

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

AQUA FRESH FISH LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 April 2019.

INTRODUCTION

1. This is an application by Allied Irish Banks plc (*"the Bank"*) to enforce a charge registered in its favour against lands owned by the defendant company (*"the Borrower"*). The Bank seeks an order for possession, and, if necessary, an order authorising it to exercise its power of sale. The lands do not comprise a family home. Accordingly, the application is made pursuant to Section 97(2) and Section 100(3) of the Land and Conveyancing Law Reform Act 2009.

2. The proceedings have a lengthy procedural history. The Borrower is a company registered with limited liability under the Companies Acts. At an early stage of the proceedings, one of the directors of the company, Mr. Adrian Flynn, sought permission to represent the company in the proceedings. In brief outline, following an earlier appeal to the Supreme Court, Mr. Flynn filed a conditional appearance, and issued a notice of motion seeking permission to represent the defendant company. This motion initially came before the High Court (Keane J.), and a reserved judgment was delivered on 27 March 2015. Ultimately, the matter came before the Supreme Court by way of appeal from the Court of Appeal. The Supreme Court delivered its judgment on 18 October 2018, *Allied Irish Bank plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49.

3. Finlay Geoghegan J., delivering the judgment of the court, stated her conclusions as follows.

"Summary of Conclusions

48. The so-called rule in *Battle v. Irish Art Promotion Centre Limited* [1969] I.R. 252, when complemented by the inherent jurisdiction and discretion of the Court to permit, in exceptional circumstances, representation of a company by a person who is not a lawyer with a right of audience, continues to be the law in this jurisdiction and is consistent with the Constitution.

49. On the facts of this appeal, exceptional circumstances have not been established which would warrant the Court permitting the Company to be represented by Mr. Flynn."

4. The substantive proceedings had been becalmed pending the resolution of this procedural issue. Following on from the Supreme Court judgment in October 2018, the proceedings were re-entered. The matter ultimately came on for hearing before me on 11 March 2019.

5. Ms Pauline McRandal, BL, appeared on behalf of the Bank. In circumstances where the defendant company has not appointed solicitors and counsel to represent it, there was no representation on its behalf. Mr. Flynn did, however, attend at the hearing. I permitted Mr. Flynn to make a brief oral submission *de bene esse* on his own behalf. I will return to discuss this submission towards the end of this judgment.

FACTUAL BACKGROUND

6. The application for the reliefs sought by the Bank is grounded on the affidavit of Robert Amerlynck sworn herein on 28 February 2013. Mr. Amerlynck describes himself as an assistant manager employed by the Bank in its insolvency and debt recovery unit.

7. The affidavit sets out the chronology as follows. The Borrower entered into and executed a mortgage deed with the Bank on 17 February 2010. The mortgage deed was subject to the AIB Mortgage Conditions (2009 Edition). The mortgage deed gives rise to what is colloquially known as an "all sums due" mortgage. The mortgage secures the "Total Debt" owing to the Bank. (See General Condition 3). The term "Total Debt" is defined at Condition 2, and includes *inter alia* all amounts payable by the mortgagor in respect of any loans or credits of any nature made or granted by the Bank to the mortgagor now or at any time in the future.

8. The mortgage deed was executed under the seal of the defendant company. The common seal of the defendant company was affixed by Adrian Flynn (Director) and Patricia Flynn (Director).

9. The Bank's powers as mortgagee and the exercise of the Bank's powers are set out at General Condition 9 and 10, respectively.

"9.1 At any time after the execution of the Mortgage, a Lender may (i) in relation to a Housing Loan Mortgage only, subject to compliance with the Act, 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 or (ii) in relation to any Other Mortgage, without any 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.

The provisions of Section 97 (*Taking Possession*), Section 98 (*Abandoned Property*) and Section 99 (*Mortgagee in Possession*) of the Act shall not apply to any Other Mortgage.

9.2 Each Lender shall have the statutory powers conferred on Mortgagees by the Act and as extended by the Mortgage and in particular subject to the following extensions that is to say:

(a) The Total Debt owing to the Lender (whether demanded or not) shall be deemed to become due within the meaning and for all the purposes of the Act on the execution of the Mortgage.

(b) In relation to a Housing Loan Mortgage only, the Lender may exercise its power of sale, together with all powers incidental to the power of sale, subject to compliance with the Act (including the provisions of Section 103 (*Obligations on Selling*)).

(c) In relation to all Other Mortgages, the Lender may exercise its power of sale free from the restrictions contained Section 100(1)(a), (b), (c), (2), (3) and (4) and without the requirement to serve notice (as provided for in Section 100(1), together with all powers incidental to the power of sale as conferred by Section 102. The Lender shall, in relation to all Other Mortgages, comply with the provisions of Section 103 (*Obligations on Selling*)).

(d) The power of leasing conferred on each Lender by the Act shall apply to this Mortgage and the Lender may exercise the power conferred by the Act to accept surrenders of leases and grant options as the Relevant Lender shall consider expedient and for any purpose that it thinks fit and not just for the purpose of granting new leases under Section 102 of the Act and any new lease granted by the lender following acceptance of a surrender need not comply with the requirements of Section 114(3) of the Act.

[...]

10. Exercise of the Lenders Power

10.1 The Lenders or either of them shall not exercise any of the powers provided for in sub-clause 9.2 unless and until any of the following events shall occur:

[...]

(b) If the Mortgagor fails to pay or discharge within three months of the due date any money payable by him or any obligation or liability payable by him from time to time to a Lender;”.

