Neutral Citation Number: [2013] IEHC 417

THE HIGH COURT

2012 No. 4744P

Between/

MICHAEL MCATEER AND (By order of Laffoy J of 15th November, 2012) BANK OF IRELAND MORTGAGE BANK

Plaintiffs

-and-

FRANK SHEAHAN (OTHERWISE FRANKIE SHEAHAN)

Defendant

THE HIGH COURT

Between/

2012 No. 12130P

FRANK SHEAHAN, JOSEPH SHEAHAN AND MyMORTGAGES LIMITED

Plaintiffs

-and-

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, BANK OF IRELAND MORTGAGE BANK AND MICHAEL MCATEER

Defendants

THE HIGH COURT

2012 No. 724Sp

Between/

BANK OF IRELAND MORTGAGE BANK

Plaintiff

-and-

FRANK SHEAHAN

Defendant

Judgment of Ms. Justice Iseult O'Malley delivered the 13th September, 2013.

Introduction

1. This is a special case, stating, pursuant to the provisions of Order 34 of the Rules of the Superior Courts, certain questions of law arising out of the three sets of proceedings named above for the opinion of the court thereon.

2. The questions of law arise from the lacuna identified in the judgment of Dunne J in Start *Mortgages v. Gunn* (hereafter "*Gunn* "), relating to the powers of mortgagees or chargeholders after the coming into force of the Land and Conveyancing Law Reform Act, 2009 on the 1st December, 2009. Section 8 of that Act had the effect of repealing, *inter alia*, s.62 (7) of the Registration of Title Act, 1964 (hereafter "s.62(7)"). The provision was re-enacted in the Act but the new provision applies only to mortgages created after the commencement of the 2009 Act. There is no express transitional provision.

3. In brief, *Gunn* decided that by virtue of the repeal provisions in that Act, a lender who had not acquired a right to apply to court for an order of possession pursuant to s.62 (7) before the 1st December, 2009 could not apply thereafter. It was further held that the right to apply was only acquired where the principal monies had become due by reason of default or certain other events and demand for repayment had been made.

4. In significant part, this case concerns a submission that *Gunn* was wrongly decided because certain arguments were not put before Dunne J. and that this court should therefore, by way of exception to the *Worldport* principle, decline to follow it. Primarily, these arguments concern, firstly, a particular clause in the deed, deeming the principal monies to have become due one month after the date of its execution and secondly, the effect of the "double construction" rule of statutory interpretation. Separate but, for the most part, related issues arise in relation to the appointment of a receiver.

The special case

5. For ease of reference, Mr. Frank or Frankie Sheahan and Mr. Joseph Sheahan are referred to as "the borrower" or "borrowers", Mr. McAteer as "the receiver" and the Bank of Ireland parties as "the bank". The first of the above-entitled proceedings is "the Receiver proceedings", the second "the Sheahan Plaintiff proceedings" and the third "the Possession proceedings".

6. The parties have identified questions of law relating, firstly, to the proper construction of certain statutory provisions and secondly, the validity of the repeal provisions of the Act of 2009 having regard to the provisions of the constitution. By agreement, the special case was divided into two modules, with the constitutional issue to be determined only if necessary. This judgment deals with Module 1.

7. The facts grounding the special case (and for these purposes assumed to have been proved) can be summarised as follows.

8. Each of the cases concerns deeds of mortgage and charge executed in respect of specified registered properties. Each of the deeds contains provisions in identical terms providing for the appointment of a receiver by the bank and/or other rights and powers of the bank (including the statutory power of sale) in the event that the mortgage falls into arrears.

9. In the Receiver proceedings, it is to be assumed that before the 1st December, 2009 the borrower executed mortgages in favour of the bank over certain properties, and that after that date he defaulted on his obligation to make repayments on the loans secured by the mortgages. The receiver was appointed by the bank after the repayments had gone into arrears. In these proceedings he claims reliefs including an order restraining the borrower from interfering with him in the exercise of his functions.

10. The borrowers challenge the appointment of the receiver and the extent, if any, of his powers for the same reasons as in the Sheahan Plaintiff proceedings -that is, they contend that (i) at the date of the appointment of the Receiver the bank had no valid extant power to make such appointments and (ii) that if the receiver was validly appointed he nonetheless had no power to take possession.

11. The Possession proceedings relate to an indenture of mortgage and charge dated the 7th January, 2007 by which the borrower charged to the bank, as security for all sums then due or to become due by him to the bank on foot of any secured loan a particular property in Co. Cork. The loans advanced were assigned to two loan accounts. The charge was registered on the relevant folio on the 28th August, 2008.

12. On dates after the 1st December, 2009 the borrower defaulted in making the payments required of him under the terms of the loan contracts. The whole of the monies due on each of the accounts was demanded in the course of November, 2011. Neither of the sums was repaid and on the 6th November, 2012 the bank demanded possession. The property has not been given up and the bank now seeks an order for possession.

13. The questions of law relating to Module 1 as set out in the special case are:

> I. Whether, by virtue of s. 27 of the Interpretation Act, 2005, the statutory powers of the bank (as mortgagee by deed of each of the properties the subject of the Receiver proceedings and the Sheahan Plaintiff proceedings) pursuant toss. 15 to 24 of the Conveyancing Act, 1881 and, in particular the power of the bank to appoint a receiver of each of the properties pursuant to s.19(1)(iii) thereof, remained extant in relation to the said mortgages after the 1st December, 2009, notwithstanding the provisions of s.8(3) and Schedule 2 of the Act of 2009.
>
> II. Whether, when properly construed, the terms of the said mortgages created in the bank contractual powers to appoint receivers in respect of the debts thereby secured.
>
> III. (a) Whether, by virtue of the various appointments of the receiver as such, the receiver is entitled to take possession of the properties as distinct from merely being entitled to the rents and profits thereof.
>
> (b) If the answer to (a) is "No", whether the appointments of the receiver are valid.
>
> IV. Whether, by virtue of s. 27 of the Interpretation Act, 2005, the statutory power of the bank as registered chargeant of the property the subject of the possession proceedings to apply for possession of the said property under s. 62(7) of the Registration of Title Act, 1964 remained extant after 1st December, 2009 notwithstanding the provisions of s.8(3) and Schedule 2 of the Act of 2009.
>
> V. Whether s.62(6) of the Act of 1964, as amended by the Act of 2009, confers on a registered chargeant pursuant to a charge executed and registered before the 1st December, 2009 the right to seek possession pursuant to Chapter 10, Part 3 of the Act of 2009.

14. Because the issue of the validity of the repeal provisions of the Act of 2009 was raised in the Receiver proceedings and in the Possession proceedings, the Attorney General was served with Order 60 notices. Although that issue was not dealt with in this hearing, constitutional questions were argued and counsel for the Attorney General has appeared and made submissions.

The relevant provisions of the mortgage

15. It is not necessary to set out the contents of the deed in full. The following provisions are relevant.

16. The term "Conveyancing Acts" is defined as meaning the Conveyancing Acts, 1881 to 1911 and the registration of Title Act, 1964.

17. Clause 1.01 contains the covenant by the mortgagor to pay to the mortgagee on demand the secured monies.

18. Clause 1.02 provides that

> *"All monies remaining unpaid by the Mortgagor to the Mortgagee and secured by this mortgage shall immediately become due and payable on demand to the Mortgagee on the occurrence of any of the following event[s] that is to say:*
>
> *(a) on the happening of any event of default other than an event specified in paragraph (i) of sub-clause 7.01 ...*
>
> *and the Mortgagor hereby further covenants with the Mortgagee to pay to the Mortgagee forthwith the sum so demanded together with further interest thereon ..."*

19. By clause 1.03 it is provided that

> *"The demand herein referred to shall mean a demand for payment of the secured moneys made by the mortgagee*

...and such demand in case of moneys due or owing on current account may be made ...when or at any time after the Mortgagee becomes entitled to call for payment of the moneys ... "

20. Clause 6 sets out the mortgagee's powers.

"6.01 At any time after the execution of this Mortgage the Mortgagee may without further consent from or notice to the Mortgagor or any other person enter into possession of the Mortgaged Property or any part thereof or into receipt of the rents and profits of the Mortgaged Property or any part thereof

6.02 The Mortgagee shall have the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by this Mortgage including the right to appoint a receiver and in particular subject to the following variations and extensions that is to say:

(a) the secured monies shall be deemed to have become due within the meaning of and for all purposes of the Conveyancing Acts on the execution of this Mortgage;

(b) the power of sale shall be exercisable by the mortgagee or on its behalf by a receiver or any other party appointed by it without the restrictions imposed by section 20 of the Act of 1881;

(c) omitted

(d) any receiver appointed by the Mortgagee under the power to appoint a receiver shall be deemed to be the agent of the Mortgagor ...

