

**APPROVED**

**[2023] IEHC 284**



THE HIGH COURT

2020 No. 289 SP

BETWEEN

ULSTER BANK IRELAND DAC

PLAINTIFF

AND

JARLATH RATTIGAN  
ELIZABETH RATTIGAN

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 25 May 2023**

**INTRODUCTION**

1. This judgment is delivered in respect of an application by Ulster Bank for a well charging order and an order for sale. The application relates to the lands comprised in Folio 60665F, County Meath. The application is advanced on two alternative bases as follows. The first basis is that the defendants are indebted to Ulster Bank pursuant to a guarantee. The indebtedness is said to have been secured by way of an equitable mortgage over the lands. This equitable mortgage has since been converted into a registered lien pursuant to Section 73 (3) of the Registration of Deeds and Title Act 2006. The second basis

NO REDACTION REQUIRED

is that Ulster Bank obtained judgment against the defendants on 17 November 2008 in the sum of €230,735.40 and this judgment has since been registered as a judgment mortgage against the defendants' interest in the lands. This second basis is advanced as a fallback position. Ulster Bank's primary submission is that it is entitled to enforce the registered lien. Ulster Bank considers that reliance on the registered lien is more advantageous to it in terms of establishing priority over other incumbrancers. A number of judgment mortgages by other parties have been registered against the lands.

2. The defendants seek to resist the application chiefly on the grounds that Ulster Bank is in breach of an agreement allegedly reached between the parties in late December 2011 or early 2012. It is said that the intention at that time had been that another property owned by the defendants, namely an apartment in County Mayo; was to be surrendered to Ulster Bank and the net proceeds of sale would be used to discharge the debt owing to Ulster Bank in respect of the guarantee. The gist of the argument appears to be that had Ulster Bank complied with this supposed agreement, then the defendants would have been better placed to pay down the debt.
3. The shorthand terms "*the Meath lands*" and "*the Mayo apartment*" will be used in this judgment when referring to the two respective properties.

#### **FACTUAL BACKGROUND**

4. The defendants executed a guarantee on 23 June 2004 in favour of Ulster Bank in respect of the debts of a company known as Fenestech Ltd. The total amount recoverable under the guarantee was not to exceed a principal sum of €250,000.

5. The following year, the defendants created an equitable mortgage over the Meath lands in favour of Ulster Bank on 19 April 2005. This was done by way of an undertaking by the defendants' solicitors to hold the land certificate in respect of the lands in trust for Ulster Bank. The equitable mortgage was stated to be as security for all the defendants' liabilities to Ulster Bank howsoever arising. The equitable mortgage thus extended to the (potential) indebtedness of the defendants pursuant to the guarantee.
6. Ulster Bank made a demand for payment pursuant to the guarantee on 17 May 2007. This demand was not met. Thereafter, Ulster Bank instituted summary summons proceedings against the defendants on 12 March 2008. Ulster Bank obtained judgment in default of appearance on 17 November 2008 in the sum of €230,735.40. This judgment remains unsatisfied. (To date, a single payment of €500 has been made by the defendants).
7. In accordance with the provisions of Section 73 (3) of the Registration of Deeds and Title Act 2006, Ulster Bank's interest under the equitable mortgage was converted into a registered lien on 7 October 2009. Ulster Bank now seeks to enforce this statutory lien by way of a well charging order and an order for sale. See, generally, *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93.
8. Turning now to the Mayo apartment, the defendants had acquired a leasehold interest of 999 years in the apartment on 24 September 2000. It is apparent from the folio that Ulster Bank held a charge over the defendants' interest in the Mayo apartment. This charge was registered on the folio on 26 October 2000. It appears, although this is not entirely clear from the papers, that the apartment had been purchased with the benefit of a loan from Ulster Bank. The loan appears to have been for an amount of approximately IRL£67,000. As of

10 June 2020, the principal and interest came to a sum of €101,653.44. (See letter dated 12 June 2020 to the defendants from Promontoria Scariff DAC). This debt is separate and distinct from the debt owed by the defendants pursuant to the guarantee.

9. The defendants allege that they had reached an agreement with Ulster Bank in December 2011 or early 2012 whereby the Mayo apartment was to be surrendered to Ulster Bank. The alleged agreement is said to be evidenced by the following exchange of correspondence. The solicitors then acting on behalf of the defendants, Dillon Geraghty & Co., had written to Ulster Bank's solicitors on 28 September 2011. The letter stated as follows:

“In an effort to be reasonable, our client suggests that we propose to you that the apartment in Mayo be transferred to the Ulster Bank to do with it what your client wishes. If this is something of interest to your client, perhaps you would be good enough to revert to us. If your client has any other suggestion in relation to the apartment, our client will welcome same.”

10. Ulster Bank's solicitors replied by letter dated 20 December 2011. The reply, in relevant part, reads as follows:

“We have now taken our client's instructions and confirm that our client is willing to accept your clients' proposal that the apartment in Mayo be transferred to our client. Please confirm that your clients' will sign a Deed of Surrender and provide an agent of Ulster Bank Ireland Limited with the keys to the property.

Our client will take possession of the property with a view to selling/letting it however, any proceeds received will be applied in partial reduction of your clients' indebtedness to Ulster Bank and will not be in full discharge of same. Your clients' will still remain liable for whatever balance remains outstanding after rent/proceeds of sale are applied.