10. The mortgage is registered in the Land Registry as a charge against lands in respect of which the defendant company is registered as full owner. The date of the registration of the charge is 11 March 2010.

11. By letter dated 26 February 2010, the Bank sanctioned a facility in the name of the defendant company. The amount of the facility was €155,615. The purpose was stated to be “working capital”.

12. The security of the credit facility was stated as follows.

(1) AIB all sums mortgage from Aqua Fresh Fish Ltd over 8.5 acres, Donaghmore, Kilkenny, Co. Louth.

(2) Letter of guarantee for €155,000 from Mr. Adrian Flynn.

13. The terms and conditions applicable to the facility in the letter of sanction were accepted on behalf of the defendant company by Adrian Flynn.

14. Mr. Flynn confirmed at the hearing before me on 11 March 2019 that *prior* to the signing of this letter of sanction he had had the opportunity of speaking to his solicitor.

15. The Bank has also exhibited a resolution passed at a meeting of the defendant company on 26 February 2010. The company is recorded as having resolved as follows.

“That the Company does accept the offer of the facility amounting to EUR155,615 made by Allied Irish Banks, p.l.c. (‘the Bank’) to the Company subject to the terms and conditions referred to in the letter of sanction dated 26/02/2010, addressed by the Bank to the Company, and that Adrian Flynn (*Insert Name of Director*) is hereby authorised to sign on behalf of the Company the letter of sanction and such other authorities, documents and instructions that the Bank shall require to be signed by the Company in connection with the facility.”

16. The credit facility was drawn down on 1 March 2010. Unfortunately, the account fell into arrears. A letter of demand was sent on 17 July 2012. This indicated that the amount due as of 15 June 2012 under the two accounts was €5,170.66, and €165,710.16, respectively, giving a total of €170,880.82. The letter stated as follows.

“We hereby demand payment in full. KINDLY TAKE NOTICE that unless we receive same immediately we are instructed to serve proceedings for recovery thereof. The cost of any such proceedings may be your responsibility.”

17. A letter of demand for possession was served on 24 July 2012 by the Bank’s solicitors.

“We refer to previous correspondence herein. In accordance with the terms of the above Mortgage/Charge, as Solicitors for Allied Irish Banks, p.l.c. we now call upon you to hand over possession of the above premises to our client immediately.

Failure to comply with the above request will result in proceedings being issued for an Order for Possession. We estimate that the cost of such legal action, which may be your responsibility, will be between €3,500 and €20,000 depending on the level of co-operation afforded by you.

18. The within proceedings were instituted on 2 November 2012.

POSITION OF MR. FLYNN

19. As noted at the outset, Mr. Flynn had—unsuccessfully—sought permission to represent the defendant company. The Supreme Court ruled against Mr. Flynn in a judgment of 18 October 2018, *Allied Irish Bank plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49. The summary of conclusions of that judgment has already been set out above.

20. In the penultimate page of the judgment, Finlay Geoghegan J. stated as follows.

"47. On the facts of this appeal, no application has been made on behalf of Mr. Flynn to have him joined as a party. The fact that a person is a director or shareholder of a company would not of itself normally permit him to be joined as a co-defendant to proceedings which sought to enforce security allegedly given by a company for monies advanced to it. No application to be joined was made upon the basis of his position as guarantor of the Company's debt."

21. At the hearing before me on 11 March 2019, I permitted Mr. Flynn to make a brief oral submission *de bene esse*. The purpose of this was to allow Mr. Flynn to indicate whether there were any additional factors since October 2018 which might suggest that he should now be joined to the proceedings. Obviously, given the definitive ruling of the Supreme Court on 18 October 2018, there was no question of Mr. Flynn being permitted to represent the defendant company.

22. In the event, Mr. Flynn did not advance any argument as to why he ought to be permitted to be joined to the proceedings. In particular, he did not seek to rely on his status as guarantor to argue that he should be joined to the proceedings. (It will be recalled that the letter of sanction of 26 February 2010 stipulated that the security for the credit facility was to include a letter of guarantee from Mr. Flynn, in addition to the mortgage from the defendant company. See paragraph 12 above). At the hearing before me, Mr. Flynn made no complaint in respect of the guarantee, and confirmed that he had had the opportunity to speak to his solicitor *prior* to his signing the letter of sanction. Mr. Flynn also confirmed that he had agreed to the terms and conditions of the letter of sanction on behalf of the defendant company by signing the letter as a director.

23. More generally, it appears that Mr. Flynn is under the misapprehension that a further deed of mortgage required to be executed *subsequent* to the defendant company's having accepted the terms and conditions of the letter of sanction of 26 February 2010. Mr. Flynn submitted that the mortgage deed of 17 February 2010 had been executed by reference to an earlier letter of sanction. Of course, this submission overlooks the fact that the mortgage deed extends to all amounts payable by the defendant company in respect of any loans or credits of any nature made or granted by the Bank to the company now or *at any time in the future*. The mortgage deed thus applies to the loan issued pursuant to the letter of sanction of 26 February 2010.

24. In all the circumstances, I am satisfied that there is no basis for joining Mr. Flynn to the proceedings.

DECISION

25. I am satisfied that the Bank is entitled to the orders sought. The evidence establishes that the Bank has a registered charge against the defendant company's lands; that there has been default in the payment of the instalments pursuant to the mortgage; that the principal monies have been lawfully demanded; and that the power of sale is now exercisable.