Neutral Citation [2013] IEHC 235

THE HIGH COURT

[2012 No. 58CA]

BETWEEN

IRISH LIFE AND PERMANENT PLC

PLAINTIFF

AND

DYLAN DUNPHY

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on 29th April, 2013

1. Section 62(7) of the Registration of Title Act 1964 ("the 1964 Act") was a key statutory provision which enabled mortgagees to recover possession of registered land where the principal sum had come due. The repeal of this sub-section with regard to mortgages of registered land created prior to 1st December 2009 has presented difficult and unusual issues with regard to the respective rights of mortgagors and mortgagees, as can be seen with a series of decisions, commencing with the leading judgment of Dunne J. in *Start Mortgages Ltd. v. Gunne* [2011] IEHC 275.

2. In these ejectment proceedings the plaintiff bank ("ILP") seeks possession of mortgaged property at 57 Marian Park, Buncrana, Co. Donegal and comprising Folio No. 13364F of the County of Donegal by reason of (admitted) default by the defendant in respect of the mortgage debt. It is important to state immediately that the defendant, Mr. Dunphy, has never lived in the property which has instead been let. While this property is not a family home, it should be recorded that Mr. Dunphy was a first time buyer and that this is his only property.

3. The present case accordingly raises once again, however, the question of the entitlement of a credit institution to recover possession in ejectment proceedings following the repeal with effect from 1st December, 2009, of the Registration of Title Act 1964 ("the 1964 Act") by s. 8(3) and Schedule 2, Part 5 of the Land Law and Conveyancing Law Reform Act 2009 ("the 2009 Act") and the decision in *Gunne*. As will presently be see, many of these issues also arose in the judgment which I delivered in *Irish Life and Permanent plc v. Duff* [2013] IEHC 43 and in this present appeal I am here required to re-examine some of the conclusions which I reached on these legal issues in that case.

4. It is not in dispute but that the defendant has defaulted on repayments due on foot of an indenture of mortgage which was issued on 3rd January, 2008, for the sum of €235,000. By 12th October, 2010, the arrears had reached the sum of €26,417 and they have doubtless escalated in the interval. On 1st February, 2011, the Circuit Court (His Honour Judge O'Hagan) granted an order for possession. The defendant now appeals to this Court against the decision.

5. In essence, the principal questions before me are whether:-

> (i) whether the Bank had a vested right to possession prior to 1st December, 2009, for the purposes of s. 27 of the Interpretation Act 2005 ("the 2005 Act"), which was unaffected by the subsequent repeal of s. 62(7)?;
>
> (ii) even if the answer to that question is in the negative, whether this Court can grant possession pursuant to a *contractual agreement* which is independent of statute?
>
> (iii) what is the relevance (if any) of the Central Bank's *Code of Conduct for Mortgage Arrears* for the present case?
>
> (iv) can and should this Court state a case-for the opinion of the Supreme Court?

6. I should record here that I am a mortgage customer of ILP and I notified the parties of this fact. Both parties expressly waived any objection to my hearing the case on that account and in light of that express waiver, I agreed to hear the case.

7. In the course of the hearing, counsel for ILP, Mr. Gallagher S.C., onjected to the issue of the Code of Conduct being raised. He noted that it had not been raised in the Circuit Court, nor did it arise at any stage on the pleadings and he submitted that it was simply too late for the defendant to raise at this point in an appeal before me, In these circumstances, I ruled that the defendant could not belatedly invoke the issue.

Whether the Bank had a vested right to possession prior to 1st December 2009 for the purposes of s. 27 of the Interpretation Act 2005

8. The mortgage itself was created on 3rd January 2008 and it seems to have quickly fallen in to arrears. On November 4, 2008 the collections department of ILP wrote to Mr. Dunphy to advise that the arrears had now reached €5,286.85. The letter-writer continued by adding:

> "As a result of the arrears stated above and the terms of your mortgage, the Bank is now entitled to possession of the mortgaged property. Accordingly, unless the above mentioned arrears are discharged within 21 days of today's date or, alternatively, vacant possession of the above premises is given to the Bank within 21 days, we will issue proceedings without further notice against you for a Court order for the recovery of possession of the premises so that the property may be sold..."

9. This letter which was written was in identical terms to that which was at issue in *Duff*, a point to which I will presently return. A similar letter was written by ILP's solicitors on 15th December 2008 requesting that Mr. Dunphy discharge the arrears on the mortgage "failing which proceedings shall continue and further legal costs shall accrue to the mortgage account."

