APPROVED **[2022] IEHC 526**

THE HIGH COURT

2019 No. 247 SP

BETWEEN

PROMONTORIA (OYSTER) DAC

PLAINTIFF

AND

MICHAEL KEAN

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 September 2022

INTRODUCTION

1. The Registration of Deeds and Title Act 2006 brought to an end the practice whereby a debt could be secured on registered land by the expedient of depositing the land certificate with the lender. The Act not only precluded the creation of *new* equitable mortgages (otherwise, liens) by way of the deposit of a land certificate, it also extinguished all existing liens with effect from 31 December 2009. The holder of an existing lien by deposit was able to protect their interests by converting their lien into a registered lien during a three-year transitional period.

2. For the reasons explained in my judgment in *Promontoria (Oyster) DAC v. Fox* [2022] IEHC 97, a registered lien pursuant to Section 73 of the Registration of Deeds and Title Act 2006 cannot be relied upon as security in respect of a further loan agreement entered into *after* 31 December 2009. An appeal has been taken against that judgment to the Court of Appeal and the appeal is listed for hearing on 16 January 2023.

3. In the present proceedings, the plaintiff seeks to rely on a registered lien as security for additional loans advanced to a borrower *after* 31 December 2009. It is sought to distinguish the judgment in *Promontoria (Oyster) DAC v. Fox* on two principal grounds as follows. First, it is said that the borrower had expressly agreed to deposit the land certificate as security in respect of present and future loans and that this contractual promise is sufficient on its own to create an equitable mortgage. Secondly, it is said that, prior to the commencement of the Registration of Deeds and Title Act 2006, the lender would have had the potential to avail of a benefit known as "*tacking*". It is submitted that the court is obliged, under the double construction rule, to avoid an interpretation of the Act which would result in the loss of this benefit.

PROCEDURAL HISTORY

4. The ownership of the land the subject-matter of these proceedings has been registered under the Registration of Title Act 1964. Put colloquially, the land is "*registered land*". The Defendant is registered as full owner of the land under Folio 15424F in County Roscommon ("***the folio***").

5. A lien has been registered as a burden on the land. It appears from the folio that the lien had originally been in favour of Ulster Bank Ireland Ltd ("***Ulster***

Bank”). The entry of the lien as a burden is dated 31 December 2009. Promontoria (Oyster) DAC (“***Promontoria***”) asserts that it has since succeeded to Ulster Bank’s interest. Promontoria’s interest in the lien is “*noted*” on the folio by reference to an instrument dated 9 March 2017.

6. The lien had been registered pursuant to Section 73(3) of the Registration of Deeds and Title Act 2006. It can be inferred, therefore, that the land certificate had previously been deposited with Ulster Bank as security for an (earlier) loan to the Defendant. This deposit would, by virtue of the now defunct provisions of Section 105(5) of the Registration of Title Act 1964, have created a lien by deposit. It can also be inferred that Ulster Bank subsequently applied to register that lien within the three-year transitional period provided for under Section 73 of the Registration of Deeds and Title Act 2006. There is a separate dispute between the parties as to whether the registration process had to have been *completed* prior to 31 December 2009.

7. Had Ulster Bank wished to enforce its security subsequent to this registration, it could have done so by way of an application for a well charging order. It would have been unnecessary for Ulster Bank to adduce evidence in respect of the creation of the lien by deposit. Ulster Bank could, instead, rely on the conclusiveness of the register. It would, however, have been necessary for Ulster Bank to establish that there were sums due and owing to it and that those sums were secured by the registered lien. (See, generally, *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93). Similarly, once Promontoria had succeeded to Ulster Bank’s interest in the registered lien, it could have enforced the original debt in the same way.

8. On 17 February 2012, Ulster Bank granted three loan facilities to the Defendant as follows: (i) an overdraft facility of €25,000; (ii) a loan facility of €165,000; and (iii) a loan facility of €260,000.

9. On 19 December 2016, by global deed of transfer and Irish law deed of transfer, Ulster Bank (by then known as Ulster Bank Ireland DAC) transferred to Promontoria all its rights, title, interest, benefit and obligation (past, present and future) in and under the Defendant's facilities, security and burdens in the land.

