[2017] IEHC 192

THE HIGH COURT

[2014 No. 149 SP]

BETWEEN

LARIANOV FOUNDATION

PLAINTIFF

AND

LEO PRENDERGAST AND SONS (ENGINEERING) LIMITED

DEFENDANT

AND

CASCADE ESTATES LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice David Keane delivered on the 24th day of March 2017.

Introduction

1. In form, the plaintiff seeks a well-charging order in the sum of €438,876 over certain lands of the defendant in County Kildare. In substance, the real controversy at trial was one between the plaintiff and the notice party on two issues. The first is whether a charge on those lands executed in favour of the notice party in 2004, though not registered on the folios concerned until 30 August 2012, is valid. The second issue, contingent upon the validity of that charge, is whether it holds priority over a judgment mortgage of those lands in favour of the plaintiff that was registered against those folios on 9 January 2012.

Background

2. The plaintiff ('Larianov') is a Liechtenstein-registered private foundation.

3. The defendant ('Prendergast') is an Irish-registered limited liability company. It is the owner of a leasehold interest in the lands comprised in both Folio 4225L and Folio 3675L in the Register of Ownership of Leasehold Interest, County Kildare ('the lands'). The lands are held under a 999-year lease running from 1 October 1975.

4. Prendergast has not entered an appearance in the proceedings and has not participated in them.

5. During the trial, reference was made to a document purporting to be an affidavit sworn in his own interest in the proceedings on 29 May 2014 by one Leo Shanahan Prendergast. As that affidavit was not sworn on behalf of any party to the proceedings and as Mr Shanahan Prendergast is not himself a party, I ruled that it could not be received in evidence.

6. The notice party ('Cascade') is a limited liability company registered in the British Virgin Islands ('BVI').

7. While there has been an extensive exchange of affidavits between Larianov and Cascade, the facts are not really in issue.

8. In or about late 2002, Larianov entered into an agreement with Prendergast to provide it with a loan of €350,000 for two years at an interest rate of 8% *per annum* to be secured by a first legal charge over the lands. By the end of February 2003, the sum of €250,000 had been drawn down under that loan agreement. Despite repeated requests from Larianov and repeated assurances by Prendergast, no charge or mortgage was executed over the lands in respect of that loan.

9. In a letter dated 27 January 2003, the directors of Prendergast indicated to Larianov that Prendergast was holding the title deeds of the lands in trust to enable Larianov to have the proposed mortgage secured as a first legal charge over the lands. However, no such mortgage was ever executed. Larianov submits, on the authority of *Bank of Ireland Finance v Daly Limited* [1978] 1 IR 79, that the said letter amounted to a memorandum of agreement by Prendergast to hold the title deeds of the lands in trust for Larianov pending the execution of a mortgage deed, which agreement was sufficient, without the subsequent execution of any such deed, to create an equitable charge over those lands. However, Larianov concedes that it did not register the equitable charge contended for in accordance with the requirements of Part IV of the Companies Act 1963, as amended, and that its failure to do so prevents that charge from obtaining priority against a third party, such as Cascade.

10. Larianov made demands for the repayment of the loan in 2006 but Prendergast did not repay it.

11. A summary summons issued on 2 December 2008 in High Court proceedings entitled '*Larianov Foundation v Leo Prendergast & Sons Engineering Ltd,* Record No. 2008/3419S.' In the course of those proceedings, it became necessary to apply to have Prendergast restored to the Register of Companies. Ultimately, Larianov obtained judgment against Prendergast on 4 April 2011 in the sum of €438,876, to include interest, together with an order for its legal costs of those proceedings. On 9 January 2012, the Property Registration Authority registered that judgment mortgage as a burden on the lands. On 11 January 2012, the Registrar of Companies issued a certificate of registration of that judgment mortgage as a charge on the lands in Folio 3675L, pursuant to s. 104 of the Companies Act 1963, as amended. On 16 March 2012, a similar certificate issued in respect of the lands in Folio 4225L. Despite Larianov's prior and subsequent letters of demand, Prendergast's judgment debt to it of €438,876 remains due and owing.

