Neutral Citation [2013] IEHC 138

**THE HIGH COURT**

**[2011 No. 205 S.P.]**

**BETWEEN**

**ACC BANK PLC**

**PLAINTIFF**

**AND**

**JOHN RUDDY**

**DEFENDANT**

**JUDGMENT of Mr. Justice Moriarty delivered on the 5th day of March, 2013**

1. In this Special Summons hearing, placed in the list for 7th February last by Dunne J. for hearing, the substantive immediate differences between the parties were essentially reduced to a net issue, and I propose to address this in a short and condensed judgment. Given that the defendant appeared in person, indicating that financial exigencies had compelled him to dispense with solicitors formerly acting, I am obliged to Mr. Bredin, B.L., who presented matters on behalf of the plaintiff with scrupulous fairness. I have considered the arguments advanced on both sides, the detailed written submissions furnished on behalf of the plaintiff and the several Irish, English and Scottish authorities referred to. It does not seem to me necessary to digress into a lengthy consideration of all the nuances of these judgments, not least the distinction between "acquired" and "accrued" rights, which receives what not unfairly could be described as somewhat mannered consideration in some of the older cases, and perhaps is most helpfully addressed in *O'Sullivan v. Superintendent in charge of Togher Garda Station*, reported together with a similar case at [2008] I.R. (Part 1, Vol. 4) at p. 212. Likewise, having examined dictionary definitions of "acquire" and "accrue", I find the judgment of Simon Brown L.J. in *Chief Adjudication Officer & Anor v. Maguire* [1999] WLR 1778, more cogent and helpful that some other authorities.

2. Of this, paramount is whether or not, in the somewhat convoluted course of statutory events affecting the rights of lenders to enforce securities over lands for borrowings in default, that have arisen in recent years, the plaintiff retains an enforceable entitlement in the events that have transpired, or whether that course is precluded in law. When heard before the Master, it was decided that the latter situation obtained, on foot of which the Master struck out the proceedings. That course did not find favour with Dunne J., who set aside that Order for want of jurisdiction but without prejudice to the ultimate outcome, when the matter was heard and argued on 7th February last.

3. The problems occasioned to lenders, who for many years had sought to enforce rights of repossession and sale on foot of instruments of charge over lands for unpaid loans, pursuant to s. 62(7) of the Registration of Title Act 1964, in a manner not dissimilar to a mortgagee, arose from the repeal of that statue on 1st December, 2009, allied to its subsequent replacement by the Land and Conveyancing Law Reform Act 2009, and the provisions of the Interpretation Act 2005. The relevant provisions have been detailed in the written submissions of the plaintiff, are addressed in detail in the judgment I propose to refer to in the next succeeding paragraph, and I do not feel it necessary to set them forth at this juncture.

4. The matters that have emerged as determinative in the present proceedings were set forth and considered in detail by Dunne J. in a substantial judgment delivered on 25th July, 2011, in the case of *Start Mortgages Limited v. Robert Gunn & Maura Dunne*, which had been heard together with other cases raising similar issues and arguments. 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 Mr. Bredin 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 I 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.

5. What was found by Dunne J., as summarised in her conclusions, was as follows:-

> "**Conclusions**
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> There are a number of conclusions that can be set out at this point.
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> 1. Proceedings commenced prior to the 1st December, 2009 can be continued after that date.
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> 2. Proceedings can be instituted after that date provided that the lender had acquired the right to apply for an order pursuant to s. 62(7) by the 1st December, 2009.
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> 3. A lender has not acquired the right to apply for an order pursuant to s. 62(7) if the principal monies secured by the mortgage have not become due.
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> 4. The principal monies do not become due until default or certain other events have occurred and demand for repayment of the principal monies has been made.
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> 5. In any case in which demand is made for repayment of the principal sums due after the 1st December, 2009, the lender has 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 will not avail such a lender.
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> I reiterate the fact that this judgment is not intended to deal with any issue other than the right of the lender to apply for an order pursuant to s. 62(7) of the 1964 Act notwithstanding its repeal by s. 8 of the 2009 Act. Any other issues that may arise by way of defence can be dealt with in due course.

It may be that the repeal of s. 62(7) by s. 8 of the 2009 Act has had unintended consequences. The 2009 Act sets out the obligations, powers and rights of mortgagees in Chap. 3, commencing at section 96. The provisions of s. 96(1) provides expressly as follows:-

'(1) Subject to this Part, the powers and rights of a mortgagee under sections 97 to 111

(a) apply to any mortgage created by deed after the commencement of this Chapter.'

