



**THE COURT OF APPEAL
CIVIL**

**Unapproved
No Redactions Needed**

**Costello J.
Pilkington J.
Butler J.**

Neutral Citation No. [2023] IECA76

Court of Appeal Record No. 2022/111

High Court Record Nos. 2019/115Sp

BETWEEN/

PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY

PLAINTIFF/APPELLANT

- AND –

JOHN FOX

DEFENDANT/RESPONDENT

-AND-

Court of Appeal Record No. 2022/112

High Court Record Nos. 2019/129Sp

BETWEEN/

PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY

PLAINTIFF/APPELLANT

- AND –

TOMAS LYNN

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Pilkington delivered on the 31st day of March 2023

Introduction

1. Both appeals come before this court in respect of the entitlement of the appellant Promontoria (Oyster) DAC ('Promontoria') to obtain well charging orders in respect of their interest in certain registered lands.

2. Specifically, both appeals involve consideration of one issue; the application of s.73 of the Registration of Deeds and Title Act 2006 ("s.73" and "the 2006 Act") as it affects registered lands, in the circumstances of this case.

3. S.73 is considered in detail below, but in essence it altered the previous well-established position whereby security over registered lands could be created and maintained by the retention of a land certificate or certificate of charge by the holder of that interest. S.73 brought that system to an end and provided that the land certificate or certificate of charge ceased to have any legal effect and that such security must now be registered within a three-year window ending on 31 December 2009. Thereafter, instead of the security being effected in the holding of the relevant title or charge documentation, it was now secured by the registration of the lien as a burden on the relevant folio.

4. The question for the High Court was, on the facts of these two cases, whether a creditor (Promontoria) could rely on its registered liens as security for further advances to a debtor (Messrs Fox and Lynn respectively) where those advances took place after 31 December 2009. I shall refer to these as the *Fox* and *Lynn* proceedings respectively.

5. Within the *Lynn* proceedings Simons J. delivered judgment on 15 March 2022. At paragraph 40 the trial judge pointed out that, for the reasons within his recent judgment in the *Fox* proceedings, the loans advanced to the defendant by Ulster Bank (thereafter Promontoria) are not secured against the relevant lands and cannot be relied upon as security. Thereafter, the Court stated that it would hear the parties on the implications of the plaintiff's claim arising from his recent judgment in the *Fox* proceedings. Accordingly, whilst there are two appeals, they both arise in respect of one judgment; that of Simons J. within the *Fox* proceedings.

6. In his judgment in the *Fox* proceedings dated 7 March 2022, Simons J. held that Promontoria was not entitled to well charging orders on the basis that s. 73 of the 2006 Act cannot secure future lending after 31 December 2009.

7. In this appeal the appellant, Promontoria, begs to differ arguing that the monies advanced formed part of its registered interest, its security was properly registered and therefore capable of being the subject of a well charging order.

8. Consideration of these matters requires a brief recitation of the facts in the *Fox* and *Lynn* Proceedings. This is followed by an analysis of the relevant statutes and in particular s.73 itself. Two cases have considered s.73 in detail. The first is the Supreme Court judgment of Clarke C.J. (as he then was) and the concurring judgment of Dunne J. in

Promontoria (Oyster) DAC v. Hannon [2020] 1 IR 364 (“*Hannon*”) and of this Court in *Promontoria (Oyster) DAC v. Greene*, a judgment of Collins J., [2021] IECA 93 (“*Greene*”). The High Court judgment follows.

9. To begin with the facts of the *Fox* and *Lynn* proceedings

Fox proceedings

10. The Special Summons issued on 21 March 2019 seeks well charging orders together with what might be described as the other standard orders and reliefs, including orders for sale (‘the well charging proceedings’) on the basis of two facility letters, both dated 27 May 2010 and signed by Mr Fox on 23 June 2010.

11. Within both facility letters, whilst other items of security are noted, the relevant item of security for this appeal is as follows:

“Lien over Folio No. 14403 County Westmeath comprising of 40 acres.”

12. Folio 14403 in the Register of Freeholds County of Westmeath shows John Fox was registered as owner on 23 February 1998. The relevant burden is at No. 4 entered on 19 March 2009 in the following terms:

“Lien pursuant to s.73(3) of the Registration of Deeds and Title Act, 2006, in favour of Ulster Bank Ireland Limited.

Note: The interest of Promontoria (Oyster) Designated Activity Company is noted on Instrument Number [set out] 9 March 2017.”

Lynn proceedings

13. The Special Summons issued on 26 March 2019 seeks well charging orders on the basis of the three facility letters dated from 21 October 2010 to 28 July 2014, each signed by the Defendant.

14. Within each facility letter various items of security are listed. The wording varies slightly in respect of each but not in any way material to this appeal.

