THE HIGH COURT

Record No. 2016/5892P

BETWEEN:

ARTHUR FFRENCH O'CARROLL

Plaintiff

-and-

PERMANENT TSB PLC, KEITH LOWE, STEPHEN TENNANT, HAVBELL DAC TOM O'BRIEN

Defendants

AND BETWEEN:

HAVBELL DAC AND TOM O'BRIEN

Plaintiffs in the Counterclaim

-and-

ARTHUR FFRENCH O'CARROLL AND CHRISTINE FFRENCH O'CARROLL

Defendants to the Counterclaim

Judgment delivered by Ms. Justice Ní Raifeartaigh on the 18th Day of December, 2018

Nature of the Case

1. This is a case in which the primary issue is whether or not the lending bank was entitled to appoint a receiver in respect of the mortgaged property. This depends on whether it was necessary to serve a valid letter of demand for the total outstanding debt, and if so, whether the bank did serve a valid letter of demand. The matter came before the Court by way of a Special Case pursuant to O. 34 of the Rules of the Superior Courts.

2. As there are two sets of proceedings I will refer to the parties, for clarity, as "the borrowers" (the Ffrench O'Carrolls) and "the lender" or "the bank" (Permanent TSB). No submissions were made on behalf of Havbell in this Special Case.

Short Chronology of Background Events

3. On the 19th December, 2007 two loan facilities were offered to the borrowers by Permanent TSB by facility letters dated the 19th December, 2007 (to the value of €2,501,200 and €1,165,000 respectively). In February, 2008 a mortgage was executed over addresses on the South Circular Road, Dublin 8 as security for the €2,501,200 loan facility (the "February 2008 mortgage"). In March, 2008 a mortgage was executed over Diep Le Shaker Restaurant, Units 5 A, B & C, Pembroke Lane, Dublin 2 as security for the €1,165,000 loan facility (the "March 2008 mortgage"). I am concerned only with the March 2008 mortgage in the present judgment.

4. The Facility Letter dated the 19th December, 2007 in respect of the Diep Le Shaker loan expressly provided for monthly interest-only payments of €5,722.13 and (in the special conditions) for interest-only repayments for the first three years. Monthly interest payments fall within the definition of "Secured Liabilities" in clause 1.1 of the March 2008 Mortgage. It is not in dispute that the borrowers subsequently defaulted on their obligations to make repayments on each of the loans secured by the mortgages in accordance with the loan agreements and the covenants for payment contained in the mortgages. The letter of the 2nd December, 2010, discussed below, referred to the substantial arrears owed by that date and the existence of arrears does not appear to be in dispute. The dispute concerns the formal preconditions to the appointment of a receiver.

5. On the 2nd December, 2010, Permanent TSB sent a letter of demand to the borrowers stating that the arrears under the said loan agreements amounted to €179,464.26 at that point in time. It also said that unless the borrowers remitted the amount of rental income due for that month within seven days and continued to remit the rental income on a monthly basis, it would appoint a receiver to collect the rental income from the secured properties. It may be noted that this letter referred only to the arrears and not the full sum due.

6. On the 3rd October, 2011, a letter of demand was sent from Permanent TSB's solicitors stating that the cumulative arrears on the loans had reached €277,085.55. It also stated that the principal outstanding in respect of the first loan was €2,473,683.21. It said that the amount due on the second loan amounted to €1,091,843.43, giving a total of €3,565,526.64. The letter demanded that this latter sum be discharged within ten days, failing which the solicitors were under instructions "to issue the appropriate proceedings so as to recover the monies due and owing". This letter did not refer to any intended appointment of a receiver.

7. On the 1st February, 2011 Mr. Keith Lowe was appointed by deeds of appointment as receiver to enter upon and take possession of the secured assets.

8. On the 1st February, 2015 this appointment was terminated and two weeks later on the 11th February 2011, Permanent TSB, by deeds of appointment, appointed Mr. Stephen Tennant to be the receiver of the secured assets.

9. On the 18th March, 2016 the plaintiff's solicitors wrote to Mr. Tennant seeking copies of the deeds of appointment, the mortgage documents and the letters of demand. This letter was replied to by email on the 21st March, 2016 by a member of Mr. Tennant's staff stating that the deeds of appointment had already been provided by email dated the 1st February, 2018 and that Mr. Tennant did not hold any of the other mortgage documents.