6.04 After entering into possession of the Mortgaged Property or appointing a receiver of the rents and profits thereof the Mortgagee may at any time relinquish possession or determine the appointment of the receiver and subsequently without giving notice or making any demand for payment again enter into possession of the mortgaged Property or appoint a receiver of the rents and profits thereof and any receiver appointed may let and manage the Mortgaged Property at the risk of the Mortgagor.

6.05 The powers conferred on the Mortgagee by this Mortgage are in addition to all the powers and remedies conferred on or vested in the Mortgagee by statute, common law or otherwise. "

21. The exercise of the mortgagee's powers is governed by Clause 7.

"7.01 The Mortgagee shall not exercise any of the powers provided in Clause 6 hereof or conferred by statute until any of the following events shall occur:

(a) default is made in payment of any monthly or other periodic payment or in payment of any other of the secured moneys hereunder ... "

The statutory provisions

22. The relevant parts of section 62 of the Registration of Title Act, 1964 are as follows.

62(1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such.

(2) There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form ...but, until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land.

…

*(6) **[Prior to amendment]** On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee by deed, including the power to sell the estate or interest which is subject to the charge.*

(7) When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof shall be deemed to be a mortgagee in possession.

23. Section 62(6) was amended by virtue of s.8 of the 2009 Act and, as of the date of commencement of that Act, now reads as follows:

"On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a legal mortgage under Part 10 of the Land and Conveyancing Law Reform Act, 2009 and the registered owner of the charge shall, for the purpose of enforcing the charge have all the rights and powers of a mortgagee under such mortgage, including the power to sell the estate or interest which is subject to the charge. "

24. Also by virtue of s.8, s. 62(7) was repealed.

25. Section 27 of the Interpretation Act, 2005 provides in full:-

27(1) Where an enactment is repealed, the repeal does not-

a) revive anything not in force or not existing immediately before the repeal

b) affect the previous operation of the enactment or anything duly done or suffered under the enactment

c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment

d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or

e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or in contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed.

The *stare decisis* issue

26. As already noted, the court is in this case being asked to decline to follow the decision of Dunne J. in *Gunn*. I therefore propose to consider that judgment in detail, along with the cases that have arisen on the point since. Before doing so it is convenient to refer to *Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, which sets out what is now the established test for the exercise by judges of the High Court of their power to disagree with a previous judgment of a judge of that court.

27. In *Worldport*, Clarke J. had been invited to disagree with a judgment of Kearns J. (as he then was). In a passage subsequently approved by the Supreme Court he made these observations:-

"I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong: Huddersfield Police Authority v. Watson [1947] KB. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the recent authorities and which was, as was noted by Kearns J, based on forming a judgment between evenly balanced arguments. If each time such a point were to arise again a judge were free to form his or [her] own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. "

28. *Worldport* has been approved in *Brady v. DPP, Kadri v. Minister for Justice* and *Ulster Bank v. Roche.*

Start Mortgages v. Gunn

29. The judgment of Dunne J. is frequently referred to by this title (and in this judgment is referred to as "*Gunn* ") but in fact it deals with four unrelated cases, with three different plaintiffs and four sets of defendants, which all raised the same issue as to the consequences of the repeal of s.62(7) of the Registration of Title Act, 1964 by the provisions of the Act of 2009. There were thus different dates in each case relating to the advancement of the loan, the creation of the charge, the registration of the charge, the default in repayment and the making of the demand for repayment.

30. It appears from the judgment that the mortgages were similar in their terms. Each contained a covenant for payment by the borrower. Each provided that the monies secured by the mortgage should immediately become due and payable on demand for payment by the lender on the occurrence of default by the borrower. Each provided that the mortgagee's powers were not to be exercised unless certain events occurred, including default in payment of any monthly or other secured payment or in payment of any of the secured monies. Provision was made for a power to enter into possession of the property by the mortgagee, who was to have the statutory powers conferred on lenders by the Conveyancing Acts.

31. The submissions made in each case can be summarised as follows.

Start Mortgages Limited v. Gunn

32. Counsel for the plaintiff in this case submitted that the creation of the mortgage, the registration of the charge, the default, the demand and the issuance of the proceedings all pre-dated the 1st December, 2009 and that the right to possession was not only acquired but accrued by that date. He relied upon the provisions of s. 62(6) as it stood before amendment in 2009, which stipulated that the registered owner of a charge was to have "*all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge*. " On that basis he submitted that once there was a default, the plaintiff was entitled to make a demand, and once he had done that he was entitled to issue proceedings without any further procedural step.

33. Counsel for the defendants (Mr. Maguire SC) submitted that since s.62(7) had been repealed it could not be relied upon by the plaintiff, despite the fact that proceedings had been issued before the repeal. He further submitted that the court had had a discretion under s.62(7), to be found in the words "*may, if it so thinks proper*", not to make an order for possession and that therefore the plaintiff never had more than "a hope or expectation" of obtaining an order. In those circumstances there could not be either an acquired or an accrued right of possession.

34. In reply to that argument, counsel for the plaintiff submitted that any discretion vested in the court did not mean that its rights

had not been acquired or accrued by the relevant date.

Secured Property Loans Limited v. Clair

35. This case concerned a twelve-month loan where the whole amount became due and owing on a date in October, 2009. Default arose from the 14th July, 2009. The demand was not made and proceedings were not issued until after the 1st December, 2009. The charge had been registered before that date. Counsel for the plaintiff relied upon the arguments that he had made in *Gunn*. He submitted that the plaintiff had acquired a right within the meaning of s.27(1)(c) by virtue of the following:

> (i) The execution of the charge and the advance of the monies gave the plaintiff a contract to complete a registered charge and an equitable mortgage.
>
> (ii) That charge was registered at a time when the instrument operated as a mortgage by deed within the meaning of the Conveyancing Act, because of the provisions of s. 62(6) prior to its amendment.
>
> (iii) The defendant was in default since the 14th July and further in default in having failed to make payment of the full amount in October, 2009.

36. It was submitted that, having regard to the default, no demand was necessary. The plaintiff had a right to issue proceedings once there had been default- indeed, counsel appears to have specifically argued that he acquired the right to issue proceedings once the charge was registered. The plaintiff had therefore a right "acquired" or "accrued" prior to the 1st December.

37. Counsel for the defendants submitted that there was no right acquired or accrued by reason of the default, on the argument that the plaintiff had only an expectation and not a right.

G. E. Capital Woodchester Homeloans Limited v. Mulkerrins

38. The defendant in this case had gone into default in May, 2008. Two letters of demand had been sent before the 1st December, 2009. The summons was issued in August, 2010.

39. The defendant was unrepresented in the hearing. Mr. Murphy SC for the plaintiff, having adopted the arguments of counsel for the other plaintiffs, argued that the operative date giving legal effect to a mortgage was the date of registration of the charge.

40. (I think that it should be noted here that in the instant case, after further reflection, Mr. Murphy has changed his view on this issue and now argues that the right for which he contends is acquired on the date of execution, or possibly even earlier where there is an antecedent contract to grant the security on the drawdown of the monies.)

41. He submitted that since the new provisions for the enforcement of charges in the Act of 2009 were not applicable to mortgages created before that Act, it must have been the intention of the Oireachtas that the provisions of the Interpretation Act, 2005 would apply. He relied on ss. 27(1)(c), 27(1)(e) and in particular s.27(2) of that Act and submitted that s.27(1)(c) referred to and preserved substantive rights other than those already asserted at the time of commencement of the 2009 Act, thus allowing for the institution of new proceedings after the commencement of a repealed Act in relation to rights preserved.

42. In this context, Mr. Murphy argued that the right to seek possession in the event of default, though a conditional right, was nonetheless a right acquired by a chargeholder on the date of registration of the charge. In the alternative, if the right to seek possession was held not to accrue until default rendered the principal monies due, the plaintiff was still entitled to succeed because the defendant had been in arrears since prior to the relevant date.

