon had theretofore: see now s. 105 of the Registration of Title Act, 1964.

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."

30. *Irish Land Law* – Fourth Edition – J.C.W. Wylie – p. 765 Paragraph [12.29] and [12.30] states:-

"[12.29] One of the guiding principles of a registration of title system is that the registers should 'mirror' the current title to the land and that all transactions relating to the land should be presented for registration to the Land Registry, for the appropriate consequent amendments to the registers to be made there. However, it was recognised from the very beginning of the introduction of a registration system in Ireland that, for convenience and administrative reasons, amongst others, the system could not and, perhaps should not seek to conform with this principle absolutely, and the modern legislation still allows several types of transactions to be effective without registration in the Land Registry and to create interest in the registered land which are not noted on the registers. One of these transactions used to be the method of informal creation of mortgages which, we pointed out above, was so common in Ireland. It had been considered that the advantages of such a method of creation of mortgages justified a breach of the 'mirror' principle of registration."

[12.30] "The 1964 Act provided that the deposit of a land certificate or certificate of charge had the same effect as a deposit of the title deeds of unregistered land. As Kenny J. put the matter: 'The right created by the deposit is not limited to keeping the deeds until the money had been paid but gives an equitable estate in the lands'. In other words, such a deposit created an equitable mortgage on the registered land which did not need to be registered in the Land Registry as a burden on the land in order to secure priority as against subsequent transactions relating to it. The mortgage was protected because subsequent transactions relating to the registered land generally could not be completed by registration in the Land Registry without production of the land or charge certificate, which the mortgagee held. However, if the mortgagee wished, he could lodge a caution with the Registrar against subsequent registered dealings. All this, however, has ceased to be possible because s 73 of the Registration of Deeds and Title Act 2006 abolished the issue of land and charge certificates, with the consequence that neither a registered owner nor registered chargee has any longer a document to deposit, so as to create such an equitable mortgage. Existing mortgages by deposit were saved, but the mortgagees holding certificates by deposit were required to register a lien in the Land Registry by 31 December 2009, in order to protect the equitable mortgage. After that date land and charge certificates ceased to have any force or effect."

The text at para [12.46] deals with the deposit of title deeds and states,

[12.46] "It appears that a mere deposit of the title deeds will be regarded as *prima facie* evidence of an equitable mortgage, unless a deposit is otherwise accounted for, e.g., deposit with a bank for safe keeping. On the other hand, a mere agreement to deposit is not enough if the deeds are not actually deposited, though that agreement may create another kind of equitable mortgage. It is not necessary to deposit all of the title deeds relating to the land, provided those in fact deposited are material evidence of title and sufficient to indicate the parties' intention. It has also been held in Ireland that a deposit of title deeds with a creditor's solicitor, for the purpose of preparation of a mortgage to secure antecedent debt and further advances, in itself creates an equitable mortgage without any further agreement. Furthermore, a verbal agreement, supported by parol evidence, to make future advances on a deposit of title deeds as security for a present loan may be sufficient to create an equitable mortgage as security for any subsequent advances."

31. I am satisfied that the effect of Section 73 of the Registration of Deeds and Title Act 2006, was not to abolish equitable mortgages as such. Its effect subsequent to its commencement on the 1st day of January, 2007 was to make the creation of an equitable mortgage of registered land impractical, because the prior benefit of the physical possession of the Land Certificate, had the effect that no dealing could be completed in the Land Registry without the original Land Certificate being lodged.
32. In addition, Section 105 of the Registration of Title Act 1964, and legal precedent gave the benefit to the holder of the equitable mortgage the priority of that mortgage over and above any other burden registered other than existing equities.
33. The effect of an equitable deposit of Land Certificates for the purpose of security, had the effect of granting to the financial institution who had advanced the monies an equitable interest in the land rather than a lien over the Title Deeds.
34. The difficulty for any financial institution holding an equitable mortgage subsequent to the 1st January, 2007 was that if a lien or burden was not registered on the Folio within a three year period from the 1st January 2007, the financial institution, lost the benefit of priority of their equitable mortgage.
35. Section 73(3)(b) of the Registration of Deeds and Title Act 2006 states:-
- "A holder of such a lien may apply to the authority for registration of the lien in such a manner as the authority may determine."
36. The Property Registration Authority issued a practice direction 2006 No. 3 on the 23rd November, 2006. At paragraph 4 of the practice direction headed "Application for Registration" at sub paragraph E it states:-
- "The application shall be accompanied by the original Land or Charge Certificate and by a copy of the Notice which shall have been delivered by personal service or by registered post to the registered owner of the land or charge at the address for service of notices in the state as appearing on the Register or in the case of a Charge or otherwise ascertained or alternatively the consent of the registered owner may be lodged."
37. Insofar as there is a submission by the Defendant that it was essential that it be proved that the Defendant actually received the registered letter that is not the case. For the purposes of registration of title there is always an obligation on the registered owner of land to furnish an address for the purposes of service of notices pursuant to the various Acts. The address furnished for service of Notices by the Defendant was Lisananny, Ballymote, Co. Sligo. Service by registered post and evidence of that service is sufficient under the direction to furnish notice.
38. The holder of an equitable mortgage who seeks to register the equitable mortgage as a lien or a burden on registered land is bound by the equitable maximum of "he who seeks equity must do equity".
39. If a situation arose where the Court considered apart from technical issues that a holder of an equitable mortgage was not entitled to register same as a lien or a burden, the Court then would have a duty to intervene as the responsibility placed on the financial institution would be to treat the registered owner against whom the lien or burden is registered in a manner which is equitable.
40. In this case the Defendant was treated equitably. He was advanced very substantial monies by the Plaintiff. The facility letters on numerous occasions outlined to him that the purpose of the deposit of the Land Certificates was for security purposes. On the 7th June, 2006, Mr. John Lane, the Commercial Manager of the Ulster Bank Limited formally received from the Defendant an acknowledgement that five Land Certificates had been received by the bank by way of equitable deposit to secure the individual liabilities of the Defendant. The Defendant in respect of any service of notice could not have been prejudiced in any way by the registration of the lien or burden. The only prejudice that could have arisen was to the Plaintiff, as from an inspection of the relevant up to date Folios, the Defendant had incurred substantial debts to suppliers where proceedings were issued, judgment marked and judgment mortgages filed in the Land Registry office.
41. It is unclear to the Court the status of the proceedings Record Number 2012/58P an action commenced by the Defendant against the Property Registration Authority and the Plaintiff challenging the registration of the lien as a burden on the relevant Folios in accordance with Section 73(3)(c) of the Registration of Deeds and Title Act 2006. There may be outstanding issues in relation to that matter upon which the Court may have to receive submissions from all three parties to that litigation.
42. Apart from that issue the Court is satisfied that the Plaintiff is entitled to a declaration that by virtue of the deposit by the Defendant with the Plaintiff on the 7th June, 2006 of the Land Certificates of Folios 2289, 2288, 2286, 2285 and 10734 of the Register Co. Sligo by way of equitable deposit that the sum specified in the Second Schedule to the Special Summons with interest thereon stands well charged on the Defendant's interest in the said lands.