

THE HIGH COURT

[2023] IEHC 65

2022 No. 90 COS

IN THE MATTER OF DIAMOND ROCK DEVELOPMENTS LIMITED

(IN LIQUIDATION) AND

IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

GERARD MURPHY (LIQUIDATOR OF DIAMOND ROCK DEVELOPMENTS

LIMITED (IN LIQUIDATION))

PLAINTIFF

AND

JOSEPH LEDDIN

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 13 February 2023

Introduction

1. These proceedings concern a mortgage in respect of a loan advanced by the defendant to Diamond Rock Developments Limited (the ‘**Company**’) in June 2018 prior to the Company going into liquidation. There were some additional issues raised between the parties which were not pursued at the hearing and therefore do not require to be addressed in this judgment.

2. There is no dispute that a loan was made by the defendant to the Company and the loan offer letter is exhibited in the plaintiff's grounding affidavit.
3. There is also no dispute that the loan gave rise to a deed of mortgage dated 8 June 2018 (the '**Mortgage**') which was executed on behalf of the Company and by the defendant, and which is also exhibited in the plaintiff's grounding affidavit. The lands charged by the Mortgage are set out in Schedule 2 of the Mortgage and comprise registered property in Belgooly, Co Cork (the '**Mortgaged Property**').
4. The Mortgage was registered by the defendant with the Property Registration Authority ('**PRA**') as a burden on the folio for the Mortgaged Property. However, it was *not* registered with the Companies Registration Office (the '**CRO**'). The Mortgage remains unregistered with the CRO.
5. A special resolution was passed to wind up the Company on 14 February 2022 and the plaintiff was appointed liquidator of the Company. The Mortgaged Property comprises the only significant asset of value remaining in the ownership of the Company (which is insolvent). There is no dispute regarding the liquidation or the plaintiff's appointment as liquidator.
6. The central issue in these proceedings concerns the priority which should be afforded to the defendant in respect of the Mortgage in circumstances where the Mortgage was not registered with the CRO pursuant to section 409 of the Companies Act 2014 (the '**Act**') at any time prior to the Company's liquidation but where the defendant says he is in possession of the Mortgaged Property due to a prior default on the loan and that he is entitled to sell as mortgagee in possession. If the defendant is correct he will secure the entire value of the Mortgaged Property for the benefit of himself to the exclusion of all other creditors of the Company. If the defendant is incorrect then the proceeds of sale of

the Mortgaged Property will be available for distribution *pari passu* amongst all unsecured creditors of the Company (there being no other secured or preferential creditors).

The parties and the background to this dispute

7. The plaintiff is the liquidator of the Company which, prior to its liquidation, carried on business as a property owner and developer. The Company ceased trading in 2019. The plaintiff was appointed liquidator on 14 February 2022.
8. The defendant is a creditor of the Company. In June 2018 he advanced €400,000 to the Company by way of loan for working capital. The loan was secured on the Mortgaged Property.
9. On 2 February 2022 the directors of the Company formed the view that the Company was unable to continue to trade by reason of its liabilities. Notice of a creditors' meeting of the Company was published in daily newspapers on 3 February 2022 advising that a creditors meeting would be held on 14 February 2022. At an extraordinary general meeting of the Company held on 14 February 2022 (in advance of the creditors' meeting), a special resolution to wind up the Company was passed. The defendant attended the creditors' meeting at which a statement of affairs was presented which confirmed that the primary asset of the Company was the Mortgaged Property with an approximate value of €340,000 and that the debts of the Company amounted to approximately €1.4 million, leaving a creditors balance in excess of €1 million.
10. Following his appointment as liquidator, the plaintiff was furnished with the Mortgage and the loan offer letter which the Company had entered into with the defendant. The plaintiff ascertained that the Mortgage had been registered as a burden on the relevant folio but that it had not been registered with the CRO.

