

THE HIGH COURT

[2016 No. 502 S. P.]

BETWEEN

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

JANET MATTHEWS

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 8th day of June, 2018

Introduction

1. Two principal issues arise for decision in this case:

(1) Is the plaintiff entitled to sue the defendant as executrix of the deceased borrower when she has not taken out a grant of probate?

(2) Are the proceedings statute barred?

The facts

2. The plaintiff is seeking an Order for Possession of the premises known as 16 The Glen, Inse Bay, Laytown, County Meath, registered as Folio 50183F of the Register of Freeholders for the County of Meath ("the Property"). The defendant is sued as executrix or, in the alternative, as executrix *de son tort*, of the late John Melsop (otherwise Melsopp) deceased, late of the Property; and in her own right as the occupant of the Property.

3. On the 24th March 2005, the deceased entered into a Mortgage Loan Agreement with the plaintiff's predecessor in title, the ICS Building Society ("the Society") under which the Society agreed to provide the deceased with a loan in the sum of €234,000.00 repayable monthly over 15 years, to be secured, *inter alia*, by way of a first legal Mortgage over the Property. The deceased executed a mortgage and charge on 27th April, 2005 securing the monies advanced under the loan agreement. The mortgage and charge was duly registered as a burden on the Folio on 23rd June 2005. On 4h May 2005, the full amount of the loan was drawn down by the deceased.

4. Between July 2009 and the deceased's death on 14 February 2013, the deceased defaulted in a number of monthly payments under the Mortgage Loan Agreement and, at the time of his death, there were arrears of €31,890.32 on the Mortgage Loan Agreement. However, notwithstanding the foregoing, the deceased had continued to make regular and substantial payments in respect of the Mortgage Loan Agreement up to the date of his death. The Society had accepted these and had not terminated or called in the loan prior to the deceased's death.

5. The deceased died testate and named his partner, the defendant, executrix in his will. The defendant held herself out as executrix of the estate of the deceased and engaged with the Society in respect of his affairs. She wrote to her solicitors on 25th February, 2013 authorising them to write on her behalf to the Society regarding the deceased's mortgage and asked them to clarify the position regarding arrears. She said "*as you are aware, I am the Executrix in the Will of my late partner John Melsopp and therefore entitled to make enquiries about his affairs*". She continued to reside in the Property. Following the death of the deceased, payments continued to be made by the defendant on foot of the Mortgage Loan Agreement. The last such payment was made on 28th January, 2014.

6. On 10th March, 2014, the defendant's solicitor wrote to the Society advising that the defendant had "*decided to agree to the extraction of the Grant of Probate and following on from that, the sale of the property at 16, The Glen, Inse Bay, Laytown*".

7. With effect from 1st September, 2014, the loan facility and associated security were transferred by statutory transfer from the Society to the plaintiff.

8. On 13th February, 2015 the defendant's solicitor wrote to the plaintiff stating that the defendant's son would be prepared to buy the Property at a particular price so as to enable the defendant to continue to reside in the Property. This offer was not accepted.

9. On 21st September, 2015, the defendant's solicitor wrote to the plaintiff and, *inter alia*, stated that: "*Ms Mathews has advised this office that she does not want to proceed with taking out a Grant of Probate in the estate of John Melsopp deceased and she intends to reside in the property for the foreseeable future*." The letter went on to explain that the solicitors firm hold "*the original Will of John Melsopp deceased and were prepared to act for Ms Mathews if she wished to extract a Grant of Probate, however as this is no longer the case we have no further involvement in the matter*".

10. On 16th August, 2016, the plaintiff made formal demand for full repayment of the loan facility and, when repayment was not forthcoming, by letter of 8th September, 2016, the plaintiff's solicitor demanded possession of the Property. The said demands were made upon the defendant in her capacity as Personal Representative of the deceased and, in relation to possession of the Property, also as occupant of the Property. The defendant continues to reside in the Property.

11. The within proceedings were commenced by Special Summons issued on 9th December, 2016, some 3½ years after the date of death of the deceased.

The first issue

12. The first issue to be determined is whether the plaintiff is entitled to sue the defendant as either the executrix or the executrix *de son tort* of the deceased.

