

## THE HIGH COURT

[2014 No. 89 COS]

**IN THE MATTER OF THE COMPANIES ACT 1963 TO 2013 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 106 OF THE COMPANIES ACTS 1963 AND IN THE MATTER OF FRANK BELL & SON LIMITED AND IN THE MATTER OF AN APPLICATION MADE BY DENIS F. SHAW, JOHN SHAW, SEAMUS TUNNEY AND KATHY GARVEY PRACTISING UNDER THE STYLE AND TITLE OF J.A. SHAW & CO., SOLICITORS**

**JUDGMENT delivered the 18th February, 2015 by Mr. Justice Michael White**

1. J.A. Shaw & Co., Solicitors (the Applicants) have applied by way of originating notice of motion for an order pursuant to Section 106 of the Companies Act 1963 extending the time for the registration of a charge created by deed of mortgage and charge dated the 25th April, 2003 between Frank Bell & Son Limited as mortgagor and Bank of Scotland (Ireland) Limited as mortgagee. The mortgage and charge relates to an industrial unit at Number 12 Mullingar Business Park, Mullingar, Co. Westmeath registered on Folio 11661F of the Register County Westmeath.

**History**

2. By facility letter of the 9th December, 2002 Frank Bell & Son Limited (the Company) was offered a loan of up to €750,000 for a term of 21 years, to refinance borrowings from ACC Bank and Anglo Irish Bank. The offer was accepted by the directors of the Company on the 7th January, 2003. The security covered the borrowers general liabilities to Bank of Scotland (Ireland) Limited. The legal charge to be taken was on the industrial unit at Number 12 Mullingar Business Park, Co. Westmeath and another property the Gaelscoil Grange, Mullingar, Co. Westmeath.

3. The Applicants gave a Solicitor's undertaking in the standard Law Society form on the 26th February, 2003.

4. Mr. Seamus Tunney on behalf of the Applicants in his affidavit sworn on the 12th February, 2014 stated that due to inadvertence the deed of mortgage and charge was not registered, and there was a failure to deliver particulars of the charge to the Registrar of Companies within 21 days, in compliance with Section 99 of the Companies Act 1963. The charge was registered on the folio on the 27th August, 2013.

5. The Company received a further loan facility on the 26th January, 2005 from Bank of Scotland (Ireland) Limited for €500,000. The amount advanced to the Company on the original facility of 9th December, 2002 was discharged in full by the Company by the 10th October, 2005. The loan facility of the 26th January, 2005 had also been repaid by July 2005.

6. A subsequent facility letter of the 22nd June, 2006 was offered by Bank of Scotland (Ireland) Limited to the Company for an amount up to €400,000 over a term of five years. The security was an extension of the Charge on No. 12 Mullingar Business Park, Mullingar, Co. Westmeath. This facility offer was accepted by the directors of the Company and signed on 26th June, 2006. There is still an outstanding sum due to Bank of Scotland (Ireland) Limited on amounts advanced by this facility.

7. An original charge registered on Folio 11661F in favour of ACC Bank was cancelled on the 8th July, 2013.

8. Frank Bell a director of the Company registered a charge in the Companies Office on the 9th September, 2013 which had been created on the 28th August, 2013 for an amount of €842,925 in his favour. Subsequently a charge in his favour was registered on Folio 11661F on the 11th September, 2013.

9. The Applicants had acted for the company over many years and had been involved in many transactions. Their professional relationship broke down, as evidenced by a letter of the 9th July, 2013 from Denis F. Shaw of the Applicant's firm to Mr. Frank Bell.

10. It is acknowledged by the Applicants that in order to register the original deed of mortgage and charge, the reference to the Gaelscoil property at Grange, Mullingar was deleted, as Bank of Scotland (Ireland) Limited by letter of the 8th November, 2005 to the Applicants had released their charge over this property.

**Jurisdiction to Permit Late Registration.**

Section 106(1) of the Companies Act 1963 provides that:- The court, on being satisfied that the omission to register a charge within the time required by this Act or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or mis-statement shall be rectified.

“

11. The relief is discretionary on the court being satisfied:-

- That the omission was accidental or due to inadvertence or to some other sufficient cause.
- It will not prejudice the position of creditors or shareholders of the Company or
- That it is otherwise just and equitable to grant relief.

12. The Applicants have submitted that the court if it extends time should direct the Registrar of Companies to register the charge in priority to the charge registered in the Companies Office on the 9th September, 2013 by Frank Bell, the director of the Company.

13. Section 99 (1) provides that any charge created by the Company shall insofar as any security on the Company's property undertaking is conferred thereby could be void against the Liquidator and any Creditor of the Company..... "unless the prescribed particulars are registered within 21 days after the date of its creation.

14. Courtney the Law of Companies 3rd Edition 2012 at 19.08 states:-

"A registrable charge that is not registered will be void against a subsequent creditor even where that creditor is aware of the prior charge. Authority for this is again in a case of *Re Monolithic Building Co* where the subsequent encumbrancer, who registered his charge notwithstanding his knowledge of the existence of a prior unregistered mortgage, was held by the Court of Appeal, to have priority. His knowledge of the prior charge did not preclude him from insisting on his rights as a registered debenture holder. "

15. In *Re Monolithic Building Company* [1915] 1 Ch. 643, the Court of Appeal confirmed that a subsequent chargeholder (who was also director) with notice of the prior unregistered charge was nevertheless entitled to take advantage of legal rights which flowed from the statutory provision, and the unregistered charge remained void against him. Phillimore L.J. described the consequences of non registration in the following terms:- at p667

"It makes void a security; not the debt, not the cause of action, but the security, and not as against everybody, but not as against the company grantor, but against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company."