11. The relevant Land Registry folio notes a burden registered over the Mortgaged Property on 31 July 2019 in the following terms:

“Charge for present and future advances repayable with interest. Joseph Leddin of....., is owner of this charge.

Note: the certificate as to registration required by Section 409 of the Companies Act, 2014 has not been produced”.

12. It is the plaintiff’s position that the failure by the defendant to register the charge in the CRO has the effect of making that charge void as against him as the liquidator of the Company.
13. It is the defendant’s position that the loan was not repaid in accordance with its terms and that this default in 2019 brought about the consequences of an ‘Enforcement Event’ as defined in the Mortgage. The defendant says he has been in possession of the Mortgaged Property since “*long before*” the plaintiff’s appointment as liquidator and the defendant says he intends to exercise all powers and entitlements vested in him under the Mortgage including the power of sale of the Mortgaged Property.
14. It appears that the Mortgaged Property had previously been subject to a contract of sale in November 2021 signed by the defendant on behalf of the Company, although his capacity and authority to do so is unclear from the face of the contract. The defendant says he signed in his capacity as mortgagee in possession. A deposit of €40,000 was paid by the proposed purchaser in October 2021. That sale is, however, no longer proceeding and the deposit has been returned.
15. The plaintiff objects to any attempt by the defendant to sell the Mortgaged Property. It is the plaintiff’s contention that the defendant is now, in reality, an unsecured creditor and that the defendant cannot sell the Mortgaged Property pursuant to the Mortgage.

16. The present proceedings were issued by the plaintiff by way of Originating Notice of Motion on 6 May 2022. The defendant gave an undertaking (which remains in place) not to take any steps to market, advertise or dispose of the Mortgaged Property pending the determination of the plaintiff's Originating Notice of Motion.
17. The reliefs which continue to be sought in the Originating Notice of Motion can be summarised as follows:
- (i) a declaration that the charge held by the defendant is void as against the plaintiff pursuant to section 409 of the Act;
 - (ii) a declaration that the burden registered by the defendant over the Mortgaged Property in the Land Registry on 31 July 2019 is void by reason of the failure of the defendant to comply with section 409 of the Act;
 - (iii) an injunction restraining the defendant from dealing with and/or disposing of the Mortgaged Property;
 - (iv) a declaration that any contract for the sale of the Mortgaged Property issued by and/or executed by the defendant, his servants or agents, is void;
 - (v) an injunction restraining the defendant from taking any further steps from marketing/advertising the Mortgaged Properties for sale; and
 - (vi) an injunction restraining the defendant from interfering with or impeding the plaintiff in any way from gaining access to and taking charge of and/or securing the Mortgaged Property.
18. The defendant says that the charge created in his favour was, at all material times up until and including his taking possession, valid as against the Company and was properly registered as a burden against the Mortgaged Property. He argues that, as the Mortgage determined and/or crystallised prior to the appointment of the plaintiff as liquidator, the

defendant's entry into possession was legal and valid, that the provisions of section 409 of the Act have no applicability and that the plaintiff's claim is misconceived. The defendant also argues that as he is lawfully in possession of the Mortgaged Property the injunctive relief sought by the plaintiff is mandatory in nature as it requires the defendant to give up his possession. The defendant argues that such a mandatory order cannot be made in a summary manner in the absence of a substantive hearing involving oral evidence.

- 19.** The plaintiff does not accept that the defendant is in lawful possession of the Mortgaged Property. He says that the deceased director's executor, who is alleged to have consented to the defendant taking possession of the Mortgaged Property, would have had no authority to consent whether on behalf of the Company or the deceased director. There were two other officers of the Company at that time and there is no evidence that either of them consented on behalf of the Company to the defendant taking possession of the Mortgaged Property in August 2019, as is alleged.
- 20.** Furthermore, the plaintiff argues that the infirmities suffered by the Mortgage/charge are not remedied simply by the act of taking possession of the Mortgaged Property. The plaintiff points out that the remedy for the defendant relating to the failure by the Company to register the charge within the prescribed 21-day period (the registration of which the defendant could have attended to himself), was to apply to the High Court to seek an order to extend the time to register the charge with the CRO pursuant to section 417 of the Act. The defendant did not do so at any time.
- 21.** The plaintiff also says that this court does not have to determine whether or not the defendant is lawfully in possession of the Mortgaged Property because, either way, once the defendant has failed to register the charge then it is void as against the plaintiff.

