THE HIGH COURT

[2019 415 Sp]

BETWEEN

PROMONTORIA (Oyster) DAC

PLAINTIFF

AND

JOHN GETHINS

DEFENDANT

DECISION of the MASTER of the HIGH COURT delivered on the 22nd day of March, 2022

TITLE TO LAND

1. Yes, of course, a functioning society needs a system of ownership of property and housing. The title to land needs to be readily ascertainable. We started the switch from documentary title to a statutory register over a century ago, and a register of this sort is of systemic importance. But, after the speed of securitisation over the past quarter of a century, the system here is now damaged to the point of dysfunctionality. (That means it doesn't work as intended.)

2. From time immemorial, possession of land was best title, and the law enforced it. Hence the maxim: *"possession is nine parts of the law."* Some mistakenly read that in the sense that possession can trump the law, defeating legal title, but not so. The ownership of land is found in the legal enforceability of the right to possession of those in actual possession.

3. As far back as the reign of Richard II we find a Statute warning of the consequences of taking possession by force "none make entry into lands and tenements, and where entry is given by law… not with strong hand nor with multitude of people but only in peaceable and easy manner." (the Forcible Entry Act 1381): "he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." The right to quiet enjoyment of land by those in possession has continued over the centuries, into various Human Rights Charters, and is even found in our own Supreme Court's recent judgment (citing proportionality)in Clare County Council v. McDonagh and others, 31st January 2022. In particular, the guidelines of Equity tramp on a mortgagee's right to "repossess", by insisting on the mortgagor's right to "redeem" until the moment of execution.

4. Over time, proof of ownership changed from actual possession to formed documents recording transactions. A documentary title to an asset could, in turn, be a collateral or

security for a credit transaction, on the basis that the borrower could repay and recover the asset. That transaction could itself be recorded in a deed of mortgage or instead be effected by a deposit of the title deeds creating a mortgage enforceable in the Chancery courts.

5. When the great registration of title project got underway in the late 19th century, the hope was that documents of title could be a thing of the past. The annotated edition of the latest Registration legislation, the 2006 Registration of Deeds and Title Act, describes the statutory system as *"a superior and more modern system which permits the registration of ownership and certain land burdens in the Land Registry and greatly simplifies the investigation of such titles for conveyancing Solicitors."*

6. In Hannon's case in 2019, Clarke C.J. said of the register that "a person who consults the register ought to be able to know who owns what interest in the land and who *may* have the benefit of charges or burdens over the land." (emphasis added).

7. The problem is that the register no longer contains accurate data and has been corrupted by the evolution of a capital market intent on liquidity and arbitrage trading. The unthinkable has occurred: burdens which are the essence of mortgage lending have themselves been re-mortgaged by the originators and the register is silent on this "*securitisation*" of the mortgagees' assets.

8. So, we now come across registered owners of land – whose title it must be recalled is, by law, "conclusive" (see s31 of the 1961 Act) - finding that some unregistered entity has sold the land.

9. Equally concerning, especially for purchasers of land at distressed sales, is the realisation that their acquired title has a part unregistered chain, and is not therefore beyond dispute: time to purchase title insurance? The SPV hedge fund purchasers of nonperforming loans may also have to consider demanding the return of their investor capital.

10. Even more unsettling is the use of "conveyancers' artifices", contrivances employed in the mortgage industry to take advantage of the shortcomings of the register in order to fast-track collateral recovery, usually by "badging" a registered entity with a fake I.D while doing business off register. Professor Levitin of Georgetown University, Washington has described securitisation as "*the apotheosis of form over substance*."