10. Mr. Dunphy then responded by letter dated 17th December, 2008, to say that he was entitled to a €8,000 first time buyer's allowance from the Revenue Commissioner which, once received, would restore the account to credit. ILP responded on 8th January, 2009, saying that, strictly without prejudice to its right to take proceedings, it would hold off taking action for another twelve weeks.

11. Mr. Dylan then wrote on 1st April, 2009, to say that the repayment had been delayed due to confusion in respect of the relevant forms from the Revenue Commissioners. He added that if ILP could:

> "place the outstanding balance on the capital and switch my account to interest only, I will be in a position to start making repayments."

12. ILP then responded by letter dated 27th April, 2009, noting that, despite assurances to the contrary, no payment had been made since the previous December, 2008 and that it was necessary for Mr. Dunphy to pay the sum of at least €329 per week. It does not appear that any further payments were made by Mr. Dunphy and there was no further meaningful exchange of correspondence between them. ILP's solicitors wrote to the defendant on 16th June 2010 at the time of the commencement of the proceedings to inform him that the proceedings had been commenced and that the arrears were then just under €20,000.

13. The terms and conditions of the mortgage deed are in substance identical in the present case with that in *Duff*. Clause 7.1 provides:

> "The total debt shall become immediately payable to permanent tsb:
>
> 1. If the mortgagor defaults in the making of two monthly repayments or for two months in the payment of any other moneys payable under the mortgage."

14. In the present case, since there had been default on the part of the mortgagor, there is no doubt but that in principle the total sum became due by reason of such default. A similar situation had also arisen in *Duff* where I stated:

> "It is, of course, true that there had been such default on the part of the mortgagor such as rendered the debt payable immediately given that more than two monthly payments had been missed. But this contractual clause in the mortgage deed had itself been almost instantly overtaken by the letter of 11th December, 2008, which, in effect, promised the mortgagor that the mortgage debt would not become due if the arrears were discharged. Could it be suggested that if the Duffs had, in fact, paid the arrears at that time that ILP could validly have called in the mortgage, the provisions of Condition 7.1 notwithstanding?
>
> To my mind, it is clear that ILP could not so have demanded the repayment or otherwise contended that the entirety of the mortgage monies had become due, since by writing the letter in question, the bank were effectively waiving or superseding the strict entitlements of the mortgage deed. In essence, the letter amounted to a representation that the entire sum was not due. All of this is further underscored by the fact that in response to the letter of December 2008, Mr. and Ms. Duff offered to make two payments of €1,500 on 6th February, 2009, and 13th February, 2009. The Bank wrote in response on 28th January, 2009 agreeing to this, although stressing the importance of making these payments on or before that date. While, of course, the Duffs found it impossible to keep up with the repayments schedule, this sequence correspondence further illustrates that the Bank had not actually called upon the Duffs to repay the entire mortgage at this point or that it had ever in reality required them to do so.
>
> In these circumstances, I am driven to the conclusion that as ILP had not unequivocally demanded repayment of the entirety of the mortgage debt prior to 1st December, 2009, the bank had not, in the words of Dunne J. in *Start Mortgages*, "acquired the right to apply for an order pursuant to s. 62(7) [as] the principal monies secured by the mortgage have not become due". It follows, therefore, that this Court has no jurisdiction to grant the plaintiff bank possession pursuant to s. 62(7), as the latter's right to apply for possession under that sub-section had not by 1st December, 2009, sufficiently crystallised for the purposes of s. 27(5) of the 2005 Act."

15. In the present case – just as in *Duff* – Clause 7.1 was effectively superseded by the subsequent letter from the Bank stating that it was simply looking for the arrears and, indeed, the contemporaneous letter from ILP's solicitors simply reinforced that understanding. It was for that reason after all that I had held in *Duff* that the principal monies had not become due prior, so that the bank's right to apply for possession of the lands prior had not sufficiently crystallised for the purposes of s. 27(5) of the 2005 Act prior to 1st December, 2009.

