

THE HIGH COURT

2011 591 COS

IN THE MATTER OF PELETON LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 106 OF THE COMPANIES ACTS 1963 – 2009

Judgment of Miss Justice Laffoy delivered on 19th day of December, 2011.

1. The application

1.1 Although this is not disclosed on the originating notice of motion dated the 11th October, 2011 which initiated this application, the applicant is the National Asset Management Agency (the Applicant).

1.2 By a Deed of Appointment of Statutory Receiver dated 16th June, 2011, the Applicant, in pursuance of the powers contained in s. 147 of the National Asset Management Agency Act 2009 (the Act of 2009) appointed Declan Taite (the Receiver) to be Statutory Receiver of all the assets referred to and comprised in and charged by the security documents listed in the schedule thereto. The schedule referred to "Mortgage Debentures dated 15 March 2004 and 20 October 2004 between Peleton Limited of the one part and Allied Irish Banks Plc of the other part". On 15th July, 2011 the Companies Registration Office (CRO) received a form E8 (notice of appointment of a receiver) in relation to the appointment of the Receiver. By letter dated 29th September, 2011 the CRO returned the form E8 because there was no record of a mortgage dated 20th October, 2004 in the CRO and sought clarification.

1.3 On this application the Applicant seeks an order pursuant to s. 106 of the Companies Act 1963 (the Act of 1963) extending the time for registration in the CRO of a "Deed of Charge" dated 20th October, 2004 entered into between Peleton Limited (the Company) of the one part and Allied Irish Bank Plc (the Bank) of the other part.

2. Section 106

2.1 Sub-section (1) of s. 106, insofar as it is material to this application, provides as follows:

"The court, on being satisfied that the omission to register a charge within the time required by this Act . . . 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, . . ."

The notes on the Court's jurisdiction under s. 106 and on the effect of an order under that section contained in MacCann and Courtney *Companies Acts 1963 – 2009* (2010 Ed.) outline the current state of the law accurately.

3. The evidence to support the application

3.1 The Applicant's application was grounded on an affidavit sworn on 11th October, 2011 by a solicitor in the firm of solicitors acting for the Applicant. There was exhibited therein a plain photocopy of a deed described on the back sheet as "Mortgage/Charge" dated 20th October, 2004 made between the Company of the one part and the Bank of the other part, which appeared to be properly executed by the Company. I will refer to this deed as "the October 2004 Charge". The October 2004 Charge created a mortgage by sub-demise over the property described in the schedule thereto as follows:

". . . the premises demised and described in an Indenture of Lease dated the 24th day of June, 2004 made between John Fraher, Jack Ronan and Richard Pratt of the one part and [the Company] of the other part being the premises known as Unit 5 Clonmel Retail Park, The Poppyfield Centre at Clonmel in the county of Tipperary . . ."

The photocopy exhibited did not contain any evidence that the appropriate stamp duty had been paid in respect of the deed. There was also exhibited a copy of Folio 3380L of the Register of Leaseholders, County Tipperary which related to the leasehold interest created by what was described as a Sub-Lease dated 25th June, 2004 from John Fraher, Jack Ronan and Richard Pratt to the Company for the term of twenty five years from 1st April, 2004 at the yearly rent specified in the instrument. From the description of the property on Folio 3380L that was obviously the lease intended to be referred to in the October 2004 Charge. I will refer to it as "the June 2004 Sub-Lease". The Folio disclosed that on 6th April, 2009 the Company was registered as full owner with absolute title on Folio 3380L. Two charges were registered as burdens on the Folio in the following order of priority:

(1) On 6th April, 2009 a charge for present and future advances repayable with interest was registered and the Bank was registered as owner of the charge.

(2) On 9th March, 2006 a charge for present and future advances repayable with interest was registered and Musgrave Ltd. (Musgrave) was registered as owner of the charge.

I note that the entry on Folio 3380L suggests that stamp duty was paid on the charge registered at (1) above.

