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No redactions required*



THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 95

Court of Appeal Record No 2019/280

Costello J.

Collins J.

Binchy J.

BETWEEN

PROMONTORIA (OYSTER) DAC

Plaintiff/Respondent

AND

SEAN McHALE

Defendant/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 26 March 2020

INTRODUCTION

1. This appeal raises issues concerning the interpretation and effect of section 73 of the Registration of Deeds and Title Act 2006 (“*the 2006 Act*”) and was heard with two other appeals raising similar issues, *Promontoria (Oyster) DAC v Greene* and *Promontoria*

(Oyster) DAC v McKenna. The Court also gives judgment on those other appeals today. This judgment should be read with those judgments.

THE FACTS

2. The material facts may be stated shortly. By special summons dated 29 June 2018 Promontoria (Oyster) DAC (“*Promontoria*”) brought proceedings against Mr McHale seeking a declaration that monies alleged to be due and owing by him – amounting, it was said, to €147,831.58 – stood well charged on his interest in the lands comprised in Folio 38240 County Mayo. An order for the sale of the lands was also sought, as well as other reliefs to which it is not necessary to refer.¹
3. Mr McHale is the sole registered owner of the lands in Folio 38240. His family home is not on those lands.
4. As I noted in my judgment in *Promontoria (Oyster) DAC v Greene*, this form of action is familiar and long-established.
5. Promontoria’s proceedings were grounded on an affidavit sworn by Albert Prendiville, one of its directors. Mr Prendiville stated that in 2012 Ulster Bank Ireland Limited (“*Ulster Bank*”) had agreed to make credit facilities in the amount of €129,000 available

¹ An amended summons was served in December 2018, pursuant to an order made on 20 November 2018. The amendment is not material to any issue on this appeal.

to Mr McHale on the terms and conditions set out in a Letter of Offer dated 4 May 2012 to which Mr Prendiville refers and which is exhibited by him. Mr Prendiville states that pursuant to that offer letter Mr McKenna “*agreed to provide a lien dated 22 December 2009 over the property described in the Schedule hereto as the security for the Loan Facility.*” The Schedule referred to appears to be the Schedule to the Special Summons which refers to the lands in Folio 38240. Mr Prendiville goes on to explain that in December 2016 Ulster Bank had agreed to transfer to Promontoria a portfolio of loan facilities, including Mr McHale’s facility and exhibits a (redacted) copy of the Deed of Transfer. Mr Prendiville goes on to explain that Mr McHale failed to make the required payments in accordance with the terms of the Letter of Offer. On 5 April 2018, Promontoria had issued a letter of demand but no payment had been made and, as of 12 June 2018, €147, 831.58 was due and owing.

6. The Letter of Loan Offer exhibited by Mr Prendiville (dated 4 May 2012) states, under the heading of security, “*Lien dated 22/12/2009 over Land Cert Folio No 38240 Co Mayo comprising of 57 acres of farmland at Creevagh, Carrowmore Lackan, Ballina, Co Mayo.*” Reference is also made to a life policy on the life of Mr McHale. The Letter of Loan Offer appears to have been signed by Mr McHale on 14 May 2012.
7. After referring to the Letter of Loan Offer, Mr Prendiville stated:

“I say that under and by virtue of deposit of equitable mortgage by the Defendant with the Plaintiff of Land Certificate for Folio 38240 of the Register of Freeholders for County Mayo, the lands and premises more particularly

described in the Schedule contained in the Special Summons hereto, which equitable mortgage was registered as a lien in favour of the Bank pursuant to section 73(3) of the Registration of Deeds and Title Act, 2006, on or about 22 December 2009 secured the payment of all monies due and owing by the Defendant to the Plaintiff in respect of the Letter of Loan Offer.”

8. Mr Prendiville also exhibits a copy of Folio 38240. It shows Mr McHale as the sole registered owner of the lands in the Folio. Part 3 of the Folio set out a number of burdens, including, at item 5b, a right of residence in favour of a named party which was registered on 16 May 1995.² Item 7 is a “*Lien pursuant to Section 73(3) of the Registration of Deeds and Title Act 2006, in favour of*” Ulster Bank. The date of registration is 22 December 2009. The entry is followed by a “*Note*” to the effect that “*The interest of [Promontoria] is noted*” by reference to an identified instrument dated 9 March 2017.