16. It is true that the present case is somewhat weaker than *Duff* in that there was not the same level of engagement in this case as there had been in the former case where, after all, Mr. and Ms. Duff had made some payments in response to the bank's letter of 4th November, 2008. It is also true, as counsel for ILP, Mr. Gallagher SC, forcefully argued, that there is much to be said for the proposition that as the Mr. Dunphy never acted upon that letter of 4th November, 2008, it cannot truly be said that the bank had effectively waived its pre-existing rights or that the principal sum had not otherwise become due by virtue of clause 7.1 for the purposes of s. 27(5) of the 2005 Act. This is a point to which I will hereafter return.

Whether the bank has a right to possession independently of the statutory powers formerly contained in s. 62(7).

17. We may next examine the question of whether this Court can grant possession to a mortgagee *independently* of the statutory powers which were formerly contained in s. 62(7) of the 1864 Act. In the present case, ILP argued that there existed such a power so that it was entitled to possession, irrespective of whether the bank had an acquired right for the purposes of s. 27(5) of the 2005 Act.

18. In *Duff* I answered this question in the negative, saying:

> "Counsel for the Bank, Mr. Seligman, argued forcefully that even if it could not avail of the right to possession under s. 62(7) of the 1964 Act, it was nonetheless entitled to possession as a matter of contractual entitlement. I think that the short answer to that is that the Oireachtas had originally designated s. 62(7) as the sole mechanism whereby this Court could grant possession in this fashion to the holder of a mortgage over registered land (i.e., the well-charging procedure coupled with an order for sale described in the next paragraph excepted). Section 62(7) – following its earlier predecessor, s. 13 of the 1942 Act – thus rectified the yawning gap in the powers of such a mortgagee which Andrews L.J. had identified in *[Northern Bank Ltd. v.] Devlin* [1924] 1 I.R. 90 by expressly granting such a power, such as already had been done for the first time in 1942. Given that the Oireachtas has removed that power – save in those cases of demand having been made or the entirety of the mortgaged sum fell due prior to 1st December, 2009 – in the case of pre-

> 2009 Act mortgages of registered land, this Court cannot supply a power to recover possession where none existed in the first place independently of statute."

19. In the important decision of the Northern Irish Court of Appeal in Devlin it was held that the mortgagee of registered land was a mere chargeant who had not an estate in the mortgaged lands. As I explained in *Duff*:

> "That case turned on the fact that the mortgagee of registered land was, as the law then stood, a mere chargeant. But all of this was changed by s. 13 of the Registration of Title Act 1942 ("the 1942 Act") and it is clear that since that date at least, the mortgagee who holds a registered charge in respect of registered land is not a mere chargeant, but has an estate in the lands. Insofar as there was any doubt on the point, s. 62(6) of the Registration of Title Act 1964 ("the 1964 Act") stated this expressly."

20. As it happens, s. 62(6) remains in force and was not affected by the 2009 Act. It provides:

> "(6) On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge."

21. Section 62(6) mirrors the language of the earlier s. 40 of the Local Registration of Title Act 1891 ("the 1891 Act") which also provided that "the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts 1881, 1882." But in *Devlin*, however, Andrews L.J. firmly rejected the argument that this sub-section operated to vest the mortgagee with an estate in the land ([1924] 1 I.R. 90 at 94-94):

> "Returning to s. 40 [of the 1891 Act], which, it is admitted, is the sheet-anchor of the plaintiff's case, [counsel] in the first place relies strongly upon s. 40(2), which, providing for the execution of an instrument of charge the creation of all charges under the Act, enacts that until the owner of the charge is registered as such that an instrument shall not confer on the owner of the charge any instrument in the land. He submits that, as the plaintiff's charge had been duly registered, they have under the concluding words of the subsection…an estate in the lands on which they can maintain ejectment. But this argument is, in our opinion, based on a confusion of the terms "estate" and "interest" which are by no means synonymous. The term "interest", used in a wide sense, may include, no doubt, estates, legal and equitable; but it may also include charges and other rights in respect of property. In a narrower sense the term "interest" is used as opposed to "estate", and therefore denotes rights on property not being estates…[counsel for the mortgagor] called our attention to this distinction during the argument, referring to the passage in 21 Hallsbury, p. 169, to the effect that, where the mortgage is not made by conveyance, but by way of charge only, the mortgagee takes no estate on the premises, but has an equitable interest enforceable by sale. An argument based on the necessary synonymity of the words "interest" and "estate" is, therefore, obviously fallacious and misleading."