3.2 There was an averment in the grounding affidavit that, having made appropriate inquiries, it appeared that the delivery of the particulars in relation to the October 2004 Charge to the CRO in accordance with s. 99 of the Act of 1963 was, due to inadvertence, never attended to. However, the nature of the inquiries made by the solicitors for the Applicant was not outlined.

3.3 There was also exhibited in the grounding affidavit a CRO printout dated 10th October, 2011 in relation to the Company, which disclosed that particulars of the following charges created by the Company had been filed in the CRO:

(a) A Mortgage Debenture dated 15th March, 2004 (the March 2004 Debenture) in favour of the Bank, which was registered on 24th March, 2004.

(b) A Charge on land created on 21st December, 2004 (the December 2004 Charge) in favour of the Bank. The particulars of the property charged disclosed that the property charged was the property the subject of the October 2004 Charge. In other words, the December 2004 Charge appeared to be a replica of the October 2004 Charge. The December 2004 Charge was registered on 23rd December, 2004.

(c) A charge in favour of Musgrave, which was created on 23rd February, 2006 and registered on 7th March, 2006.

3.4 When the application first came before the Court on 7th November, 2011 there was proof of service of the application on the Receiver, the Bank, the Company and the CRO. The Court was furnished with a letter from the CRO dated 13th October, 2011 indicating that the Registrar had no objection to the application. A letter dated 27th October, 2011 directly to the Applicant from P. J. O'Driscoll & Sons, (solicitors for the Company) was also before the Court. The letter did not signify consent to the extension of time. It was commented that it appeared that the validity of the Receiver's appointment was called into question and a meeting was requested.

3.5 When the matter was before the Court on 7th November, 2011, the Court sought an explanation as to the registration of the December 2004 Charge, which appeared to replicate the October 2004 Charge. There is now before the Court the following additional evidence:

(a) a supplemental affidavit sworn on 9th December, 2011 by the solicitor who swore the grounding affidavit exhibiting correspondence to and from the Bank and to and from the solicitors who acted for the Company in 2004 (the Company's solicitors); and

(b) an affidavit sworn on 15th December, 2011 by Neil Campbell, a solicitor of the Bank. Mr. Campbell was not personally involved in the original security process and his explanation of what happened is based on his examination of the Bank's records and correspondence with the Company's solicitors. However, he has acknowledged in his affidavit that, while the Company's solicitors were responsible for registration in the Land Registry, he could find no undertaking from them, which "left the Bank with the obligation to ensure compliance with the provisions of the Companies Acts governing the registration of charges".

(c) A certified copy of the dealing which was lodged in the Land Registry to register the June 2004 Lease and the incumbrances in favour of the Bank obtained from the Property Registration Property (PRA).

One document which has not been exhibited, which might cast some light on the unusual facts disclosed in the printout, is a copy of the form (Form C1) on foot of which the particulars of the December 2004 Charge were registered in the CRO. However, notwithstanding that omission, I think the full story emerges from the documentation before the Court.

4. The full story

4.1 The Company's solicitors lodged the original dealing which led to the opening of Folio 3380L and the registration of the Company and the Bank's charge thereon on 15th November, 2004, that is to say, after the creation of the October 2004 Charge, but before the creation of the December 2004 Charge. The papers lodged included the June 2004 Lease and what was described in the schedule of documents lodged as "AIB Debenture 15th March, 2004". There was also lodged in the Land Registry a letter from the Bank dated 20th October, 2004, addressed to the Registrar, wherein the Bank consented to the use of the "enclosed Mortgage/Debenture dated 15th March, 2004 for the purposes of registration". From the documents obtained from the PRA, it appears that the March 2004 Debenture was registered in the Registry of Deeds on 2nd April, 2004. The first part of the first schedule, the purpose of which was to set out the details of the property thereby specifically mortgaged by demise, was left blank.

4.2 The application to the PRA was, in effect, an application for first registration of the leasehold interest created by the June 2004 Lease. It took some time to process and, as Folio 3380L discloses, registration was not complete until April, 2009.