11. **SHORTCOMINGS OF THE REGISTER**

i. The widespread assumption that the owner of a registered charge is "conclusively registered" as owner of the charge.

ii. The subterfuge that the loan originator can sell beneficial ownership of the charge to investors (via a Special Purpose Vehicle for tax "neutral" capital intermediation) but still claim to be entitled to possession as before.

iii. Failure to require updating of the register when securitization alters the ownership status of the loan originator.

iv. The strange notion that a "bare" trustee can, as such, initiate proceedings for repossession (as a bare trustee, it cannot even give good receipt). Or that a bare trustee can acquire or trade in possession orders.

v. The assertion that an off-register bare trust can be created without a formal settlement by the legal owner of the charge.

vi. Avoiding the bar on registering co-owners as new owners of the charge by just not bothering to let the Registrar know about any securitization which splits title in this way.

vii. Dodging the Companies Acts' requirement to register charges on assets.

viii. The use of Swiss bank style secret Central Bank registering of Section 110 SPVs, (including AIFs, QIAIFs and, latterly, ICAVs) as true owners of repossessed Irish homes and lands.

ix. Including agricultural land in the portfolio being securitized when this is prohibited by the 2001 Asset Covered Securities Act, (and not telling the judge).

x. And let no one assume that the asset class of receivables sold to the SPV includes third party collateral which has not then crystallised: check the small print.

12. The UK Court of Appeal in Paragon Finance v Pender and anor [2005] 1 WLR 3412, par 14, describes *securitisation* in the following passage:

Since early 1987 Paragon has been party to what are known as "securitisation" arrangements. Such arrangements typically involve (and the instant case is a typical case) the transfer by way of sale of a portfolio of mortgages (I use the word mortgages to include charges) to a "special purpose vehicle" ("SPV") in consideration of a sum which is funded by the issue by the SPV of listed bonds carrying an entitlement to interest at a floating rate. In order to attract investors the bonds must carry a credit rating which is acceptable to the market, for example a rating from a well known credit agency such as Standard & Poor's. Interest payable on the bonds is in turn funded from the income generated by the mortgages transferred. The sale is non-recourse, in that the transferor is not liable for losses incurred by holders of the bonds. The transfers of the mortgages may or may not be completed by the vesting of the legal title in the SPV. In the case of a mortgage of registered land, vesting of the legal title will occur by the registration of the SPV as proprietor of the mortgage, in the case of a mortgage of unregistered land, vesting of the legal title will occur on the execution of an appropriate deed of transfer.

13. Alistair Hudson, in his book on the law of finance Sweet and Maxwell, 2013 notes at paragraph 44-10 that "*because the assets are transferred outright to the SPV, the investors have the security of knowing that they can receive what they are entitled to from the SPV*". He goes on in paragraph 44-15, under the heading:

    "*the originator divests itself of all rights in the receivables*":

    "As has been set out above, the originator is intended to divest itself of all the property rights it held in the receivables. This has two purposes. First, the investors must know that all of the rights to the receivables have been transferred to the SPV, that there is no encumbrance with the income stream passing through into the bonds as intended, and that the originator cannot recover title in those assets. Secondly, the outright transfer of the assets to the SPV, in such a way that the originator has no property right in them nor any contingent right to them, means that the assets are put beyond the reach of originator in the event that the originator should subsequently go into insolvency".

14. Once you have grasped the essentials it becomes difficult to understand how our own McGovern J. in Freeman v Bank of Scotland 2014 IRHC 284 stated at Para. 8:

    "It is an important principle in securitisation transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank."

    Somebody must have misled the judge. I do not think it is likely to have been the plaintiff. His comment was *obiter* (not a judicial determination of an issue in the case) but has been quoted up and down the country, with unfortunate results.

15. I could go on. There is an amusing ruling by the Revenue Appeal Commissioners in the matter of a claim by Y limited, formerly a mortgage provider, latterly a mere servicer after securitisation, to carry forward its historic losses into later trading periods. The Appeal Commissioners disallowed the €129 Million claim holding that the mortgage provision business had ceased. One of the points made most frequently in the hearing was that Y, had sold the loans but had retained legal title. This was used to illustrate the continuity of the business being transacted. At the same time, Y sought to explain the importance, before and after securitisation, of "bankruptcy remoteness", clearly failing to grasp that that the construct was only of practical use to investors in the event of Y's own insolvency (see above) if title ended up as an asset in the liquidation. (In the event the legal title point was not explored). (The losses were disallowed)

OWNERSHIP OF THE CHARGE

16. Judicial comments about the post-securitisation legal title of the loan originator, which are clearly wrong, have been welded onto the notion, also wrong, that the ownership of a registered burden is established "conclusively" by its registration as such. Combine the two errors: securitisation requires that the loan originator retains the legal title and, two, the registered ownership thereof is beyond dispute. The reality, instead, is that the loan originator was never *conclusively* the owner of the charge and has, in securitising it, sold the legal title to the charge to the SPV.

