

THE HIGH COURT**IRISH BANK RESOLUTION CORPORATION****[2012 No. 211 CA]****PLAINTIFF/RESPONDENT****AND****COLIN HAYES AND JENNIFER FITZGERALD****DEFENDANTS/APPELLANTS****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 20th September, 2012, whereby possession of the appellants' property was granted to the respondent.

FACTS

The deed of charge in this case was entered into by the parties on the 25th March, 2005. The property concerned is the lands hereditaments and premises of the appellants at Killaha, Kenmare, Co. Kerry, Registered Folio 33519F. The property was offered by way of charge to secure repayment to the respondent of the sum of £150,000 with interest at the rate of 4.85% per annum. The terms of the deed provided for monthly repayments of £799.50 per month for a term of 30 years. The respondent further provided the appellants with a loan offer of €65,000 with interest at the rate at 4.48% per annum for a term of 25 years. The terms of this loan provided for monthly repayments of €242.67. The respondent further provided the appellants with a loan offer of €240,000 with interest at the rate of 4.73% per annum for a period of 24 years. This provided for monthly repayments of €946.00. The loan offers were respectively accepted by the appellants on the 14th June, 2001, the 26th April, 2006, and the 17th October, 2006. The appellants have been in default of payments on foot of the mortgage since March, 2009. As of February, 2011, the appellants' mortgage account was in arrears in the sum of €36,273.36 with monthly repayments required in the sum of €2,418.45. By letter dated the 17th November, 2010, possession was demanded of the property and demand was made for payment of the sums due on foot of the mortgage. The appellants did not make payments in accordance with the terms of the loan facility and this default continued for more than one month after the initial failure.

HISTORY OF THE PROCEEDINGS

By Civil Bill returnable the 16th June, 2011, grounded on the Affidavit of Mr. John Larkin the respondent sought possession of the appellants' property for failure to make payments due and owing to the respondent. By order of the Circuit Court dated the 29th September, 2011, the respondent was changed from Irish Nationwide Building Society to Anglo Irish Bank and the matter was adjourned. By order of the Circuit Court dated the 20th September, 2012, an order for possession of the property the subject matter of this case was granted to the respondent. The appellant sought an extension of time to appeal the order of the Circuit Court made on the 20th September, 2012, granting possession to the respondent. By order of the Master of the High Court of the 22nd January, 2012, time was extended by three weeks to allow the appellants lodge their appeal.

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 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) 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 C.7(c) of the mortgage states:-

"Duly and punctually to pay to the Society on demand any other sum or sums of money which may be paid for or on behalf of the Mortgagor by the Society pursuant to the provisions hereof, together with any sums of money, interest on repayments in arrears, fees or costs which become due to the Society by the Mortgagor by reason of the provisions hereof, the Rules, or the Letter of Loan Approval as and when the same shall respectively become payable by the Mortgagor and to observe and perform the Rules as far as applicable in respect of the Loan.

PROVIDED ALWAYS that if at any time any instalment or other monies which shall be payable by the Mortgagor to the Society under this covenant hereinbefore contained shall be in arrears and unpaid for one month after the same shall have become due, in breach of the Rules or this covenant hereinbefore contained, then and in such case the whole of the future instalments of principal money thereafter to become due and payable in respect of the Loan or such Advance or Re-Advance shall immediately on the expiration of the said period of one month become due and payable by the Mortgagor to the Society in addition to the instalments and monies in arrears s aforesaid and shall be recoverable by the Society with interest at the appropriate rate by action against the Mortgagor or by the exercise and enforcement of any of its powers or remedies in that behalf PROVIDED FURTHER that in case of any instalment or other monies which may be payable by the Mortgagor to the Society under the foregoing provisions hereof shall be so in arrears and unpaid for one month after the same shall have become due then in such case the Society may at its option capitalise the amount of all arrears of instalments or other monies payable by the Mortgagor to the Society and then due to the intent that the amount thereof shall then be deemed to be advanced to the Mortgagor by the Society by way of further advance on the security of these and then repayable at the option of the Society with interest at the appropriate rate either in addition to the monthly instalments already payable under the terms hereof over the remaining period of repayment or over such further period after the termination of the existing period and repayment of such further instalments for principal and interest as the Society may determine."(Emphasis added)

CASE MADE ON APPEAL

The respondent 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 respondent 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 respondent 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.

The appellants argue that the provisions as set out in *Start Mortgages v. Gunn* apply and that the letter of demand dated the 17th November, 2010, does not suffice to fulfil the requirements in the *Gunn* decision.

DECISION

On examination of the terms of the mortgage upon which the respondent relies, and in particular paragraph C.7(c) 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 appellants in making one periodic payment for one month or more (and given that this default occurred prior to the 1st December, 2009), the respondent became entitled to seek an order for possession under the provision of s.62(7) of the Act of 1964.

I would therefore dismiss the appeal.