The relevant legal provisions regarding registration of a charge created by a company

22. The relevant legal provisions regarding the requirement to register a charge created by a company are set out in section 409 of the Act. Section 408(1) of the Act expressly defines “charge” as a mortgage (or charge) that is created over an interest in any property of the company.
23. Section 409 of the Act provides (insofar as is relevant to the present case) as follows:

“(1) Every charge created, after the commencement of this section, by a company shall be void against the liquidator and any creditor of the company unless either the procedure set out in –

(a) subsection (3) – the “one-stage procedure”, or

(b) subsection (4) – the “two-stage procedure”,

with respect to the charge’s registration is complied with.

(2) If, in purported compliance with the requirements of this Part as to the taking of steps in that behalf, there is received by the Registrar particulars of a charge that omit the required particulars in respect of one or more properties to which the charge relates, subsection (1) shall be read as operating to render void (as against the liquidator and any creditor of the company) the charge as it relates to the particular property or properties in respect of which that omission occurs but not otherwise.

(3) The procedure for registration under this subsection referred to in subsection (1) as the one-stage procedure consists of the taking of steps so that there is received by the Registrar, not later than 21 days after the date of the charge’s creation, the prescribed particulars, in the prescribed form, of the charge.

(4) The procedure for registration under this subsection referred to in subsection (1) as the two-stage procedure consists of the following, namely the taking of steps:

(a) so that there is received by the Registrar a notice stating the company's intention to create the charge (being a notice in the prescribed form and containing the prescribed particulars of the charge); and

(b) so that, not later than 21 days after the date of the Registrar's receipt of the notice under paragraph (a) (the "first-mentioned notice"), there is received by the Registrar a notice, in the prescribed form, stating that the charge referred to in the first-mentioned notice has been created.

(5) If the requirement under paragraph (b) of subsection (4) is not complied with, within the period specified in that paragraph, the notice received under paragraph (a) of that subsection in relation to the charge shall be removed by the Registrar from the register.

(6) Subsection (1) is without prejudice to any contract or obligation for repayment of the money secured by the charge concerned and when a charge becomes void under that subsection, the money secured by it shall immediately become payable."

24. In order to ensure that creditors are not disadvantaged by a company who fails or refuses to comply with its duty to register a charge it enters into, section 410(2) of the Act provides that: –

"Any person interested in the charge may use the procedure under section 409 (3) or (4) with respect to its registration and the persons using that procedure (and in compliance with section 409 (3) or (4)), shall have the same effect as if the company had used that procedure (and in compliance with section 409 (3) or (4))."

25. It is clear from the drafting of section 409 that the registration requirements are not discretionary in nature. The legislation uses the term “*shall*” and contains an “*unless*” provision. There is no discretion in relation to the validity of the charge if the provisions of section 409 of the Act are not complied with – the charge *shall* be void as against a liquidator or a creditor *unless* it is registered.

26. The charge however remains enforceable as against the company itself even if not registered. As was made clear by Phillimore LJ in *Re Monolithic Building Co* [1915] I CH 643 (at pages 667-668) in relation to the predecessor of section 409 of the Act:

“It makes void a security; not the debt, not the cause of action, but the security, and not as against everybody, 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”.

27. The question which arises in this case is whether the security is enforceable against a liquidator, despite non-registration, where a default has occurred while the company is a going concern and enforcement steps are taken prior to the appointment of a liquidator.