13. The deceased died testate. The defendant confirms that she was named executrix in his last will and testament. Initially she was

prepared to take out a grant of probate but she has not done so. In her replying affidavit in these proceedings she describes herself as the executrix of the deceased. She has not renounced her entitlement to take out a grant of probate. In a letter written by her solicitors to the plaintiff on the 21st September, 2015 it was indicated that she did not want to proceed with taking out a grant of probate in the estate of the deceased and she intends to reside in the Property for the foreseeable future.

14. As an executrix, her title to the estate of the deceased stems from the will and the estate vested in her immediately upon the death of the deceased. An executor's acceptance of the office may be implied by the performance of acts by the appointee which are referable to the functions of an executor. Acts of intermeddling in the estate of a deceased which make a stranger an executor *de son tort* are similar to those which imply acceptance of the office by an executor named in the will (see Brady's *Succession Law in Ireland* 2nd ed. 1995 para. 9.40).

15. In *The Goods of Hanlon* [1894] 1 I.R. 551 the court held that the executor named in the will of the deceased had interfered with the assets of the testatrix in such a way that he could not repudiate the office of executor and that he was bound to extract a grant of probate of the will. The court said:

"He was the person entitled; he knew that he was executor named in the will at the time, and he was acting in a way which he could not properly have done if he was not executor."

16. The defendant is in the same position as the executor in *Hanlon's* case. She was the named executrix and she knew that she was the executrix named in the will at all times. She acted in a way which she could not properly have done if she was not the executrix of the deceased. By letter dated the 25th February, 2013 she wrote to her solicitors regarding the loan account the subject of these proceedings in the following terms:

"Dear Jim,

I, Janet Matthews, was the partner of John Melsopp deceased for the past fourteen years. I hereby authorise you to write to the ICS Building Society on my behalf re the above mortgage account number to clarify the position re the mortgage and outstanding arrears.

As you are aware, I am the Executrix in the Will of my late partner John Melsopp and therefore entitled to make enquiries about his affairs."

The following year on the 10th March, 2014 her solicitor wrote to the plaintiff about the mortgage account of John Melsopp deceased and the property stating that the executrix *"has decided to agree to the extraction of the grant of probate and following on from that, the sale of the property ... I would ask that ICS furnish up to date redemption figures for the outstanding mortgage at your earliest convenience."*

17. On the 13th February, 2015 her solicitor made an offer to the plaintiff for the purchase of the property by the defendant's son. The offer was not accepted and the defendant indicated that she would not be taking out a grant of probate and intended to reside in the property for the foreseeable future.

18. It is common case that the defendant has remained to this day in occupation of the property. Taking possession of a deceased's lands has been held to constitute the person an executor *de son tort*. See *McAllister v. McAllister* 11 L.R. Ir 533; *Earl of Westmeath v. Coyne* [1896] 2 I.R. 436. There is ample evidence that the defendant has intermeddled in the estate of the deceased and that she has acted in a manner which she could not properly have done if she were not the executrix. Following *Hanlon's case*, she may not now renounce the office.

19. In her replying affidavit the defendant states that she was granted the deceased's interest in the property in his will. She makes no reference to any other entitlement to the property in her affidavit, though I should point out for the sake of completeness that in the letter of the 13th February, 2015 her solicitor asserted:

"My client contributed at the time the property was purchased a sum of €10,234 to assist Mr. Melsopp to purchase the property, she has also made many improvements to the property as in i.e. bathroom with shower unit; kitchen units, etc."

20. In submissions to the court, counsel for the defendant asserted that she had an interest in the property and therefore her actions did not amount to intermeddling in the estate of the deceased. She could not be an executrix *de son tort* and therefore she could not be deemed to have accepted the office of executrix. He relied upon *Femings v. Jarrat* (1795) 1 Esp NPC 336. In that case the deceased bought sails for his ship from the plaintiff but had not paid for them by the time of his death. The plaintiff sued the defendant as executor *de son tort* of the estate of the deceased for the price of the sails. It was alleged that the plaintiff had taken possession of the ship and had thereby constituted himself executor *de son tort* of the deceased. The defendant said that he had taken possession of the ship by virtue of a *bona fide* assignment made by the deceased during his lifetime. Therefore, his interference with the ship did not make him an executor *de son tort*. Lord Kenyon held that if the defendant came into possession of the ship by colour of a legal title, though he had not made out such title completely in every respect, he should not be deemed an executor *de son tort*.