17. It is a mistake to think that, just because the ownership of the land is conclusive when registered, the same is true of ownership of a registered burden. It's not. The title of a mortgagee as a burden holder is its deed of legal mortgage or its possession of the title deeds. There may be issues as to the validity or legal effect of either, and the Court will have to resolve these prior to declaring the mortgage "well charged."

18. The underlying contractual position is much less certain with equitable mortgages by deposit than with legal deeds of mortgage. Nevertheless, both must be resolved employing standard contract principles before ownership of the charge can be declared by the Court. It is not the role of the Registrar to resolve contract disputes. He just keeps a register.

19. Chief Baron Palles wrote in McKay v. McNally, 1896, at page 450:

> "What is the effect of the transaction? It passed no legal estate in the demised premises. It was nothing but an agreement, to which effect would have been given in a Court of Equity, that the mortgagor should have a lien upon the lease for certain advances; and, possibly, an agreement that the lessees would, when required, execute

a legal mortgage. I think it unnecessary to consider what would have been the exact relief afforded – whether it should necessarily have been confined to a sale. Or whether, if the mortgagee preferred, he could have had a decree for the execution of a legal mortgage. What I deem material is, that the whole matter rests in contract; that the action of the Court of Equity would have been founded on the contract."

20. United bank of Kuwait v Sahib 1996 3 All ER 215 concerned a deposit of a land certificate which was not effective since it post dated the UK's 1989 Act. The UK Court of Appeal observed that since Russel v Russel 1783 "*a deposit of title deeds relating to a property by way of security has been taken to create an equitable mortgage of the property without any writing, notwithstanding s4 of the Statute of Friends (1677).*" At p.221 Peter Gibson IJ, adopts this passage from the judgment of the trial judge. "*In all those cases, the Court was concerned to establish, by presumption, inference, or evidence, what the parties intended and then to enforce their common intention as an agreement*". He continued at p.223 *"It is clear from the authorities that the deposit is treated as rebuttable evidence of a contract to mortgage".*

21. In his 2014 book on the Registration of Deeds and Title in Ireland, ("A textbook of definitive authority" Maire Whelan, AG, 2014), John Deeny, former deputy registrar, writes at para. 2104 that "*Registration of a charge as a burden on registered land is not evidence of ownership, it is evidence only that the charge is an encumbrance on the estate of the registered owner of the land."*

22. In the Court of Appeal's recent exploration of the significance of the registration of a burden (such as a mortgage), Promontoria v Greene [2021] IECA 93,, the court does not significantly deviate from that description, though Collins J. disagrees with the High Court's (Simons J.) description of it as "merely an administrative function." In fact, the disagreement is not serious. Collins J's view is at odds also with Professor Cretney's description of the Registrar's function as "purely ministerial, as no proof of entitlement is required." ("Land Charges" NLJ, vol.118, 1167) Collins J. has, in my view, painted a picture of the "weight of the statutory role of the Registrar" which bears little resemblance to the actual business of the Registry: there isn't even an affidavit required to register a burden, a signature on a form will suffice.

23. But at par. 42 of his judgment, Collin J. confirms the essence of the matter in writing that *"Upon registration Section 31 of the 1964 Act applies to the lien. In other words, the register is conclusive evidence that the title of the registered owner is subject to such lien*." The comment is about liens but applies to all registerable charges. Note, this is the only conclusive effect; the registered ownership of the charge is not to be read as "conclusive" under Section 31. Why, then, are judges hearing cases up and down the country being told otherwise?

