

THE HIGH COURT

[2012 No. 105 CA]

BETWEEN:

ULSTER BANK IRELAND LIMITED

APPELLANT

AND

GARY MCDONNELL AND SABRINA MCDONNELL

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 21st day of February, 2014.

INTRODUCTION

This is an appeal from an order of the Circuit Court of the 18th May, 2012, whereby an order for possession of the respondents' property was refused.

FACTS

By letter of loan offer dated the 25th October, 2006, First Active plc made available a loan facility in the sum of €236,000 to the respondents. This loan offer was accepted by the respondents on the 28th March, 2007. The loan was to be secured upon a property at 63 Lealand Avenue, Clondalkin, Dublin 22, Folio 16636F. It was repayable over a period of 29 years payable in instalments. A charge was granted by the respondents over the lands comprised in Folio 48386F by a deed dated the 19th April, 2007. This charge was registered in the land registry on the 25th June, 2007.

On the 8th October, 2008, the business and assets of First Active plc was transferred to the appellant by the Minister for Finance and the appellant is successor in title to First Active plc.

The respondents did not make payments in accordance with the terms of the loan facility, in particular the sum of €1,039.54 on the 15th October, 2009. This default continued for more than one month after the initial failure.

HISTORY OF THE PROCEEDINGS

The matter appeared before the Circuit Court on the 18th May, 2012. The appellant sought to distinguish the mortgage from the mortgages the subject of the decision in *Start Mortgages v. Gunn* [2011] IEHC 275 (Unreported, High Court, Dunne J., 25th July, 2011). The learned judge took the view that the Circuit Court was bound by the decision in *Start Mortgages* and since the bank in this case had not made a demand for the repayment of the entire principal and interest before the 1st December, 2009, it held that it was not entitled to avail of the provisions of s.62 (7) of the Registration of Title Act 1964 and therefore the court had no jurisdiction to hear the application.

RELEVANT LAW

Section 62(7) of the Registration of Title Act 1964 provided as follows:

"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."

This provision was repealed by s. 8 of the Land Law and Conveyancing Law Reform Act 2009. New provisions replacing it were included in that Act but they apply only to mortgages created after the 1st December, 2009.

Section 27 (1) Interpretation Act 2005 deals with the effect of repeals.

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.

Start Mortgages Ltd. v. Gunn

In *Start Mortgages Ltd. v. Gunn* [2011] IEHC 275 (Unreported, High Court, Dunne J., 25th July, 2011) the court held that as the Act of 2009 had repealed section 62 (7) of the Act of 1964 and that mortgagees of registered property could not apply for summary judgment unless the principal amount secured under the relevant charge had become due prior to the 1st December, 2009, (the

commencement date of the Act). If the monies had not become due and owing before that date then the mortgagee's right to obtain possession by summary proceedings had not been "acquired" nor had it "accrued" prior to the repeal of the Act of 1964 by the Act of 2009.

The relevant clause in the mortgage in question in *Start Mortgages* provided as follows:-

"All monies remaining unpaid by the borrower to the lender and secured by this mortgage shall immediately become due and payable on demand to the lender on the occurrence of any of the following events that is to say:

- (a) *On the happening of any event of default ...*

The borrower hereby further covenants with the lender to pay to the lender forthwith the sum so demanded together with further interest at the rate applicable to the relevant secured loan from time to time and at any time until the same shall have been repaid in full and shall be payable after as well as before any judgment or order of the court."

Dunne J. held that, because the terms of the mortgage required a demand before the monies became "due and payable", the provisions of section 27 of the Interpretation Act 2005 could only be relied on where a demand for repayment of the entire principal sum had been made before the 1st December, 2009.

EBS v. Gillespie

In the case of *EBS Limited v. Gillespie* [2012] IEHC 243 (Unreported, High Court, Laffoy J., 21st June, 2012) the court was asked to consider among other things the validity of a letter of demand that had been sent to the defendant on the 28th May, 2009, and whether it was sufficient to render the principal sum due in such a way that allowed the plaintiff to avail of the provisions of section 62 (7). The court concluded that on the particular terms of that mortgage, it was not necessary that there be a demand prior to the 1st December, 2009. The Court summarised the relevant clauses of that mortgage as follows:-

"(a) The expression "Offer Letter" is defined in the definitions clause (Clause 1.01) as meaning any offer letter from the plaintiff to the defendant offering loan facilities to the defendant.

(b) The covenant to pay is contained in Clause 2.01 which provides:

"The [defendant] shall pay to the [plaintiff] on demand or on the happening of any of the events specified in Section 5.01 all monies now owing or which may from time to time be or become due and owing or payable by the {defendant} to the [plaintiff] in any manner whatsoever ...".

That provision then elaborates on what may be subsumed in "all monies": including, advances to, or charges or liabilities incurred on behalf of, the borrower, including, inter alia, legal charges occasioned by enforcement of the Charge, and so forth. It is provided in Clause 2.01 (b) that the monies thereby secured shall bear interest at such rate or rates at such times and subject to such terms as shall have been agreed in writing between the defendant and the plaintiff as well after as before any demand or judgment. Clause 2.03 provides that all interest shall accrue "in accordance with the terms of the Offer Letter".