21. In this case the defendant has not established, or even adduced any evidence, that she had a right to the property other than as a beneficiary of the deceased's will. Her affidavit makes no reference to any equitable claim to the property. The letter of her solicitor is not evidence of the *facts* referred to, particularly where she has the opportunity to depose to the facts herself and fails to do so. It follows that she cannot rely upon *Femings's* case to say that she has not committed acts that would constitute her executrix *de son tort* and therefore that *Hanlon's* case does not apply.

22. I conclude that the defendant is correctly sued as executrix. While she did not extract a grant of probate, by her actions she implied that she accepted the office of executrix and she may not now resile from that position.

Did the defendant validly renounce?

23. It was submitted on behalf of the defendant that the letter of her solicitor of the 21st September, 2015 addressed to the plaintiff constituted renunciation by the defendant of the office of executrix. This argument is without merit. Renunciation must be in writing, signed and witnessed and filed in the Probate Office. It is required to be in the form of Form No. 18 of Appendix Q of the Rules of the Superior Courts. Further, it is not possible to renounce after an executor has intermeddled with the estate of the deceased. It follows that the letter of the 21st September, 2015 written by the defendant's solicitor after she had intermeddled in the estate since 25th

February, 2013 cannot constitute a valid renunciation by the defendant.

The Land and Conveyancing Law Reform Act, 2013

24. The defendant argues that, by virtue of s.3 of the Land and Conveyancing Law Reform Act, 2013, proceedings brought by a mortgagee seeking an order for possession of land which is the principal private residence of the mortgagor of the land concerned must be brought in the Circuit Court. The defendant says that the property is her principal private residence and, by reference to the definition of mortgagor in the deed of mortgage, she is the mortgagor of the land concerned. At Clause B (14) of the deed, mortgagor is defined as *"the person or persons named as such in Recital A.1 of the Mortgage Particulars and the personal representative or personal representatives of the Mortgagor and the person or persons deriving title under the Mortgagor to the Mortgaged Property."*

25. The plaintiff submits that s.3 of the Act of 2013 should not be construed by reference to the particular definition of a mortgagor in a particular deed as the term is defined in the Land and Conveyancing Law Reform Act, 2009 and so s.3 of the Act of 2013 should be construed by reference to the definitions in the 2009 Act. In s.3 of the Act of 2009, mortgagor is defined as *"any person deriving title to the mortgaged property under the original mortgagor or entitled to redeem the mortgage."* This is similar to the definition in s.2 of the Conveyancing Act, 1881. Until a personal representative has taken out a grant of probate or administration they are not entitled to redeem the mortgage of the deceased mortgagor. In this case, the defendant has not taken out a grant of probate and she is not entitled to redeem the mortgage within the meaning of s.3 of the Act of 2009. Therefore, she is not a mortgagor of the land within the meaning of s.3 of the Act of 2013.

26. I agree with counsel for the plaintiff. The relevant definition for the purpose of s.3 of the Act of 2013 is to be found in s.3 of the Act of 2009 and not in the mortgage deed. That being so, as a matter of fact the defendant is not a mortgagor and therefore the provisions of s.3 of the Act of 2013 have no application to these proceedings.

Accrual of the cause of action

27. The principal ground upon which the defendant opposed these proceedings was on the basis that the cause of action had accrued prior to the death of the deceased. If the cause of action had accrued prior to his death then the limitation period was that provided by s.9(2) of the Civil Liability Act, 1961:-

"No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either -

(a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or

(b) proceedings were commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."

If the defendant is correct, it is common case that these proceedings were commenced more than two years after the date of death of the deceased and therefore would be statute barred. The answer to this question depends upon the true construction of the deed of mortgage and charge of the 27th April, 2005.

Provisions of the Mortgage

28. Clause B (8) defines event of default as *"any of the events stipulated in paras. (a) - (j) inclusive of sub clause 7.01 hereof"*. For the purposes of these proceedings the relevant events are those set out in paras. (a) and (e). They read as follows:

"(a) default is made in payment of any monthly or other periodic payment or in payment of any other of the secured moneys hereunder...

