

THE HIGH COURT

Record No. 2012/234CA

Between/

ULSTER BANK IRELAND LIMITED

Plaintiff

-and-

STEPHEN CARROLL AND VICKI CARROLL

Defendants

Judgment of Ms. Justice Iseult O'Malley delivered the 16th July. 2013**Introduction**

1. This is an appeal against an order of Her Honour Judge Linnane of the Circuit Court of the 1st November 2012 refusing the Plaintiffs claim for an order of possession. The defendants did not appear before the court to contest the claim.

2. At the hearing of this appeal on 22nd April, 2013, there was again no appearance by the defendants. Having heard the submissions of Counsel for the plaintiff I gave an *ex tempore* ruling allowing the appeal. Counsel then pressed for a written judgment. I agreed, with reluctance, to accede to his request. It must be stressed that this was an undefended and therefore unargued case and that this judgment is, as a result, of very limited value.

3. The issue in this case is whether the lender's rights are governed by the decision of Dunne J in *Start Mortgages v Gunn* or by the decision of Laffoy J in *EBS v Gillespie*. It should be noted that in the intervening period of time the court has heard and reserved judgment in the case of *McAteer and Bank of Ireland v Sheahan*, which was a fully argued case dealing with issues arising from the decision in *Gunn*.

4. By letter of Loan Offer dated the 14th September, 2006 First Active plc made available a loan facility in the sum of €420,000 to Stephen Carroll and Vicki Carroll. The loan offer was accepted by the borrowers on the 28th November, 2006. The loan was repayable by instalments over 35 years and was to be secured upon a property at 1Woodford Court, Clondalkin, Dublin 22 which property was comprised in Folio 48386F of the Register County Dublin. The borrowers granted First Active plc a charge over the lands by a deed dated 8th December, 2006 and the said charge was registered in the Land Registry on the 21st May, 2007.

5. Ulster Bank is the successor of First Active plc as of 8th October 2009.

6. The defendants first defaulted in making one of the monthly instalments required by the terms of the Letter of Loan Offer in or about January 2009. Subsequently, on 6th December 2010 a letter issued to the defendants calling in the entire amount of the loan which at that point was in the sum of €426,073.57 which included a sum of €25,745.74 in respect of arrears.

7. S62(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.

8. 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.

9. Section 25 (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

10. In *Start Mortgages Ltd. v Gunn* [2011] IEHC 275 Dunne J held that as the 2009 Act had repealed section 62 (7) of the 1964 Act, mortgagees of registered property could not apply for summary judgment unless the principal amount secured under the relevant charge had become due prior to 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 1964 Act by the 2009 Act.

11. The relevant clause in the mortgage in question 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."

12. 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

13. In the case of *EBS Limited v Gillespie* [2012] IEHC 243 Laffoy J 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 1st December 2009.

14. 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."

15. This mortgage differed, therefore, from the one considered in *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.

Terms of the Mortgage in the Instant Case

16. 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.

Submissions on behalf of the Plaintiff

17. Counsel for the plaintiff has argued that this case is on all fours with *EBS v Gillespie*. He submits that 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. He says that once he can establish an event of default then there is no need to show a valid demand made before the 1st December, 2009.

Conclusions

18. Applying the above principles, 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.

19. 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.

20. 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.