(c) Section 5 deals with enforcement of the security. Clause 5.01 provides, insofar as is relevant for present purposes, as follows:

"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 to the [plaintiff]...

(d) The powers of the plaintiff are set out in Section 9. Clause 9.01, which deals with entry into possession, provides as follows:

"At any time after the security hereby constituted shall have become enforceable, the {plaintiff} may at its discretion enter upon or take possession of the Mortgaged Property or any part thereof and may sell ... the Mortgaged Property"

Clause 9.07 provides that the power of sale conferred on mortgagees by the Conveyancing Act 1881, as amended, shall apply to the security without the restrictions therein contained as to giving notice or otherwise. It then stipulated a deemed legal date for redemption by providing that for the purpose of any sale under such power-

"the monies hereby secured shall be deemed to have become due immediately after the execution of these presents although no demand shall have been made."

This mortgage differed, therefore, from the one considered in *Start Mortgages v. Gunn* in that the monies became due in the event of a default, and there was then no further requirement for a demand. Default having occurred before the relevant date, the lender's rights were preserved.

Ulster Bank v. Carroll

In the case of *Ulster Bank v. Carroll* (Unreported, High Court, O'Malley J., 16th July, 2013) in a similar case with the same situation of an unopposed appeal the court examined the following terms of the mortgage:-

"Clause 8(a) of the mortgage states as follows:

The Total Debt shall become immediately payable to the Lender:-

- (a) If the Borrower defaults in the making of one Periodic Payment or in the payment of any other money payable by the Borrower for a period of one month; or
- (b) If the Borrower fails to perform or observe any of the obligations on the part of the Borrower contained in or implied by these Mortgage Clauses or in any Relevant Loan Offer or any agreement between the Borrower and the Lender; or
- (c) If the Mortgaged Property is compulsorily purchased or requisitioned; or
- (d) If a building on the Mortgaged Property is pulled down removed or injured so as to materially depreciate the value of the security; or
- (e) If the Borrower assigns, lets or parts with possession of the Mortgaged Property without the written consent of the Lender; or
- (f) On the expiration of one month's notice given by the Lender to the Borrower; or
- (g) If an encumbrancer or other similar party takes possession of the Mortgaged Property; or
- (h) If any of the representations made by the Borrower to the Lender prove to be materially untrue; or
- (i) The Borrower [being an individual] shall have become bankrupt or have entered into a composition or arrangement with his creditors or being a company shall have gone into liquidation whether compulsory or voluntary or have a receiver or examiner appointed, or
- (j) The Borrower shall have ceased to occupy the Mortgaged Property."

The court held as follows in allowing the appeal:-

"...the question is whether the terms of the mortgage on this particular set of facts required that a demand should be made or whether the entire principal sum became due and owing upon the event of default.

On examination of Clause 8 (a) of the mortgage, set out above, I do not consider that a letter of demand is necessary for the entire principal sum to become due. It is clear that the clause provides that the entirety of the debt became due and owing on the happening of one of the stipulated events of default and there was no requirement for a "demand" in addition.

I accept that there was an event of default on the part of the defendants. I conclude that the approach of Laffoy J in EBS v Gillespie applies to the circumstances of this case. I therefore allow the appeal."

Terms of the Mortgage in the Instant Case

Paragraph 7 of the mortgage states:-

"The Lender will allow the Borrower to hold and enjoy the Mortgaged Property until the Total Debt has become immediately payable to the Lender."

The "Total Debt" is defined in paragraph 1(j) of the mortgage as:-

"..the unpaid balance of all Loans and unpaid interest thereon and all sums due by the Borrower to the Lender pursuant to these Mortgage Clauses including but without limiting the generality of the foregoing, insurance or assurance premiums, legal costs, expenses or other sums paid or incurred by the Lender."

Paragraph 8(a) states:-

"The Total Debt shall become immediately payable to the Lender:-

(a) If the Borrower defaults in the making of one Periodic Payment or in the payment of any other money payable by the Borrower for a period of one month..."

CASE MADE ON APPEAL

The appellant claims that the terms of its mortgage deem the entire of the principal sum due immediately on the event of a default and without the necessity of a demand and therefore it is entitled to proceed with a claim for possession under the provisions of s.62(7) of the Registration of Title Act 1964. The appellant claims that once it can establish that there was an event of default prior to the 1st December, 2009, then the particular provisions in the mortgage do not require a demand and that the entire sum became due and owing upon the event of default. Once an event of default can be established then there is no need to show a valid demand made before the 1st December, 2009. The appellant also claim that the rules as set out in of *EBS v. Gillespie* apply and the terms of the mortgage do not require a letter of demand to issue.

There was no appearance by the respondent in the hearing of the appeal.

DECISION

On examination of the terms of the mortgage upon which the appellant relies, and in particular paragraph 8(a) thereof, the principal monies are deemed to become due as soon as there has been a default in making one periodic payment and without the requirement for or necessity of any demand upon the borrowers.

Therefore on default of payment by the respondents in making one periodic payment for one month or more (and given that this default occurred prior to the 1st December, 2009), the appellant became entitled to seek an order for possession under the provision

of s.62(7) of the Act of 1964.

I would therefore allow the appeal.