(a) The first facility is;

“Lien over Folio No. 4913 County Westmeath comprising of 46.369 acres located at Churchtown, County Westmeath.”

The same wording is also reflected in respect of Folios 11280F and 9121 respectively.

(b) Within the second facility letter the security relevant for this appeal comprises:

“3. Equitable deposit of the title deeds to 46.369 acres of agricultural land at Churchtown, County Westmeath (registered as a lien on Folio 4913, County Westmeath).”

Again, the same wording is also reflected in respect of Folios 11280F and 9121 respectively.

(c) Within the third and final facility letter the relevant items of security comprise:

“3. A first legal charge over 46.369 acres of agricultural land at Churchtown, County Westmeath registered as a lien on Folio WH4913.....”

Again, the same wording is also reflected in respect of Folios 11280F and 9121 respectively.

(d) Thomas Lynn, was registered as full owner of Folio 4913 on 2 February 1999, of Folio 11280F as full owner on 30 April 1998 and of Folio 9121 as full owner on 31 March 1978.

(e) In respect of each folio there is an entry of a burden dated 10 December 2009 in the following terms:

“Lien pursuant to s.73(3) of the Registers of Deed and Titles Act, 2006, in favour of Ulster Bank Ireland Limited.

Note: The interest of Promontoria (Oyster) Designated Activity Company is noted on Instrument Number [set out] 9 March 2017.”

15. It was clearly the intention in both cases that the registered liens would secure the monies to be advanced by the new facilities, each of which were accepted by Messrs Fox and Lynn. It was not disputed that the monies were advanced on these terms or that the borrowers were in default. The issue is whether the debts are in fact as a matter of law secured by the registered liens. Prior to the enactment of s. 73 it was possible to secure future advances by existing liens created by the deposit of land certificates or certificates of charge. Whether this remains the case depends upon the import of s. 73.

16. This in turn requires consideration of the legislation prior to the enactment of s.73 dealing with the system of land registration in Ireland, in particular the Local Registration of Title (Ireland) Act 1891 (‘the 1891 Act’) and its successor the Registration of Title Act 1964 (‘the 1964 Act’).

The Legislation

17. S.81 of the 1891 Act is replicated within s.105 of the 1964 Act. Both sections of the respective Acts, save for the designation of a ‘registering authority’ in the 1891 Act which becomes the ‘Registrar’ in the 1964 Act, are identical. Accordingly, I have only set out s.105 of the 1964 Act in full.

Registration of Title Act 1964, S. 105

‘(1) Subject to general rules, the land certificate or certificate of charge granted on the registration of an owner of land, or of a charge on land, shall be produced to the Registrar on any subsequent transaction in relation to the land or charge requiring registration, as

the case may be, and shall be either cancelled or so altered as to be brought into conformity with the register.

(2) Subject to general rules, the Registrar may, on the application of the registered owner, or of any person appearing to the Registrar to be entitled to require the production of a land certificate or certificate of charge, order any person in whose custody the certificate may be to produce the certificate to the Registrar for the purpose of any dealing with the registered land or charge which can be effected without the consent of the person having the custody of the certificate.

(3) The production of a certificate under this section shall not alter the right to the custody of the certificate, and shall not affect any lien of any person thereon.

(4) A land certificate or certificate of charge shall be prima facie evidence of the several matters therein contained.

(5) Subject to any registered rights, the deposit of a land certificate or certificate of charge shall, for the purpose of creating a lien on the land or charge to which the certificate relates, have the same effect as a deposit of the title deeds of unregistered land or of a charge thereon’.

18. S. 105 and its predecessor s.81 of the 1891 Act both confirm that those who held their security over registered lands by holding land certificates or certificates of charge do so without the necessity for registration on the folio itself.

19. As s. 105(1) provides that this security must be produced prior to any subsequent transaction, this ensured that such holders of this security were on notice of any subsequent transaction. S.105(5) confirms that the deposit of this security for the purpose of creating a lien on lands has the same effect as the deposit of title deeds in respect of unregistered lands.

20. S.73 considers the position of those who previously held such a land certificates or charge certificates over registered lands, pursuant to s.105 of the 1964 Act. It is as follows;

Section 73 of the 2006 Act

*PART 5
MISCELLANEOUS*

Abolition of land certificates and certificates of charge.

73.—(1) The Authority shall cease to issue land certificates and certificates of charge under the Act of 1964, and accordingly—

(a) sections 28, 32(2), 32(3), 51(3), 51(4), 62(5) and 64(3) of that Act are repealed, and

(b) section 105 (certificates) thereof—

(i) applies only in relation to land certificates and certificates of charge issued before the commencement of this subsection and not already cancelled, and

(ii) ceases to have effect 3 years after the commencement of subsection (2)¹.

(2) Subject to subsection (3), land certificates and certificates of charge issued before the commencement of subsection (1) and not already cancelled cease to have any force or effect on the expiration of the period of 3 years after the commencement of this subsection.

