

THE HIGH COURT

2018 No. 179 SP

BETWEEN

PROMONTORIA (OYSTER) DAC

PLAINTIFF

AND

DESMOND GREENE

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 24 February 2020

INTRODUCTION

1. These proceedings seek a well charging order, and an order for sale, in respect of certain lands in County Westmeath. The title to the lands is registered under the Registration of Title Acts. The application is made pursuant to a lien which has been registered as a burden on the title. The lien is said to arise from an equitable mortgage created by the deposit of title deeds with Ulster Bank Ireland Ltd. ("*Ulster Bank*") The plaintiff, Promontoria (Oyster) DAC ("*Promontoria*"), asserts that it has succeeded to Ulster Bank's interest in the lien.
2. The plaintiff maintains that the lien is intended to secure the debt outstanding on three loan agreements said to have been entered into between the defendant, Mr Greene, and Ulster Bank Ireland Ltd. The principal difficulty which the plaintiff faces, however, is that it has not exhibited the terms and conditions referable to one of these three loan agreements.

THE POSITION OF THE PARTIES

3. The case which Promontoria seeks to make is straightforward. The defendant, Mr Desmond Greene, is the registered owner of lands in County Westmeath. The title to these lands is registered under Folio 10081F. It is said that Mr Greene deposited the land certificate in respect of these lands with Ulster Bank on an unspecified date in 1992 or 1993.
4. Promontoria has not produced any direct evidence of the circumstances in which this deposit is said to have occurred. The most that has been done is to exhibit a document described as the "Forms of Certificate". This document has been exhibited as part of the supplemental affidavit of Albert Prendiville. This document reads as follows.

"Mullingar Branch

11 day of Feb 1993

Desmond Greene has have this day deposited with the Ulster Bank Limited, the undernoted Deeds and Documents as Security for all his/her/their and each of their individual liabilities, direct or collateral, present or future, including Letters of Guarantee.

Read the above to said Desmond Greene this 11 day of February 1993.

[Illegible Signature]

Manager”.

5. The schedule to the document then refers to (1) Original Land Certificate Folio No: 10081F Co Westmeath, and (2) Part 1 Certificate A Family Home Protection Act Declaration. The dates against these documents are 27 November 1992, and 11 February 1993, respectively.
6. It should be noted that this document does not purport to have been signed by Mr Greene himself.
7. Promontoria contends that the deposit of the land certificate gave rise to an equitable mortgage, and that this equitable mortgage was subsequently registered as a lien on the folio in accordance with section 73 of the Registration of Deeds and Title Act 2006.
8. It is further contended that monies advanced to Mr Greene pursuant to three separate loan agreements are secured against the mortgaged lands. The principal monies outstanding as of 13 March 2018 are said to be in the sum of €210,954.00 (together with contract interest).
9. Promontoria asserts that it has succeeded to the interest which Ulster Bank held under the three loan agreements and the equitable mortgage. In this regard, the relevant extracts from the global deed of transfer between Ulster Bank Ireland DAC, Ulster Bank Ltd, and Promontoria (Oyster) DAC have been exhibited. It is on this basis that Promontoria applies for a well charging order, and an order for sale, in respect of the mortgaged lands.
10. The position of Mr Greene, as set out by counsel on his behalf in written and oral submissions, is that Promontoria has failed to establish that the principal monies in respect of the first of the three loan agreements were due as of the date the proceedings were instituted. The terms and conditions governing the first loan agreement have not been put before the court in full. On its face, the letter of offer indicates that the term of the loan agreement was to be ten years. The loan offer appears to have been accepted by Mr Greene on 3 October 2008. (The precise date of the drawdown of the principal monies has not been established). These proceedings were instituted on 12 April 2018, i.e. at a time when less than ten years had expired since the date upon which the loan agreement had been entered into.
11. No grounds of defence have been advanced in respect of the second and third loan agreements. Counsel indicated that his client did, however, request to be allowed a period of time, before any order for sale would take effect, within which to discharge any monies adjudged to be due.
12. As appears from this summary, the core of the dispute between the parties centres on the first of the three loan agreements. It is, therefore, necessary to consider this in some detail.

LOAN AGREEMENT OF 3 OCTOBER 2008

13. Ulster Bank offered to provide a "committed loan facility" to Mr Greene by letter dated 23 June 2008. The offer was said to be subject to (i) the terms and conditions set out in the letter of offer, and (ii) Ulster Bank's Standard Terms & Conditions Governing Business Lending to Companies – Business Banking (Ref 01/2007). The amount of the loan was to be €116,000, and was to be available for drawdown as requested. The term of the loan was to be ten years, the first five years of which were to be on a fixed rate of interest of 7.77 % per annum.