28. It is instructive to first examine the terms of the documents relating to the defendant’s secured interest, in this case the loan offer letter and the Mortgage.

The loan offer letter

29. The loan offer letter is dated 8 June 2018 and is expressed to be between the Company as borrower and four named individuals including the defendant. The amount of the loan is €400,000 with its stated purpose being “*to assist the Borrower with working capital*”.

The offer letter confirms that the loan will be secured on identified lands and that

“4. The loan shall be repayable on demand and subject to the following conditions:

*5. In the event of the Borrower disposing of it (sic) interest in the properties more particularly described in the Schedule hereto (“the **Properties**”) the loan will be repaid”.*

30. The Schedule to the offer letter refers to six houses numbers 1 to 6. It provides that

“The required repayment schedule is as follows:

In the following contributions on the sale of

House 1: €20,000

House 2: €20,000

House 3: €100,000

House 4: €100,000

House 5: €100,000

House 6: € 100,000

*Total **€440,000.**”*

31. Clause 6 of the loan offer letter confirms that *“Interest shall be payable by the Borrower to the Lenders at the rate of 10% per annum, for the 12 month term of the Loan”*. That is the only clause which expressly confirms the term of 12 months or indeed any fixed term of the loan. The repayment amount of €440,000 does appear to reflect a 10% interest rate on the original loan amount of €400,000 for a one-year period. There is no specific requirement however or expressed understanding that the six houses would be sold within a period of 12 months from 8 June 2018. In fact, only the first two houses were sold and the envisaged repayments of €40,000 (€20,000 x 2) were made on their sale in July 2019.

The Mortgage

32. The Mortgage is also dated 8 June 2018. The defendant is the sole named “*Chargee*”. It is not clear why there is a difference between the “*Lenders*” in the loan offer letter and the “*Chargee*” in the Mortgage of the same date and no evidence or explanation was provided in that regard. However, the definition of “*Secured Liabilities*” at subsection (c) includes all monies and liabilities due “*whether solely or jointly with any other person(s)*”.
33. Subclause (g) of the definition of “*Secured Liabilities*” includes “*all the foregoing monies and liabilities pursuant to the Offer Letter of even date between the Chargee of the one part of the Chargor of the other part*”.
34. It is clear that there is not a complete symmetry between the parties to the loan offer letter and the Mortgage. However, for the purposes of the present application I am satisfied that the defendant is the party entitled to the benefit of the Mortgage and has standing to invoke its provisions.
35. The covenant to pay is set out at clause 2.1 in the following terms: –
- “The Chargor hereby covenants with the Chargee that the Chargor will, on demand pay and discharge the Secured Liabilities when the same are due to be paid and discharged. The Chargor acknowledges that the Secured Liabilities shall, in the absence of express written agreement to the contrary, be due and payable to the Chargee on demand.”*
36. In determining when the Secured Liabilities fell due it is instructive to consider the definition of “*Enforcement Event*” which is defined in the following terms:

“any of the following events (a) a failure by the Chargor to pay or discharge any of the Secured Liabilities when the same ought to be paid or discharged; or (b) any event (whether described as an event of default or otherwise) by virtue of which any of the Secured Liabilities become due to be paid or discharged before the date on which it would otherwise be due to be paid or discharged”.

- 37.** This definition is not particularly helpful as there is no express date on which the loan monies were to be repaid. The defendant asserts that the events of default which entitled him to enter into possession of the Mortgaged Property were the breach by the Company of the loan facilities and/or the expiry of the loan facility which he avers had a term of 12 months (para 11 of the defendant’s replying affidavit sworn 1 July 2022).
- 38.** There is no evidence before this court as to whether any other houses were sold and whether monies fell due on their sale. The defendant in his replying affidavit refers to the fact that *“only three of the 6 houses had been developed”* (para 10), but there is no evidence as to whether the third of those houses was ever sold. There is no evidence of a demand for payment having been made by the defendant for the loan to be repaid prior to the defendant entering into possession of the Mortgaged Property in August 2019. Clause 2.1 of the Mortgage appears to require a demand for repayment to be made.
- 39.** Clause 8 of the Mortgage deals with enforcement. Clause 8.3 is in the following terms: –
- “**Possession.** At any time after the security hereby constituted has become enforceable and without the need to obtain the consent of the Chargor or an order for possession under sections 97 or 98 of the Act, the Chargee may without further notice or demand enter into possession of the Secured Assets. The rights of the Chargee under this clause are without prejudice to, and in addition to, any right of*