9. Mr McHale swore a number of affidavits. In his first affidavit (sworn on 23 October 2018, at which point the proceedings were still before the Master), he exhibited a letter sent by him to the solicitors acting for Promontoria in which he had requested copies/inspection of a various categories of documents “*by way of verification*” of Promontoria’s claim. The documents requested included certified copies of “*any and all documentation*” regarding the registration of the lien in favour of Ulster Bank, as well as evidence of the registration of Promontoria as owner of the lien and “*any and*

² Such a right is personal and does not operate to create any equitable estate in the land: section 81 of the Registration of Title Act 1964 (as amended, “*the 1964 Act*”)

all background legal documentation” as to how Promontoria came to be registered as owner. This material had not been provided to him. Mr McHale sought an adjournment to pursue his request as well as to clarify whether the loan was affected by what he referred to as “*the ongoing Ulster Bank Overcharge of Interest Redress Scheme*”. The affidavit refers to the fact that “*the debt being pursued in this instance previously was a primary debt held with Ulster Bank Ireland prior to the latter institution disposing of the debt to the present Plaintiff.*” It does not otherwise engage in any way with the substance of Promontoria’s claim.

10. Mr McHale swore a further affidavit on 12 December 2018, at which point an amended summons had been served. The affidavit stated that Mr McHale was fully defending the proceedings and disputing the reliefs sought but does not otherwise address the substance of the claim. The main thrust of the affidavit is to complain of Promontoria’s refusal to provide Mr McHale with documentation proving the existence “*of an equitable deposit of title deeds in the first instance.*” Mr McHale helpfully identified the documents he was seeking as “*the original Certificate of Equitable Deposit of the Land Certificate with Ulster Bank*” and/or as “*a certified copy of the Land Certificate so deposited as an equitable deposit with Ulster Bank in the first instance*” (at paras 4 and 5). This documentation had been sought in correspondence (which Mr McHale exhibited) but had not been provided.

11. Mr McHale swore a third affidavit on 3 May 2019, shortly before the hearing in the High Court. In it, he took issue with Mr Prendiville’s capacity to give positive evidence in support of Promontoria’s claim, referring to the decision of the Supreme Court in

Ulster Bank v O' Brien [2015] IESC 96. He complained about the redacted form in which the Global Deed of Transfer had been exhibited and “*the hearsay and bare assertion evidence provided to date.*” Again, however, Mr McHale’s principal focus appears to have been on Promontoria’s refusal “*to deal with the issue of the proof of the existence of the initial equitable deposit of title deeds*” (at para 5)

HIGH COURT HEARING AND DECISION

12. This was the state of the evidence when the proceedings came on for hearing before Barton J in the High Court on 13 May 2019. Promontoria was represented by solicitor and counsel while Mr McHale represented himself, assisted by a McKenzie friend. The Court was provided with the DAR transcript of that hearing which I have reviewed.
13. In moving the application, counsel for Promontoria explained that its position was that it was not necessary to adduce evidence of the equitable mortgage here in circumstances where the Folio disclosed the existence of a registered lien. Counsel submitted that no proof of the deposit of the land certificate was necessary given the conclusive effect of section 31 of the [Registration of Title Act 1964 and reference was made in this context to the decision of this Court in *Tanager DAC v Kane* [2018] IECA 352. Counsel accepted that, if the proceedings related to unregistered lands, proof of the deposit of the title deeds by way of equitable mortgage would be required but, he said, that was not the position in respect of registered land. As regards the claim more generally, he observed that Mr McHale had not mounted any defence, other than seeking the disclosure of documents none of which were material.
14. Mr McHale's submissions were very brief. He referred the Court to the decision of the High Court (Noonan J) in *Promontoria (Aran) Ltd v Burns* [2019] IEHC 75 and submitted that the Court should in the interests of justice refuse the relief sought or, in the alternative, adjourn the proceedings to plenary hearing.