24. No one is likely to suggest that a *lis pendens* on the folio confirms, ipso facto, the incontrovertibility of the plaintiff's claim. Likewise, registration of a charge is merely a record (and notice to prospective purchasers) that the chargee is staking a claim to ownership of the land as security. The stake is not automatically converted into ownership by registration because underlying issues of contract have not yet been determined. (And it's not deemed "conclusive" just because the mortgagor was on notice of the application to register, as some judges have suggested.)

25. Section 73 of the 2006 Act, which was designed to streamline the enforcement of equitable mortgages by deposit of title deeds, was yet another example of legislation being fast tracked to deal with creditors' problems with awkward factual disputes and to facilitate securitisation. It scrapped the old Land Certificate and allowed mortgages instead to register a lien to like effect (on or before 32/12/2009).

26. No one could seriously imagine that the register could "conclusively" register an applicant as *owner* of property on the strength of an (unsworn) PRA Form A submitted (along with the original Land Certificate) "stating" that we hold the land certificate "under lien created by deposit of the said certificate as security for advances made" and "are entitled to register a lien as a burden on the property". (Service of a Form B Notice is claimed, but without sworn evidence of same, and Form A is signed but not witnessed.) The lien may be registered on the strength of Form A but you cannot leapfrog the step of proving the contractual context just by filing Form A.

27. Two interesting conclusions emerge from the foregoing analysis. First, insofar as the register contains an entry pertaining to a charge which is, on examination, found to be in breach of the terms of the underlying contract, that entry is now obviously wrong. It follows that, far from being a conclusive entitlement because it appears on the register, the registration of some charges may be erroneous. The second item of note is that the appointment of a receiver supposedly appointed under the terms of such a charge will not be valid. Any such receiver purporting to sell using the charge as the basis of his title cannot give good title. Unsuspecting purchasers of distressed assets beware.

COMPLEXITY

28. I see that Collins J. is of the view that "*Section 73 of the 2006 Act cannot properly be understood without understanding the position prior to the enactment"*. (Promontoria v Greene IECA 93 at par. 25). I'm not sure he is right about that: normal interpretive principles prefer the literal meaning rule, do they not? Anyhow, did Parliament intend us to read up on old law? I doubt that too. Let's not overcomplicate the Acts of the Oireachtas, if at all possible, please.

29. On 2nd February 2010 Lord Myners, then UK Financial Services Secretary, giving evidence to a House of Commons committee which was examining the future regulation of derivatives said that he "was reminded of the comment made by one of the non-executives of one of our major banks to a Treasury official about a year ago: *"In the future, he said, we are only going to do things we understand!"* Lord Myners probably didn't have Y Ltd in mind, but the free for all which is facilitated by complexity in the law does no one any favours, least of all the reputation of law.

30. Writing on an unrelated topic in 2018 (Judicial Power in Ireland, IPA, ed Carolan) O'Donnell J. now Chief Justice, wrote that, *"some of the changes in the law are extraordinarily complex, and I suspect that the number of people in the State who truly understand them is limited, and that they are on first name terms with each other."* Our legislators need to think about that for a moment. Did they understand what they enacted when the Asset Covered Securities Act was voted through in 2001? Or when it was amended in 2007? Or the now notorious 2014 amendments to s.110 of the Finance Acts which were supposed to curb "aggressive" tax avoidance. Is this not a form of corruption of the Oireachtas? It is not for nothing then that ODonnell J. has written (same article) that the Court is the only *"check and balance"* in the executive? *"We do not in truth have a system of constitutional equilibrium created by tripartite checks and balances between equal and largely separate branches: in many cases we have a check and a balance in the shape of an independent judiciary; the executive and parliamentary branches are not accustomed to exercising checks on each other."*

31. Do the legislators know that the Central Bank now operates as Ireland's Swiss bank cloak of anonymity? And how that prevents us from knowing who actually owns Irish land and housing? So much for the Registration of Title project? The suggestion that a court might be easily distracted from its core task of interrogating the issues before it because they are "complex" is a concern.