4.3 By letter of 7th October, 2008 the PRA informed the Company's solicitors that the documents presented could not be registered until the defect outlined therein had been remedied. The defect was set out as follows:

"The first part of the first schedule of the Deed of Charge has not been completed. Please attend to the same."

That defect obviously related to the March 2004 Debenture, the original of which was obviously returned to the Company's solicitors at that stage, as is noted on the copy thereof retained. It was also noted on the copy retained that €630 stamp duty had been paid.

4.4 By letter dated 5th December, 2008 the Company's solicitors responded to the PRA query. The letter stated that the writer was returning "the Deed of Charge dated 20th October, 2004 referring to the Charged Property in the schedule thereto". It is clear that it was the March 2004 Debenture which was returned by the PRA and that the October 2004 Charge had not been previously lodged in the Land Registry. The copy of the October 2004 Charge held by the PRA was exactly the same as the copy exhibited in the grounding affidavit on this application. It showed no particulars of stamping. I surmise that it was assumed by the PRA official that the copy document it received with the letter of 5th December, 2008 was a copy of the original charge (the March 2004 Debenture), which it had returned to the Company's solicitors on 7th October, 2008. While that was not the case, it explains why the PRA registered, as a burden on Folio 3380L, a charge which had not been stamped. However, that deficiency has been corrected, because on 7th December, 2011 the Revenue issued a stamp certificate establishing that the stamp duty and penalties have been paid in relation to the October 2004 Charge.

4.5 To summarise the title position, the October 2004 Charge has been registered as a burden on Folio 3380L, having been lodged with the PRA in December 2008. However, as I have pointed out, the date of the lease under which the property is held by the Company is incorrectly stated in the schedule to the October 2004 Charge.

4.6 Returning to how the December 2004 Charge came into existence and how particulars thereof came to be filed in the CRO, I assume that Mr. Campbell did not have the benefit of seeing the certified copy of the documents lodged originally in the Land Registry and now held by the PRA. In my view, it is absolutely clear that the October 2004 Charge was not lodged in the Land Registry with the dealing on 15th November, 2004. Therefore, I believe the Company's solicitors retained the original of the October 2004 Charge. The original has not been produced on this application. However, it seems from Mr. Campbell's inquiries and investigations that the error in failing to have particulars of the October 2004 Charge delivered to the CRO, within the time limited by, and in accordance

with, s. 99 of the Act of 1963, was identified at some point and that that led to the execution of the December 2004 Charge. What appears to have happened was that although the October 2004 Charge had been executed by the Company, that fact was ignored and a replica was executed by the Company and the date 21st December, 2004 was inserted in it. The original of the December 2004 Charge has been put before the Court, as I understand it, it having been received from the Company's solicitors. The December 2004 Charge was never stamped, and, it would appear, was never intended to be acted upon by the Bank, although particulars of it were delivered to the CRO for registration as if it were an effective charge. Clearly this should not have happened. The Bank had the benefit of the October 2004 Charge and it apparently intended to rely on it. Accordingly, an application should have been made at that stage under s. 106 to extend the time to register the October 2004 Charge.

4.7 There is exhibited in the affidavit of 9th December, 2011 a letter dated 28th November, 2011 from AIB, NAMA Case Management section, in Cork, signed by Gearoid Reddington, Manager, referring to this application and stating:

"We are writing to confirm that Allied Irish Banks Plc is not relying upon the charge dated 21st December, 2004 registered in the Companies Registration Office. We also confirm that we will take all necessary steps to vacate this charge and clear it from Companies Registration Office details."

5. Conclusions and order

5.1 I am satisfied that the Applicant is a "person interested" who may seek relief under s. 106, having taken over the security of the Bank under the October 2004 Charge. I am also satisfied, on the basis of the evidence now before the Court in the form of Mr. Campbell's affidavit, that the failure to deliver particulars of the October 2004 Charge to the CRO in accordance with s. 99 of the Act of 1963 was due to inadvertence on the part of the Bank, which has accepted that the delivery of the particulars was its responsibility. However, the manner in which the Bank set about rectifying the omission to register the particulars in accordance with s. 99 in December 2004 was wholly inappropriate. Therefore, as a condition to granting the relief sought on this application, I intend requiring the Bank to –

(a) give an undertaking to stamp the December 2004 Charge, and

(b) in accordance with the letter of 28th November, 2011, to give an undertaking to the Court confirming that it will not rely on the December 2004 Charge and will take all steps necessary to ensure that it cannot be relied on by executing a Deed of Release in favour of the Company and having a memorandum of satisfaction registered in the CRO.