15. At the conclusion of the hearing, the Judge gave an *ex tempore* ruling. He noted that paragraph 5 of Mr McHale's first affidavit implicitly acknowledged his debt and also noted that nowhere in any of the affidavits he had sworn was it denied that the money was owing. Nowhere in the correspondence exhibited had Mr McHale disputed the debt or disputed that an equitable deposit had taken place. While Judge expressed regret that a clearer explanation of the position had not been provided to Mr McHale in response to his correspondence, the fact was that his demand for proof of the deposit ignored the effect of the 1964 Act, as a result of which the Folio was conclusive evidence of the registered lien and no additional proofs were required. As regards the redaction of the global deed of transfer, those aspects of the deed affecting Mr McHale had been disclosed and the Judge was satisfied that his facility had been transferred to Promontoria. The facility letter had been signed by Mr McHale and he had not disputed that in any way and indeed had acknowledged that there was a debt. In all of those circumstances, the Judge concluded that it was appropriate to grant the reliefs sought, with costs. A stay was granted on the order for 28 days.

THE APPEAL

16. The only specific ground of appeal in Mr McHale's notice of appeal referred to the decision of the Supreme Court in *Promontoria (Oyster) DAC v Hannon* [2019] IESC 49 which, it was said, properly encapsulated the law dealing with precisely the same subject matter and legal issues as arose in Mr McHale's appeal. In its respondent's notice, Promontoria addressed that decision in some detail, asserting that it did not avail Mr McHale in any way. It appears that this notice prompted Mr McHale to review the full judgments in *Hannon* (he had previously seen only media reports of the decision) and in his written submissions he very properly acknowledged that the decision in *Hannon* was not aligned with his case having regard to the date of registration of the lien.

17. In those submissions, Mr McHale makes several points about the lien here. First, he reiterates his complaint about the absence of any evidence about the original deposit of the land certificate and the registration of the lien on the Folio by Ulster Bank. Second, he makes the point that the Folio merely "*noted*" the "*interest*" of Promontoria and that, he said, did not entitle Promontoria to rely on the lien. That was particularly so, Mr McHale said, where such "*interest*" was registered on 9 March 2017, "*over 7 years after the cut off point and expiry date for the registration of such valid liens under the legislation.*" Thirdly, Mr McHale questioned what proof there was, as 9 March 2017, that the actual Equitable Deposit or even the actual Land Certificate on which the original Lien was based still existed.

18. All of Mr McHale’s arguments were directed to the issue of the lien and no argument was advanced in relation to the Judge’s finding that the debt claimed was due and owing.
19. In his oral submissions – made with conviction and courtesy – Mr McHale re-iterated these arguments, emphasising that the Folio simply “*noted*” Promontoria’s interest in the lien which, he submitted, was not sufficient to entitle it to rely on it. He also stressed that Promontoria’s interest in the lien arose after the statutory cut-off date. Mr McHale adopted the arguments made by counsel for the respondent in *Promontoria v Greene* standing over the decision of the High Court in that case that an applicant for a well-charging order was required to give evidence of the creation of the equitable deposit and in particular the date on which it was created. Here, there was no proof of the deposit of the land certificate.
20. In its written and oral submissions Promontoria argued that registration of the lien as a burden on the Folio constituted “*conclusive evidence*” of the lien having regard to the provisions of section 31 and that no further evidence was necessary either as to the creation of the original lien by deposit of the land certificate (which, counsel noted, had not been disputed by Mr McHale in any event) or the registration of that lien as a burden pursuant to section 73(3) of the 2006 Act in 2009. As regards the form of entry noting the lien and noting the interest of Promontoria in the lien, that was precisely as per the Land Registration Rules. Reference was made in this context to Rules 98 and 101 of the Land Registration Rules 2012.³ It was standard procedure for a burden or change of

³ SI No 483 of 2012

interest in a burden to be recorded by reference to an instrument or the effect of it. As for the timing of the transfer, provided that a lien was registered as a burden within the 3 year period allowed by section 73 – as was the case here – that burden could be transferred at any time subsequently.

DISCUSSION

21. In my judgments in *Promontoria (Oyster) DAC v Greene* and *Promontoria (Oyster) DAC v McKenna*, I consider in some detail the status and legal effect of a lien registered as a burden pursuant to section 73(3) of the 2006 Act. The registration mechanism provided for by section 73(3) effected the conversion of a lien by deposit of a land certificate (or equitable mortgage) into a registered lien: *Promontoria (Oyster) DAC v Hannon* [2019] IESC 49. Thereafter the lien-holder's security comprises the registered lien. Registration of the lien constitutes "*conclusive evidence*" that the title of the registered owner is subject to such lien: section 31 of the 1964 Act.