10. On or about the 19th June, 2015 Permanent TSB assigned all its interest, security, and entitlements to Havbell Ltd. On the 1st April, 2016 Havbell appointed Mr. Tom O'Brien as receiver by composite instrument of appointment.

11. On 7th April, 2016 the plaintiff's solicitors wrote to Mr. O'Brien's office seeking, inter alia, copies of the mortgage documents and evidence that the power to appoint the receiver had become exercisable. On the 27th April, 2016 the solicitors for Mr. O'Brien and Havbell Ltd., AMOSS, wrote to the plaintiff's solicitors declining to provide a copy of the mortgage sale agreement, but furnished a copy of the letter of the 2nd December, 2010.

12. Having regard to the correspondence above, the borrowers contended that as of the date of the appointment of Keith Lowe, the bank had no entitlement to appoint him under the March 2008 mortgage because there had been no valid demand for the debt secured by the March 2008 mortgage; that the 2nd December 2010 letter did not constitute a valid demand because it was a demand for arrears only and did not purport to call in the entire debt (principal plus accrued interest); and that the subsequent appointment of Mr. Tennant was invalid because the appointment of Mr. Lowe had been invalid. The borrower did not take issue with the entitlement to appoint a receiver under the February 2008 mortgage because of the specific terms of that mortgage.

13. The bank contended that on the occurrence of one of the default events specified at clause 7 of the March 2008 mortgage (here, default in making repayments from time to time), the security became immediately enforceable; that under clause 9, the bank had a contractual right to appoint a receiver thereafter; and that the receiver had the powers specified in the contract as well as powers conferred by statute, including the power to take possession of, collect and get in the property secured by the March 2008 mortgage.

Questions of law arising in the Special Case
14. The matter came before me by way of Special Case, in which the following questions were raised:

> *Question 1*: Whether, by virtue of clause 7.1 of the March 2008 Mortgage, the security constituted by the March 2008 Mortgage became immediately enforceable on the occurrence of the events more particularly set out in clause 7.1.1 to clause 7.1.12 (or any of them)?
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> *Question 2*: Whether, by virtue of clause 9.1 of the March 2008 Mortgage, and consequent on the security constituted by the March 2008 Mortgage becoming enforceable, the Bank had a contractual right to appoint a Receiver over the property secured by the March 2008 Mortgage without prior demand of the monies secured by the March 2008 Mortgage?
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> *Question 3:* If the answer to Question 3 is "no", whether, consequent on the 3rd October, 2011 letters, the Bank had, on the date of his appointment, the right to appoint the third named defendant, Stephen Tennant, as Receiver over the property secured by the March 2008 Mortgage (a) under contract; and/or (b) under the Act of 1881.
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> *Question 4*: Whether, consequent on the 3rd October, 2011 letters, the statutory power of sale under the Act of 1881 arose notwithstanding the prior appointment of the Second named Defendant, Keith Lowe, as Receiver over the property secured by the March 2008 Mortgage?

Relevant Clauses in the March 2008 Mortgage
15. The following clauses contained in the March 2008 mortgage between Permanent TSB and the borrowers are relevant for present purposes.

16. Clause 2.1 is entitled "Covenant to Pay" and provides as follows:-

> The Mortgagor hereby covenants with the Bank that the Mortagor will *on demand* Pay and discharge the Secured Liabilities when the same are due. The Mortgagor acknowledges that the Secured Liabilities shall, in the absence of express written agreement to the contrary, be due and payable to the Bank *on demand*.

Clause 2.4 provides that the mortgagor covenants with the bank to pay interest (after as well as before any demand or judgment) on the secured liabilities and provides for the method of calculating the rate of interest.

17. Clause 3 is entitled "Charging Clause" and provides for the grant and conveyance to the bank of property as continuing security for the payment and discharge to or in favour of the bank of the secured liabilities by the mortgagor.