43. Mr. Murphy pointed out that, having regard to the provisions of s.62(2) of the Registration of Title Act, 1964, the instrument creating the charge did not confer any interest in the land until registration. Therefore the right to seek possession, in the event of default, for the purpose of sale to recover the sums secured, represented the whole substance of what the lender obtained on receipt of a charge in its favour. That was the "interest" referred to in s.62(2), which was postponed until registration. Upon registration, the holder of the charge had done all that was necessary to acquire the interest. The right to seek possession might or might not have to be exercised, but it existed "from the date of the charge" and the fact that it could not be exercised until default was of no significance.

44. The plaintiff also relied upon the provisions of s.62(6) of the 1964 Act, as amended by the 2009 Act, which is set out above. It was submitted that the rights under the mortgage, including the right to possession or the right to sell the property, were acquired upon registration of the plaintiffs' charge on the Folio.

45. In an alternative argument, the plaintiff argued that the right to apply for possession was acquired or accrued when the principal monies became due, which came about when default occurred in May 2008.

G.E. Capital Woodchester Homeloans Limited v. Grogan

46. The submissions on behalf of the plaintiff were identical to those in *Mulkerrins*. On behalf of the defendants it was submitted that the registered owner of a charge only acquired the right, or the right accrued to the registered owner, to initiate proceedings when the repayment of the principal monies became due. Having regard to the terms of the instrument in question, that only arose when demand was made on the occurrence of an event of default.

Decision of Dunne J.

47. Dunne J. referred to the fact, not in dispute, that until such time as the charge was registered the lender had no interest in the land. Nor did registration of the charge give the holder an estate or interest in the property such as would enable it to recover possession. It was also not in dispute that s.62(7) was enacted for the purpose of dealing with this situation, which had been highlighted by the decision in *Northern Banking Company v. Devlin* [1924] 1 I.R. 90. According to Dunne J., the parties were agreed that if the plaintiffs could not rely on s.62(7), "there was no basis upon which an order for possession in a summary manner [could] be made".

48. The question then was the extent, if any, to which the provisions of s.62(7) were saved by s.27(1) and (2) of the Interpretation Act, 2005.

49. It is, I think, important to bear in mind that the "right" being contended for in *Gunn* was the right to apply to court for an order of possession and that the issue, having regard to the provisions of the Interpretation Act, was whether that right had been "acquired" or had "accrued" before the repeal of the section.

50. Having considered the cases of *Birmingham Citizens Permanent Building Society v. Caunt* [1962] 1 Ch. 883, *Anglo Irish Bank Corporation v. Fanning* [2009] I.E.H.C. 141 and *Bank of Ireland v. Smyth* [1993] 2 I.R. 102, Dunne J. concluded that it was clear that s.62(7) conferred a right on a registered owner to obtain an order for possession for the purpose of a sale out of court, and that the scope of the discretion conferred on the court in relation to the grant of the order was very limited.

> *"In practical terms if the principal sum due on foot of the charge has become payable the registered owner of the charge is entitled to an order for possession. That is not to say that the borrower is not entitled to an adjournment of proceedings to pay off the mortgage in full or alternatively to come to an arrangement with the lender as to the repayment of the mortgage. However, if the proofs of a plaintiff are in order and there is no other bar to an order being made, then it seems the court has no discretion but to make the order."*

51. She therefore concluded that it was a right capable of being preserved by s.27 of the Interpretation Act. In determining whether the right could be said to have been acquired, or vested, prior to the repeal Dunne J. considered the decisions in *O'Sullivan v. Superintendent of Togher Garda Station* [2008] 41.R. 212, *Director of Public Works v. Ho Po Sang* [1961] A.C. 901 and *Chief Adjudication Officer v. Maguire* [1999] 1 W.L.R. 1778.

52. In *Director of Public Works v. Ho Po Sang*, a lessee had applied to the Director for a re-building certificate and had received notification that the latter intended to grant it. While certain petition procedures triggered by the application were underway and before a decision on the certification had actually been taken the relevant legislation was repealed. The Privy Council held that neither the Director nor the lessee had an accrued right at that stage. According to Lord Morris of Borth-y-Gest, as quoted by Dunne J.,

> *"The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects ...he did not have any right even of a contingent nature ...The difference between that case [Hamilton Gell v. White] and the present is that in that case a right existed and the investigation, which was unaffected, was an investigation in respect of it; whereas in the present case no right existed or had accrued, and the intended investigation which had not taken place before the time of the repeal (i.e. the consideration by the Governor in Council) was an investigation in order to decide whether a right should or should not be given. It was not in itself a right or privilege which was preserved ... "*

53. *Ho Po Sang* was considered in *Chief Adjudication Officer v. Maguire*, which concerned an entitlement to compensation where a particular condition had been contracted by a claimant before a change in the relevant regulations regarding such compensation. According to Simon Brown L.J. :-

> *"What [the authorities] establish is essentially this: that whether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefit receivable by him provided only that he takes all appropriate steps by way of notices and/or claims thereafter."*

54. The relevant passage from Bennion (5th ed. p. 309) is cited by Dunne J. as follows:-

> *"The right etc. must have become in some way vested by the date of repeal, i.e. it must not have been a mere right to take advantage of the enactment now repealed. If a right to damages has accrued, it is immaterial that the amount has not been quantified. Being able to avail oneself of a statutory defence is not a 'right' for this purpose. A liability was held to be 'incurred' when the debtor had committed an act of bankruptcy. "*

55. Dunne J. concluded that the right to apply for an order of possession under 62(7) was an entitlement to an order for possession and not a mere hope or expectation.

56. However, she did not accept the proposition that it was acquired or accrued on the date of registration of the charge.

57. The case of *0'Sullivan v. Superintendent of Togher Garda Station* was considered and distinguished. That decision concerned the provisions of the Road Traffic Acts conferring a right on a person, disqualified from driving, to apply for restoration of a driving licence after the elapse of a statutorily-prescribed period of time. At the time that the applicant was convicted and disqualified, the statutory period was nine months. Following amendment of the legislation, he would have had to wait for 12 months unless he had, as he contended, a right to apply after nine. Dunne J. considered that he had acquired the right to apply on conviction and that it accrued after the lapse of nine months. No further procedural step was necessary.

58. The position of the holder of a charge was different because it was not entitled to apply for an order for possession unless certain events had occurred - default on the part of the borrower, and demand by the lender for repayment of the principal monies.

59. In coming to this conclusion, Dunne J. again referred to the plaintiffs' submission that the point of a charge was to create the right to recover the sum secured; that this, in effect, was what was comprised to a large extent in the "interest" mentioned in s.62(6) and that the 1964 Act viewed the registered charge holder as having rights from the time of registration. There is no suggestion that she did not accept these general propositions, but clearly she did not consider that it followed that there was a right to apply for possession from the date of registration.

> *"To paraphrase what was stated about the right at issue in the Ho Po Sang case, the issue rested in the future. To put it another way, did the lender have an entitlement at the date of repeal to make an application for possession?"*

60. Having regard to the requirement in the mortgages in question that demand should be made, that question could only be answered "yes" if the demand had been made for repayment by the relevant date because the monies were not otherwise "due" by that date. An application could not have been made to court simply on the basis that the lender had registered the charge.

61. In conclusion, Dunne J. set out the following five propositions: -

> 1 Proceedings commenced prior to the 1st December, 2009 could be continued after that date.

2 Proceedings could be instituted after that date provided the lender had acquired the right to apply for an order pursuant to s.62(7) by the 1st December, 2009.

3 A lender had not acquired the right to apply for an order pursuant to s. 62(7) if the principal monies had not become due.

4 The principal monies did not become due until default or certain other events had occurred and demand for repayment of the principal monies had been made.

5 In any case in which demand was made for repayment of the principal sums due after the 1st December, 2009, the lender had neither an acquired or accrued right to apply for an order pursuant to s.62(7) and consequently the provisions of s. 27 of the 2005 Act did not avail such a lender.

62. Dunne J. observed that the repeal of s.62(7) had created a lacuna in that lenders who did not have an entitlement to apply under that section by the 1st December, 2009 were also not entitled to apply under the replacement provisions of the new Act. However, she concluded that

"It is not for the court to supply that which is not contained in the 2009 Act".