12. Larianov issued these proceedings, seeking a well-charging order against Prendergast together with other relief, on 11 April 2014.

13. Between 2004 and 2006, Cascade provided Prendergast with three loans of €600,000, €250,000 and €450,000 respectively, amounting to an aggregate loan of €1.3 million. On 24 March 2004, Prendergast executed a deed of mortgage and charge over the lands in favour of Cascade for present and future advances with interest ('the mortgage deed'). The mortgage deed was registered as a charge over the lands in the Companies Registration Office on 1 April 2004, in accordance with the requirements of Part IV of the Companies Act 1963, although it was not registered in the Land Registry as a burden on the lands until 30 August 2012.

The validity of the mortgage deed

14. Larianov points to three features of the mortgage deed, which – it argues – render it invalid and, hence, ineligible for priority over Larianov's judgment mortgage.

15. First, the mortgage deed describes Cascade as having its registered office at an address on the island of Jersey in the Channel Islands, whereas it is common case that the registered office of Cascade is in the BVI.

16. Second, the mortgage deed contains a recital (or 'certificate') that Cascade is 'a bank named in the Third Schedule to the Central Bank Act 1942', whereas it is common case that Cascade is not a bank.

17. Third, while the mortgage deed is endorsed with the common seal of Prendergast and the signatures of two directors of Prendergast, it has not been executed by or on behalf of Cascade.

18. Peter Zajac, a director of Cascade, swore an affidavit on 5 March 2012. In it, he avers that at the material time Cascade's administrative office was at the address in Jersey identified and that it was recorded on the mortgage deed as Cascade's registered office due to an error on the part of the solicitors who were then acting for Cascade. Mr Zajac further avers that the recital that Cascade is a bank, registered as such with the Central Bank, was included in error by the firm of solicitors then acting on behalf of Cascade and is an obvious error. Mr Zajac goes on to aver that at no time did Cascade 'actively hold itself out as being a bank nor was [Prendergast] lead to understand that [Cascade] was a bank.'

19. Cascade has not applied to rectify the terms of the mortgage deed.

The validity of the mortgage deed –discussion and conclusion
20. The relevant principles concerning the construction of deeds are not in dispute.

21. In *Moorview Developments Ltd. v First Active Plc &Ors* [2010] IEHC 275, one of the issues that the High Court had to consider was the proper construction of a personal guarantee where the company that had secured the relevant credit was wrongly named in that document. The company named in the document was 'Moorview Properties Limited' ('Properties'), whereas the name of the borrower involved was actually 'Moorview Developments Limited' ('Developments'). The evidence in that case was that all of the letters and contractual documents passing between the parties at or about the time of the execution of the guarantee at issue referred to 'Developments' as the borrower, and that the lender was unaware of any relevant entity called 'Properties.' All of the relevant loans were with 'Developments' and a search of the Companies Register had established that there was no company with the name 'Moorview Properties Limited.' Based on that evidence, Clarke J found as a fact that the reference to 'Properties' in the guarantee was a clear mistake and that what the correct reference should have been – i.e. one identifying 'Developments', and not 'Properties', as the borrower – was equally clear. Clarke J concluded:

> 'It is inconceivable that there could have been any other intention of the parties but that the company whose liabilities were to be guaranteed was Moorview Developments Limited and not Moorview Properties Limited.'

22. Before making those findings of fact and reaching that conclusion, Clarke J first identified the following principles of law applicable to the construction of contracts where a mistake is alleged to have occurred:

> '3.5 This aspect of the case concerns what has, in some of the case law, (see for example *East v. Pantiles* (Plant Hire) Limited (1981) 263 E.G. 61) been described as "correction of mistakes by construction". As is clear from East and from the speech of Lord Hoffman in *Investors Compensation Scheme Ltd. v. Bromwich Building Society* [1998] 1 W.L.R. 896, two conditions must be satisfied in order for such a correction to occur. First, there must be a clear mistake. Second, it must be clear what the correction ought to be.
>
> 3.6 It is also clear from the speech of Lord Hoffman in *Investors Compensation* that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake. Thus a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to be used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event. I am satisfied that those cases, most recently restated by the House of Lords in *Chartbrook v. Persimmon Homes Ltd* [2009] 1 A.C. 1101, represent the law in this jurisdiction.'