32. Look at AIB v Registration Of Title Act [2006] IEHC 483, for an example of a sort of *"you can rely on the lawyers"* proposal to a judge, Abbott J. (It failed). The judge was told that the Asset Covered Securities Act 2001 was "a complex and technical piece of legislation containing 106 Sections" meaning: much too long to read. The judge was also told that *the Act allowed credit institutions in Ireland to create a new form of security over their assets with the same characteristics as a security familiar to German law known as Pfandbriefz "bonds*". Meaning: its ok by German law, so just rubberstamp it here, don't bother checking. (The outcome of the case was that the Registrar was not authorised to register co-owners of a charge when *"the instruments proposed to effect the charge of the two banks in this case envisage provision for future advances and differential interest rates between the two co-owners".)*

33. There is a tendency now for deponents in these cases to offer their personal understanding of an exhibited deed. This is just not appropriate. It suggests that it is expected that the judge will not himself read the deed. (That's probably especially true when it's heavily redacted). Perhaps this attempt to "help" the judge is what caused

McGovern J. to reach the wrong conclusion in Freeman (see above). Particularly when one party is on the sharp end of an inequality of arms, it is Counsel's duty to the court (even if at odds with his duty to his client) to explain the law to the court even where that law is not in his client's favour. See to it.

34. Vice Chancellor of the Delaware Court of Chancery, Travis Laster., recently offered these thoughts on the rise of aggressive lawyering: "*Business pressure is part of it. But so is the general polarisation of society. There is an ambient negativity in our discourse that has seeped into professional interactions. Seeing yourself as the champion of the client also plays a major role. The notion that you are acting for someone else can create a feeling of moral license that loosens constraints."* He added: *"The clients that the big firms represent are another piece of the puzzle. They have a goal they want to achieve, and they want a lawyer to help them achieve it. That is how the lawyer adds value. The role of the lawyer as conscience, as a wise counsellor, has been de-emphasised. The role of the advocate, the enabler, has been accentuated."*

35. We have seen our own example of engineered default in the case of O'Flynn and others v. Carbon Finance Limited and others 2014 666P in which the O'Flynn group injuncted an attempt by Blackrock (immediately after acquiring the loans from NAMA) to call in personal debts offering little or no time to pay.

36. There certainly is a triumphalism in the blogs posted by some of the major solicitor firms specialising in debt collection, which seems to foreshadow a culture of aggressive lawyers. After the judgment in Pepper Finance v Jenkins 2018 IEHC 485, one such firm blogged (MHC Sept 19 2018) that the court *"rejected yet another novel procedural challenge to the enforcement of loans"* and that *"this decision is a welcome development for current and prospective purchasers of debt and security in the Irish market"*. (Incidentally, this appears to be a judgment which turned on the affidavit deponents' interpretation of the Mortgage Sale Deed.)

37. Or this snide comment by solicitors McCann Fitzgerald (17 July 2020) in their blog on the High Court (missing evidence) judgment in Promontoria v McKenna, under the heading "Purchasers Proofs fail to pass High Court Scrutiny", (and after noting that "where that information (sic) is not available, however, it may be difficult to obtain the required court assistance (sic) to allow enforcement of the mortgage"): *"It will be interesting to see how case law on this issue develops and whether the courts may offer any flexibility on the level of information required."* Who can read this as anything other than a broad hint to their client base (and to the certifiers and title insurers who also have "skin in the game") that they have reason to believe the courts will "assist" them to fix this?

THIS CASE

38. In this case, the plaintiff has chosen to ignore s. 15 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020. The plaintiff (which apparently likes to refer to itself as "Oyster" (see exhibit JB5) asserts that it has acquired Ulster Bank's rights over folio 3540F County Sligo. (The special summons is headed wrongly *"In the Matter of an Application for Well Charging Relief"* and also *"On the Application of Promontoria (Oyster) DAC"*, neither required by the Rules) *Inter alia*, Oyster asks for a "well charging" order over the entirety on the folio, even though Ulster Bank's lien was registered as a burden on property no. 1 only, and not over the 12 hectare parcel at Knocknageeha or the undivided moiety of the 0.4 hectare parcel at Carricknagat.