(3) The following provisions have effect during the period referred to in subsection (2) :

¹ Pursuant to S.I. No. 511 of 2006 cited as the Registration of Deeds and Title Act (Commencement) (No 2) Order 2006, 1 January 2007 was appointed the day upon which s.73 of the 2006 Act came into operation, so the three year period expired on 31 December 2009.

(a) the Authority shall cause adequate notice to be published of the coming into operation of subsection (2) and of its implications for persons to whom land certificates or certificates of charge have been issued and for any others who may be affected, including persons holding a lien on registered land or a registered charge through deposit or possession of those certificates;

(b) a holder of such a lien may apply to the Authority for registration of the lien in such manner as the Authority may determine;

(c) the application shall be on notice by the applicant to the registered owner of the land or charge and be accompanied by the certificate concerned;

(d) the lien is deemed for the purposes of section 69 of the 1964 Act to be a burden which may be registered as affecting registered land;

(e) the Authority shall register the lien without charging any fee or duty for doing so.

(4) Notwithstanding subsection (2), where the holder of a lien has suffered loss by reason of not having applied to the Authority during the period referred to in subsection (3) for registration of the lien as a burden affecting the registered land, the holder may apply to the court for compensation for the loss, on notice to the Minister for Finance' (my emphasis).

21. In my view s.73 is therefore straightforward in its terms;

(a) The Land Certificates and Certificates of Charge which were previously held as security, as reflected within s.105 of the 1964 Act, cease to have effect after 31 December 2009 – s.73(1)(b) and S.73(2) – this particular issue is considered in *Hannon*

(b) A grace period of three years is provided to those who held Land Certificates and Certificates of Charge to register their interest. (Section 73(2) – up to 31 December 2009).

(c) Pursuant to s.73(3)(b) “*the holder of such a lien may apply to the authority for registration of the lien....*”

(d) The means of registration of the lien is as a burden pursuant to s.69 of the 1964 Act – s. 73(3)(d).

Section 69 of the 1964 Act

22. S.73 introduces the registration of a s.73(3) lien as a burden pursuant to s. 69 of the 1964 Act. S. 69 (1) states ‘There may be registered as affecting registered land any of the following burdens, namely...’ and thereafter lists a number of interests in land which a holder may register as a burden on the relevant folio. It is a lengthy and varied list including matters such as a *lis pendens*, judgment mortgages and easements. S. 73(3) now adds the registration of a lien to that list. The wording within the folio, in respect of this registered lien, states the fact of its registration pursuant to s.73(3) of the 2006 Act, together with the date of registration and the holder of the lien. This is reflected within the folios to the *Fox* and *Lynn* proceedings above. So, upon registration pursuant to s.73, Promontoria now holds a lien registered as a burden on the folio lands

Hannon

23. The Supreme Court in *Hannon* was concerned with a single question, posed by Clarke C.J. as follows (para.17):

“ *whether, as a matter of the proper construction of the 2006 Act, it can be said that any entitlement which a party might have formerly held in respect of registered land, as the holder of a lien by virtue solely of the deposit of a land certificate, ceased to have any force by the end of 2009*”.

The Supreme Court, in overturning the judgments of the High Court and Court of Appeal, answered that question in the affirmative.

24. In *Hannon*, Promontoria issued proceedings in September 2009 seeking to enforce its liens over five folios of registered lands, based solely on their entitlement as the holder of a lien by deposit, that is without utilising the s.73 procedure for registration.

25. Clarke C.J. initially considered the judgments of White J in the High Court [2014] IEHC 670 and the *ex tempore* decision of Ms. Justice Finlay Geoghegan on 9th February 2017 in the Court of Appeal.² Both courts held that the deposit of the land certificate, given to create security for the plaintiff bank and creating an equitable charge over Mr Hannon's lands were not affected by the provisions of s.73. Whilst the land certificate may have ceased to have effect, Finlay Geoghegan J. held that there was nothing in the 2006 Act "*which indicates an intention or has the effect of abolishing or interfering with security created by the deposit of a land certificate as between the person who has deposited the land certificate and the person to whom it has been deposited and to whom it has been given as security for borrowings. Therefore, the trial judge was correct in my view, in determining that as and between the plaintiff and the defendant, the deposit of the land certificate, which the trial judge held was for the purpose of giving to the plaintiff security, and creating an equitable charge over the lands to which the land certificate related, was not affected by the requirements of section 73, including the provisions in section 73 that a land certificate would cease to have effect after three years*".