23. In *Chartbrook*, Lord Hoffman used the memorable phrase that, in addressing a clear mistake on the face of a contract, where it is clear what correction ought to be made to cure the mistake, 'there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed.'

24. Larianov places reliance on the decision in *Byrne v Killoran & Anor*. (No. 2) [2014] IEHC 328. That case involved a mortgage deed in favour of a lender named Allied Irish Bank Finance Limited ('AIF'). However, between 2006, when the underlying loans were made or consolidated, and 2009, when the relevant mortgage deed was executed, AIF transferred all its assets and liabilities to its parent company, Allied Irish Banks plc ('AIB') on 1 January 2007. In consequence, at the time the mortgage was created, the mortgagor had an obligation to AIB and did not have any to AIF, the purported mortgagee. As Ryan J put it (at para. 42):

> 'That came about by mistake because neither side adverted to the prior transfer of business to AIB but it was not that the wrong name was put into the deed by accident and was not noticed; the mortgagee named in the deed was the intended party but the wrong party because of the 2007 transaction.'

On that basis, Ryan J concluded (at para. 43) that, while AIB was presumptively entitled to get a new deed naming it as mortgagee, formal rectification of the deed to that effect would be necessary, as it could not be treated simply as a naming error.

25. Larianov submits that the position here is closer to the one in *Byrne* than that in *Moorview*. I cannot agree. Larianov itself has caused to be exhibited correspondence confirming that no company with the same name as Cascade has ever been registered in Jersey and that Cascade does not appear as a bank in the registers maintained by the Central Bank. Accordingly, there can have been no intention on the part of Prendergast to enter into a mortgage deed with another company with the same name as Cascade, though with its registered office in Jersey and with a bank licence in Ireland. That conclusion is reinforced by the uncontroverted evidence of Mr Zajac, already described, to the effect that Cascade's administrative address in Jersey was included by mistake instead of its registered address in the BVI, and that the recital that Cascade was an Irish-registered bank was included (or not deleted from the relevant drafting precedent) in error by Cascade's solicitors when drafting the document.

26. I am satisfied both that these are clear errors and that it is clear in each case what the correction should be, namely the

substitution of the address of Cascade's registered office in the BVI for that of its administrative office in Jersey and the 'red ink' deletion of the incorrect recital that Cascade is 'a bank named in the Third Schedule to the Central Bank Act 1942.'

27. Even if I were not satisfied that it is appropriate to construe the mortgage deed subject to those corrections, it could not avail Larianov for the following reason. In its submissions, Cascade points out that an error in the description or address or a mortgagee is of a different order than an error in its name, and does not carry the same consequences. They rely, presumably by analogy, on three passages from the chapter entitled 'Form and Content of Deeds' in the textbook Wylie and Woods, *Irish Conveyancing Law*, (3rdedn, Tottel Publishing, 2005), which deals with the form and contents of deeds for the conveyance of registered and unregistered lands.

28. The first, at para. 18.19, states:

> 'It is usual to describe each party by his full name, ie, Christian or forename or names in full and the surname. Care should be taken over this, as a mistake can cause considerable difficulties in later transactions. If the name now differs from that given in an earlier deed, or a mistake was made in the latter, it may be useful to draw attention to the discrepancy directly, eg, by stating that the party (probably the vendor) was called by such and such a name when reciting the deed in question. It is, however, settled that, if a mistake does occur, the court will correct it on being shown sufficient evidence of the error. The need for accuracy in respect of names is vital for registration purposes, for the key to the Registry of Deeds system is the Index of Names.'