16. If the court accedes to the application to admit the charge to be registered out of time, the issue arises as to the priority of the charge.

17. Courtney the Law of Companies 3rd Edition 2012 at 19.094 states:-

"It is usual for the court to insist the late registration is to be without prejudice to rights acquired by others".

This principle is commonly referred to as the Joplin proviso from the early 20th century English case *Re Joplin Brewery Co* [1902] 1 Ch. 79.

### **The Allegation of Mala Fides against Frank Bell**

18. In his supplemental affidavit of the 24th March, 2014, Mr. Seamus Tunney, Solicitor, challenges the *bona fides* of Frank Bell as to his state of knowledge about the deed of mortgage and charge and also his *bona fides* in registering the charge on the folio and in the Companies Office in respect of the personal debt due to him from the Company. This affidavit was sworn in response to the original affidavit of Frank Bell sworn on the 10th March, 2014.

19. In particular at paragraph 12 of his Affidavit of the 24th March, 2014 Mr. Tunney views with considerable scepticism the assertion by Mr. Bell that he had been engaged in financial planning in 2012 and had taken advice as to how his loan to the Company could be protected.

20. There is also considerable controversy between the Applicants and Frank Bell, as to the continued existence of a charge on Folio 11661F. Mr. Bell has stated in his affidavits that on a number of occasions he had discussions with Bank of Scotland (Ireland) Limited and with the Applicants about security held over various company properties. He states in his affidavits that his understanding was that the industrial unit 12 was no longer the subject of a charge from Bank of Scotland (Ireland) Limited, as he had sought to engage the bank with providing alternative security by way of other property development sites.

21. In his affidavits Frank Bell has exhibited a number of documents to support his *bona fides* in registering the charge on the Folio and in the Companies Office.

22. The documents are:-

(1) Pre Lease enquiries in respect of Unit 12 Mullingar Business Park arising from a proposed Lease to Gosseraft Kitchens and Clear Electrical, where he refers to Requisition 6.1 which asks the question if the property is subject to any Mortgage in Charge. The answer given by the Applicants was "No. Prior ACC Charge registered at Entry No. 2 Part 2 of Folio is discharged." The Company contends that this reflects the information given to him that the relevant Folio 11661F was free of charge.

(2) A letter of the 6th May, 2011 from the Applicants to the Company, when at sub paragraph 8 to the letter states "Folio 11661F Co. Westmeath registered to Frank Bell & Son Limited, this comprises Unit 12 Mullingar Business Park.

This property is subject to a mortgage with ACC from 2001 and it is to be clarified if this mortgage has been fully cleared and if so we can take up a discharge as referred to in respect of the previous charges".

(3) An extract from his own diary of the 28th November 2011, wherein he notes "Denis, what undertaking has he on €400,000 with BOS and how long, it was six sites in Ardmore and they had an undertaking with Shaws". The Company contends, that reflects the position as Mr. Bell understood it, that the security held by Bank of Scotland (Ireland) Limited was over six sites in Ardmore rather than Unit 12 Industrial Estate, Mullingar.

(4) Counsel's Opinion of the 5th December, 2012 where advice was tendered to Frank Bell about securing loans advanced to the Company of €500,000 to €600,000, when he was advised that it was appropriate to register a charge.

23. Mr. Bell also relies on the affidavit of Jim Stafford, accountant sworn on the 24th April, 2014 stating that on the 5th January, 2012 he gave financial advice to Frank Bell in the context of monies owing to him by the Company and outlined the options opened to Frank Bell including taking a charge over the assets of the Company.

### **Conclusion**

24. The Applicants made serious errors over a number of years in failing to register the Bank of Scotland (Ireland) Limited charge on the Folio and failure to address the issue of notifying the Companies Office of the charge.

25. However the facility letter of the 22nd June, 2006 sets out at Paragraph 3 (i) "an extension of Bank of Scotland (Ireland) Limited's first specific Charge over the freehold land and premises of the Borrower consisting of an industrial unit at No. 12 Mullingar Business Park, Mullingar, Co. Westmeath". That facility letter was signed by Frank Bell on the 26th June, 2006. The Company's opposition to the extension of time to register the charge is thus unreasonable.

26. The Applicants have not established mala fides against Frank Bell. He took financial advice in early 2012 about his loans to the Company and sought legal and Counsel's advice. He could well have been confused as to what security was held against Unit 12 Industrial Estate, Mullingar, even though he had signed the facility letter of the 22nd June, 2006.

27. It is appropriate to extend the time to register the charge in the Companies Office without prejudice to the rights of Frank Bell. The charge should have priority in the Companies Office from the date of the application to this Court, the 13th February, 2014. It is appropriate that time be extended for a period of 21 days from the date of perfection of the order to allow the charge to be registered in the Companies Office.