It only applies therefore to mortgages created by deed after the 1st December, 2009. It appears that there is a lacuna created by the repeal of s. 62(7) in that, as I have found, those lenders who did not have an entitlement to apply for an order pursuant to s. 62(7) by the 1st December, 2009, are not in a position to avail of the provisions of the 2009 Act to apply for an order of possession, as their right to apply for such an order is not saved by the provisions of the 2005 Act. It is not for the Court to supply that which is not contained in the 2009 Act."

6. In the present instance, the plaintiff sought, under s. 62(7) of the 1964 Act, delivery of possession to it of two properties charged by the defendant to it under Indentures of Charge, dated 8th February, 2005, and 22nd June, 2005, respectively, for purposes of sale. The properties were respectively a derelict cottage comprised in Folio 52112 of the Galway Register of Freeholders, and a dwelling-house in a large Dublin housing estate comprised in Folio 169864F of the Dublin Register of Freeholders. What was sought to be secured in the former instance was a term loan of €200,000 to complete renovations, and in the latter, a further loan of €490,000 to enable purchase of the house in question. In each instance, the Indentures of Charge were duly registered on the properties, on 1st October, 2008, and 19th July, 2006, respectively.

7. Default in agreed repayments of each loan set in at a relatively early stage, and what were undoubtedly unequivocal letters of demand for repayment, as a necessary prelude to enforcement proceedings, were prepared by the plaintiff for delivery to the defendant on 9th November, 2009, a date preceding the subsequent repeal date of the 1964 Act. What has occasioned the principal problem for the plaintiff is that the letters in question were sent by ordinary pre-paid post, were directed to the wrong address, being 21, Riam Luachra, Ballybane, Co. Galway rather than 22, Riam Luachra, and the defendant had sworn an affidavit and reiterated in last month's hearing that he never received either letter, a position Mr. Bredin candidly and properly concedes he cannot dispute.

8. Insofar as the subsequent date of service of the Special Summons on the defendant may be relied upon by the plaintiff as a demand for payment within the intent of the legal authorities, it is acknowledged by Mr. Bredin that this does not avail his client, as it and any other possible subsequent demands post-dated the cut off point of 1st December, 2009. Accordingly, he is thrown upon arguing that the letters of 9th November, 2009, sufficed as such demands, being unequivocal external acts vouching an intent to call in all facilities, albeit not received by the defendant.

9. On this, the heart of the present controversy, I cannot agree. The Shorter English Oxford Dictionary, in defining "demand" traces it to the Latin, *demandare*, meaning to hand over or entrust. To take only one of the other legal connotations of the concept of demanding, I turn to the criminal offence popularly called blackmail, or more accurately, demanding with menaces. It is palpably clear from Archbold and other leading authorities that a necessary proof of the commission of such offences is imparting or conveying a wrongful request to a victim. Demanding inherently connotes a bilateral process of conveying that peremptory requirement to a person affected: if it is not communicated, it is an internal and not external process, amounting to no more than a memorandum of intention, and in my view clearly cannot suffice for present purposes from the plaintiff's viewpoint. Accordingly, I believe that if I am to apply the operative law correctly, the essential proof of demand must be found to lacking. In these circumstances, the appropriate Order is to reinstate the Order striking out the proceedings initially made by the Master (likewise, it would seem, by the application of the *Start Mortgages* decision, but as found by Dunne J. to have been made without jurisdiction). In all the circumstances, including the representation in person of the defendant, I will make no order for costs.

10. I might not in general terms enthuse over technical arguments that have little regard to the merits, for it is utterly clear that default on the loans has flagrantly occurred, but the law appears clear, and it may be that the plaintiff should have moved more promptly, given the imminence of the repeal date, or adopt a more definitive measure in ensuring personal service, not least by garnering more reliable information from its agents regarding the precise Galway location. However, these are not matters for me, and cannot in any event be ascribed to any deception or misrepresentation on the part of the defendant. This finding obviously does not extinguish the debt, and I note from a reading of the several affidavits that the plaintiff has not denied an averment by the defendant that a relatively substantial payment was made at a late stage, and it may make sense that possibilities of a revised basis of payment between the parties be explored, that again this is beyond what I am at present required to rule upon.