29. Whereas the second, at para. 18.20, notes:

> 'It is also usual to give each party's address or, in the case of a company, its registered office. This helps to identify the parties more clearly and may resolve any doubt created by the name given.'

30. And the third, at para. 18.21, under the heading 'Occupation', continues:

> 'It was also the traditional practice to give each party's occupation…. But most solicitors regard this as superfluous nowadays, since the full name and address are usually quite sufficient to identify the party in question.'

31. Here, there was no error in the identification of Cascade by name. Nor is there any suggestion that the name it provided created any doubt or confusion about its identity. To that extent, I accept on the evidence before me that, even if uncorrected, the errors concerned were immaterial to the validity of the deed.

32. For the sake of completeness, I should say that I reject the separate argument advanced by Larianov that the incorrect recital in the body of the mortgage deed that Cascade is 'a bank named in the Third Schedule to the Central Bank Act 1942', requires the court to hold that the said deed is ineligible for any priority over Larianov's judgment mortgage on the ground of public policy. In advancing that argument, Larianov relies on s. 7 of the Central Bank Act 1971, as amended, which prohibits a person who does not hold a banking licence from carrying on banking business or holding himself out or representing himself as a banker or as carrying out banking business. Section 58 of that Act provides that any person who contravenes s. 7 is guilty of a criminal offence. However, I have already concluded, on the uncontroverted evidence before me in these proceedings, that the relevant recital was included in the mortgage deed concerned through an innocent mistake. It would be inconsistent with that finding to hold, as Larianov invites me to do, that the inclusion of that recital can only amount to 'a criminal misrepresentation' on the part of Cascade, which deprives the charge created by the mortgage deed in which it appears of any priority over Larianov's judgment mortgage.

33. Larianov advances one further separate argument on the validity of the mortgage deed. It is that the mortgage deed is invalid because, while it has been executed on behalf of Prendergast, it has not been executed on behalf of Cascade, as mortgagee. No authority has been cited by Larianov for the proposition that a mortgage deed that it not executed by or on behalf of a mortgagee is invalid. In arguing the contrary, Cascade relies on the following authority. First, it refers again to the text *Irish Conveyancing Law*, already cited, and a further analogy between the law governing a deed of conveyance, on the one hand, and a mortgage deed, on the other. In respect of the former, Cascade submits that the text confirms, at paras. 18.77 and 18.123, that there is no requirement that, to be valid, a deed of transfer must be executed by the transferee. On that basis, it invites the court to conclude that the position is the same in respect of a mortgage deed.

34. Cascade further makes reference to two English cases on mortgage deeds. The first is the decision of the Court of Appeal for England and Wales in *Eagle Star Insurance Ltd v Green* [2001] EWCA Civ 1389. That case involved an application for permission to appeal a decision of the Swansea County Court. One of the points raised in seeking permission to appeal was that the mortgage deed on foot of which the respondent mortgagee had obtained an order for possession of the applicant's property was invalid because, as a 'contract…for the disposition of an interest in land', it had not been signed by or on behalf of each party to the contract, contrary to the strict requirement of s. 2 of the Law of Property Miscellaneous Provisions Act 1989, because it had not been signed by or on behalf of the respondent Eagle Star Insurance Limited. In refusing leave to appeal, Mummery LJ pointed out very simply that a mortgage deed is not a contract and that, while a contract to create a mortgage is plainly captured by s. 2, a mortgage deed is not. That finding suggests, if only by implication, that there is no infirmity in a mortgage deed simply because it has not been signed by the mortgagee.