14. The loan repayments were dealt with as follows.

"The Borrower shall repay the Facility by 60 fixed monthly repayments of €1381.51. The Bank reserves the right to adjust the amount or number of such monthly instalments should the interest rate applicable to the Facility vary. The residual debt post fix rate period to be structured over 5 years."

15. The security for the debt was stated to be as follows.

"Security:

- Existing security to be held for this borrowing
- Life Policy on the life of Mr Desmond Greene in the sum of €140,000.

Security items above must be in place before utilisation of the Facility."

16. The concluding paragraph of the letter of offer reads as follows.

"If you wish to accept this Facility please return the duplicate of this Facility Letter signed and dated by authorised persons and a certified copy of a resolution of your board of directors authorising acceptance of the Facility within 30 days and in advance of utilisation of the Facility."

17. This form of wording is self-evidently directed towards a company rather than an individual. No explanation has been provided as to why it is that a loan offer in this form was sent to Mr Greene.

18. The letter of offer appears to have been signed by Mr Greene on 3 October 2008.

19. The affidavit of Mr Prendiville grounding these proceedings states as follows at paragraph 8 thereof.

"8. The Facilities incorporate Ulster Bank's Standard Terms & Conditions Governing Business Lending to Individuals – Business Banking ('General Conditions'). I beg to refer to the General Conditions upon which marked with the letter 'D' I have signed my name prior to the swearing hereof."

20. This averment is incorrect. It is clear from the face of the letter of 23 June 2008 that the first of the three loan offers was subject to a different set of terms and conditions, namely

those governing business lending to companies. This error has never been corrected by Mr Prendiville.

21. Mr Prendiville swore a supplemental affidavit on 26 April 2019. This second affidavit addresses the issue of security as follows.

"3. Paragraph 4 of the Grounding Affidavit relates to the First Facility Letter, dated 23 June 2008, which is exhibited at 'A' therein. Whilst the Second Facility Letter and Third Facility Letter, exhibited at 'B' and 'C' respectively, list the lien over Folio 10081F Co. Westmeath as security for the loans, the First Facility Letter merely refers to the deposit of the Defendant's title deeds with Ulster Bank as '*Existing security to be held for this borrowing*'. I say and believe that the original land certificate to Folio WM10081F was deposited by the Defendant as security back in 1992 and in this regard I beg to refer to the Forms of Certificate evidencing the creation of an equitable mortgage by deposit of title deeds, together with the Form 17 Application for Registration of same as a Lien under instrument number D2009LR036866V, upon which, pinned together and marked 'I', I have signed my name prior to the swearing hereof."

22. The content of the first of the two documents exhibited by Mr Prendiville has been set out at paragraph 3 above.

DISCUSSION

23. Before turning to examine the extent of the evidence which Promontoria has put before the court in relation to the first of the three loan agreements, it may be helpful to pause briefly and to consider the nature of the remedy sought. The plaintiff seeks, in effect, to enforce an *equitable mortgage* arising from the deposit of the land certificate. This is so notwithstanding that equitable mortgage has since been registered as a burden on the title in the form of a lien. The Registration of Deeds and Title Act 2006 does not provide an express statutory remedy for enforcing such registered liens. Instead, as explained below, the plaintiff is relying on the court's inherent jurisdiction to enforce the equitable mortgage.
24. The plaintiff's case is (i) that Mr Greene deposited the land certificate in respect of Folio 10081F with Ulster Bank; (ii) that this gave rise to an equitable mortgage; (iii) that this equitable mortgage was subsequently registered as a lien as required under section 73 of the Registration of Deeds and Title Act 2006; and (iv) that the plaintiff has since succeeded to the mortgagee's interest in the equitable mortgage.
25. The only documentary evidence which has been put forward in support of the asserted deposit of the land certificate is the document dated 11 February 1993, which has been exhibited as part of Mr Prendiville's affidavit. (See paragraph 3 above). This document, it will be recalled, indicated that Mr Greene had deposited the original land certificate as security. The document states that it had been "read" to Mr Greene. It is not, however, signed by Mr Greene himself.

26. One consequence of the fact that Mr Greene did not sign the document is that same does not constitute a written memorandum for the purposes of what is now section 51 of the Land and Conveyancing Law Reform Act 2009. See Wylie, *Irish Land Law* (Fifth Edition) at paragraph [12.48], fn. 223.

“Some banks have in the past tried to get round this problem by having the customer read a memorandum containing the terms of the loan at the time of the deposit and then having this signed in the customer’s presence by bank officials only as a record of the transaction. See the remarks in *Bank of Ireland v. Macaura* [1934] LJ Ir 89 at 90 (*per* Kennedy CJ). This may avoid later disputes in practice and, because the customer-mortgagor has not signed anything, there is no written memorandum coming within the Statute of Frauds (or s 51 of the Land and Conveyancing Law Reform Act 2009), nor, indeed, any deed or conveyance within the Registry of Deeds legislation.”