possession (express or implied) to which it is at any time otherwise entitled (whether by virtue of this Mortgage, operation of law, statute, contract or otherwise)”.

40. Clause 8.4 gives the Chargee the power of sale at any time after the security has become enforceable.

41. Registration of the charge was certainly envisaged by the Mortgage itself. In that regard clause 6.1.3 provides as follows:

*“**approvals and registrations.** The Chargor holds or will, within any applicable time limit, obtain and keep in full force and effect and comply with all approvals, authorisations, consents, licences, registrations, filings and exemptions necessary for the creation or validity of the security hereby expressed to be created or evidenced and for the Chargor to perform the Chargor’s obligations hereunder”.*

42. Furthermore, clause 6.2.4 provides as follows: -

*“**Companies office registration.** without prejudice to the generality of clause 6.1.3, this Mortgage will be presented for registration with the Companies Registration Office of Ireland within twenty one days of its creation”.*

43. Clause 5.1.4 of the Mortgage provides as follows: –

*“**enforceability.** on the date hereof and on each date hereafter until released by the Chargee, this Mortgage constitutes a first priority security interest over the Secured Assets enforceable in accordance with its terms against the Chargor, the Chargor’s creditors and any liquidator or trustee or assignee in bankruptcy appointed to the Chargor.”*

44. Of course, clause 5.1.4 must be subject to the law generally in relation to the requirement to register charges created by companies. It would operate as envisaged only assuming the registration of the Mortgage.

Analysis

45. There is a dispute between the parties as to whether the defendant validly took possession of the Mortgaged Property in August 2019 or at any time prior to the appointment of the liquidator. In the ordinary course, that dispute would be resolved following a consideration of oral evidence from both parties.
46. What is not in dispute however is that the Mortgage was never registered with the CRO prior to the appointment of the liquidator and that the Mortgaged Property has not yet been sold.
47. In those circumstances, I do not believe that it is necessary for this court to determine whether the defendant validly took possession of the Mortgaged Property. Regardless of the answer to this question, I am of the view that the unregistered Mortgage is now void as against the plaintiff liquidator. It does not matter if there was a default under the Mortgage or if there were steps taken by the defendant to enforce the Mortgage before the liquidator was appointed. Section 409 of the Act does not exempt charges/mortgages which are in the process of enforcement.
48. The defendant may well be correct in his argument that an Enforcement Event and his taking of possession occurred prior to the appointment of the liquidator. He is correct in his argument that the Mortgage was at all material times effective against the Company irrespective of any registration with the CRO. However, I do not accept that the taking of steps to enforce a mortgage in some way crystallises or terminates the mortgage in the sense argued by the defendant. It is clear to me that even if the defendant is lawfully in possession of the Mortgaged Property, the Mortgage is the only basis of his title and he

will have to rely upon the Mortgage to, for example, sell the Mortgaged Property as mortgagee in possession.