26. Clarke C.J. pointed out that the Court in *Hannon* was only considering the position of registered lands and any issue of priorities did not arise on the facts of that case. The same is true in the present appeal. At paragraph 3 he pointed out that the concept of a lien over registered land has '*a long history and even more ancient antecedents*'

² A reporter's note to the Supreme Court judgment states that the *ex tempore* judgment of the Court of Appeal was unavailable so the quotation is taken from this Supreme Court judgment

27. In also considering the 1891 and 1964 Act and the requirement for the registration of the lien pursuant to s.73 Clarke C.J. also highlighted the role of the 2006 Act in moving towards a universal system of land registration.³

28. In considering the effect of the three year transition period specified within the 2006 Act, Clarke C.J. commented at para. 53 as follows:

“There was, obviously, the possibility that the right in question might be lost but only if the party concerned did not go through the relatively straightforward procedure of registering their lien on the lands in question. It follows that the proper characterisation of the situation which might be said to have been brought about by the 2006 Act, if it is to be interpreted in the way urged on behalf of the defendant, is that it did not retrospectively interfere with the underlying rights which Ulster Bank (or Promontoria, as their successor) enjoyed. Rather, that right continued in existence for three years and continued thereafter, provided only that the relevant party registered their entitlement as a lien on the land in question. It is, in my view, an overstatement to suggest that an existing right has been retrospectively removed, when the only requirement of the legislation which is said to remove it is that an affected party must register their interest in order for it to continue to be enforceable. That analysis is not necessarily decisive but it does, in my judgment, diminish the strength of the argument which suggests that the legislation can properly be said to remove rights and thus could only do so if that intent was expressed in clear language. Rather, the legislation regulates, in what I think can fairly be described as a light touch way, the entitlements of holders of liens by deposit by requiring registration”.

³Paragraph 48

29. The Court continued to consider this point at para.68 in the following terms:

“Rather, it is appropriate to say that the existing interests of a holder of a lien in respect of registered land by deposit of a land certificate continue beyond the relevant three year period but subject only to registration as a lien. Viewed against that characterisation, I do not consider that the retrospectivity argument carries significant weight. It is not, in my judgment, sufficient to outweigh the clear statutory intent that the land certificate is to cease to have any legal effect for any purpose which, in my view, carries with it a clear implication that a lien by deposit of such certificates can no longer, in the absence of registration, give security over the lands concerned” (my emphasis).” (my emphasis).

30. Dunne J. in her concurring judgment focuses upon the history of the deposit of security by way of holding land certificates or certificates of charge over registered lands which was reflected within the system of land registration. That system commenced with the 1891 Act.

31. In respect of s.81(5) and s.81(4) of the 1891 Act, Dunne J. considered; (para.82):

“In other words the Act of 1891 recognised the importance of the creation of equitable mortgages by the deposit of title deeds and made similar provision for the creation of equitable mortgages by deposit of the land certificate”

32. The same considerations in respect of the creation of equitable mortgages by the deposit of title deeds is likewise reflected within s 105(5) and s.105 (4) of the 1964 Act.

33. In considering this point further Dunne J states;

“84. It is evident from the provisions of the statutes referred to above that the fact that land was registered land did not deprive the owner of that land of the opportunity to create an equitable mortgage. The owner could do so by depositing the land certificate, being the document showing title, in the same way as the owner of unregistered lands could create an equitable mortgage by deposit of the title deeds. In the course of submissions the court was referred to Coote's Treatise on the Law of Mortgages (8th ed., Stevens and sons, 1912), at p. 68, where it was stated:

“A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit, operates as an equitable mortgage or charge, by virtue of which the deposittee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown; and the delivery would be sufficient part-performance of such agreement to take the case out of the statute. (The reference to the statute is a reference to the Statute of Frauds (Ireland) Act 1695.)”

34. Dunne J. carefully considered s.105(5) of the 1964 Act with particular regard to the well-known texts of Fitzgerald, *Land Register Practice (2nd Ed.,1995)* (*‘Fitzgerald’*) and McAllister, *Registration of Title in Ireland (1st Ed., 1973)* both of which set out the nature

of a lien created by the deposit of a land certificate or certificate of charge. Dunne J. quotes *Fitzgerald* as follows;

'93. Reference is also made in Fitzgerald, Land Registry Practice (2nd ed., Betaprint, 1995) to the nature of the lien created by the deposit of a land certificate. At p. 167, the author states:

“The lien created by deposit of a land certificate is an unregistered right but different to other unregistered rights already referred to. The right of the depositor is provided for by section 105(5) of the Registration of Title Act 1964. The deposit creates a lien on the lands which cannot be defeated under a disposition for value so long as the depositor holds and refuses to produce the land certificate. Registration cannot be made without it, and the depositor cannot be compelled to produce it for the purpose of converting, by registration, an equity inferior to his own into a legal interest that would have priority to it.”

Fitzgerald also commented in Land Registry Practice (2nd ed., Betaprint, 1995) at p. 347 as follows:

“The land certificate could be regarded as the registered lands equivalent of title deeds of unregistered land or a substitution for them. The folio (written up to date) is the best evidence of a registered title. The land certificate is prima facie evidence of the ownership of the property but not of the charges and burdens registered thereon ...