35. The second authority relied upon by Cascade in support of this aspect of its rebuttal is another decision of the Court of Appeal, this time in a case called *Helden v Strathmore Ltd* [2011] EWCA Civ 542. Giving judgment for the Court on the appeal in that case, Lord Neuberger MR considered a submission that, on the basis of certain admitted defects, a mortgage deed was invalid as in breach of both s. 2 of the 1989 Act, already considered, and the separate requirements of s. 53 of the Law of Property Act 1925. Having rejected the appellant's argument on s. 2, Lord Neuberger MR went on to note (at para. 29) that the argument on s. 53 of the 1925 Act was 'only marginally less weak' in that, although that section does apply to mortgage deeds (unlike s. 2 of the 1989 Act), it 'merely requires the arrangement to be in a document signed by the person creating or disposing of the interest.' It is not clear how much further that decision takes Cascade's argument here, if any distance at all, since no attempt has been made to identify a statutory provision in this jurisdiction equivalent in its terms or effect to s. 53 of the 1925 Act.

36. Nevertheless, having considered the submissions on this point as a whole, it seems to me that I cannot accept the argument that the mortgage deed is invalid simply because, although executed by Prendergast as mortgagor, it has not been executed by Cascade as mortgagee.

The issue of priority

37. Larianov's judgment mortgage was registered as a burden on the lands by the Property Registration Authority on 9 January 2012. Cascade's mortgage deed was registered in the Land Registry as a burden on the lands on 30 August 2012. Which of those charges

takes priority?

38. The Land and Conveyancing Law Reform Act 2009 ('the 2009 Act') came into operation, in material part, on 1 December 2009. Part 11 of the 2009 Act deals with judgment mortgages. Section 116 provides that a person may apply to the Property Registration Authority to register a judgment against a person's estate or interest in land. Section 117 provides, in material part:

> '(1) Registration of a judgment mortgage under section 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt….
>
> …
>
> (3) The judgment mortgage is subject to any right or incumbrance affecting the judgment debtors land, whether registered or not, at the time of registration.'

39. I am satisfied that, at the time when Larianov's judgment mortgage was registered on 9 January 2009, Cascade had a right or incumbrance affecting Prendergast's lands, though an unregistered one, in the form of the mortgage deed entered into by Prendergast on 24 March 2004, the validity of which was confirmed by its registration as a charge over the lands in the Companies Registration Office on 1 April 2004.

40. What is the effect of s. 116 (3) of the 2009 Act? According to Professor Wylie in *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary* (2009):

> 'This confirms the position of a judgment mortgagee is not a "purchaser" but is a mere volunteer. Thus the judgment mortgage is subject to the prior rights or incumbrances affecting the judgment debtor's interest in the land, whether or not they have been registered and whether or not the judgment mortgagee has notice of them: see *McAuley v Clarendon* (1858) 8 IrCh R 121; *Eyre v McDowell* (1861) 9 HLC 620; *Quinn v McCool* [1929] IR 620; *ACC Bank plc v Markham* [2005] IEHC 437. As regards registered land, this was governed by s. 71(4) of the Registration of Title Act 1964: see also *Re Murphy and McCormack's Contract* [1930] IR 322; *Re Strong* [1940] IR 382; *cfTempany v Hynes* [1976] IR 101; Wylie *Irish Land Law* (3rdedn, Tottel Publishing, 1997), para 13.182; Wylie and Woods, *Irish Conveyancing Law* (3rdedn, Tottel Publishing, 2005) para 12.06. See now s 71(2)(c) substituted by s 130 of the 2009 Act: see the Note to that section.'

41. Section 71 (registration of judgment mortgages) of the Registration of Title Act 1964 (the 1964 act'), as substituted by s. 130 of the 2009 Act provides:

> '71.-(1) Application for registration of a judgment mortgage under *section 116 of the Land and Conveyancing Reform Act 2009* shall, in the case of registered land, be in such form and in such manner as may be prescribed.
>
> (2) Registration under *subsection (1)* shall operate to charge the estate or interest of the judgment debtor subject to-
>
> (a) the burdens, if any, registered as affecting that estate or interest,
>
> (b) the burdens to which, though not so registered, that estate or interest is subject by virtue of s. 72,
>
> (c) all unregistered rights subject to which the judgment debtor held that estate or interest at the time of registration,
>
> and with the effect stated in *section 117* of the said 2009 Act.'