22. The Bank then relied on s. 40(4) – the statutory predecessor to s. 62(6) of the 1964 Act – to the effect that an instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts and that the registered owner of the charge shall, for the purposes of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed. The Bank then submitted that these rights and powers included the power of entry under s. 7(1)(c) of the Conveyancing Act 1881. Andrews L.J. thought that there were "several answers" to this argument ([1924] 1 I.R. 90, 94-95):-

> "In the first place whilst it is true that the covenant for quiet enjoyment set out in the section contains words extending to a right of entry in default of payment of the mortgage debt, the section is not expressive, as he assumes, of a mortgagee's powers but only of the implied covenants on the part of a mortgagor who purports to convey as beneficial owner. That the remedy for breach of any covenant lies in damages is, we think, indisputable law. It is clearly recognised by the Master of the Rolls in *National Bank v. Hegarty* 1 N.I.J.R. 13, 14 where, referring to the Bank's power of selling to the Court, with incidental rights of obtaining the appointment of a receiver and an order for possession, is that the Bank declined to take this remedy, and wanted an ejectment to recover possession. "This", he adds, "is an ejectment by a person claiming to be entitled to the lands under a covenant made with him by a person who has broken it. There is no case in the books in which on mere covenant, apart from the conveyance of any estate or grant of title, there has been an ejectment decree".

23. Andrews L.J. then continued:

> "A second reason, why in our opinion, the provisions of s. 7(1)(c) of the Conveyancing Act 1881, cannot be relied on by a chargeant under the Act of 1881 is that s. 40(4) in mentioning the rights and powers of a mortgagee under a mortgage by deed, obviously refers to those mentioned in s. 19 of the Act of 1881, which opens with the words, "a mortgagee, where the mortgage is made by deed, shall by virtue of this Act, have the following powers…". These powers do not include a right of entry. Section 40(4) is not intended to refer, nor does it in fact refer to s. 7 of the Conveyancing Act 1881, and cannot be relied on by a chargeant under the Act of 1891 is that s. 40(4) in mentioning the rights and powers of a mortgagee under a mortgage by deed, obviously refers to those mentioned in s. 19 of the Act of 1881 which opens with the words, "a mortgagee, where the mortgage is made by deed, shall by virtue of this Act have the following powers…". These powers do no include a right of entry. Section 40(4) does not intend to refer nor does it in fact refer, to s. 7(1)(c) of the Act of 1881 which implies a covenant in a conveyance made by a person who conveys as beneficial owner in relation to the subject matter expressed to be conveyed by him. A deed of charge is not such a "conveyance" within the meaning of that word by s. 5 of the Conveyancing Act 1881."

24. As is clear from the passages just quoted, Andrews L.J. plainly demonstrated that, the apparent breadth of the language used notwithstanding, s. 19 did not give the mortgagee a power of entry.

25. On further reflection, therefore, I was wrong to say in *Duff* that a registered mortgage has an estate in land by virtue of the provisions of s. 62(6). In the light of *Devlin*, it would have been more accurate to say that the registered holder of such a charge had an interest in land enforceable by sale. Indeed, the very language of the sub-section ("…including the power to sell the estate or interest which is subject to the charge…") seems to reflect this, recognising as it does that any estate in the land remains vested in the mortgagor, while subject to the charge.

26. This reflects the unanimous view of the text-book writers. Thus, Glover, *Registration of Ownership of Land in Ireland* (Dublin, 1933) observed (at 165) that one of the manifest defects in the 1891 Act was that:

> "the owner of a charge has no estate legal or equitable in the land: the only estate that can exist in the land is the estate of the registered owner. A charge owner is in the same position of the owner of a mere charge on unregistered land, who cannot recover possession of it from this mortgagor, because his mortgage does not convey any estate to him…"

27. Likewise, s. 62(6) echoes the earlier language of s. 40(2) of the 1891 Act by providing that "until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land." Of course, as was pointed out by Andrews L.J. in *Devlin*, the reference here to the word "interest" in s. 40(2) of the 1891 Act was there used in the narrower sense "as opposed to an 'estate' and therefore denotes rights in property not being estates…" For the same reason, s. 62(2) of the 1964 Act must be taken as likewise referring to an interest in land in the narrower sense, *i.e.*, namely in this context, an equitable interest (albeit not an estate) enforceable by sale.