39. At the time Ulster Bank registered a lien in 2009, it did so over the 25 acres at Ardleebeg only (property no. 1 in the folio) but we have no evidence as to what indebtedness was thereby secured. Then we come to the 2013 loan of €52,750 repayable in six months. The security for that loan was specified in the facility letters as to be a "requirement" that the land certificate be deposited, but of course that cert would have been cancelled by the PRA back in 2009. The lien Oyster relies on was referable to the 2009 loan and not the 2013 and the latter loan was effectively unsecured. Maybe there is evidence otherwise but, if so, it is not before the court.

40. But never mind all that, Oyster's supplemental deponent, Brendan Campbell, is *"satisfied that the form of proceedings herein are* (sic) *correct and the necessary proofs are before the court to support the reliefs sought"* (para. 17) and *"as a result… the defendant has no defence to the within proceedings"* (para. 18). Mr. Campbell is not a director of Oyster, he is an agent of a "servicer".

41. As to the form of the proceedings, I beg to differ. You cannot seek, on special summons, a well charging order in respect of a specified sum. The sum charged will, in due course, be determined by the Examiner. Evidence of the debt will have to be furnished. In this case, as of now, all we have is a letter specifying the view of Oyster that the balance due on 28th May, 2019 was €65,104.46 (exhibit JB5).

42. Although the borrower is said to have been in default as of July, 2013, the proceeding did not issue until September, 2019. Oyster must surely realise that, unless Ulster Bank obtained security back in 2013, the limitations period is six years from default, and without security, the claim is *prima facie* barred.

43. Mr. Campbell quotes paras. 2, 3 and 4 of the General Conditions of the facility, at para. 8 of the affidavit, but then goes on, at para. 10, to assert that the General Conditions expressly allow for the charging of interest by stating *"…interest shall accrue and be payable on such liability/ies on a compound basis until its/their* (sic) *fully discharged"*. I cannot find that passage anywhere in the facility letter.

44. Helpfully, Mr. Campbell states in para. 13, that he *"understands that the AA I interest rates were as follows"*. And he sets out a table. Looks good, but it is not a business record, and it is clear hearsay. In pars 8 and 9, he suggests that pars. 2, 3 and 4 specify the surcharge and that the defendant was adequately informed. Actually, the surcharge was to apply only when (a) he failed to provide financial information and/or failed to complete an annual review. Is Mr. Campbell being deliberately obtuse?

45. Mr. Burke's affidavit is not much better. He starts by stating that he *"makes this affidavit for the purpose of verifying the contents of the said special summons"*. Of itself, that is probative of nothing specific.

46. He then goes on to aver (para. 2.3) that *"the facility letter expressly provided that the bank hold (my emphasis) inter alia the following security…"*. It did not. It stipulated a requirement that the title deeds *be* (future tense) deposited. He says (para. 2.6) that the defendant's signature was 4th January, 2013. That is his personal interpretation of the date the defendant signed. It could also be 9th January.

47. He says that the registration of the lien in April, 2010 *"operated to create a charge…"* in respect of the monies due and owing against the defendant's interest in the property (not only the 25 acre parcel at Ardleebeg) but doesn't say that the monies secured were those advanced *before* that registration. You have to read between the lines.

48. He says (para. 2.4) that *"it was expressly stated that the term of the facility was 6 months"* from January, 2013 but then goes on to say (para. 7.1) that the monies due on foot of the facility became due *"as a result of the demand letter dated 31 May 2019"*. Again, not so. An attempt to restart the clock perhaps?

49. At para. 5, Mr. Burke asserts a commercial sensitivity of redacted material and banker/client confidentiality. Mr. Burke's company is not a bank. He is *"advised that the redacted portions are not relevant"* but does not tell us who advised him.