42. On their face, the effect of the provisions just described is to give Cascade's mortgage deed, created on 24 March 2004 though not registered until 30 August 2012, clear priority over Larianov's judgment mortgage registered on 9 January 2012 since, on the latter date, Cascade's legal mortgage deed was an existing right or incumbrance affecting Prendergast's lands, subject to which Prendergast, as judgment debtor, held those lands.

43. But Larianov argues that that is not so. It does so by reference to the judgment of Carroll J. in the case of *Industrial Credit Corporation plc v M. and J. Gleeson and Company Ltd & Anor*. (Unreported, High Court, 18 February 1992) and the terms of s. 74 (priority of registered burdens) of the Registration of Title Act 1964.

44. Section 74 provides:

> 'Subject to any entry to the contrary on the register, burdens which are registered as affecting the same land, and which, if unregistered would rank in priority according to the date of their creation, shall, if created or arising since the first registration of the land, rank according to the order in which they are entered on the register and not according to the order in which they are created or arise, and shall rank in priority to any other burden affecting the land and created or arising since the first registration of the land, not being a burden to which, though not registered, the land is subject under section 72.'

45. The issue in *Industrial Credit Corporation* was one of the order of priority between a judgment mortgage and a prior unregistered charge. The plaintiff in that case had advanced a loan to certain persons to acquire a public house premises, subject to getting a first legal mortgage over that premises. Between the date of the execution of that mortgage deed and its registration, two judgment mortgages were registered as a burden on the lands, one by the defendant. In addressing that controversy, Carroll J identified a 'possible inherent contradiction' between the general provision of s. 74 of the 1964 act, which ranks the priority of burdens on the register according to the date of their creation, and the special provision of [the original] s. 71 (4) of that Act, which is in materially identical terms to the present s. 71 (2) of that Act, and which made the registration of a judgment mortgage subject to all pre-existing unregistered rights subject to which the judgment debtor held the lands concerned.

46. Carroll J took the view that the possible contradiction between those provisions could be resolved by treating the payment of the loan monies, which preceded the registration of the judgment mortgages at issue, as having created an equitable charge which could then take priority over those judgment mortgages. Larianov submits that, it follows from this analysis that, since its payment of loan monies to Prendergast predated the payment of loan monies to Prendergast by Cascade, each of those payments created an equitable charge that takes priority over Larianov's judgment mortgage. Further, since Larianov's equitable charge was first in time, it should take priority over Cascade's equitable charge. Even if I were to accept that argument as far as it goes, it would still be necessary to take into consideration the fact that Larianov's equitable charge cannot take priority over Cascade's registered charge,

having regard to the terms of s. 68 (3) of the Registration of Title Act 1964. Accordingly, Cascade's registered charge must take priority.

47. I should add that, for my part, I would resolve any possible tension between those provisions by applying the maxim of interpretation '*generalia specialibus non derogant*' i.e. that the general does not derogate from the specific, or that provisions of more universal application do not prevail over, or detract from, those of specific application to the same subject matter. That view, if not stated in those terms, is reflected in Deeney, *Registration of Deeds and Title in Ireland* (Bloomsbury Professional, 2014) at para. 18.04, where that author states:

> '[Section 74 of the 1964 Act] settles the priority of registered burdens inter se according to the order in which they are entered in the register, and not the date of their creation, subject to any entry to the contrary on the register. However, it excludes from its effect burdens whose priority is created by statute and judgment mortgages which are created by registration, and whose priority is fixed by virtue of [s. 71(2) of the 1964 Act] as substituted [by s. 130 of the 2009 Act].'

Conclusion

48. For the reasons I have given, I am satisfied that Cascade's mortgage deed is valid and that that it takes priority over Larianov's judgment mortgage.

49. I will hear the parties in relation to the appropriate orders to be made in the proceedings in consequence of the findings I have made.