28. All of this puts the importance of s. 62(7) - and, indeed, its subsequent repeal – in a clearer light. The very full examination of the antecedents to s. 62 of the 1964 Act carried out by Andrews L.J. in *Devlin* is sufficient to demonstrate that the mortgagee did not have an estate in lands. Without such an estate, he had no right of entry and one was not conferred by the Conveyancing Act 1881. This is why s. 62(7) was so important and why it filled what Geoghegan J. described in *Bank of Ireland v. Smyth* [1993] 2 I.R.102 as the "yawning gap" in the powers of the mortgagee, since it vested the mortgagee to seek possession and sale which, the well-charging procedure aside, he would not otherwise have enjoyed.

29. It remains to consider two important recent decisions which are not referred to in *Duff* but in respect of which Mr. Gallagher S.C. placed particular emphasis: *Kavanagh v. Lynch* [2011] IEHC 348 and *McEnery v. Sheahan* [2012] IEHC 331, both of which concerned the power to appoint receivers pursuant to a mortgage deed created prior to 1st December 2009. In both cases the mortgages in question had incorporated by reference the power to appoint receivers contained in s. 19(1) of the 1881 Act. That sub-section provided:

> "A mortgage, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been made in terms conferred by the mortgage deed, but not further, namely, ….
>
> (iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof."

30. Section 19 was, however, repealed by s. 8 of the 2009 Act and the issue in both cases was whether this fact served to divest the banks of a jurisdiction to appoint receivers which they otherwise would have enjoyed under the mortgage deed.

31. *Kavanagh* concerned an application for an interlocutory injunction to restrain the receiver from acting. Laffoy J. clearly thought that the repeal of s. 19 of the 1881 Act did not affect the jurisdiction of the receiver to act, although she acknowledged that there might be room for further argument on this point at the full hearing:

> "On this application, the defendants have raised issues about the title of the plaintiffs as receivers and their powers, which I have addressed earlier, by reference to the provisions of the 2005 Mortgage and the 2007 Mortgage, and they have done so in reliance on the fact that the provisions of the Act of 1881, by reference to which powers were conferred on the mortgagees and receivers appointed by them, have been repealed. On this point, it seems to me that there is a clear distinction between the impact of the repeal of s. 62(7) of the Act of 1964, which provided a statutory remedy to the owner of registered land to apply to court in a summary matter for possession of the land when repayment of the money secured by the charge had become due, as found by Dunne J. in *Start Mortgages Limited & Ors v. Gunn & Ors*, and the impact, if any, of the repeal of the Act of 1881 on the drafting device universally availed of by draftsmen of security documents of conferring powers on mortgagees by incorporating statutory provisions in force at the time of creation of the security, with or without variation. As I have found, in the latter situation, the ascertainment of the rights and liabilities of the parties to the security document is a matter of construction of the document and the repeal of the statutory provisions does not have the impact advocated by counsel for the defendants. Nonetheless, the issue may be the subject of further debate at the trial of the action. However, at this juncture, on the basis that all of the immovable property the subject of this application was mortgaged by the 2005 Mortgage or the 2007 Mortgage and that both Mr. Kavanagh and Mr. Lowe have been validly appointed as receivers with power to take possession of the respective parts of that property over which each has been appointed a receiver, I am satisfied that the title of each of the plaintiffs to possession cannot be in issue."

32. This was matter was further considered by Fenney J. in McEnery. Following the approach indicated by Laffoy J. in *Kavanagh*, Feeney J. stressed the presumption against unclear changes in the law, manifested in cases such as *Meagher v. Luke J. Healy Pharmacy Ltd.* [2010] IESC 40. He added that this presumption applied with peculiar force where it was sought thereby to affect substantive (as distinct from simply procedural) rights:

> "The presumption against radical amendments applies with particular force to a purported abolition of a well established substantive right. In those circumstances when the Court comes to ascertain the intention of the Oireachtas it is satisfied that if it had been the intention of the Oireachtas to disapply the provisions of the previously existing law, in particular, the provisions of the Act of 1881 to mortgages created prior to December 2009, the Act of 2009 would have expressly so provided. In applying the provisions of s. 27 of the Act of 2005 to substantive rights as opposed to procedural rights, the Court is satisfied that the facts of this case can be distinguished from *Start Mortgages*. The provisions of s. 62(7) of the Act of 1964 are unique and provide for an additional procedural right without removing the substantive right. The Court has already indicated that if the Oireachtas had intended to make a radical change to a substantive right it would have expressly and explicitly stated such a change. It was submitted on behalf of the plaintiff in this action that if the intention of the Oireachtas had been to disapply the provisions of the previously existing law, in particular, the provisions of the Act of 1881, to mortgages created prior to 1st December, 2009, the Act of 2009 would have expressly so provided. In this context, it is informative that when s. 111 of the Act of 2009 amends the law in relation to future advances, s.111(4)(a) expressly provides that it applies to mortgages made both before and after the commencement of Chapter 3 of the Act of 2009. It was contended that that demonstrated a clear intention on the part of the Oireachtas to disapply the previous legislation to mortgages created before 1st December, 2009. The Court adopts that argument and is satisfied that if the intention of the Oireachtas had been to disapply other aspects of the pre-existing law to mortgages created by deed prior to the commencement of the Act of 2009, it would have done so by express provision.
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> Applying s. 27(1)(c) of the Act of 2005 to this case, the Court is satisfied that the mortgagee's statutory right to appoint

a receiver was acquired under the Act of 1881 at the time of the execution of the mortgage and that therefore the operation of the relevant section in the Act of 2005 results in a situation where such acquired or accrued right cannot be abrogated by the operation of a subsequent statute which purports to abolish such a right. Section 19(1) of the Act of 1881 provided:

> 'A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed ...'

The facts in this case demonstrate that the right to appoint a receiver was conferred immediately upon the creation of the mortgage. Even though as of that date the mortgagee could not exercise that right but could only do so when the mortgage monies became due, the entitlement to do so and the circumstances which would permit the exercise of the entitlement were identified and required no further agreement. The Court is satisfied that a correct analysis of the contractual agreement between the parties and the application of the then relevant legislative provisions as contained in the Act of 1881 to the agreement results in the situation that the power to appoint a receiver was acquired at the time of the creation of the mortgage even though the power did not actually accrue or become capable of exercise until mortgage monies had fallen due. The restriction on the appointment of a receiver until after the mortgage monies had become due can be correctly categorised as a procedural restriction which is placed on the exercise of the power rather than a substantive restriction placed upon the acquisition of the power. Section 24 of the Act of 1881 specifically commences with the words "A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act ...." There is no doubt but that the right sought to be relied upon by the plaintiff in this case must have been acquired or accrued, as provided for in the words of s. 27(1)(c) of the Act of 2005 and not merely capable of being acquired or accrued to benefit from that provision."

33. It is impossible to doubt the force of this analysis. Yet one may query whether it can be applied to the powers of a mortgagee to take possession of registered land, for the simple reason that no such power existed prior to the enactment of s. 13 of the 1942 Act and the statutory successor to that earlier legislation, namely, s. 62(7), stands repealed.

34. Section 19 of the 1881 Act, on the other hand, merely recognised (and facilitated) the appointment of a receiver by a mortgagee. But it could never be said that the power to appoint a receiver in respect of land (whether registered or unregistered) and which remedy owes its origins in the Court of Chancery was contingent on a statutory grant. By contrast, the right of the mortgagee of registered land to possession depends and always has depended on the existence of a special statutory jurisdiction.

35. All of this would suggest that the conclusion reached in *Duff* is correct, even if the issues brought by the repeal of s. 62(7) do not lend themselves to easy resolution.

Whether the Court can and should state a case for the Supreme Court?

36. As I clear from the foregoing discussion, the repeal of s. 62(7) of the 1964 Act has had significant repercussions and raised difficult legal issues in respect of which the legal system has to date struggled to give fully comprehensive and consistent answers. In these circumstances, it seems entirely appropriate that these issues should be authoritatively determined by the Supreme Court. This is especially so given that these questions are of supreme importance for both credit institutions and home owners. Given the high level of mortgage arrears and the heavy burden involved in re-capitalising these credit institutions which has to date fallen on the shoulders of the taxpayers, it is accordingly in the public interest that these matters would be swiftly and authoritatively resolved by the Supreme Court.

37. Counsel for Mr. Dunphy, Mr. Maguire SC, sought such a case-stated. This was opposed by counsel for ILP, Mr. Gallagher SC, who understandably emphasised the attendant delays which would be thereby entailed. Given, however, the intrinsic importance of this case and the fact that it has a systemic importance for the entire mortgage market, it is a matter in respect of which priority might reasonably be applied for.