The land certificate can be pledged or deposited by way of security and so the depositor has a lien on the lands under section 105(5) of the Registration of Title Act 1964. No registration of such lien is necessary nor can a notice of the deposit be

registered on the folio. It should always be written up before any transaction with the lands.”

35. Given the central role afforded to s.105(5) within the 1964 Act, Dunne J., having considered the comments from the learned authors and noting the provisions of s.73 of the 2006 Act to the effect that s.105 ceased to have any effect upon the expiry of the period afforded for registration of such liens, comes to her conclusion as follows;

‘98. I find it very difficult in these circumstances to come to any other view than that the effect of the changes brought about by s. 73 of the 2006 Act in respect of s. 105 of the 1964 Act are that three years after the commencement of the provisions concerned, s. 105 of the 1964 Act ceased to have effect. The fact that s. 105 of the 1964 Act ceased to have effect in my view means that an equitable deposit of a land certificate could no longer be enforced as an equitable mortgage after the date concerned. I cannot see any other interpretation being open. That being so, it seems to me that that is the end of the matter. The whole point of effectiveness of the deposit of a land certificate was that without the land certificate no further transactions could be carried out in relation to the land. Thus the creditor of the landowner was in a position to stop the landowner from carrying out any transactions that would affect the creditor's security. With the abolition of a land certificate the creditor no longer has a means of stopping such transactions. The provisions of s. 73 of the 2006 Act enabled the holder of an equitable deposit to register a lien over the land in the three-year period concerned and in that way to preserve their security. Thus, even if it is no longer possible to rely on the land certificate and the lien effectively provided for by the deposit on the land, the creditor had the option during the three-year period immediately following the commencement of s. 73 of the 2006 Act to register the equitable mortgage created by the deposit of the

land certificate as a lien on the register. A lien thus registered will appear as a burden affecting the land.

36. In my view both judgments of the Court confirm that the correct interpretation of s.73 is that the lien held as security over registered land by way of holding or retaining either a land or charge certificate ceased to exist after 31 December 2009⁴.

37. These interests were, prior to 31 December 2009, to be registered as a lien.

38. The Supreme Court considered the history of liens in respect of registered lands. They are clearly interests of long standing, the holders of these interests now retain their security upon registration pursuant to s.73. They do not suggest that the rights attaching to the lien, once registered, were altered or reduced in any other way.

39. The factual issue which arose in *Hannon* is obviously different to that in the present case. In this case all of the facility letters and the loans sought to be secured on foot of the registered liens were advanced by Ulster Bank (thereafter Promontoria) after the registration of the various liens pursuant to s.73(3) of the 2006 Act and also after the time for their registration on 31 December 2009 had passed.

Greene

40. In *Greene*⁵, again dealing with an application for a well charging order, the issue was one of the necessary proofs required in respect of one of the facility letters relied upon by

⁴ See generally Wiley on Irish Land Law, paragraph 12-30

⁵ Which also considered the related cases of *Promontoria (Oyster) DAC v McKenna* [2021] IECA 94 and *Promontoria (Oyster) DAC v McHale* [2021] IECA 95

Promontoria. The High Court had been uncertain whether the registered lien coupled with the facility letter in question had been sufficient to establish that the monies were advanced on foot of it and were, on the specific facts of the case, therefore secured by the lien.

41. On the facts Collins J. held that the Judge erred insofar as he held that the date of the creation of an equitable mortgage is a necessary proof that must be established in evidence in well charging proceedings.

42. Within his judgment Collins J. considered s.73 and *Hannon and* stated;

‘39. However, section 73 enabled holders of liens by deposit to register, and thereby protect, their liens. It provided “a coherent scheme .. for the conversion of a lien by deposit into a registered lien”: per Clarke CJ at para 7.5. Registration of an existing lien by deposit enabled the holder “ to protect their interests” (per Clarke CJ at para 7.24) and “to preserve their security”: per Dunne J at para 21. The Court considered that requiring the holders of such liens to apply for registration simply regulated their entitlements in a “light touch way”. It is clear from the Court's analysis that it did not consider registration to involve any diminution of the entitlements of lien holders’.