I propose joining the Bank as a notice party to this application to procure such undertaking.

5.2 That leaves the issue of priority between the Bank and Musgrave. The Applicant has exhibited a number of letters in its original grounding affidavit relevant to that issue. The first, chronologically, is dated 17th February, 2004 and is from Ronan Daly Jermyn, Solicitors for Musgrave, to the Bank in which it is stated that Musgrave proposed to take "a charge over a Supervalu at Clonmel, County Tipperary which is leased to [the Company]". I assume that that is the property now registered in Folio 3380L County Tipperary. The letter stated the understanding that the Bank had a first charge over the property, stating that Musgrave wished to take a second charge to be stamped to cover €750,000 and consent to that was sought. The response was a letter of 8th March, 2004 from the Bank, which was copied to the directors of the Company. In it the Bank confirmed that it was agreeable to Musgrave taking a second charge over the property "subject however to your agreement that AIB Security shall rank first in order of priority for all indebtedness of [the Company] up to a limit of €2,500,000 together with interest costs and other charges". It was stated that the Musgrave security would rank second in order of priority "for all indebtedness of [the Company] up to a limit of €750,000 together with interest costs and other charges" and that the Bank's security would "rank third in order of priority for all sums thereafter". Over a year later, by letter dated 22nd April, 2005, Ronan Daly Jermyn confirmed that their client was happy with the order of priorities set out in the letter of 8th March, 2004. Broadly speaking, that agreement is reflected in the manner in which the Bank's charge and the Musgrave charge were registered as burdens on Folio 3380L.

5.3 The usual form of order made on an application under s. 106 contains a proviso that the order is without prejudice to the rights (if any) of parties acquired between the date of creation of the charge and the date of its actual registration in the CRO. While the general rule is that a subsequent chargee will have priority over a chargee who has failed to register in time, even though he had notice of the unregistered charge at the time he obtained his own charge, it is well settled that, if the subsequent charge is expressly subordinated to the earlier charge, the earlier charge will gain priority after late registration has been effected (*Re Clarets Limited; Spain v. McCann* [1978] ILRM 215).

5.4 Notice of this application was not given to Musgrave. It was averred in the Applicant's grounding affidavit that it was at all times accepted by all parties that the Bank's charge would rank in priority to the charge of Musgrave. However, that is not entirely accurate on the basis of what is contained in the letters to which I have referred above, and, in particular, the letter of 8th March, 2004. It is also averred that acceding to the application would not prejudice Musgrave or any third party. I simply do not know what the position is as regards "any third party". As regards Musgrave, it would appear that there was an agreement between Musgrave and the Bank. It is open to the Applicant, as successor in title to the Bank, to rely on that agreement, if a dispute arises with Musgrave. I propose including in the order the usual proviso which will not prejudice the Applicant because it will only save rights of third parties, including Musgrave, which can be established.

5.5 Accordingly, subject to the Bank giving the undertaking referred to at para. 5.1 above, there will be an order extending the time for registration of the particulars of the October 2004 Charge for twenty one days from the date of perfection of the order, but the order will be expressly without prejudice to the rights, if any, of parties acquired between the date of the creation of the said charge and the date of actual registration. Finally, the order will amend the originating notice of motion to show that the application is brought by the Applicant.

5.6 Counsel for the Applicant referred the Court to s. 218 of the Act of 2009, which provides that an acquired bank asset is not invalidated or rendered void or voidable as against the Applicant by, *inter alia*, s. 99 of the Act of 1963. The conclusions set out above were not influenced by that provision.