Cases decided since Gunn
Kavanagh v. Lynch ([2011] IEHC 348)

63. This case concerned an application brought in the course of plenary proceedings by two receivers, appointed by two banks, for various interlocutory orders. They sought, *inter alia*, orders restraining the defendants from remaining in occupation of the property in issue and from interfering with them in the exercise of their powers under the terms of their appointments. They also sought an order for possession.

64. The defendants contended, inter alia, that the receivers had not been validly appointed, on the basis of the repeal of ss. 15 to 24 of the Conveyancing Act, 1881.

65. The first mortgage contained a clause providing that at any time after the power of sale had become exercisable, whether or not the bank had entered into possession, the bank could appoint a receiver. This was stated to be in addition to, and not to be to the prejudice of, all statutory and other powers of the bank under the Conveyancing Act, 1881. It was further provided that the receiver so appointed would have all powers conferred by that Act as if appointed under it, and also additional powers not in substitution for the powers contained in the Act. The first power so conferred was to enter into, take immediate possession of, get in and collect the secured assets or any part thereof.

66. The power of sale, which had to be exercisable before a receiver could be appointed, arose upon an "Event of a Default", or immediately upon the bank making demand as and when the payment became due and payable, or immediately upon the obligations becoming otherwise due and payable. The defendants fell into arrears and a formal demand was made in September, 2010. On the evidence, Laffoy J. was satisfied that the power of sale was exercisable on the 18th October, 2010 when the receiver was appointed.

67. The second mortgage authorised the mortgagor to appoint, at any time after the "Total Debt" had become immediately payable, a receiver to collect and receive rents and profits, and further that the statutory provisions respecting the appointment and powers of such receiver should apply except where varied by, and subject to, the provisions of the mortgage. The "Total Debt" became payable to the bank if, *inter alia*, two monthly payments were missed. Letters of demand were sent in April, 2010.

68. On consideration of the terms of the instruments, Laffoy J. concluded that the powers of the mortgagees to appoint receivers were not dependent on the statutory powers created by the Act of 1881. At the time the mortgages were created they incorporated into their terms the relevant statutory provisions, subject to any variations expressly provided for. The repeal of the provisions could not vary the proper construction of the mortgage, or impact upon the contractual relationship of the mortgagor and mortgagee thereby created, and the contractual rights and remedies still applied.

69. Laffoy J. expressly concluded that the considerations that arose in *Gunn* in consequence of the repeal did not arise in this case.

70. This case is also relevant to the question of the receiver's right to take possession of the property, considered further below.

EBS v. Gillespie ([2012] IEHC 243)

71. This was an application under s.62(7) for an order for possession, in proceedings which were initiated in 2011. Per Laffoy J.:-

"In order to determine whether, notwithstanding the repeal of s.62(7), the jurisdiction of the Court to make an order for possession under that provision is alive as regards the plaintiff's claim against the defendant in these proceedings, the crucial question is whether it has been established that the plaintiff had acquired as against the defendant a right to seek the statutory remedy in the form of an order for possession of the property secured by the charge prior to 1st December, 2009. The answer to that question turns on the application of the requirements of s.62(7) in the context of the agreement between the plaintiff and the defendant embodied in the charge to the facts. In performing that exercise, because it is the easiest course to adopt, I propose looking at the matter from the historic perspective and considering whether the plaintiff has established that it had a right to seek an order for possession prior to 1st December, 2009. However, it is not to be inferred that I consider that such approach is the only approach to the crucial question.

In order to establish that its claim/or possession came within s.62(7) prior to 1st December, 2009, the plaintiff has to establish ...that repayment of the principal monies secured by the charge had become due by that date ... "

72. The instrument in question contained a clause providing that

"All monies (including accrued interest) hereby secured shall become immediately payable and this security immediately enforceable ...on demand by the [plaintiff] for repayment of the monies secured hereunder OR upon the happening of the following events (whatever the reason for such event):-

(a) if the borrower fails to pay on the due date any money payable or interest due by it from time to time ... "

73. The borrower had defaulted in making payments prior to 1st December, 2009 and Laffoy J. held that, notwithstanding the argument that there was not a proper demand, the monies secured had become immediately payable. The plaintiff had therefore acquired a right to seek an order of possession. The fact that the plaintiff had agreed during the course of 2010 to treat the loan as interest only amounted to a postponement of the right to possession and could not in the circumstances be construed as a waiver.

Moran v. AIB Mortgage Bank & ors. ([2012] IEHC 322)

74. In this case the plaintiffs challenged the appointment of a receiver by the defendants in respect of 24 separate but identical mortgages. In each case demand had been made and the receivers appointed after 2009. The mortgages included an interpretation clause providing that

"Reference to any enactment includes reference to any statutory modification thereof, whether by way of amendment, addition, deletion or [repeal] andre enactment with or without amendment."

75. Another clause provided that

"The Bank shall have the statutory powers conferred on mortgagees by the Conveyancing Acts **[including the Registration of Title Act, 1964]** *with and subject to the following variation and extensions, that is to say:*

(a)The secured monies (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of these presents.

(b)The power of sale shall be exercisable without the restrictions on its exercise imposed by section 20 of the Act of 1881 ... "

76. The plaintiffs' argument was that, having regard to the repeal of the relevant provisions of the Act of 1881 in 2009, the power to appoint a receiver was solely that contained in the 2009 Act, which imposed certain requirements in relation to notice which had not been complied with. It was therefore contended that the appointment was invalid.

77. Having regard to the terms of the mortgages McGovern J. held that the secured monies were deemed to have become due and, therefore, the right to appoint a receiver accrued, as soon as the deed was executed and the contract entered into. Since the 2009 notice provisions applied only to mortgages created by deed after the commencement of that Act, they could not affect a mortgage that pre-dated it. In this regard he adopted the analysis of Laffoy J. in *Kavanagh*.

78. There is no reference in the judgment to *Gunn*.

79. In any event, McGovern J. considered that the contractual term incorporating amending legislation could only be read as referring to amending legislation in force at the time that the contract was entered into. This was because it had to be presumed that the parties, in entering into the contract, intended that the rights they were acquiring and the obligations they were assuming would be certain. It could not be assumed that they intended to be bound by future changes in the law of which they had no knowledge.

McEnery v. Sheahan ([20127 IEHC 331)

80. This case concerned the mortgage of a commercial premises to cover all present and future indebtedness of the defendant. Registration of the charge was applied for in June, 2009 but not completed until August, 2011. The demand for repayment and the appointment of a receiver (the plaintiff) occurred in April, 2011. The defendant refused to permit the plaintiff to take possession. On the 15th April, 2011 the plaintiff issued a plenary summons seeking an order compelling the defendant to deliver up possession together with declaratory relief. The defendant pleaded that the plaintiff had no power to appoint a receiver because of the repeal of s.19 of the Act of 1881.

81. Section 19(1) of that Act provided that

"A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely)- ...

(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; ... "

82. Feeney J. considered the judgments in *Gunn* and *Kavanagh* in considerable detail. He concluded that there was a clear distinction to be made between the impact of the repeal of s.62(7) of the Act of 1964, which gave an entitlement to summary relief, and the entitlement to appoint a receiver where this entitlement had been in place by reference to the Act of 1881 at the date of the repeal. He was satisfied that the two entitlements were of a different order or nature, finding that

"A consideration of what is involved leads to the conclusion that a lender who loses the right to apply for possession of mortgaged property on a summary basis still retains the right to apply on a plenary basis. Therefore, what is in issue is the loss of a procedural facility and there is no loss of a substantive right. In contrast, the loss of the right to appoint a receiver would result in the loss of a substantive right ...