22. Accordingly, Promontoria was entitled to rely on the register to establish conclusively that it was the holder of a section 73 lien registered as a burden on Folio 38240. Its interest in the lien is shown on the Folio. It was not required to adduce any further evidence on that point. Neither was it necessary for Promontoria to establish that Ulster Bank was entitled to have that lien registered in 2009 i.e. that, as of that time, it was the holder of a lien by deposit created by the deposit with it of the relevant land certificate by Mr McHale. The application for registration was made on notice to Mr McHale and if he was in a position to advance any objection to it, then it would have been considered by the Property Registration Authority. In any event, it is clear that the Authority was satisfied to register the lien in accordance with section 73. Such registration provides *conclusive* evidence that Ulster Bank was the beneficiary of a lien by deposit of the land certificate which was registerable pursuant to section 73. That follows from the

conclusiveness of the register as provided for by section 31 of the 1964 Act. No suggestion of any fraud or mistake is made. In fact, in none of the affidavits sworn by him does Mr McHale dispute that he had entered into a lien by deposit with Ulster Bank and he had, of course, signed a facility letter which identifies the registered lien as security for the sum being advanced by Ulster Bank.

23. Promontoria was not required to lead evidence in respect of the deposit of the land certificate. While that was, indeed, the event that created the equitable mortgage, that equitable mortgage had been converted into the section 73 registered lien and, as the registered holder of that lien, Promontoria was entitled to rely on it without having to lead evidence as to the circumstances in which and/or the date on which the prior lien by deposit was created by the deposit of the land certificate. It follows that, contrary to Mr McHale's submissions, the absence of such evidence was not a basis for refusal of the application. For the same reasons, Promontoria was not required to put the land certificate (which no longer has any force or effect and is no more than "*a piece of paper*") into evidence or establish its continuing existence .
24. That the Folio simply "*notes*" the "*interest*" of Promontoria does not affect Promontoria's entitlement to rely on it. No argument was made by Mr McHale to the effect that the benefit of the registered burden could not be transferred by Ulster Bank to Promontoria or that it had not been transferred as a matter of fact. Rule 101 of the Land Registration Rules provides for the modification of registered burdens and it was a matter for the Property Registration Authority to satisfy itself that it was appropriate to modify the burden and it was also a matter for the Authority to determine the form

in which such modification should be recorded on the Folio. The instrument to which reference is made in the Folio was at all times subject to inspection by Mr McHale: Rule 159. The entry here is in accordance with the relevant Land Registration Rules and it plainly discloses that Promontoria holds the interest in the lien and, as such, was and is entitled to rely on it.

25. The final point made by Mr McHale is that Promontoria's "*interest*" in the registered lien was registered in March 2017, long after the cut-off point provided for in section 73. The implication is that such interest is a nullity having regard to section 73. That argument is founded on a misunderstanding of the effect of section 73. It required the holders of liens by deposit to register their liens not later than 31 December 2009 (it is unnecessary to consider whether it was sufficient to *apply* for registration within that period). Ulster Bank's lien was in fact registered on 22 December 2009, within the relevant 3 year period. Once registered as a burden in accordance with section 73(3), subsequent changes in interest were not affected by section 73 and were instead subject to the 1964 Act and the Rules made under it in the ordinary way.

CONCLUSIONS AND ORDERS

26. Mr McHale has not demonstrated that the Judge erred in concluding as he did or in making the order that was made by him. It follows that I would dismiss the appeal and affirm the order made by the High Court.
27. The Judge made an order for costs in favour of Promontoria and there does not appear to be any basis for interfering with that order. As regards the costs of the appeal, it would seem to follow from the dismissal of the appeal that Mr McHale should pay Promontoria's costs.
28. If Mr McHale wishes to be heard on the terms of the order to be made by this Court (including as regards costs) he will have liberty to apply to the Court of Appeal Office within 21 days for a brief supplemental hearing. However Mr McHale should be aware that, if he requests such a hearing and the Court proceeds nonetheless to make orders in the terms I have provisionally indicated above, he may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Costello and Binchy JJ have authorised me to record their agreement with it.