Please confirm when your clients' will be in a position to deliver up vacant possession of the mortgaged property so that we may make arrangements for a Deed of Surrender to

be sent to you for signature and an agent of Ulster Bank Ireland Limited to take possession of the property.”

11. There does not appear to have been any formal response to that letter. The defendants have stated on affidavit that they subsequently instructed their solicitor to agree to the surrender of possession of the apartment notwithstanding that it was to be in partial satisfaction only of their overall indebtedness to Ulster Bank. Crucially, however, there is no evidence that this instruction was communicated to or accepted by Ulster Bank and no deed of surrender was ever executed.
12. As explained earlier, the Mayo apartment was itself subject to a charge in favour of Ulster Bank and the proceeds of any sale would have had to be applied to the discharge of that underlying debt first, before any balance could be applied towards the general indebtedness of the defendants. As of 31 December 2011, there was a sum of €69,855.58 outstanding on this loan.
13. In the event, the defendants did not deliver up vacant possession of the Mayo apartment to Ulster Bank. The benefit of the charge and underlying debt in respect of the Mayo apartment has since been transferred to a third party, Promontoria Scariff DAC, by way of a deed of transfer in June 2019. It appears from the papers before the court that the Mayo apartment has now been sold by way of a receiver’s sale for the sum of €174,000.
14. It is not evident from the papers before the court as to what balance remained once the debt charged on the apartment had been repaid. At the hearing on 22 May 2023, the first named defendant informed the court that he had been told that the balance payable to the defendants is approximately €12,000.

## **DISCUSSION AND DECISION**

15. The defendants seek to resist the application for a well charging order and an order for sale chiefly on the basis that Ulster Bank is in breach of the agreement allegedly reached in December 2011 or early 2012.
16. The evidence does not establish that any such agreement was ever entered into. As appears from the correspondence cited under the previous heading, the proposal as of December 2011 had been that the defendants would sign a deed of surrender and provide an agent of Ulster Bank with the keys to the Mayo apartment. This proposal was never acted upon: in particular, no deed of surrender was ever executed. Instead, the defendants retained possession of the Mayo apartment for the next decade. The contractual position of the parties thus remained as it always had been, and the defendants continued to be indebted to Ulster Bank in respect of the loan charged against the apartment. It appears, although this is not an issue to be decided in these proceedings, that Ulster Bank were entitled, under the terms of the loan agreement, to assign the charge and underlying debt to a third party. This seems to have been the basis upon which the charge and underlying debt came to be transferred to Promontoria Scariff DAC.
17. The defendants also make a complaint to the effect that they were not notified of the transfer of the benefit of the charge and underlying debt in respect of the Mayo apartment to Promontoria Scariff DAC. It would appear that the relevant notification had been sent to an out-of-date address. With respect, the complaints made in this regard are not relevant to the narrow issue before the court in the present proceedings, namely whether the indebtedness pursuant to the guarantee is well charged on the Meath lands.

18. The defendants also make a more general complaint that it had been envisaged, under a loan agreement entered into between Ulster Bank and Fenestech Ltd in August 2005, that an equitable mortgage over what is described as the “*equity*” in the Mayo apartment was to be released once an equitable mortgage over the Meath lands had been created. The reference to the “*equity*” in the apartment is, presumably, intended to refer to the difference between the then market value of the apartment and the loan secured against the apartment. The defendants are aggrieved that the Mayo apartment is back in the mix.
19. None of this constitutes a good ground for resisting the application for a well charging order and order for sale in respect of the Meath lands. There is nothing in this documentation which suggests that the equitable mortgage in respect of the Meath lands was to be released. Moreover, matters were overtaken by events in that the company subsequently defaulted on its loan and the guarantee was called in.
20. The simple fact of the matter is that the defendants granted an equitable mortgage in respect of the Meath lands which extends to their liability under the guarantee. That equitable mortgage has since been converted into a registered lien. The debt under the guarantee comes within the scope of the liabilities secured by the registered lien. The defendants have never disputed the debt under the guarantee; and it is, in any event, too late for them to do so in circumstances where the debt has crystallised in the judgment of 17 November 2008. Ulster Bank is entitled to enforce that registered lien by way of a well charging order and an order for sale.

**CONCLUSION AND PROPOSED FORM OF ORDER**

21. 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 Ulster Bank has made out its proofs for a well charging order. In particular, Ulster Bank has adduced evidence which relates the debt pursuant to the guarantee to the undertaking to deposit the land certificate 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 in the sum of €230,235.40 (together with interest thereon). (This figure reflects the payment of €500 made by the defendants).
22. An order for sale will also be made directing that, in default of payment of the said sum (together with further interest) within three months from the date of service of the perfected order, the lands comprised in Folio 60665F, County Meath be sold at such time and place subject to such conditions of sale as shall be settled by the court.
23. As to costs, my provisional view is that each party should bear its own costs. This provisional view is informed by the fact that whereas the plaintiff has succeeded in obtaining the relief sought, the case should not have been called on for a Monday hearing. The hearing had to be staggered and this resulted in additional cost and inconvenience for the defendants.
24. If the plaintiff wishes to contend for a different costs order than that proposed, it should file written legal submissions within fourteen days.

*Appearances*

Grainne Fahy for the plaintiff instructed by McKeever Rowan Solicitors  
The defendants appeared as litigants in person

Approved  
Gemma S. Mass