The decision in the Start Mortgages cases relates to the loss of a procedural facility and to extend its scope beyond procedural facilities to substantive rights would be to disregard the established rights of mortgagees as recognised in legislation for over one hundred years. "

83. Further on in the judgment Feeney J. stated that

"The provisions of s.62(7) of the Act of 1964 are unique and provide for an additional procedural right without removing the substantive right. "

84. Drawing on the principles of statutory interpretation applicable to repeal provisions he concluded that if the Oireachtas had

intended to make a radical change to the substantive right enabling the appointment of a receiver it would have said so in clear terms. He was satisfied that the right in question was acquired at the time of execution of the deed. Although at that date the mortgagee could not exercise the right but could only do so when the mortgage monies became due,

> *"the entitlement to do so and the circumstances which would permit the exercise of the entitlement were identified and required no further agreement. "*

85. The restriction on the appointment of a receiver until the monies became due was characterised as a procedural restriction placed on the exercise of the power rather than a substantive restriction placed upon the acquisition of the power. Feeney J. adopted the approach of Simon Brown L.J. in *Chief Adjudication Officer v. Maguire* in holding that, while a "*mere hope or expectation*" of acquiring a right would not survive a repeal, an entitlement which was inchoate or contingent did suffice.

> *"The right to appoint a receiver was inchoate as of the date upon which the mortgage was agreed but ... such right was nevertheless a real and acquired right and not a right based upon hope or expectation. The right to appoint was present as and from the date when the mortgage was completed and was not dependent upon any further action being taken or any future agreement. "*

86. It should be noted here that the parties in the instant case are agreed that Feeney J. fell into error in categorising the effect of the repeal of s.62(7) as having a purely procedural effect and as leaving lenders with the option of seeking the same remedy by way of plenary proceedings. That this is not the case was established by *Devlin*, referred to above, which was followed in this jurisdiction in *Re Rose Jacks. Devlin* pointed out that the provisions of the 1881 Act intended to assimilate the position of charge holders to that of mortgagees by deed did not fully achieve its objective. The aim of s.62(7) (which re-enacted a provision first enacted in s.13 of the Registration of Title Act, 1942) was to confer a right which did not otherwise exist, not simply to grant a more expeditious way of enforcing that right. Counsel for the bank argues, however, that the learned judge was right in respect of his analysis of the substantive nature of the right to appoint a receiver. He further makes the case that the right to apply for possession is, similarly, a substantive although inchoate or contingent right and urges the court to follow that approach in this case. He contends that if Feeney J. had been aware of *Devlin*, it would have been apparent to him that the rights were of a similar order.

87. Counsel for the borrower says that the decision is not reconcilable with Gunn and that the latter is preferable.

Irish Life and Permanent plc v. Duff [2013] IEHC 43

88. This was an appeal from the Circuit Court to the High Court against an order for possession in favour of the plaintiff. The property comprised both registered and unregistered lands and the references to the judgment here relate to the part concerned with registered land. The proceedings, were issued in April, 2009 but then withdrawn to facilitate discussions between the parties. They were subsequently re-entered. Judgment was delivered on the 31st January, 2013.

89. Having considered the judgments of Laffoy J. in *Gillespie* and Dunne J. in *Gunn*, Hogan J. held that the question was whether the monies had become due prior to the 1st December, 2009. The letter of demand in the case, dated the 11th December, 2008, had referred to the arrears and to the right of the plaintiff to recover possession. However, it then went on to say: -

> *"Unless the above mentioned arrears are discharged within 21 days of today 's date, or, alternatively, vacant possession is given to the bank within 21 days; we will issue proceedings without further notice against you for a Court Order for the recovery of possession of the premises so that the property may be sold ... "*

90. A clause in the mortgage provided that the total debt would become immediately payable if more than two monthly payments were missed. This had occurred, but Hogan J. held that the clause had been "overtaken" by the letter, which in effect promised that if the arrears were cleared the mortgage debt would not become due. The bank had therefore waived the strict terms of the contract and had not unequivocally demanded repayment of the entirety of the debt prior to the 1st December, 2009. It had therefore not acquired the right to apply for an order under s.62(7) by that date, since its right to so apply had not sufficiently crystallised.

91. Hogan J. went on to consider whether the bank had a contractual right to seek possession without reference to s.62(7). On this point he said: -

> *"I think that the short answer to that is that the Oireachtas had originally designated s.62(7) as the sole mechanism whereby this Court could grant possession in this fashion to the holder of a mortgage over registered land (i.e. the well-charging procedure coupled with an order for sale described in the next paragraph excepted). Section 62(7)- following its earlier predecessor, s.13 of the 1942 Act- thus rectified the yawning gap in the powers of such a mortgagee which Andrews L.J had identified in Devlin by expressly granting such a power, such as already had been done for the first time in 1942. Given that the Oireachtas has removed that power - save in cases of demand having been made or the entirety of the mortgaged sum fell due prior to 1st December, 2009- in the case of pre-2009 mortgages of registered land, this Court cannot supply a power to recover possession where none existed in the first place independently of statute.*
>
> *Of course this does not at all mean, for example, that the bank cannot sue independently to obtain a well-charging order and to ask the Court to exercise its "inherent" power of sale in that fashion: see Bank of Ireland v. Waldron [1944] IR 303 and Wylie, Irish Land Law (4th Ed., 2010) at 801. Rather, all that has been decided by me is that as the bank neither demanded repayment of the entire sum nor that the entire sum had properly become due prior to 1st December 2009 (the terms of the mortgage deed notwithstanding) the statutory power to allow a mortgagee possession by means of court order in respect of registered land is no longer exercisable. Absent the applicability of that (now repealed) statutory power and given that the successor to s.62(7) provided/or in s.97(2) of the 2009 Act only applies to mortgages created after 1st December, 2009 this court cannot, as it were, create or invent a new power to grant the mortgagee possession. "*

92. Hogan J. expressed some doubts as to the constitutionality of this situation, querying whether the Oireachtas might be said to have

> *" ...unfairly struck at the substance of the lender's property rights in a disproportionate fashion, which in this instance is the right to recover the security given in exchange for the loan where the borrower has defaulted. "*

93. He did not, however, express any doubt as to the correct interpretation of the effect of the repeal.

94. It should be noted that this in this judgment Hogan J. expressed the view that a registered mortgage holder had an estate in land by virtue of s.62(6) of the Act of 1964.

Ulster Bank Ireland v. Carroll [2013] IEHC 347

95. This was an undefended case in which this court gave an *ex tempore* ruling, subsequently given in writing at the request of the plaintiff. The judgment points out the fact that it was an unargued case and therefore of limited value. The mortgage in question contained a clause providing that the total sum would become due in the event of default in a monthly payment. It was therefore held that no demand was necessary and that the case was governed by *Gillespie* rather than *Gunn.*

G.E. Capital Woodchester Home Loans Limited v. Reade ([2012] IEHC 363)

96. This was an application for an order of possession of registered land pursuant to s.62 of the Act of 1964. The mortgage provided that all monies unpaid by the defendants to the plaintiff should "immediately become due and payable on demand" on the happening of any of the events of default.

97. Clause 8.01 of the charge provided that at any time after the execution of the charge the plaintiff might without any further consent from or notice to the defendants enter into possession of the property. Clause 8.02 provided that the plaintiff should have the statutory powers conferred on lenders by the Conveyancing Acts and the Act of 1964, as varied and extended by the terms of the charge itself. It also provided that

> *"(i) the secured monies should be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of the charge, and*
>
> *(ii) the power of sale should be exercisable by the plaintiff without the restrictions on its exercise imposed by s. 20 of the Conveyancing Act, 1881. "*

98. A further clause provided that such powers should not be exercised except in the event of default.

99. Laffoy J. noted that the effect of these provisions meant that the monies did not become due and payable until demand was made on foot of an event of default. The power to enter into possession and the power of sale arose on execution of the charge. The power of sale was exercisable on the occurrence of default.

100. On the evidence before her, Laffoy J. concluded that the letters of demand exhibited by the plaintiff were insufficient to render the monies due and payable, since they did not demand the entire balance. The first letter relied upon (and the only one pre-dating the repeal) called only for the arrears. The second did not even mention the entire outstanding balance and the third assumed that the entire balance was due without having demanded it.

101. Laffoy J. noted in her judgment that the plaintiff had "inherently adopted" the position that if it could not show that it had made demand before the 1st December, 2009 it would be precluded from relying on s.62(7) and she therefore approached the case on that basis.