10. Promontoria sent demand letters to the Defendant on 18 August 2017 and 24 April 2018 seeking repayment of the amounts then owing under the loan facilities.

11. By Special Summons dated 13 June 2019, Promontoria seeks a number of reliefs including, *inter alia*, a declaration that the interest of the Defendant in the subject land stands well charged with the payment of all monies due and owing by the Defendant to Promontoria on foot of the facility letter of 2012 and the registered lien. A further declaration is sought that the sum of €310,512.83 is due and owing on the principal and interest as of 3 September 2018 (together with continuing interest pursuant to contract and/or statute).

12. The Defendant resists the application, and a number of issues were raised by way of replying affidavit including, *inter alia*, whether or not the lien had been properly registered by 31 December 2009. Detailed written legal submissions have been filed outlining the substance of the defence.

13. The Defendant made an application to remit the proceedings to the Circuit Court. I delivered a written judgment on 21 December 2021 refusing that application: *Promontoria (Oyster) DAC v. Kean* [2021] IEHC 796. A pre-emptive or protective costs order was made in the following terms: if the Defendant is

ultimately unsuccessful in the defence of the proceedings, then costs would be confined to the Circuit Court scale. In the event of the Defendant being successful, he may make an application for a differential costs order pursuant to Section 17 of the Courts Act 1981 (as amended).

14. There is a dispute between the parties as to whether the present proceedings are governed by the judgment in *Promontoria (Oyster) DAC v. Fox* [2022] IEHC 97 ("***Fox***"). The parties agreed that the question of the applicability of that judgment should be addressed by way of a modular hearing. It is only in the event that the judgment in *Fox* were held to be inapplicable that it would then become necessary to consider the alternative grounds of defence advanced. Written submissions on the issue were furnished by the parties on 18 July and 20 July 2022, respectively, and there was an oral hearing on 26 July 2022. Judgment was reserved until today's date.

CONTRACTUAL PROMISE OR PLEDGE

15. Promontoria seeks to distinguish *Fox* on the basis that the Defendant had expressly agreed to deposit the land certificate as security in respect of present and future loans. It is said that this contractual promise or pledge is sufficient on its own to create an equitable mortgage. More specifically, it is said that an agreement to provide security represents a *separate route* to the creation of an equitable mortgage which is distinct from the deposit of the land certificate. The gist of the submission is that equity looks to intent, rather than form, and that it must follow, therefore, that equity will treat the contractual promise or pledge as effective, notwithstanding that the equitable mortgage by deposit created by the

actual deposit of the land certificate has since been extinguished by operation of the Registration of Deeds and Title Act 2006.

16. The gravamen of Promontoria's argument is summarised as follows in the written legal submissions filed on its behalf:

> "'Security' is a defined term within the General Conditions, meaning 'the security comprised in the Security Documents', which latter term is defined as 'the security documents specified in the Facility Letter'. Ultimately, amongst all the verbiage, 'security' – the lowercase English word with its plain meaning – was sought by the lender and agreed to be furnished by the borrower. The intent and substance of the promise made by the Defendant to the Plaintiff's predecessor was to give actual security, not merely some nullity masquerading under the style and title of 'Security' or a 'Lien registered…'. Although, unbeknownst to the parties, the form was defective, Equity looks to intent rather than form and there was an agreement in writing, however informal, for the relevant property to be security for a debt."

17. I turn now to consider these submissions. It is correct to say that the factual position—as assumed for the purposes of the modular hearing—differs from that in *Fox* insofar as the deposit of the land certificate in the present case was expressly intended to secure *future* advances, in addition to the initial borrowings in 2005. This does not, however, alter the legal analysis. The rationale of the judgment in *Fox* is that the contractual intention of the parties cannot prevail over the amended statutory scheme. The matter is put as follows at paragraph 38 of the judgment:

> "The next argument made by Promontoria is that the Defendant should not be permitted to resile from his contractual commitment to secure his post-registration lending on the lien. With respect, this argument is, again, inconsistent with the logic of the judgment of the Supreme Court in *Hannon*. Contractual intention cannot prevail over the statutory scheme. The fact—if fact it be—that the parties intended to put in place a particular form of security does not bring about that result where it would be inconsistent with the amended

> statutory scheme. The effect of the Registration of Deeds and Title Act 2006 was to bring to an end the informal mechanism for creating security other than by way of charge."