43. In considering s.73 and the proofs required in that case, Collins J. also stressed the importance of s.31 of the 1964 Act which section confirms that the register is “*conclusive evidence*” of all matters appearing within it⁶. At para. 43 the Court continued (this passage is also quoted by the trial judge):

“On any view, however, the registration provisions in section 73(3) are very brief. The lien may be registered as a burden and that is all. No power of sale is conferred on the

⁶ See *Tanager v Kane* [2019] 1 IR 385

lien holder by section 73(3). Only the fact of the lien and the identity of the holder (as well as the date of registration) is registered; registration does not extend to the date on which the lien was created or the liabilities to which it relates. As the Judge observed in his judgment in Promontoria (Oyster) DAC v McKenna, there can be no question that registration involves any adjudication by the Property Registration Authority that particular monies are secured on the lands in the folio. In simply deeming the lien to be a registerable burden for the purposes of section 69, section 73 does not acknowledge and/or address the specific characteristics of such liens and leaves unaddressed potentially significant issues as to their priority once registered”

44. It is thus clear that in neither *Hannon* nor *Greene* did the Supreme Court or the Court of Appeal consider that the rights of a lien holder who registered their lien were in any way “diminished”, in the words of Collins J. This, as shall be seen, is key.

45. So the question arising in this case is the degree to which the registration of these specific interests can now be secured.

Judgment of the High Court

46. Simons J. posed the question at issue as follows⁷;

“The specific question for determination in the present proceedings is whether a creditor can rely on a registered lien as security for further advances to a debtor, i.e. as security for additional loans advanced after 31 December 2009. The legislation is silent on this point...”

⁷ Paragraph 30

The dilemma is categorised at paragraph 7 as follows:

“...Promontoria asserts, as a general proposition that a registered lien may, by agreement of the parties be relied upon as security for subsequent lending after 31 December 2009. As discussed shortly this proposition necessitates treating a registered lien as, in effect, the functional equivalent of a registered charge for present and future advances.”

47. In considering the characteristics of a lien Simons J. considered it of particular relevance that in his view *“a lien is ordinarily understood as intended to secure monies which are due and owing”* (paragraph 31).

48. The Court also criticised the submission of Promontoria to the effect that what persists after registration of s.73(3) lien is the same lien ‘before and after’. This is categorised by the Court as being an overly literal interpretation of s.73 and irreconcilable with the approach adopted in *Hannon* and *Greene*. The Court then stated that *“this case law clearly establishes that the pre-December 2009 equitable interest is extinguished and has been converted into something different, namely a registered lien”* (paragraph 36).

49. The High Court, having referenced both *Hannon* and *Greene*, considered that the primary objective behind the changes affected by s.73 of the 2006 Act was to move towards a universal system of land registration. Thereafter the trial judge summarises his position within paragraph 32 in the following terms;

“The continuation of the former practice whereby debt could be secured against registered land without the existence of same being disclosed on the register was

inimical to this objective. The scheme of the amended legislation is that the proscribed method of creating security for the repayment of debts is by way of charge. The introduction of the concept of a registered lien, as part of the transitional provisions, is not intended to displace the primacy of a charge. Rather a registered lien represents a lesser form of security which has been put in place to protect the existing property rights of the holders of liens by deposit.”

The Court continued:

“It is sufficient to this purpose that the lien be consigned to the principal debt due as of the date of registration (together with accrued interest). It is not necessary that the holder of the newly fashioned registered lien has the right to rely on same as security for additional loan facilities granted after 31 December 2009. Any such loan facilities would, by definition, have been granted against the backdrop of the new legislative regime which excluded the creation of security other than by way of charge. The provisions of s.62 of the Registration of Title Act 1964, which allows for the payment of money to be secured against the ownership of land, are confined to charges; and the provisions of s.105(5) ceased to have affect after 31 December 2009.”

Issues for Consideration

50. The question in this appeal is that posed by the High Court judge at paragraph 46 above – it is the only question before this court. It is raised solely in the context of registered land. No question in respect of competing priorities arises on the facts of this case.

51. The two interlinked propositions, raised by the learned trial judge, are as follows:

(a) whether liens registered pursuant to s.73 of the 2006 Act can secure loan agreements or advances made after 31 December 2009 and;

(b) whether the import of s.73 is that any such interests can now only be registered by way of charge.

Discussion

52. In considering (a) above the trial judge, considered that *'in the absence of an express statutory prescription of the characteristics of a registered lien, it is necessary to ascertain the legislative intent by reference to the overall scheme of the legislation'*⁸

53. He also considered that this legislative intent is to be found, by reference to the underlying objective of the 2006 Act in moving towards a universal system of land registration. From that he considers that *'the most obvious indication of the legislative intent is the conversion of a former equitable interest created by the deposit of a land certificate into a registered 'lien' rather than a 'charge'*⁹. That, linked to the finality of the register, ensured two matters (a) that the prescribed method of creating security for the repayment of a debt is by way of charge and (b) that the registered lien, as a lesser form of security, had been put in place as a transitional provision to protect existing rights of lien holders, which precludes any entitlement to secure future lending after 31 December 2009.

54. It is undoubtedly correct that the general intention is one of moving towards a system of universal land registration. The point is confirmed by Clarke C.J in *Hannon*¹⁰ and that passage is also quoted with approval in *Greene*¹¹.