50. Collins J. describes in Greene (at para's 4-6) how Promontoria "*had to establish that those sums were secured by the lien"* ("what will constitute such proper evidence will vary from case to case"). Collins J. labels the issue as the "*relation of the debt to the deposit*".

51. In this case, the lien registered as of 31/12/2009 pertains to the loan advanced sometime prior to December 2009. Any advance after 31/12/2009 was not secured by any "piece of paper with no legal effect and only of historical interest" (Clarke CJ's description of a land certificate after the 31/12/2009, in Promontoria v Hannon 2019 IESC 49).

52. In the Greene case, the Court of Appeal commented that "*there is an error in Mr Prendivilles's affidavit* (in fact, more than one*) and it is right that it should be corrected".* (A *"costs thrown away order"* was suggested by Collins J.) I am not sure that the material deposed to by Mr Burke in this case can easily be corrected. He tries to insinuate the case that the original deposit covered the later facility, but the facility letter clearly requires a fresh deposit by the borrower.

53. The plaintiff is seeking possession of the property described in the schedule to the summons : that's ALL of Folio 3540F, not just the 25 acre parcel. Check the Register !

54. The affidavit "evidence" in this case is a bit of an "omnishambles." Mr Burke says the 2013 loan was secured by the pre-2009 deposit of title deeds, but that's just not true.

55. It gets worse. *"The Facility Letter expressly provided that the Bank* held *(my emphasis) inter alia the following security*…" It clearly didn't say that: it said that the "following items of security *are* (my emphasis again) required (future tense): equitable deposit…" Also, the sequencing of the paragraphs is designed to lead the reader from 2013 and *on* to the creation of the lien, as if that postdated the loan drawdown: "A lien was registered on Folio 3540F County Sligo…" (it wasn't; it was only on the 25 acres !). Paragraph 2.5 also misdescribes paragraph 4 of the schedule attached to the facility letter.

56. We would do well to revisit the judgment of Sanfey J in Promontoria v. Jaszai Limited and anor. [2021] IEHC 250, *"both affidavits comprise inadmissible hearsay: certificates are utterly inadequate to establish the debt due; the failure on the part of the plaintiff to observe basic principles of summary procedure and presentation of evidence."*

DEADBEATS

57. Professor Levitin, in his evidence to Congress, recognises that there is a widespread collateral recovery industry view that "deadbeats" are collateral damage. He quotes Jamie Dimon of JPMorgan Chase "*For the most part by the time you get to the end of the process we're not evicting people who deserve to stay in their house"* and counters with the argument that *"To argue that problems in the foreclosure process are*

irrelevant because the homeowner owes someone a debt is to declare that banks are above the law. The most basis rule of real estate law is that only the mortgagee may foreclose….Ultimately, the "no harm, no foul" argument is a claim that the rule of law should yield to banks' convenience."

58. Of course, a court is obliged to give effect to a clear contractual statement, but it should probably read the small print first, the redacted small print perhaps especially. CSR and ESG now frequently influence contracts, and "badging" is the latest form of mis-selling. The marketplace for working capital has been transformed, risk can be priced in, credit default "swapped" and business and finance can venture jointly. It seems the judiciary is tone deaf to the twenty first century's new realities in financial markets and, in particular, to the new ability of capital to hedge against losses caused by economic shocks.

59. This case appears to me to be a carbon copy of Hannon. Probably equally fatal to it is the recent judgment in Promontoria v Fox [2022] IEHC 97. If nothing else, it should be thrown out because it is a blatant attempt to seize much more land than was originally secured for the old Ulster Bank loan. Also, the fact that the 2013 loan was never secured. Take your pick.

60. But there's a broader issue, namely, that this agricultural land was probably securitised, and the 2001 Asset Covered Securities Act precludes the securitisation of agricultural land. This is more small print stuff. Given our experience with complexities and judicial differences of opinion on the interpretation of legislation, I have decided to refer the papers to the Governor of the Central Bank for his urgent attention. He will know whether Promontoria has wrongly participated in a securitisation SPV. And he will know what to do if so. That's his job.