



March 2018

After Acquired Property: Chargee's Position

The question of whether a lender can enforce a fixed charge security in respect of after acquired property has been addressed in the case of *Anglo Irish Bank Corporation Limited ("Anglo") v Kilquane Limited ("Kilquane")* and the Property Registration Authority (the "PRAI") [2013] IEHC 659. An after acquired property clause ("**AAP Clause**") can be found in most standard form security agreements. An AAP Clause is one which purports to create a charge over any property which a borrower may acquire subsequent to entering a deed of charge (or mortgage).

A charge containing an AAP Clause seeks to create security over property which is unascertainable at the time the deed is entered into, but which takes effect once the borrower acquires the additional property. A legal charge can only be created over an asset which is clearly identifiable in the security document and the chargor must hold legal title to the property at the time the charge is created.

The Irish courts have, however, recognised equitable mortgages facilitate the granting of security over after acquired assets. An equitable mortgage (or charge) will only pass an equitable interest in property and therefore confers less rights on the mortgagee than those provided pursuant to a legal mortgage. It was generally understood that the granting of security over after acquired property will effectively create a floating charge over that property and that additional steps (i.e. executing a charge that specifically refers to the property) are required in order to register the charge against that property.

For further information
on any of the issues
discussed in this article
please contact:



Keith Robinson

DD:+ 353 (0)1 674 1004

Keith.robinson@dilloneustace.ie



David O'Shea

DD:+ 353 (0)1 673 1718

David.oshea@dilloneustace.ie

The Decision

The decision in Kilquane clarified the position of the Irish courts in respect of AAP Clauses. The case concerned an appeal by Anglo of the decision of the PRAI to refuse to register Anglo as owner of a charge against a property which was not specifically identified in the deed of mortgage and charge (the “**Mortgage**”). The property was acquired by Kilquane after the date of the Mortgage. Anglo sought to rely on an AAP Clause which granted it security over any immovable property which Kilquane might subsequently acquire and argued that this amounted to a first fixed charge over that property.

The PRAI refused to register the charge on the basis that Kilquane was not and was not entitled to be the registered owner of the property at the date of execution of the Mortgage. The registration of a charge is governed by Section 62 of the Registration of Title Act 1964 (as amended by the Land and Conveyancing Law Reform Act 2009) (the “**Act**”) which provides that only a registered owner of land can charge the land and no interest in the land shall confer to a charge holder until they are registered as such. The PRAI acknowledged that an equitable charge over the land may exist in this case, but pointed out that such an interest can only be recognised by a court of equity and is not registrable in the Land Registry. In citing *Goode*, the PRAI argued that there “*must be a present transfer of an existing asset*” in order for security to take effect at law and that any security interest with respect to future property is equitable in nature only.

The Court was influenced by the judgment of Clarke J in *Moorview Ltd & Ors v First Active Plc & Ors*, in finding that the charging clause in the Mortgage constituted a contract *in personam* between the parties thereto carrying with it the right to register the charge under the Act. In addressing the registration argument raised by the PRAI, Mr. Justice Abbott held that the “*operative time for considering whether the mortgagee or chargee was the registered owner is when the chargor...presents the documentation for registration, which in this case was after the acquisition of the after acquired property...*”. In other words, the charge over the future acquired property crystallises once the owner lodges the registration documents with the Registrar, and so long as the correct documents are furnished, the charge will be compliant with the Act.

Mr. Justice Abbott pointed out that the intention of the AAP Clause was to create security, however this intention is substantiated once the chargor acquires future property and thereby becomes entitled to be the registered owner. The decision was significant as it confirmed that an AAP Clause can be relied on to create a fixed charge over after acquired property without the chargor having to execute a further deed or take additional steps in order to satisfy Land Registry requirements. The Court recommended the introduction of an additional form containing sufficient information to enable the Registrar assess whether the application to register a charge is bona fide and not likely to be fraudulent or part of a scheme.

Conclusion

While the judgment in Kilquane does not place as much emphasis on the element of control contained in the charging clause, it is worth noting that the clause required Kilquane to inform the lender in writing of any property acquired by it and to do all that is necessary to facilitate the registration of the charge. The Court ruled that this type of wording is common in many mortgage documents and that it did not mean that additional action was required to enforce the security.

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2018 Dillon Eustace. All rights reserved.