ACC Bank plc v. Ruddy ([2013] IEHC 138)

102. In this case the net issue arose from the fact that the letters of demand, written on the 9th November, 2009, had been sent to the wrong address. The plaintiff was unable to dispute the defendant's assertion that he had not received them and fell back upon the argument that the letters constituted *"unequivocal external acts vouching an intent to call in all facilities, albeit not received by the defendant"*. In presenting the case against an unrepresented defendant, counsel for the plaintiff drew the court's attention to the issue arising from the repeal of the section and to the judgments relating thereto. Referring to *Gunn*, Moriarty J. said

> *"Having read this judgment with care, it seems to me one that is carefully and cogently reasoned in the light of all relevant statutory provisions and earlier authorities. I am unaware of whether or not it is under appeal, and accept from [counsel] that some other less exhaustive High Court decisions have taken different views on particular facts, but unless and until otherwise established, I propose to follow the judgment as a detailed and thorough statement of current law, although 1 note that Dunne J stated that not all consequences resulting from the repeal of s.62(7) by s.8 of the 2009 Act may have been intended. "*

103. Finding that an uncommunicated demand could not suffice, Moriarty J. struck out the proceedings.

Irish Life and Permanent plc v. Dunphy ([2013] IEHC 235)

104. This was another Circuit appeal against an order for possession granted on foot of ejectment proceedings. As described by Hogan J., two of the principal questions before him were:-

> *"(i) whether the bank had a vested right to possession prior to 1st December, 2009, for the purposes of s. 27 of the Interpretation Act 2005 ... which was unaffected by the subsequent repeal ofs.62(7)?;*
>
> *(ii) even if the answer to that question is in the negative, whether this Court can grant possession pursuant to a contractual agreement which is independent of statute? "*

105. The mortgage had been taken out in early 2008 but soon fell into arrears. As in *Duff*, it provided that the total debt would become immediately payable if the mortgagor defaulted in the making of two monthly repayments or for two months in the payment of any other monies payable. However, as in *Duff*, the correspondence from the bank simply sought the arrears.

106. Hogan J., having examined the judgment of Andrews L.J. in *Devlin*, reconsidered the nature of the mortgagee's interest and decided that he had taken an incorrect approach in *Duff*, albeit he considered that he had reached the correct result. He had been wrong to say in that case that a registered mortgagee had an estate in land, but rather should have said that the registered holder of such a charge had an interest in land enforceable by sale. The estate remained vested in the mortgagor. That was why s.62(7) was so important- without an estate in the land the mortgagee could have no right of entry without the power conferred by the section.

107. Having regard to the significant repercussions and difficult legal issues given rise to by the repeal, Hogan J. decided to state a

case for the determination of the Supreme Court, notwithstanding certain doubts about his jurisdiction so to do. The questions stated asked whether the plaintiff in the case had a vested right to possession prior to 1st December, 2009 and, as a separate issue, whether the court could grant possession to a mortgagee of registered land pursuant to a contractual agreement.

G.E. Capital cases (unrep., Dunne J, 16th May, 2013)

108. The main issue with which this judgment is concerned is the adequacy of certain standard form letters of demand, there apparently having been a divergence between the views expressed in *ex tempore* judgments given by, amongst others, Dunne J. herself and the considered decision of Laffoy J. in *Reade* (referred to above). That issue is not of itself of concern in the instant case but it is worth noting that Dunne J. mentioned the distinction between *Gunn* and *Gillespie*. The wording of the mortgage in *Gunn* required a valid demand for payment of the full amount to render the principal money due, and therefore to ground an application for an order, while that in *Gillespie* did not.

109. Dunne J. then went on to refer to the passage from the judgment of Clarke J. in *Worldport* quoted above. She stated that the "*value of certainty*", or, in Clarke J.'s phrase, the "*virtue of consistency*" was central to our system of jurisprudence. She also referred to *Brady v. Director of Public Prosecutions* [2010] I.E.H.C 231, where Kearns P., having cited *Worldport* with approval cited Parke J. in *Irish Trust Bank v. The Central Bank of Ireland* [1976-7] I.L.R.M. 50 as follows: -

> *"I fully accept that there are occasions in which the principle of stare decisis may be departed from but I consider that these are extremely rare. A court may depart from a decision of a court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authorities cited or in some other way departed from the proper standard to be adopted in judicial determination. "*

110. Dunne J. therefore concluded, having regard to all the arguments, submissions and authorities, that she should not depart from the *Reade* decision and revisit the issue of the adequacy of the letter of demand.

Freeman v. Bank of Scotland (Ireland) Limited & ors. (unrep.,Gilligan J, 31st May, 2013)

111. A variety of arguments were raised by the plaintiffs in this case. On the issue relevant to the instant case, Gilligan J. followed *Kavanagh v. Lynch* in holding that the entitlement of the bank to appoint a receiver was a contractual matter conferred on it by the deed of mortgage and was unaltered by the repeal of the legislation.

ACC Bank v. Fagan ([2013] IEHC 346)

112. In this case arrears had arisen in the course of 2009 but there had been no demand until 2010. However, the plaintiff relied on Clause 6 of the deed, which provided *inter alia* that

> *"If any payment whether of interest or principal not be made on the due date ... then and in any such case the total balance outstanding together with interest thereon at the date of such demand or the happening of such event shall immediately become due and payable to ACC Bank."*

113. It was further provided that on the happening of such an event

> *" ...the Law Agent or any Officer of ACC Bank may forthwith demand repayment of the principal and interest outstanding (whether due or not) together with interest on the amount so demanded until repayment ...All sums so demanded shall be immediately due and payable. "*

114. Having regard to the decisions in *Gunn, Gillespie and Reade*, Finlay Geoghegan J. held that in the absence of a demand the monies had not become "due" by the 1st December, 2009.

115. The plaintiff further relied on a clause providing a power to sell the premises in the same manner as if the statutory power of sale under s.19(1) of the Act of 1881 had arisen, but since that too depended on the monies having become due it was held not to be available.

Submissions on *Gunn*
116. It was noted at the start of the judgment that in this case the bank is urging the court to decline to follow *Gunn*, by way of exception to the general principle set out in *Worldport*. The primary ground for this is that significant arguments were not made in *Gunn*. These arguments relate to Clause 6 of the mortgage deed and, as a separate issue, to the "double construction" principle. It is also submitted that *Gunn* and *McEnery* are in conflict with each other and that the court therefore has a choice as to which it should follow.

117. I propose to deal with the double construction rule first.

The double construction rule
118. As a general proposition the bank makes the case that by virtue of s.62(7) it had, within the meaning of the Interpretation Act, substantive acquired rights at the time of the repeal. It points to the fact that it had an interest in the land which, pursuant to s.90 of the Act of 1964, could itself be transferred or charged. It contends that on a proper construction, s.62(7) both confers a substantive right and regulates it procedurally. The substantive right is to apply for possession. Upon such application a lender is entitled to an order subject to a limited discretion. The regulatory aspect relates, it is argued, to the issues of timing (the application may only be brought when repayment of the principal sum is due) and procedure (the application must be brought by summary summons). The fact that, at the time of repeal, the right to apply could not have been exercised because there had been no default did not prevent the contingent right from subsisting thereafter.

119. The "double construction" rule of statutory interpretation is a constitutional principle identified in the decision of the Supreme Court in *McDonald v. Bard na gCon* [1965] I.R. 217. The rule stipulates that if, in respect of any statutory provision, two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction.

120. The bank and receiver submit that on its proper construction, s. 27 of the Interpretation Act operates so that, in relation to a

charge on secured land, s.62(7) of the Act of 1964 and ss. 19 and 24 of the Act of 1881 survive their repeal. It is argued that the interpretation adopted in Gunn has the effect of rendering the Act of 2009 unconstitutional, as arbitrarily removing from lenders the right to apply for possession in the case of charges created before the 1st December, 2009 where the borrower did not default until after that date. It is submitted that the legislature could not have intended to bring about this situation, especially given that it rel enacted the equivalent enforcement provisions. Reference is made to the doubts expressed by Hogan J. in *Irish Life & Permanent v. Duff*, summarised above.

121. It is submitted that the issue is whether the rights of the lender comprehended by the statutory provisions should be regarded as acquired, on the basis that the concept of contingent rights should be read broadly enough to comprehend such interests.

122. The section to be interpreted is s.27 but the argument is that if that section cannot be interpreted so as to save the lender's rights, then the repeal provisions would be unconstitutional as not having provided for any saver.