38. There remains the question of whether this Court has a jurisdiction so to state a case. Section 37(1) of the Courts of Justice Act 1936 ("the 1936 Act") (as applied to this Court by s. 48 of the Courts (Supplemental Provisions) Act 1961) expressly provides that an appeal shall lie to the High Court sitting in Dublin "from every judgment given or order made…by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given." This is such a case, as no oral evidence was given before Judge O'Hagan.

39. Section 38(1) and s. 38(2) of the 1936 Act next provide:-

> "(1) An appeal shall lie from every judgment or order (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom and judgments and orders in respect of which other provision in relation to appeals is made by this Part of this Act) of the Circuit Court in a civil action or matter—
>
> (a) where such judgment or order is given or made by a judge of the Circuit Court for the time being assigned to and sitting in the Dublin Circuit, to the High Court sitting in Dublin, and
>
> (b) in every other case, to the High Court on Circuit sitting in the appeal town for the county or county borough in which the action or matter resulting in such judgment or order was beard and determined.
>
> (2) Every appeal under the section shall be heard and determined by one judge of the High Court and shall be so heard by way of a rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made."

40. The actual jurisdiction to state a case to the Supreme Court is, however, contained in s. 38(3):

> "The judge hearing an appeal under this section may, if he so thinks proper on the application of any party to such appeal, refer any question of law arising in such appeal to the Supreme Court by way of case stated for the determination of the Supreme Court and may adjourn the pronouncement of his judgment or order on such appeal pending the determination of such case stated and, in particular, may so adjourn such pronouncement to Dublin and there pronounce his said judgment or order at any time after such determination."

41. It is clear, therefore, that there are several pre-conditions to the operation of the case-stated jurisdiction. First, the judge must think it proper so to state a case. This condition is satisfied, inasmuch as I think it desirable for all the reasons that I have mentioned that this should be done. Second, the case-stated must be on the application of one of the parties. This is also satisfied here, given that Mr. Dunphy has applied for a case-stated.

42. The third requirement is more problematic. Section 38(3) refers to "a judge hearing an appeal under this section" and the general tenor of s. 38 might be thought to suggest that it deals only with certain types of appeals from the Circuit Court not otherwise dealt with elsewhere in the 1936 Act. Specifically, this might be thought to exclude appeals coming under the rubric of s. 37 (*i.e.,* those appeals where no oral evidence was given in the Circuit Court.)

43. Yet it if this is so, it would mean that the jurisdiction of this Court to state a case to the Supreme Court would be contingent on the happenstance of whether oral evidence was given or not in the Circuit Court. It is hard to discern why the Oireachtas should wish differentiate in this fashion between those cases where oral evidence was given at first instance and those which were not. After all, such evidence might relate to purely peripheral or incidental matters. Is it to be said that merely, for example, because oral evidence happened to be given in a matter of minutes in the Circuit Court in relation to some formal proof that this should govern the question of whether a case could be stated by this Court to the Supreme Court?

44. Curious as it may seem, this jurisdictional point has never been directly considered by the Supreme Court, although it would appear that there have been occasions where that Court assumed that it could entertain a case stated by this Court in the course of a Circuit appeal where no evidence has been given: see, *e.g.*, *Wigoder Ltd. v. Moran* [1977] I.R. 112, 118, per Henchy J. This, however, is a matter touching on the Supreme Court's own jurisdiction which that Court only can resolve. It is entirely appropriate, therefore, that this jurisdictional issue should itself be the subject a question posed in the case-stated.

Conclusions

45. In conclusion, therefore, I propose to state the following questions to the Supreme Court by way of case-stated pursuant to s. 38(3) of the 1936 Act:

> (i) Does the High Court have jurisdiction to state a case for the consideration of the Supreme Court pursuant to s. 38(3) of the Courts of Justice Act 1936 in the course of hearing an appeal from the Circuit Court where no oral evidence was given before that Court?
>
> (ii) If the answer, to Question (i) is in the affirmative, whether ILP had a vested right to possession prior to 1st December, 2009, for the purposes of s. 27 of the Interpretation Act 2005 ("the 2005 Act"), which was unaffected by the subsequent repeal of s. 62(7) of the 1964 Act?;
>
> (iii) Irrespective of the answer to Question (ii), can this Court grant possession to a mortgagee of registered land pursuant to a contractual agreement?

46. As required by s. 38(3) of the 1936 Act, I will naturally adjourn the pronouncement of my judgment until these questions have been determined by the Supreme Court.