

**APPROVED**

**[2022] IEHC 493**



THE HIGH COURT

2020 No. 276 SP

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

KELLIE GREENE (OTHERWISE KELLIE BYRNE)  
KENNETH GREENE

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 19 August 2022**

**INTRODUCTION**

1. This judgment is delivered in respect of an application for well charging orders. The basis for the application differs as between the two defendants. As to the first defendant, the application is grounded on a number of loan facilities granted to her personally. It was a condition of the loan facilities that they be secured by way of an equitable mortgage by deposit of land certificate. As to the second defendant, the application is grounded on a written guarantee given by him in respect of the indebtedness of the first defendant.

NO REDACTION REQUIRED

## PROCEDURAL HISTORY

2. The principal terms of the three loan facilities are set out in letters dated 17 May 2004 and 14 October 2006. In total, a sum of €336,500 was lent to the first defendant. This aggregate sum was divided as between three specific loan facilities. The first defendant had been an employee of the plaintiff bank and thus qualified to obtain certain loan facilities at preferential rates.
3. The purpose of the first two loans had been to purchase a dwellinghouse at 19 Hamlet Avenue, Chieftain's Way, Balbriggan ("*the subject property*"). The purpose of the third loan, which had been granted in 2006, had been to restructure the first defendant's debt.
4. The facility letters indicate that security was to be provided by way of an equitable deposit of the land certificate for the subject property, together with a guarantee. As it happens, no land certificate was deposited with the plaintiff bank. This is because no land certificate was ever issued by the Land Registry in respect of the subject property. The plaintiff bank relied instead on a solicitor's undertaking, to deliver the title documents to it, as giving rise to an equitable mortgage. This undertaking appears to be dated 9 June 2004.
5. The guarantee was entered into between the plaintiff bank and the second defendant on 1 November 2006. It is expressly provided that the total amount recoverable from the guarantor shall not exceed the sum of €336,500 together with interest thereon from time to time (whether before or after judgment) at the plaintiff bank's lending rate from the date of demand by the bank for payment until full discharge.
6. As a result of amendments introduced under the Registration of Deeds and Title Act 2006, the procedure whereby an equitable mortgage could be created in

respect of registered land by way of deposit of a land certificate was abolished. The holder of an existing equitable mortgage could apply to have a lien registered as a burden against the title. This was subject to a cut-off date of 31 December 2009.

7. The plaintiff bank applied to register a lien in respect of the subject property in February 2008. A copy of the folio in respect of the subject property, Folio 169302F County Dublin, has been exhibited. There is an entry dated 11 February 2008 in the following terms:

“Lien pursuant to Section 73(3) of the Registration of Deeds and Title Act, 2006, in favour of Allied Irish Banks plc.”

8. Following default on the part of the first defendant in making payments pursuant to the loan facilities, the plaintiff bank, through its solicitors, made a formal demand for repayment on 5 November 2014.
9. By a second letter dated 5 November 2014, the plaintiff bank demanded immediate payment pursuant to the guarantee entered into by the second defendant. This letter of demand identified the sum of €336,500 as being payable. This, it will be recalled, was the maximum sum allowed under the terms of the guarantee.
10. It is stated in the grounding affidavit that the subject property is the primary residence of the defendants. Notwithstanding this, the plaintiff bank offers the view that the Central Bank’s Code of Conduct on Mortgage Arrears (“*CCMA*”) does not apply as each of the loans was provided on a commercial basis, and not as personal housing loans. Nevertheless, the plaintiff bank explains that, out of what it characterises as an abundance of caution, it applied the *CCMA* process to the first defendant. The first defendant is expressly described in the grounding affidavit as the only party to the lending relationship (as distinct from the

guarantor, i.e. the second defendant). This will become relevant to the discussion below in relation to the supposed securitisation of the guarantee.

11. The outcome of the CCMA process was that the first defendant was, by letter dated 11 March 2014, deemed to be non-cooperating within the meaning of the CCMA.
12. The within proceedings were instituted by way of special summons on 30 October 2020. There were difficulties in serving the defendants. The delay in service necessitated an application to renew the summons pursuant to Order 8 of the Rules of the Superior Courts. This application was granted by order of the High Court on 14 February 2022.
13. The High Court made an order on 25 April 2022 directing that service of the proceedings could be effected by way of prepaid post addressed to the defendants at a specified address.
14. The special summons came on for hearing on 11 July 2022. The matter was adjourned to 25 July 2022 for further submissions in circumstances where the court raised a query as to whether the liability under the guarantee was properly regarded as secured against the second defendant's interest in the subject property. A supplemental affidavit has been filed on behalf of the plaintiff bank which exhibits the documentation filed with the Land Registry in February 2008 as part of the application to register a lien.
15. Judgment was reserved until today's date.

## **DISCUSSION AND DECISION**

16. The first issue to be addressed is the question of service. There was no appearance on behalf of the defendants at either of the two hearings in July 2022.