49. In circumstances where the Mortgage is void as against a liquidator I do not see how the defendant can continue to rely on it, regardless of what steps he may have validly taken on foot of the Mortgage prior to the appointment of the liquidator. I was referred by counsel for the defendant to the decision in *Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co. Ltd* [1937] 1All ER 231. In that case floating charges, which ought to have been registered, were held to have been perfected by the seizure of the goods before the liquidation of the company and the seizure was held in the circumstances to be a rightful one and valid against the liquidator. I believe that case can be distinguished from the present case. Here, the defendant is continuing to rely upon the Mortgage after the liquidator has been appointed.
50. The defendant was always exposed to his possession being avoided by a liquidator for so long as the Mortgage remained unregistered. The defendant could have taken steps to himself register the Mortgage, but he did not do so. I appreciate that this result creates a prejudice for the defendant who provided a loan to the Company in good faith and relied on the Mortgage and may well have validly taken possession of the Mortgaged Property (although I make no such finding). Nevertheless the clear wording of section 409 of the Act must be applied by this court.
51. The second issue advanced by the defendant is that he should be afforded the right to a full hearing in respect of the injunctive relief sought which is, in the defendant's view, in the nature of a permanent injunction. While framed in prohibitory terms, the defendant says the injunctive relief sought will ultimately require the defendant to give up vacant possession of the Mortgaged Property. The defendant says the plaintiff is not entitled to the relief sought in a summary manner by way of Originating Notice of Motion and that

the proceedings cannot be determined in the absence of a full plenary hearing with oral evidence. The defendant says the plaintiff is, in essence, seeking to obtain summary judgment under the guise of an injunction, which is impermissible in accordance with the judgment of the Supreme Court in *Charleton v Scriven* [2019] IESC 28.

52. I accept that in interlocutory injunctions, the courts will be slow to grant any relief that is likely to end matters before a plenary action. As noted by Clarke CJ in *Charleton* at para 7.1:

“Interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain a summary judgment. They are designed to do what they say, that is, to hold the situation until there can be a full trial. While there will inevitably be some cases where the result of an interlocutory injunction may, in practical terms, bring the proceedings to an end, it remains the case that there is an obligation on any party which has obtained an interlocutory injunction not to rest on their laurels, but to bring the matter on for full hearing”.

53. I am satisfied in this case that, even if the defendant’s evidence was accepted in full, the defendant is unable to continue to rely on the Mortgage as against the liquidator. In that case I see no impediment to granting the declaratory and interlocutory relief sought by the plaintiff restraining the defendant from dealing with and/or disposing of the Mortgaged Property including taking steps to market or advertise the Mortgaged Property for sale. It also seems to follow from the declaration that the Mortgage is void that the more extensive injunction sought restraining the defendant from interfering with or impeding the plaintiff from gaining access to or taking charge of the Mortgaged Property should also be granted.

54. I do not see that any possible benefit would arise for the defendant if the court directed a plenary hearing in this case. This case can be distinguished from those many cases in which there is a dispute regarding the right to possession of property where that dispute is a factual one and not based on the statutorily mandated requirement for registration of company charges. Even if the defendant could establish in evidence that he had validly and lawfully taken possession of the Mortgaged Property prior to the appointment of the liquidator, my finding is that the wording of section 409 of the Act makes the Mortgage “void” as against the subsequently appointed liquidator . The Mortgage can no longer be relied upon by the defendant to enforce his security. The liquidator is not bound by the Mortgage and the Mortgaged Property must therefore fall into the Company’s assets to be distributed amongst all the Company’s creditors (including the defendant) *pari passu*. In those circumstances, there is no opportunity lost to the defendant to improve his evidence at plenary hearing. In light of this and the costs that would be associated with a full plenary hearing, I am satisfied that this court can deal with matters on the basis of the Originating Notice of Motion issued by the plaintiff.

Conclusion

55. For the reasons set out in detail in this judgment I find that the Mortgage is void as against the plaintiff, even if the defendant legally and validly took possession of the Mortgaged Property prior to the plaintiff’s appointment as liquidator.
56. I see no benefit in directing a plenary hearing in this matter as the defendant’s position in respect of the unregistered Mortgage will not be improved with oral evidence.
57. I will hear the parties in relation to the form of order arising from this judgment, as well as on costs and any other matters arising. I will list this matter for mention at 10:45 AM on 28 February 2023 for that purpose.