27. The absence of a deed has the consequence that any equitable mortgage created did not benefit from the statutory power of sale under what was then section 19(1) of the Conveyancing Act 1881. (See now section 96 of the Land and Conveyancing Law Reform Act 2009). If, therefore, the plaintiff wishes to enforce the mortgage, it must do so by way of an application for an order of sale pursuant to the inherent jurisdiction of the court. The making of such applications is governed by Order 51 and Order 54 of the Rules of the Superior Courts.
28. 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. It is, however, a necessary precondition to the making of such an application that the principal monies be due and owing at the time the proceedings by way of Special Summons are instituted. The mortgagee under an equitable mortgage created by the deposit of title deeds does not have a greater power of sale than the statutory power of sale enjoyed by a mortgagee under a mortgage made by deed.
29. The evidence before the court in the present case does not establish when the principal sum under the first loan agreement became due and owing. This is because the full extent of the terms and conditions governing the loan agreement have not been put before the court. More specifically, the standard terms and conditions incorporated by reference into the loan agreement, namely Ulster Bank’s “Standard Terms & Conditions Governing Business Lending to Companies”, have not been exhibited. The only version of the standard terms and conditions before the court are those referable to business lending to individuals.
30. The term of the loan as stated by the loan agreement was to be ten years. In the absence of sight of the contractual terms which define an event of default, which event might allow for payment of the principal sum to be demanded and to become due and payable prior to the expiration of this ten-year period, this court cannot simply *assume* that the contract between the parties contained such a term.

31. On the basis of the limited evidence before the court, therefore, the proceedings were instituted at a time prior to the expiration of the ten-year term, and without any indication of there being a right to demand payment of the principal monies. The condition precedent to the making of a well charging order and order for sale have not been met in respect of the first loan agreement.
32. Separately, it should be noted that there is an ambiguity as to when the land certificate is said to have been deposited, with the document exhibited by Mr Prendiville referring to two possible dates, i.e. 27 November 1992, and 11 February 1993, respectively. This ambiguity is a further reason for refusing relief. It is essential that the date of the creation of an equitable mortgage be established in evidence, as this date affects the priority between it and any competing mortgages or charges.

DECISION AND FORM OF ORDER

33. The dispute between the parties at the hearing before me centred solely on the question of whether the plaintiff was entitled to relief in respect of the first of the three loan agreements. The defendant has not filed any affidavit, and has not sought to challenge the enforceability of the *other* two loan agreements. Nor was any legal argument advanced in respect of the two other loan agreements. Similarly, the defendant, Mr Greene, has not sought to dispute the validity of the transfer documentation relied upon by the plaintiff to assert that it has succeeded to the mortgagee's interest in the equitable mortgage which had previously been held by Ulster Bank Ireland Ltd.
34. In all the circumstances, I am satisfied that the plaintiff is only entitled to the relief sought in respect of the second and third loan agreements. The plaintiff's interest in the lien is noted on the folio in respect of the lands. The principal monies are due and owing under these two loan agreements. The contractual documentation evidencing the transfer of the mortgagee's interest has been exhibited and has not been challenged.
35. The plaintiff is not entitled to any relief in respect of the first loan agreement.
36. A well charging order and an order for sale will be granted, subject to the necessary modifications to reflect the fact that the sum declared to be well charged is confined to the principal and interest under the second and third loan agreements only.

POSTSCRIPT

37. Subsequent to the delivery of an unapproved version of this judgment, the issue of costs and the period within which the monies might be paid have both been addressed by the parties. The court refused an application for costs on behalf of the plaintiff and instead made no order as to costs. This is intended to reflect (i) the court's disapproval of the fact that an incorrect averment was made in the grounding affidavit; and (ii) the fact that relief has been refused in respect of one of the three loan agreements.
38. The period allowed for the payment by the mortgagor of the principal sum (together with interest) is to be twelve months (rather than the usual three months). In default of payment within this period, the mortgaged lands will be sold pursuant to court order. This longer period is to reflect that Mr Greene took a responsible attitude to the

proceedings, and raised no objection to the relief sought in respect of the second and third loan agreements. This allowed the proceedings to be determined more expeditiously than had the defence been dragged out. Mr Greene now has the opportunity to repay the monies.

Appearances

Jonathan Miller instructed by Matheson for the Plaintiff

Rory O'Connor instructed by Owen Carty & Co Solicitors for the Defendant