Neutral Citation: [2014] IEHC 281

THE HIGH COURT

[2012 No. 9172P]

BETWEEN

CHARLES McGUINNESS

AND

NOEL MULLIGAN

PLAINTIFFS

AND

ULSTER BANK OF IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 27th day of May, 2014

1. The plaintiffs in these proceedings are two businessmen who in July, 2006 availed of a facility letter offered to them by the defendant, Ulster Bank of Ireland Ltd. The facility amount was by of loan in the sum of €12m. and the purpose of the facility was to assist them with the purchase of a 50 acre site at Farnham Road, Cavan, Co. Cavan.

2. This acquisition was made as the property market peaked. Since then there have been been calamitous falls in the value of property, albeit, perhaps, with some modest improvement in the past year. It is not altogether surprising in the light of these developments that the plaintiffs' venture did not prove to be a success. The loan was called in and judgment was given in this Court on 1st November 2010 against the plaintiffs (along with two others) in the sum of €12m. A further judgment was given on 22nd November, 2010, against the second plaintiff (and another person) in the sum of €1.652m.

3. These judgments were not discharged and in January, 2012 the defendant Bank purported to appoint a receiver, a Mr. David O'Connor, pursuant to the terms of the relevant mortgage deed of 14th August 2006. Clause 9 of the mortgage deed provides in relevant part:

> "At any time after the chargor so requests or the security thereby constituted becomes enforceable, the Bank may from time to time appoint under seal or under the hand of a duly authorised officer of the Bank any person or persons to be receiver and manager or receivers and managers…."

4. There is no doubt but that the appointment of the receiver was not under seal. The receiver was, in fact, appointed by means of a supplementary deed dated 27th January, 2012. It was signed and delivered by a Michael McNaughton "for and on behalf of and as the Deed of Ulster Bank Ireland Ltd." under a power of attorney dated 13th April, 2011, which has not been revoked. Mr. McNaughton is evidently a senior bank official, since he was one of a number of such officials authorised pursuant to the power of attorney.

5. Where there is a contractual requirement that the appointment of a receiver by a deed under seal, then the appointment of a receiver other than in that fashion is fatal to the validity of that appointment: see *Re Belohn Ltd. (No.1*) [2013] IEHC 130, [2013] 2 I.L.R.M. 388, *per* Gilligan J.. In that case the terms of the debenture deed expressly excluded the possibility that the receiver might be appointed under the hand of a duly authorised officer of the Bank. Although the respondent Bank in that case was incorporated under the law of Scotland, it did not adduce any evidence that the appointment by deed "was executed in accordance with the legal requirement governing execution of the instrument in question by such a body corporate in the jurisdiction where it is incorporated" in the manner contemplated by s. 64(2)(b)(iv) of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act").

6. In the present case, the defendant is an Irish company, so that this provision does not apply. It is nevertheless submitted that through a combination of the provisions of s. 17 of the Powers of Attorney Act 1996 ("the 1996 Act") and the other provisions of s. 64 of the 2009 Act, the receiver was in fact lawfully appointed. We may consider these submissions in turn.

The implications of s. 17 of the Powers of Attorney Act 1996

7. Section 17 of the 1996 Act provides that:

> "(1) The donee of a power of attorney may—
>
> (a) execute any instrument with his or her own signature and, where sealing is required, with his or her own seal, and
>
> (b) do any other thing in his or her own name,
>
> by the authority of the donor of the power; and any instrument executed or thing done in that manner shall be as effective as if executed or done by the donee with the signature and seal, or, as the case may be, in the name, of the donor of the power."

8. As Gallagher, *Powers of Attorney Act 2010* (Dublin, 2010) notes (at 25), s. 17 of the 1996 Act re-states and extends s. 46 of the Conveyancing Act 1881. Where the 1881 Act was confined to the execution of deeds by power of attorney, s. 17(1) greatly extends the range of legal instruments which can be executed by the duly authorised attorney.

9. As donee of the power of attorney Mr. McNaughton never executed the supplementary deed with his own seal, so that s. 17(1)(a) does not apply. So far as s. 17(1)(b) is concerned, Mr. McNaughton certainly executed the deed "in his… own name by the authority of the donor of the power", Ulster Bank of Ireland Ltd. In such circumstances, it is clear that the deed "shall be as effective as if executed by the donee with the signature and seal" of the donor of the power.

10. What, then, is the effective of this deeming provision in s. 17(1)(b)? The use of deeming clauses by the Oireachtas in legislation is an established drafting technique, but where such clauses are utilised, then the question becomes whether the deeming clause operates for all purposes, or just for some specific purposes: see generally *Erin Executor and Trustee Co. Ltd. v. Revenue Commissioners [*1998] 2 I.R. 287 and *O hAonghusa v. DCC plc* [2011] IEHC 300, [2011] 3 I.R. 348. As Barron J. pointed out ([1998] 2 I.R. 287, 302-303), the question of the extent of the deeming provision is ultimately a matter of statutory construction.

