

The High Court rejects well charging application of a registered lien.

Promontoria Oyster DAC v John Fox [2022] IEHC 97 judgment of Mr. Justice Simons dated 7 March 2022 (the “Judgment”).

“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. It follows, therefore, that the loans advanced to the Defendant by Ulster Bank pursuant to the loan agreements entered into on 23 June 2010 are not secured against the relevant land. The application for a well charging order is, accordingly, refused.”

Practice Focus

- Banking enforcement litigation
- Well charging applications of liens

Background:

- Promontoria Oyster DAC (“**PODAC**”) issued well charging proceedings for an order for the sale and well charging of the property contained in folio WH14403 (the “**Folio**”).
- The defendant’s liability arose from two loan agreements both dated 27 May 2010 for €40,000 and €100,000 respectively (the “**Loan Agreements**”) between Ulster Bank Ireland Limited (“**Ulster Bank**”) and the defendant.
- The Loan Agreements were secured by way of a lien registered as a burden on the Folio (the “**Lien**”).
- The interest in the Loan Agreements transferred to PODAC by global deed of transfer dated 19 December 2016 and PODAC’s interest in the Lien was noted on the Folio on 9 March 2017.

- Section 105 (5) of the Registration of Title Act 1964 allows for the creation of a lien on registered land by the deposit of the land certificate relating to the land, i.e. “lien by deposit”.
- Pursuant to Section 73 of the Registration of Deeds and Title Act 2006, all liens must be registered in the Land Registry on or before 31 December 2009 or will cease to have effect. See judgment in *PODAC v Hannon* [2019] IESC; [2020] I.R. 364.

Mr. Justice Simons identified two distinct legal issues:-

- Does a lien created by deposit of a land certificate have the same effect as an equitable mortgage created by a deposit of title deeds for unregistered land?
- Can a creditor rely on a registered lien as security for future advances to the debtor post-31 December 2009?

The defendant objected to the application on the following grounds:-

- A registered lien is merely a mechanism for registering pre-existing security and cannot be used to create security for loans made after 31 December 2009.
- The term “lien” refers to an entitlement to retain something as security for a debt already incurred. A “lien”, unlike charges for present and future advances, does not cover future debt or obligations.
- To extend a registered lien to secure sums advanced subsequent to 31 December 2009 would be inconsistent with the legislative aim to abolish, prospectively, equitable mortgages as a security.

The Court's findings:-

In examining the Defendant's application, Mr. Justice Simons observed and held as follows:-

- The provision under section 62 of the Registration of Title Act 1964 allows for the payment of money to be secured against the ownership of land is confined to "charges" and not liens.
- Pursuant to the Supreme Court judgment in *PODAC v Hannon [2021] I.R. 364* and the Registration of Deeds and Title Act 2006, the practice of creating a lien by deposit of a land certificate for registered land has ended.
- Prior to legislative amendment in 2006, the production of the land certificate would have been a prerequisite to most forms of dealing in the land. In the absence of the land certificate, the owner of the land would not normally be able to register any subsequent transactions in respect of the land. All liens by deposit and land certificates ceased to have any force or effect after 31 December 2009. Section 73 of the Registration of Deeds and Title Act 2006 allowed for the orderly transposition of liens by deposit of land certificate into registered liens.
- Relying on Justice Dunne in *PODAC v Hannon* "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...to registered the equitable mortgage created by the deposit of the land certificate as a lien on the register. Therefore the equitable interest no longer exists, it has been converted into a registered lien.
- There is an absence of express statutory provisions for registered liens.
- By "reference to the overall scheme of the legislation", the Judge found that it would be inconsistent with the move towards a universal system of land registration to permit the creation of security post-2009 with no new registered instrument.
- PODAC argued that a registered lien, in effect, is the functional equivalent of a registered charge for present and future advances. The Court disagreed, noting fundamentally it cannot be reconciled with the legislative choice to convert the pre- 31 December 2009 equitable interests to a registered lien (as opposed to a charge). It would also be inconsistent with the move towards a universal system of land registration to permit the creation of security post- 2009 on the strength of the brief notation of a burden on the folio with no registered instrument.

- The defendant's contractual commitment to secure property post 31 December 2009 does not prevail over Irish statute.
- A lien registered pursuant to section 73 of the Registration of Deeds and Title Act 2006 cannot be relied upon as security for loans entered into after 31 December 2009. The application for a well charging order was refused.

Key Takeaways

- There is an absence of express statutory provisions for registered liens.
- A lien registered on a folio pursuant to Section 73 of the Registration of Deeds and Title Act 2006 cannot be enforced for loans entered into after 31 December 2009.

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