⁸ Paragraph 31

⁹ Also paragraph 31

¹⁰ Paragraph 48

¹¹ Paragraph 39

55. At paragraph 46.02 in the text by John Deeney¹² Registration of Deeds and Title in Ireland [Bloomsbury Professional Ltd, 2014] the author states;

'The paper-based land certificate and charge certificate system was entirely incompatible with the introduction of electronic registration and conveyancing. The concept of hidden equitable interests was inconsistent with the objective of a transparent land register for purchasers'.

56. However, it must be acknowledged, a point also made by Clarke.C.J. in *Hannon*,¹³ that other unregistered interests can affect registered land. This is clearly reflected within s.72 of the 1964 Act which is headed '*Burdens which are without registration to affect registered lands*'. Within that section a number of interests are listed, perhaps the most common and certainly well known to all conveyancers is s.72(1)(j) comprising '*the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed*'.

57. Simons J. considers that the necessity to construe legislative intent arises as there is no express statutory prescription of the characteristics of a lien registered pursuant to s.73. Of course, many interests in land, in particular equitable interests, are recognised by law but are not expressly dealt with by statute.

58. Both the trial judge and the respondent within their submissions contend that this appeal revolves around a question of statutory interpretation. Both point to the fact that the lien holder is given no express powers, in contrast to the position of the holder of a charge pursuant to s.62 of the 1964 Act. S. 62(1) in essence provides that a registered owner of

¹² A former Deputy Registrar of Titles within the Property Registration Authority

¹³ Paragraph 26

land may charge it with the payment of money and the owner of that charge may then register that interest.

59. The trial judge also relies upon the quotation from *Greene*, at paragraph 43 above, to highlight that the terms of any legislative provisions in respect of liens within s.73 are brief. That may well be so but in my view, prior to ascertaining the legislative intent by reference to the overall scheme of the existing legislation, there is guidance to be found within s.73 itself and the role or function of the lien within the evolving system of land registration.

60. The appellant contends that the correct initial approach is not to consider any comparison or reference to s.62 of the 1964 Act, but rather the focus should be on the lien itself. In this regard they highlight both s. 73 and s.105 of the 1964 Act. In my view these matters should be considered in seeking to consider the section itself.

61. S. 73 is headed ‘abolition of land certificates and certificates of charge’. In my view, as contended by the appellant, regard can be had to the interest which existed prior to the enactment of s.73. The whole purpose of s.73 is to provide a mechanism for the continuance of existing liens created by the deposit of the land certificate or the certificate of charge. The interest exists and was recognised in law to be a lien. That pre-existing interest is referred to in s.73. It is clear from the language of the provisions of s.73 (2)(b) (‘ a holder of such a lien may apply to the Authority for registration of the lien in such manner’) (my emphasis) that this must be a reference to the previous interest held prior to its registration.

62. It is acknowledged by the trial judge¹⁴ that pursuant to the terms of the 1891 and 1964 Acts a lien could be secured in respect of present and future advances. The appellant's submission refers to *Bank of Ireland v Purcell* [1989] IR 327. On the facts of the case the security was created in 1975 when the defendant had deposited, without notes or memorandum in writing, a land certificate of the property contained in a registered folio. The Supreme Court accepted it was held by the plaintiff by way of equitable mortgage to secure all liabilities of the defendant. They also accepted the view of the trial judge that '*each time a further advance is made the interest in the property which is being charged is altered*'¹⁵.

63. Clearly in this case the interest is a lien, it may secure future advances, each time further advances are made and the **extent** of interest in the property being charged is altered. It is not that each new advance on a current account amounts to a new security. It is the same security but securing different amounts.

64. Secondly, the reference to a lien is not new but rather a continuation of the references to it within both s.81(3) and(5) of the 1891 Act and s.105 (3) and (5) of the 1964 Act, which make reference to the existence of a lien, which is then of course also referenced within s.73 itself.

65. It is well recognised (and highlighted by Clarke C.J. and Dunne J in *Hannon*) that, for perhaps what may ultimately be described as pragmatic reasons, the enactment of s.105(5)

¹⁴ Paragraph 22

¹⁵ The Supreme Court upheld the judgement of the High Court that no security was created in favour of the plaintiff for any advances made after the Family Home Protection Act 1976 came into force, on the basis that the plaintiff was aware it was a family home and no consent had been sought or granted by the Defendant's spouse.

of the 1964 Act, (previously s.81 (5) of the 1891 Act) maintained the well known and well utilised system of the equitable deposit of title deeds as security for land. With the introduction of a system of land registration beginning with the 1891 Act, that procedure was incorporated into the legislation, to confirm that the holding of such security was not only recognised in the context of registered lands but that such security could be maintained without registration. As to the nature of the interest Kenny J. in the well known decision of *AIB v Glynn*¹⁶ states;

“The right created by the deposit is not limited to keeping the deeds until the money has been paid but gives an equitable estate in the lands”.