18. The argument urged in the present case is simply another version of the argument rejected in *Fox*. In each instance, the gravamen of the argument is that the intention of the parties should be treated as bringing about the very thing which the legislation has abolished. It is artificial to suggest that there is a standalone agreement to provide a form of security, separate and distinct from the agreement to create an equitable mortgage by deposit. This agreement was fulfilled. Crucially, however, the equitable mortgage so created was subsequently extinguished by operation of the Registration of Deeds and Title Act 2006. The loan agreements entered into by Ulster Bank in 2012 were governed by the new statutory regime and any earlier agreement between the parties as to the creation of security by equitable mortgage by deposit was spent.

19. The logic of the judgment in *Fox* is that the legislative intent underlying Section 73 of the Registration of Deeds and Title Act 2006 is to provide a mechanism to safeguard the *existing* property rights of the holder of a lien by deposit. It was sufficient for that purpose for the transitional provisions to confine the registered lien to the principal debt due as of the date of registration (together with accruing interest). It was not necessary to provide that the holder of the newly fashioned registered lien have the right to rely on same as security for additional loan facilities granted *after* 31 December 2009.

20. For completeness, Promontoria's reliance on certain *dicta* at paragraph 101 of the reported judgment in *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49, [2020] 1 I.R. 364 is misplaced. The statement there that the change in the law introduced by the Act has "*no bearing on any other method of creating an*

equitable mortgage in a manner previously known to the law" is referring to methods which are not predicated on the deposit of a land certificate. These other methods would include, for example, a scenario whereby there is some deficiency in the documentation creating a charge. By contrast, a contractual promise to deposit a land certificate is not a method which is separate and distinct from the actual deposit. Promontoria is also incorrect in seeking to characterise the security created by the deposit of the land certificate as having been *defective* in form. The correct legal position is that an equitable mortgage was created in 2005 but subsequently extinguished by operation of the Registration of Deeds and Title Act 2006.

21. In summary, the argument here is indistinguishable from that rejected in *Fox.*

CONSTITUTIONAL READING / DOUBLE CONSTRUCTION RULE

22. Promontoria seeks to undermine the precedent value of the judgment in *Fox* by introducing a new line of argument as follows: It is said that, prior to the commencement of the Registration of Deeds and Title Act 2006, Ulster Bank would have had the potential to avail of a benefit known as "*tacking*". It is then submitted that the court is obliged, under the double construction rule, to avoid an interpretation of the Act which would result in the loss of this benefit.

23. The double construction rule, as summarised in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (at 341), is to the effect that an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution of Ireland. There may be a question as to whether the double construction rule is applicable in a case, such as the present, where there is no challenge to the

constitutional validity of the relevant statutory provision. This may turn, to an extent, on whether one characterises the double construction rule as a remedial principle rather than simply a rule of statutory interpretation. See *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny and Walsh, Fifth Edition, Bloomsbury Professional, 2018) at §6.2.283 to §6.2.286. For the purposes of the present judgment, I propose to proceed on the assumption that the rule is, in principle, applicable.

24. To assist the reader in understanding the discussion which follows, it is necessary to pause and explain what is involved in "*tacking*". In brief, this refers to the principle whereby a mortgagee, who makes further advances to a borrower subsequent to the date of the creation of the mortgage, is entitled in certain circumstances to rely on the date of the initial mortgage to establish priority over another mortgage created in favour of a third party in the interim. The additional lending is, in effect, tacked onto the initial mortgage.

25. Promontoria submits that the legal position prior to the commencement of the Registration of Deeds and Title Act 2006 had been that any advances made by Ulster Bank to the Defendant would have been tacked on to the equitable mortgage created by the deposit of the land certificate. This would have allowed Ulster Bank to assert priority over any intervening mortgage created in the period between the date of the deposit of the land certificate and the date of the additional lending.

