

Irish Court of Appeal gives significant ruling for lenders and funds in enforcing security

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The recent Irish Court of Appeal judgment in *Promontoria (Oyster) DAC v Fox*[2023] IEHC 76 provides clarity for lenders and funds in enforcing security.

The importance of this decision cannot be underestimated for lenders, loan portfolio purchasers, credit servicing firms and, most importantly, borrowers. All borrowers should now check their loan documentation and conditions of lending to see whether new monies have been advanced on foot of previously registered liens.

COA Fox Decision 2023

It was previously common practice to create an equitable mortgage over a property by deposit of the land certificate with the lender. This was a common informal method of creating security. This method was abolished pursuant to the of section 73 of the Registration of Deeds and Title Act 2006 (the 2006 Act). Section 73 provided that the land certificate ceased to have any legal effect and that such security must now be registered within a three-year (period ending on 31 December 2009).

Thereafter, the security was secured by the registration of the lien as a burden on the relevant folio. A lien is essentially a legal tool used by those who are owed money to ensure that they're paid back. A "lien" is a notice that attaches to a property, telling the world that a creditor claims you owe it some money. A lien is typically of public record.

Background

In *Promontoria (Oyster) DAC v Fox*[2022] IEHC 97 the High Court was asked to consider whether *Promontoria* was entitled to a well-charging order over a Land Registry property in relation to which it had acquired a registered lien (pursuant to an earlier loan sale). The original lender had loaned monies to the defendant on the security of an equitable deposit of the land certificate to

the property. In this case the original lender registered such a lien. However, it also subsequently advanced new monies on foot of further loan agreements. Promontoria's interest in the lien was noted on the Folio on 9 March 2017. Promontoria argued that those new loans (which it had acquired and was seeking to enforce), were validly secured by the existing registered lien. The defendant argued that the lien could only secure debts in existence at the time of its registration.

The High Court decision

The High Court had to decide whether a creditor could rely on a registered lien as security for future advances to the debtor, ie as security for additional loans advanced after 31 December 2009.

Simons J opined that the 2006 Act is silent on this point and he held that, in the absence of an express statutory prescription of the characteristics of a registered lien, it was necessary to look at the legislative intent by reference to the overall scheme in the 2006 Act.

Applying that interpretative approach, Simons J held that:

- The introduction of a registered lien as part of the transitional provisions under the 2006 Act was not intended to displace the primacy of the charge
- The right to register a lien had been put in place to protect the existing property rights of the holders of liens by the deposit of land certificates
- When the equitable mortgage created by deposit of the land certificate (which could have secured future advances) was converted by statute into a registered lien, the equitable interest was extinguished and replaced by a different interest (namely a registered lien)

In light of the above reasoning and the more limited nature of a registered lien Simons J held that Promontoria was not entitled to a well-charging order on foot of its registered lien in relation to monies advanced under loan agreements entered into after the date of the lien's registration.

The Court criticised the submission of Promontoria who had argued that what persists after registration of s.73(3) lien is the same lien 'before and after'. The Judge ruled that this was an overly literal interpretation of Section 73 and irreconcilable with the approach adopted in previous High Court decisions. This decision meant that Promontoria was estopped from enforcing loans where monies were loaned following registration of a lien. These loans were no longer allowed to be secured by way of a lien.

Not surprisingly, Promontoria appealed the decision to the Court of Appeal and on 31 March 2023 Pilkington J delivered her judgement.

The Court of Appeal decision

In overturning the High Court decision in *Promontoria (Oyster) DAC v Fox* [2022] IEHC 97, Pilkington J clarified the law in respect to liens and well charging proceedings. Pilkington J referred to the fact that Section 73 is headed 'abolition of land certificates and certificates of charge'. In her view, regard can be had to the interest which existed prior to the enactment of Section 73 as the purpose of Section 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.

She held that on the one hand Section 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. However, it does not follow that existing liens cannot secure advances after 2009. She referred to the fact that Section 31 of the 1964 Act confirms the conclusiveness of the matters entered onto 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.

Whereas Simons J made reference to Section 73 being a transitional provision, Pilkington J held that the issue in this case does not end there and she specifically considered 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? In overturning the High Court, Pilkington J. concluded: "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 Section 73 of the 2006 Act, can be, and, if agreed by the parties, are secured by the registered liens."

Conclusion

Borrowers should now be aware that liens registered pursuant to Section 73 can secure loan agreements or advances made after 31 December 2006.

If you would like more information, please contact the authors of this article.

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Meet the Author



[Ronan McGoldrick](#)

Partner

[Ireland](#)

E: ronan.mcgoldrick@ogier.com

T: [+353 1 632 3116](tel:+35316323116)

Key Contacts



[Clodagh Buckley](#)

Senior Associate

[Ireland](#)

E: clodagh.buckley@ogier.com

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