66. So, rather than relying on possession of a certificate of charge or land certificate (both of which now cease to have effect) as evidence of the lien, s.73 introduced a simple device of the registration of the (pre-existing) lien as a burden pursuant to s.69 of the 1964 Act. I can see nothing in *Greene* or more particularly within *Hannon* which suggest anything to the contrary. On the one hand s.73 created a definitive time period when the existing liens may be registered. Thereafter they may no longer be registered. In addition, no new liens may be created after 31 December 2009. It is these two changes which must be notified to the holders of existing liens and they were so notified. If it was also intended that they could no longer rely on existing liens to secure future advances, as had been the law heretofore, then notice of this would also have to be given in respect of this reduction in their rights.

67. Prior to the enactment of s.73 the relief available to the holder of a lien was by way of well charging proceedings and this point has been highlighted and indeed considered in some detail by Collins J. in *Greene*. That relief remains enforceable by way of well charging order

¹⁶ [1973] IR 188 at p.192

notwithstanding the fact that no new liens (of the kind with which this judgment is concerned) may be created after 2009. After 2009 the only way to create security is by charge as it is no longer possible to create a lien. But it does not follow that existing liens cannot secure advances after 2009.

68. Section 31 of the 1964 Act confirms the conclusiveness of the matters entered on the register. The primary purpose for the registration of an interest on the folio is to alert all interested parties as to its existence and therefore those parties are put on notice should any further enquiries be required. The opening lines are as follows;

'31.—(1) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land;'

69. The folio therefore reflects both ownership and the interests that affect that land, which now includes a burden registered pursuant to s.73(3). In this, as in respect of other registered interests, it is the nature of the security that is reflected on the folio, not the actual sums secured at any given time.

70. The s.73 burden is registered. The trial judge makes the point that liens can generally be considered as interests which are in some way 'backward looking' which I interpret as meaning registered in respect of a fixed security interest. That may or may not be the case, but it is not an indicia of a lien. The characteristics of the lien, both prior to and after its registration pursuant to s.73, has been discussed above. Moreover, the quantum attaching to

any such interest can easily itself vary over time (for example certain repayments may have been made) and may not therefore be fixed. In any event the register provides conclusive evidence of the burden in this case. Parties are on notice of it, but any additional clarification as to the quantum secured necessitates further enquiries.

71. I also note one of the further implications of the High Court judgment is the absence of notice to lienholders [and borrowers] by the preclusion of the possibility of securing further advances by the existing lien. This had previously been both permissible and commonplace.

72. In construing s.73, it is initially necessary to consider the interest that exists after 31 December 2009. That must be considered first before any inference, based upon a desire to effect a system of universal land registration, can be prescribed. As set out above, this particular lien arose in the context of an interest in registered land that was not itself registered, when it was converted into a registered lien whose security is now protected by registration as a burden. It may have had an unusual provenance, but I see nothing to infer that registered security cannot be used as security for later or further advances as contended for by Promontoria.

73. In my view there was nothing within section 105 of the 1964 Act to prevent using the lien, as security for later or further advances. What of the rights and entitlements of those granting and accepting security pursuant to the terms of a lien, as on the facts of this appeal? What within s.73 now prevents that contractual relationship, with the facility letters executed by both parties, from being applied against the existing security in respect of subsequent advances? In my view for the reasons advanced above no such impediment exists.

Conclusion

74. As an initial general point, in my view in potentially affecting any significant changes in land law and in particular the entitlements of creditors and debtors in creating and /or realising security, that such changes should be, as far as possible, clearly specified within any legislative amendments.

75. The judge makes reference to s.73 being a transitional provision. It is transitional in the sense that paras (a) to (e) are only operative during the specified, transitional period. However the issue in this case does not end there and specifically considers the question of whether a lien once registered during the transitional period can take effect only retrospectively as regards monies advanced before (and maybe during) the transitional period or is it capable of operating in respect of monies advanced subsequent to its registration and after the expiry of the transitional period?

76. In my view additional monies advanced subsequent to the date of the registration of the liens as burdens on the relevant folios and after the time fixed for registration of those liens on 31 December 2009, in compliance with the terms of s.73 of the 2006 Act, can be, and, if agreed by the parties, are secured by the registered liens.

Outcome of this Appeal

For the reasons given therefore, I would allow the appeals and set aside the judgment of Simons J. in the *Fox* proceedings.

Costs

As the Appellant has been entirely successful, my provisional view is that it should be entitled to the costs of both appeals, on the basis that they cannot recover more than one set of costs.

If the respondents wish to contend for an alternative order, they have liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the appellant will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made.

As this judgment is being delivered electronically, Costello and Butler JJ. have indicated their agreement with it and the orders I have proposed.