26. It should be emphasised that Ulster Bank did not, in fact, make any further advances prior to the commencement of the Registration of Deeds and Title Act 2006 and that no intervening mortgage was actually created in favour of a third party. There are thus no competing priorities at play. Rather, the argument

which Promontoria seeks to make is that the bundle of property rights supposedly enjoyed by a mortgagee under an equitable mortgage would have included the potential to gain priority in respect of further advances. It is said that the *potential* to rely on tacking represented a property right enjoyed by the mortgagee. It is then submitted that to interpret the Registration of Deeds and Title Act 2006 as precluding the mortgagee from availing of tacking post-31 December 2009 would involve the "*expropriation*" or "*destruction*" of a valuable property right. This would, it is said, represent an unjust attack on the existing property rights of the mortgagee and render the legislation invalid having regard to the Constitution of Ireland. The court is urged to apply the so-called "*double construction rule*" so as to avoid this supposed invalidity, i.e. by interpreting the Act as preserving the potential to tack.

27. For the purpose of this judgment, I propose to assume—without deciding—that tacking would have applied to an equitable mortgage created in respect of registered land. The legal position may, in truth, be more complex as the only form of tacking which is expressly recognised under the Registration of Title Act 1964 is in respect of registered charges and does not necessarily extend to an equitable mortgage.

28. Promontoria's submissions are all predicated on the proposition that the loss of the potential to tack represents an unjust attack on the property rights of a mortgagee under an equitable mortgage. The unjust attack is said to involve the expropriation of the potential to tack.

29. The fallacy underlying these submissions is that they seek to equate the discontinuance of a potential benefit under the previous legal regime with the expropriation of an existing or vested property right. Crucially, Ulster Bank had

not made any further advances to the borrower prior to the introduction of the legislative amendments. Accordingly, Ulster Bank never availed of the potential, under the previous legal regime, to tack. It cannot be said, therefore, that Ulster Bank had acquired a property right in this regard prior to the introduction of the legislative amendments. The loans, the subject of these well charging proceedings, were not advanced until several years after the amended legislation had been commenced and are governed by its provisions.

30. It is clear that Promontoria considers that the terms of the amended legislation are less favourable than the previous legal regime. However, the fact, if fact it be, that the legislative amendments governing *future* lending might be less favourable in some respects than those formerly available under the previous legal regime does not result in an unconstitutionality. It is frequently the case that the enactment of new legislation will have the consequence that future conduct is regulated differently than before. For example, the amendment of planning and environmental legislation will often result in new development projects being more highly regulated than those carried out under the previous legal regime. A developer, who had not availed of the previous legal regime, could not successfully challenge the validity of legislative amendments on the basis that they have now lost the opportunity to avail of the previous, laxer regime. (See, generally, *M. & F. Quirke & Sons v. An Bord Pleanála* [2009] IEHC 426, [2010] 2 I.L.R.M. 93).

31. It would, similarly, be incorrect to seek to characterise the legislative amendments which regulate the creation of security in respect of *future* lending as entailing the expropriation of an existing or acquired right.

32. The position in respect of *existing* lending is safeguarded by Section 73 of the Registration of Deeds and Title Act 2006. As explained in *Fox*, this section allows for the conversion of the equitable interest, which had been created by the deposit of a land certificate, to a "*lien*" rather than a "*charge*". This reflects the underlying objective of the Act, namely, to move towards a universal system of land registration in which all, or almost all, interests in land or entitlements which run with land can be definitively determined by consulting the register. The legislative intent of the provision was to provide a mechanism to secure *existing* property rights of the holder of a lien by deposit. For that purpose, it is sufficient to confine the lien to the principal debt due as of the date of registration (together with accruing interest). It is not necessary that the holder of the newly fashioned registered lien have the right to rely on same as security for additional loan facilities granted *after* 31 December 2009.

33. In summary, the interpretation given to the legislation in *Fox* does not result in an unconstitutionality and hence there is no necessity to resort to the double construction rule.

CONCLUSION

34. For the reasons explained, I have concluded that the circumstances of the present case are indistinguishable from those considered in *Promontoria (Oyster) DAC v. Fox* [2022] IEHC 97. It would seem to follow, therefore, that the application for a well charging order must be refused. I will list the matter remotely for final orders on 17 October 2022 at 10.45 am.

Appearances

Eoghan Casey for the plaintiff instructed by O'Brien Lynam
Diarmaid Padraig Murphy for the defendant instructed by Michael Keane & Co.

Approved Garrett Simons