(e) the Mortgagor being an individual ...dies".

By Clause 1.01 *"the mortgagor hereby covenants with the Society to pay to the Society on demand the secured monies..."*

Clause 1.02 and 1.03 provides:

"All moneys remaining unpaid by the Mortgagor to the Society and secured by this Mortgage shall immediately become due and payable on demand to the Society on the occurrence of any of the following events, that is to say:

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

And the Mortgagor hereby further covenants with the Society to pay to the Society forthwith the sum so demanded together with further interest thereon...

The demand herein referred to shall mean a demand for payment of the secured monies made by the Society or on behalf of the Society by any law agent or solicitor, Secretary, manager or other officer of the Society upon the Mortgagor and may be made when or at any time after the Society become entitled to call for payment of the moneys and separate demands may be made in respect of separate accounts at different times."

29. Two other clauses of the deed must be considered. Clause 6 is headed 'The Society's Powers' and provides as follows:

"6.01 At any time after the execution of this Mortgage, the Society may 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.

6.02 The Society shall have all the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by this Mortgage including the power to appoint a receiver and in particular subject to the following variations and extensions, that is to say:

(a) the secured moneys shall be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of this Mortgage."

30. Clause 7 is headed the 'Exercise of the Society's Powers' and Clause 7.01 provides:

The Society shall not exercise any of the powers provided for in Clause 6 hereof or conferred by statute until any of the following events shall occur."

The relevant sub paras. are (a) and (e) which I have cited above.

The construction of the deed

31. Clause 1.02 of the mortgage provides that all monies remaining unpaid by the mortgagor to the Society and secured by the mortgage immediately become due and payable upon demand by the Society on the occurrence of an event of default. An event of default is defined in Clause B (8) which refers to the events stipulated in Clause 7.01. These include the death of the mortgagor (e) and default in payment of any monthly or other periodic payment or in payment of any other of the secured monies under the mortgage (a). The monies do not immediately become due and payable on the occurrence of an event of default. Upon the occurrence of an event of default the Society may make demand for payment of the remaining unpaid monies and it is upon the making of the demand that the monies remaining unpaid and secured by the mortgage become immediately due and payable to the Society.

32. Clause 1 is clear that a demand is necessary before the mortgagor is obliged to pay the monies remaining unpaid and secured by the mortgage. Clause 1.01 comprises a covenant by the mortgagor to pay to the Society *on demand* the secured monies. In Clause 1.02 the mortgagor further covenants with the Society to pay forthwith the sum *so demanded* i.e. the monies remaining unpaid and demanded by the Society upon the happening of an event of default. Clause 1.03 then clarifies precisely what is meant by a demand. It specifies that a demand "may be made" when or at any time after the Society becomes entitled to call for payment of the monies. The happening of an event of default entitles the Society to call for payment of the monies and the Society may at its discretion make a demand for payment of the secured monies. Unless and until such demand is made, the mortgagor is not obliged to pay all monies remaining unpaid to the Society i.e. the principal sum outstanding is not due.

33. The issue raised in argument by the defendant was whether Clauses 6 and 7 of the mortgage deed varied the provisions of Clause 1. By Clause 6.01, the Society is given power at any time after the execution of the mortgage without any further consent from or notice to the mortgagor or any other person to enter into possession of the mortgaged property. By Clause 6.02 the Society has all statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by the mortgage. In particular, it is subject to the express variation and extension that the secured monies "*shall be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of [the] mortgage*".

34. This clause confers powers on the Society. Clause 6.02 is expressly concerned with the statutory powers conferred on mortgagees by the Conveyancing Acts. The secured monies are deemed to have become due upon the execution of the mortgage "for all purposes of the Conveyancing Acts". The clause does not state that the secured monies are deemed to have become due on the execution of the mortgage. They are deemed to have become due for all purposes of the Conveyancing Acts on the execution of the mortgage.