Nevertheless, having regard to the affidavit of service of Niamh O'Shea sworn on 16 May 2022 and that of Gemma Furlong sworn on 19 July 2022, I am satisfied, first, that the proceedings were properly served in accordance with the order of the High Court of 25 April 2022; and, secondly, that the defendants had been expressly notified of the hearing dates of 11 July and 25 July 2022.

17. I turn next to consider the merits of the application for well charging orders. The position in respect of the first defendant is clear-cut. It is apparent from the documentation exhibited that the first defendant entered into a number of loan agreements with the plaintiff bank. It is also evident that the monies were drawn down pursuant to the loan agreements and that the loan accounts have all fallen into arrears. A formal demand for repayment was made as long ago as November 2014. Notwithstanding this, there has been no payment made since that date.
18. It is also apparent from the evidence that the Land Registry had been satisfied that an equitable mortgage had been created by virtue of the defendants' solicitor's undertaking to deliver the title documents to the bank, and the Land Registry had, accordingly, registered a lien in favour of the plaintiff bank pursuant to the provisions of Section 73 of the Registration of Deeds and Title Act 2006.
19. Having regard to the legal test as set out by the Court of Appeal in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93 (at paragraphs 46 to 52), I am satisfied that the plaintiff bank has made out its proofs in relation to the first defendant. In particular, the plaintiff bank has adduced evidence which relates the debt to the undertaking to deposit title documents and that the security so created has since been protected by registration as a lien under Section 73 of the Registration

of Deeds and Title Act 2006. Accordingly, a well charging order will be made as against the first defendant.

20. The position in respect of the second defendant is more complicated. It is established on the evidence that the second defendant executed a guarantee in favour of the plaintiff bank in respect of the indebtedness of the first defendant. The guarantee is, however, an unsecured guarantee in the sense that it was not a condition of same that the second defendant provide a mortgage or charge over his interest in any property which might then be enforced against in the event of default on his part.
21. Notwithstanding the absence of an express condition to this effect, counsel on behalf of the plaintiff bank contends that it is implicit from the documentation that the second defendant's interest in the property was charged. Attention is drawn to the content of the material submitted as part of the application to register a lien in February 2008. This material has been exhibited as part of the supplemental affidavit filed on 19 July 2022.
22. With respect, this contention is not well founded. There is nothing in the documentation which indicates that it was intended to create a mortgage over the second defendant's interest in the property. As correctly observed in the plaintiff bank's own grounding affidavit, the only party to the formal lending relationship was the first defendant. The loan facilities were granted to her alone. Presumably, this may have been connected to the fact that she was an employee of the plaintiff bank and thus able to avail, in respect of part of the overall lending, of a preferential rate of interest.
23. It is ultimately a question of fact as to whether an equitable mortgage by deposit has been created in any particular case, and as to the extent of the debt secured

by such equitable mortgage. See, for example, *O’Keeffe v. O’Flynn Exham* (unreported, High Court, Costello J., 31 July 1992). On the basis of the materials before the court, there is nothing to indicate an intention that the guarantee provided by the second defendant was to be secured by way of a mortgage or charge over his interest in the property.

24. As explained by the Court of Appeal in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93, it is an essential proof of an application for a well charging order that the relation of the debt to the deposit which gave rise to the registered lien must be supported by proper evidence. What will constitute such “*proper evidence*” will vary from case to case. It may (but will not necessarily) involve evidence going to the circumstances in which the original deposit took place but where such evidence is put before the court, its purpose is not to prove the lien but to prove that the lien secures the sums claimed.
25. The evidence in the present case goes no further than demonstrating an intention that the primary indebtedness of the first defendant pursuant to the loans granted to her personally be secured against her interest in the subject property. There is nothing which indicates that, separately, the second defendant had agreed to secure his guarantee by way of a mortgage or charge against his interest in the property. The plaintiff bank did not afford the second defendant the benefit of the CCMA process which would appear to be inconsistent with the contention now made that he had, in fact, created a mortgage over his interest in his primary residence.
26. It is also significant that the solicitors’ undertaking predates the execution of the guarantee. The undertaking appears to be dated 9 June 2004, and the guarantee was executed on 1 November 2006. The undertaking is in very general terms

and could not be understood as intended to create a mortgage in respect of a future guarantee.

27. The acknowledgment signed by the defendants at the time of the registration of the lien simply indicates that neither defendant objected to the registration of the lien against the first defendant's interest in respect of her borrowings. Moreover, and in any event, an acknowledgment signed in the context of the registration of the lien in February 2008 could not rewrite the terms of the guarantee executed on 1 November 2006.

### **CONCLUSION AND FORM OF ORDER**

28. A well charging order will be made as against the first defendant in respect of her interest in the property. None of the reliefs sought in respect of the second defendant are available in these proceedings in circumstances where, for the reasons outlined above, the plaintiff bank has not established that a mortgage or charge was created over his interest in the property.
29. The proceedings will be listed for final orders at 2 pm on Monday 10 October 2022. I will also hear from the parties on that date as to whether it is appropriate to direct an order for sale and partition.

#### *Appearances*

Keith Rooney for the plaintiff instructed by Mason Hayes and Curran LLP  
No appearance by either defendant

Approved  
S. MANS