123. On behalf of the borrower, it is submitted that the bank should not be permitted to "re-open" *Gunn* on the basis of the double construction rule because to do so would be

> *"to permit unhappy litigants in similar circumstances to make a similar argument, thereby undermining the certainty or consistency associated with the proper administration of justice. "*

124. It is further submitted that the rule has no application in the circumstances of this case. There can be no question but that s.8 of the 2009 Act repealed s.62(7). It cannot be argued that s.27 of the Interpretation Act is unconstitutional because it fails to save the repealed section. On the basis of *Cahill v. Sutton* [1980] I.R. 269 the bank would not have *locus standi* to maintain such a claim.

125. Counsel for the Attorney General submits that s.27 (1)(c) is designed precisely to protect rights that would be seen as having constitutional protection.

> *"If indeed the statutory right is of a type that it enjoys constitutional protection (in other words, it is substantive and vested and therefore protected against retrospective legislation), then it is preserved by section 27. If it is a right of a sort that has not [been] preserved, then it is not in the nature of a right protected against retroactive legislation by the provisions of the constitution. There is no daylight in between. "*

126. In other words, if the right was acquired or accrued, it is protected. If it was not, then it is without constitutional protection.

127. I do not propose to embark upon a discussion of the authorities on the double construction rule because it appears to me that it cannot avail the bank parties in this case.

128. I should make it clear that this is not because I do not consider it open to the bank parties to raise new arguments in unrelated proceedings. Where a point arises that was not previously decided, the court is not prevented from considering it because it could have been argued by a different party, or even by the same party, in an earlier case. The issue that arises here is, in my view that, in applying the *Worldport* principles, I have to consider whether the new argument is one that leads to a materially different outcome in the sense that it demonstrates that the determination in the earlier case was wrong.

129. The double construction rule of statutory interpretation is one that applies only where two or more interpretations are reasonably open. Where the literal meaning of a statute is clear, unambiguous and not absurd, there is no necessity and indeed it would be wrong to use other canons of construction to interpret it - see the judgment of Denham J. in Board of Management of *St. Malaga's NS v. Secretary of the Department of Education* [2010] IESC 57.

130. The issues in this case do not in my view give rise to competing interpretations of the statutory provisions.

131. Section 8 of the 2009 Act repealed s. 62(7) and there is no ambiguity about that. Section 27 of the Interpretation Act protects rights that, under the repealed legislation, were acquired or accrued at the date of repeal. The only question then is whether the right identified in this case -the right under s.62(7) to apply for an order of possession when "*repayment of the principal money secured by the instrument has become due*" -had been acquired or accrued by the 1st December, 2009. Dunne J. held that it had not, not because she did not consider the right to be a substantive one capable of being preserved despite the repeal but because she held that the principal money had not "become due". That was a finding by reference to the facts of the case and the terms of the instrument. Whether the finding was correct or not, and whether she was correct or not in considering that the right was not "acquired" in the same way as in *O'Sullivan v. Superintendent of Togher Garda Station* does not depend on any issue of disputed statutory interpretation capable of attracting the double construction rule.

Clause 6 of the deed

132. As set out above, clause 6.02(a) of the deed provides that the principal monies are "deemed" to become due, for the purposes of the Conveyancing Acts including the Registration of Title Act, 1964, on execution of the mortgage. A provision of this nature is, the court has been told, to be found in almost all modem mortgages and probably has been since 1881. It is not apparent from the judgement in *Gunn* whether there was such a clause in the mortgages under consideration there, but there certainly does not appear to have been any point made in relation to it, if there was. A clause of the same type is mentioned in the judgment in *Reade* but was not discussed.

133. Mr. Murphy argues that the effect of the clause is that, from the date of execution, the money has become due for the purposes of s.62(7). The mortgagee then has a right to apply under s.62(7) for possession, subject only to its covenant not to exercise that right in the absence of default. This, it is submitted, is comparable to the characteristic feature of a mortgage that the mortgagee has an immediate, present right to possession which is made subject to a covenant not to exercise the right until default.

134. On behalf of the borrower, Mr. Maguire agrees that this provision is probably contained in almost mortgages. He argues that it was not relied upon in *Gunn* because it does not have the effect now contended for. The issue in *Gunn* was whether or not there was a right to apply, and manifestly, clause 6.02(a) would not have given a right to apply where the borrower was repaying the loan in accordance with the contract. The mortgage in the instant case, he says, requires default and demand before an application could be made.

135. Mr. Maguire also relies upon the decision of the House of Lords in *West Bromwich Building Society v Wilkinson* [2005] 1 W.L.R. 2303. In that case the plaintiff had repossessed and sold the mortgaged property. As the full amount of the debt had not been realised by the sale, it now sued for the balance. One of the issues raised by the defendants was a limitation argument. Relying on a

clause similar to that under consideration in this case, it was submitted that time in respect of the debt ran from the expiration of one month from the date of execution of the charge.

136. Rejecting that argument, and holding that time ran from the date of default, Lord Scott of Foscote said: -

> *"I am unable to accept that submission. The submission ignores the words "be deemed to". It is very common to find in mortgages some such provision as clause 5(c). The purpose is not to advance the date on which the mortgage money becomes due. It is to protect purchasers from the mortgagee and relieve them of the need to inquire whether "the mortgage money has become due "... I do not think this commonplace provision can be given an extended meaning simply because this Legal Charge has been ineptly drafted. "*

137. On behalf of the bank, Mr. Murphy says that this authority is in fact in his favour. The reason that the clause protects a person purchasing from the mortgagee where the latter is exercising a power of sale, it is submitted, is because it saves him from having to investigate how that power arose and whether it is being validly exercised. Because it is a "deeming" provision, it does not operate so as to actually render the money payable and nor, according to Mr. Murphy, would it on its own ground a right to apply for possession. The lender's covenant not to apply save in the event of default would prevent that. However, the clause does, he submits, serve the purpose of fulfilling the condition that the monies be due within the meaning of s.62(7) before that section can be invoked. It also satisfies the similar conditions contained in s.19 of the Act of 1881 relating to receivers.

138. This is indeed a new argument, and one which could be described as significant. However, on balance I think that it must fail. It is not simply that it might be thought odd that a clause having such an important effect should have escaped the notice of so many experienced practitioners and judges for so long, for such things can happen - in this context Mr. Murphy points to the lapse in time between the passage of the 1881 Act and the judgment in *Devlin* in 1924. Rather, it seems to me that the "deeming" provision, described in *West Bromwich Building Society* as "commonplace" and as being designed to protect the position of a third party buying the property from the mortgagee, cannot be interpreted as overriding the legal relationship between the parties to the agreement in all other respects.

139. Mr. Murphy expressly disavows any suggestion that the clause could ground an application, because of the lender's covenant. However, if a borrower was making payments as they fell due under the terms of the contract and the lender nonetheless made demand for the entirety of the principal, I am not convinced that the only reason a court would refuse an order for possession would be the lender's covenant. The money would not be "due" within the meaning of clause 1.02 set out above, because none of the events described therein had occurred and the borrower was in compliance with the covenant to pay.

140. I consider that I do not have to determine whether there is a conflict between the two clauses, or whether the "deeming" provision is only directed towards third party rights. The issue, in my view, ultimately comes back to the question whether, as of the relevant date, the bank had an acquired right to apply for the statutory remedy. The bank, in essence, says that it had an acquired but as-yet unexercisable right. Dunne J. considered that the right in question could not be described as acquired unless the conditions for its exercise had arisen.

141. I have also considered whether I should prefer the analysis of Feeney J. in *McEnery v. Sheahan*, relating to the difference between procedural and substantive rights, to that of Dunne J. in *Gunn*. It will be recalled that Feeney J. held that the right to appoint a receiver, although inchoate, subsisted from the execution of the deed and that it was therefore an acquired right at the date of repeal. He distinguished *Gunn* on the basis of an apparent misapprehension as to the unique function of the s.62(7) procedure. Mr. Murphy has submitted that if he had been aware of *Devlin*, he would have realised that both the right to apply for an order and the right to appoint a receiver were of a similar nature.

142. That of course may be correct. However, it is not for me to say what direction the learned judge's judgment would then have taken. He could have decided to disagree with Dunne J. on *Worldport* criteria, or he might have decided that he should apply the general principle in *Worldport* and adopt the reasoning in *Gunn*.