35. This is to ensure that the Society shall have all the statutory powers conferred on mortgagees by the Conveyancing Acts from the date of the execution of the mortgage, just as it is entitled under Clause 6.01 to enter into possession of the mortgaged property at any time after the execution of the mortgage. These provisions have long been included in mortgages for the purpose of protecting third parties dealing with mortgagees. They do not alter the fundamental terms of the agreement between the mortgagor and the mortgagee. On the construction contended for by the defendant, on the date of the execution of the mortgage, the mortgagee would be entitled to go into possession of the secured property and the entire of the monies secured by the mortgage would be due to the mortgagee on that date. Aside from the fact that this flies in the face of the purpose of the entire transaction, it makes the provisions of Clause 1 of the mortgage in relation to a demand otiose. Construing the deed as a whole, I am satisfied that the defendant's construction of the deed is not correct.

36. Further, the Society's powers set out in Clause 6 are expressly limited by Clause 7. Clause 7.01 clearly states that the Society shall not exercise any of the powers provided for in Clause 6 or conferred by statute until any of the specified events shall occur. The specified events are the events of default. This means that, until an event of default occurs, the Society may not go into possession of the mortgaged property under Clause 6.01 and the Society may not exercise any of the statutory powers conferred by the Conveyancing Acts. So while Clause 6.02 (a) deems the secured monies to have become due for the purposes of the Conveyancing Acts, Clause 7.01 (a) provides that the Society shall not exercise any of the powers provided for in Clause 6 until there is an actual default in payment of any monthly or other periodic payment or in payment of any other of the secured monies due under the mortgage. Upon default in payment of monies due under the mortgage the prohibition on exercising the powers set out in Clause 6 ceases to apply. It does not mean that the secured monies become immediately and automatically due.

37. I conclude that under the terms of the mortgage in these proceedings the principal sum secured by the mortgage became due when the Society lawfully demanded repayment of the sum and not before. The occurrence of an event of default was simply a necessary precondition to the Society's right to make the demand and did not render the deceased immediately liable to repay the secured monies.

The cause of action

38. The plaintiff seeks possession of the property pursuant to s.62(7) of the Registration of Title Act, 1964. This provides:

"62(7) 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."

39. It is clear that it is only once repayment of the principal money secured by the instrument of charge has become due that the registered owner of the charge may apply to court for relief under s.62(7). See *Start Mortgages Limited v. Gunn & Anor.* [2011] IEHC 275; *Irish Life v. Dunne* [2015] IESC 46.

40. Section 9(2) of the Civil Liability Act, 1961 provides that no proceedings shall be maintainable in respect of any cause of action which has survived against the estate of a deceased person unless the proceedings have been commenced within the relevant period. But this claim was not maintainable until after a demand was made. It follows no cause of action arose until such demand was made. No demand had been made prior to the death of the deceased and it follows that s.9(2) does not apply to the plaintiff's claim.

41. This conclusion follows the decision in *Bank of Ireland v. O'Keefe* [1987] I.R. 47. Barron J. held it was necessary to establish that

the plaintiff's cause of action was one which subsisted at the date of death of the guarantor. He found that no cause of action existed whereby the plaintiff could sue the guarantor either, while he was alive, or his estate, after his death, until demand on foot of the guarantee had been made. Since the demand was not made until after his death, it followed that there was no cause of action subsisting against the guarantor and therefore the case was not barred by virtue of the provisions of s.9(2) of the Act of 1961. See also *Bank of Ireland v. Stafford & Ors.* [2013] IEHC 546.

42. The demand for the repayment of the principal sum secured by the mortgage was made on 16th August, 2016. It follows that the plaintiff's cause of action only accrued on that date, after the date of death of the deceased. Accordingly, s.9(2) does not apply to this case and the plaintiff's claim is not statute barred.

43. Incidentally, I should note that it is only as executrix of the deceased that the defendant could have standing to raise this defence and to the extent that she does advance it, she is acting inconsistently with her first ground of defence to these proceedings.

Conclusion

44. The plaintiff was entitled to sue the defendant as the executrix of the estate of the deceased. The plaintiff's claim is not statute barred by the provisions of s.9(2) of the Civil Liability Act, 1961 as it does not apply on the facts of this case. The plaintiff's proofs are in order and it is entitled to an order for possession under s.62(7) of the Act of 1964.