11. As it happened, in both *Erin Executors* and *O hAonghusa* the deeming provisions were held to be limited in their effect and operation. In *Erin Executors*, a provision of the Value Added Tax Act 1972 deemed a reversionary interest to have been self-supplied by the taxpayer so that it became taxable for this purposes, but as Barron J. noted, "it is not deemed to have been supplied for any purpose".

12. I adopted this general approach in my judgment in *O hAonghusa*. In that case I held that a provision of the Liability for Defective Products Act 1991 was deemed to be relevant provision of the Statute of Limitation Acts solely for the purposes of the application of the date of knowledge and running of time rules, but for no other purpose: It followed that the general limitation period prescribed by the 1991 Act (three years) had not been reduced to two (as had been done with personal injuries claims by more recent amendments to the Statute of Limitations). As I put it ([2011] 3 I.R. 348, 354):

> "The deeming provision goes no further than this. It does not deem s. 7(1) of the 1991 Act to be a provision of the Statute of Limitations for all purposes. It follows that the principal limitation period remains that of three years. Any other conclusion would mean that the limitation period contained in one statute (i.e., the 1991 Act) might be taken to have been obliquely and indirectly amended by the amendments effected in respect of another statute (i.e., the Statutes of Limitation Acts), in the absence of a general collective interpretation clause such that deemed the 1991 Act to be part of the Statute of Limitations for all purposes."

13. By contrast, the deeming clause contained in s. 17(1) of the 1991 Act seems to be a perfectly general one. It deems a deed executed in this fashion to be generally "as effective as if executed or done by the donee with the signature and seal…of the donor of the power" and, unlike the statutory provisions at issue in *Erin Executors* and *Ó hAonghusa*, it does so without limitation and it is not confined in its purpose or scope.

14. In these circumstances, the effect, therefore, of this deeming provision is to deem the appointment by deed of the receiver by the duly authorised attorney to be the same in law as if the receiver had been appointed by the donor of the power by deed under seal, even if there was no such appointment in actual fact. The Court must accordingly treat the deed executed by the attorney, Mr. McNaughton, as having the same legal purpose and effect as if it were a deed under seal. It follows that by reason of this fact alone that the sealing requirements of Clause 9.1 of the debenture deed can be deemed to be satisfied. It follows, accordingly, that the appointment of Mr. O'Connor in this fashion was not unlawful.

The effect of s. 64 of the 2009 Act

15. One might add that a consideration of s. 64(2)(c) of the 2009 Act leads to precisely the same result. Section 64(1)(a) of the 2009 Act provides that any common law rule which requires a seal for the valid execution of a deed is abolished. This provision, however, does not assist the Bank, for all it provides is that insofar as the pre-existing common law required that a deed should be sealed, that rule has been abolished. While this sub-section accordingly abolished any such common law rule, it did not, however, address the situation where (as here) the deed required that any further step be taken by deed under seal.

16. Section 64(2) further provides that an instrument executed after the commencement date of the 2009 Act (*i.e.,* 1st December, 2009) is a deed if, in the case of a individual, it is expressed to be such and is duly executed by signature and attestation by that individual. Section 64(3) then provides that:

> "Any deed executed under this section has effect as if it were a document executed under seal."

17. In the present case, the deed appointing the receiver has been duly signed by Mr. Mc Naughton and has been appropriately attested by a witness in the manner required by s. 64(2)(b)(i). What, then, is the effect of the deeming provisions ("…as if it were…") of s. 64(3) of the 2009 Act?

18. Just as in the case of s. 17(1) of the 1996 Act (but unlike the particular examples seen in *Erin Executors* and *Ó hAonghusa*), the deeming provisions of s. 64(3) are perfectly general in nature. They provide that a deed which satisfies the requirement of s. 64(2) and which is executed in the manner contemplated by that sub-section must be treated in law as if it were a deed under seal, even though it was not so sealed in fact.

19. For the same reasons, therefore, as in the case of s. 17(1) of the 1996 Act, the deed of appointment executed by Mr. McNaughton and duly attested in the manner required by s. 64(2)(b)(i) of the 2009 Act must be treated as if it were a deed under seal. It follows, accordingly, that the sealing requirements of Clause 9(1) of the debenture deed have also been independently satisfied in this case by reason of the fact that the supplementary deed of January 2012 complies with the requirements of s. 64(2) and the consequential effect of the deeming provisions of s. 64(3).

Conclusions

20. The supplementary deed of January 2012 was effective in law so far as the sealing requirements of Clause 9(1) of the debenture deed are concerned. It follows in turn that the appointment of Mr. David O'Connor as receiver must be adjudged to be valid.