143. In any event, it seems to me that maintenance of the values sought to be protected by the *Worldport* principle are best served in this instance by accepting the *Gunn* determination on the issue. It is apparent from the cases post-dating it, summarised in this judgment, that it has been followed or distinguished several times by a number of different judges but never disagreed with. To disagree with it now, especially in a case where, to adopt Clarke J.'s phrase, the issues are evenly balanced, would cause a highly undesirable state of uncertainty in an area of economic activity where certainty as to one's rights and obligations is desirable.

144. I therefore conclude that, on this issue, the bank parties have not discharged the burden of persuading the court that it should depart from the decision in *Gunn*. By way of observation, however, I note that the concluding propositions in that case were probably drafted more broadly than was necessary. By this I mean the reference to a requirement that a demand should have been made before the 1st December, 2009 -this clearly was a condition of the deeds with which Dunne J. was concerned but, as *Gillespie* demonstrates, it does not necessarily apply in every case.

The appointment of the receiver

145. The borrowers contend, in the Sheahan Plaintiff proceedings and the Receiver proceedings, that the power to appoint a receiver did not survive the repeal because of the specific provisions of the deed. Reliance is placed on the provision that

> *"the Mortgagee shall have the powers conferred on mortgagees by the Conveyancing Acts as varied and extended by the mortgage, including the power to appoint a receiver".*

146. The deed provides that

> *"Reference to any enactment includes reference to any statutory modification thereof whether by way of amendment addition deletion or repeal and re enactment with or without amendments and whether such be occasioned by Act of the Oireachtas, Ministerial Order or regulation or by regulation or directive or other enactment of any organ of the European Union. "*

147. It is submitted on behalf of the borrowers that by so providing, the bank left itself open to the possibility that the Conveyancing Acts would be amended after the date of execution, thereby altering the powers conferred. In this case, that includes the repeal by the 2009 Act of the 1881 provisions conferring the power to appoint a receiver. It is submitted that this is the plain and ordinary meaning of the document. In the alternative, if the provision is held to be ambiguous, it is submitted it should be construed *contra proferentum*.

148. The bank submits that its right to appoint a receiver derives from the contract and not from statute. It therefore relies on *Kavanagh v. Lynch* and *Moran v. AIB*, both summarised above. There is no dispute about the fact that the borrower was in default at the time of appointment.

149. Mr. Maguire has not made any submission, either oral or written, in respect of these authorities other than to say that he does not concede the point.

150. In my view they are apposite and I therefore adopt the principles set out by Laffoy J. as to the survival of the contractual power to make the appointment. I further agree that, in the absence of any indication to the contrary, it is not likely that the parties to a commercial contract intended to leave themselves subject to any change in the law that might occur, of which they had no knowledge at the time. I agree with the analysis of McGovern J. on this issue and hold that the reference to the legislation set out in paragraph 145 above is to the existing corpus of laws at the time of the agreement.

151. Mr. Maguire makes a separate argument as to the validity of the appointment, based on the actual terms of that appointment as compared with the powers set out in the deed. He submits that the powers conferred by the deed are limited to that set out in s.19(1)(iii) of the Conveyancing Act,1881, which refers only to receipt of the income of the property or part thereof. The deed of appointment purports to confer a power to enter into possession. He submits that it follows that the appointment itself is invalid.

152. This argument commences with the terms of s.19(1), which provides that

> *"(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):*
>
> > *(i) A power, when the mortgage money has become due, to sell ...the mortgaged property ...*
> >
> > *(ii) omitted*
> >
> > *(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof .. "*

153. Subsections (2) and (3) provide as follows:-

> *"(2) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and as so varied or extended, shall, as far as may be, operate in a like manner and with all the like incidents, effects, and consequences, as if such variations and extensions were contained in this Act.*
>
> *(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained. "*

154. Mr. Maguire compares the power of a receiver who purports to exercise a power to take possession, which he does not have, with the position of a Garda officer executing a defective search warrant and points to the protection afforded to occupiers by decisions such as *Simple Imports*. He argues that, in the same way, the court should strictly scrutinise the power claimed by a receiver to enter onto another person's property, and ensure strict compliance with the terms of appointment. If the deed of appointment of the receiver purports to confer powers beyond those authorised by law, that is sufficient to invalidate the appointment itself.

155. Reliance is placed upon the decision of Gilligan J. in *The Merrow v. Bank of Scotland* [2013] IEHC 130, where a particular debenture required the appointment of a receiver to be done under seal. Gilligan J. held that non-compliance with that requirement invalidated the appointment.

156. Mr. Murphy submits that the terms of the deed make it clear that the powers conferred by it are additional to those conferred by statute. He points to clause

6.04, set out above, which provides that the receiver may "let and manage" the mortgaged property.

157. Mr. Murphy relies on s.2 of the Act of 1881, which provides that

> *"Possession includes receipt of income"*
>
> and argues that, as a matter of logic, it follows that income is a type of possession. This is, he says, a proposition that is intrinsic to property law and to the nature of property transactions. He refers by way of example to the situation where a tenant of the mortgagor, whose tenancy is binding on the mortgagee, is in possession. In that case the mortgagee "takes possession" by giving notice to the tenant to pay the rent to himself. If the tenant refused, the receiver must be entitled to assert possession in the form of insisting that the rent is paid to him.

158. Mr. Murphy also points to the fact that a similar argument in relation to the receiver was made and rejected in *Kavanagh v. Lynch*. In that case the objection was that the receiver had been appointed to be "receiver of the income, rents and profits" of the property only and that the deed of appointment did not make any reference to taking possession. The relevant clause of the mortgage provided that

> *"Any receiver shall have power in the name of the mortgagor to give notice to quit and bring and take actions or proceedings for ejectment or recovery of possession of any tenancy or otherwise and to let or re-let the property or any part thereof .. "*

159. Laffoy J. held that this provision reflected what was necessary to make the appointment of a receiver of "income, rents and profits" a reality. Notwithstanding that it was not spelt out in the deed of appointment that the receiver should have the power to take possession, it was implicit that he should have since otherwise he would not be able to do his job. She was therefore satisfied that the receiver had a power to take possession.

160. It seems clear that in the instant case clause 6.04 envisages two separate situations - the entry into possession by a mortgagor

on foot of an order for possession, which I have held to be unavailable in this case, and the appointment of a receiver, which I have held is lawful by virtue of the contractual entitlement of the bank. Where a receiver of rents and profits, with a power to let and manage, is properly appointed with due regard to any formal requirements, it seems to me that, as in *Kavanagh v. Lynch*, it is implicit that he has a power to take possession in order to carry out his functions.

Question 5 of the special case
161. This question concerns the potential availability of the new provisions of the 2009 Act in relation to this case. Both the bank parties and the borrowers are agreed that they have no application. A robust effort was made in the hearing by counsel for the bank to compel counsel for the Attorney General to give a view on this issue, which was equally robustly resisted. In the circumstances, I refused to direct him to make submissions. The Attorney General is a notice party in this case, not a party, and if the parties are agreed on a particular issue I do not see that either the Attorney General or the court should feel obliged to take part in an artificial exercise with a view to the potential arguments to be made in module 2 of the special case.

Conclusions
162. It may appear strange that the law distinguishes in this fashion between the availability of the right to apply for possession and the rights of lenders to appoint receivers. The reason is that the former right was entirely rooted in the now repealed statutory provision (subject to a potential argument that it may be provided for by contract).The latter almost invariably derive from a contractual agreement incorporating and perhaps adding to the powers set out in statute. A change in the legislation will not, in general, directly affect the terms of the contract. However, the repeal of s.62(7) has undoubtedly affected the right to seek that particular remedy and thereby indirectly impacted upon the legal context in which the contract is created in a significant way. Where the power of a lender to appoint a receiver is entirely dependent on the repealed sections a similar result has occurred. The right may only be exercised if it was acquired by the date of repeal.

163. That this was done accidentally seems overwhelmingly likely, given that the remedy in question was re-enacted. However, as Dunne J. said in *Gunn*, it is not for the court to supply the omission of the Oireachtas.

164. I will answer the Questions in this Module as follows: -

I. No.

II. Yes.

III. (a) Yes.

(b) Does not arise.

IV. No.

V. This question was not argued. I therefore record the fact that the parties to the substantive litigation are agreed that the answer is "No" and that the Attorney General has reserved her position.