18. Clause 7 of the Mortgage document is entitled "Default and Enforcement" and provides as follows:-

> 7.1 The Bank shall cease to be under any further commitment to the Mortgagor and any of the Secured Liabilities not already payable on demand shall become immediately due and payable *on demand* and the security constituted by this mortgage shall become immediately enforceable and the Mortgagor shall provide immediate cash cover for all contingent liabilities of the Mortgagor to the bank in the event:-
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> 7.1.1 The Mortgagor fails to pay or discharge on the due date any of the Secured Liabilities; or
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> 7.1.2 any event occurs by virtue of which any of the Secured Liabilities becomes due to be paid or discharged before the date on which it would otherwise be due to be paid or discharged, or there is a breach by the Mortgagor of any of the terms and conditions of this Mortgage or of any facility from the Bank, or the Mortgagor fails to perform any of his obligations or liabilities to the Bank, or any representation or warranty or undertaking from time to time made to the Bank by the Mortgagor is or becomes incorrect or misleading in any material respect; or
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> 7.1.3 the Mortgagor defaults under any loan agreements facility letter or other agreement or obligation relating to borrowing (which expression includes all liabilities in respect of any type of credit and accepting, endorsing or discounting any notes or bills and all unpaid rental and other liabilities present and future, under hire purchase, credit sale, leasing and similar agreements) or under any guarantee (which expression includes all contingent liabilities undertaken in respect of the obligations or liabilities of any third party including all guarantees indemnities or bonds whether constituting primary or secondary obligations or liabilities) or any borrowing or other money payable under any of the foregoing becomes or is capable of being declared payable, prior to it stated maturity or is not paid when due or any Encumbrance or other security now or hereafter created by the Mortgagor becomes enforceable; or
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> 7.1.4 the Mortgagor (if an individual) commits an act of bankruptcy or is adjudged a bankrupt or becomes of unsound mind or is made a ward of court or dies; or
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> 7.1.5 where the Mortgagor is a body corporate (save for the purpose of and followed by an amalgamation or reconstruction which shall have first been approved in writing by the Bank), a petition is presented, or an order is made, or a resolution is passed, or a notice is issued convening a meeting for the purpose of considering a resolution, or analogous proceedings or actions are taken, to wind up the Mortgagor or to appoint an examiner, administrator, trustee or

similar official to the Mortgagor, or the Bank has reason to believe any of the foregoing may be about to happen; or

7.1.6 an encumbrancer takes possession or exercises or attempts to exercise any power of sale, or a receiver, administrative receiver or similar official is appointed of the whole or any part of the property assets or revenues of the Mortgagor, or

7.1.7 any judgment or order made against the Mortgagor is not complied with within seven days, or any execution, distress, sequestration or other process is levied or enforced upon or sued out against any part of the property assets or revenues of the Mortgagor; or

7.1.8 The Mortgagor stops payment or agrees to declare a moratorium or becomes or is deemed to be insolvent or unable to pay his debts as and when they fall due, or a notice is issued convening a meeting of or the Mortgagor proposes or enter into any composition or arrangement with his creditors generally or any class of creditors; or

7.1.9 this Mortgage or any guarantee, indemnity or other security for any of the Secured Liabilities fails or ceases in any respect to have full force and effect or to be continuing or is terminated or is disputed or becomes jeopardised invalid or unforceable [*sic*]; or

7.1.10 the Liquor Licence is not promptly renewed, or is forfeited, or for any other reason ceased to remain in full force and effect of is or becomes in the opinion of the Bank in jeopardy; or

7.1.11 any material adverse change occurs in the affairs of the Mortgagor which in the opinion of the Bank gives ground for belief that the Mortgagor may not or may be unable to perform his obligations hereunder or under any facility from the Bank; or

7.1.12 any of the foregoing events occur without the prior consent in writing of the Bank in relation to any third party which now or hereafter has guaranteed or provided security for or given an indemnity in respect of any of the Secured Liabilities."

19. Clause 8 is entitled "Powers of the Bank" and sub-clauses 8.1-8.3 incorporate into the mortgage deed the statutory powers conferred on mortgagees, subject to variation and extension within the agreement itself. It provides as follows:-

8.1 Save as hereby varied or extended, the Bank shall have the power of sale and other powers and remedies conferred upon mortgagees by the Conveyancing Acts, 1881 to 1911. The said power of sale shall be exercisable *upon or at any time after the security constituted by this Mortgage has become enforceable, without the restrictions as to giving of notice and otherwise contained in Section 20 of the Conveyancing Act, 1881.* For the purposes of all powers implied by statute, the Secured Liabilities shall, for the benefit of any third party dealing with the bank or any Receiver in connection herewith but not further or otherwise by deemed to have become due and payable on the date hereof.

8.2 At any time after the security hereby constituted has become enforceable by the Bank, the Bank or any Receiver may as agent of the Mortgagor remove, store and sell at the expense of the Mortgagor any chattels found on the Mortgaged Property and, in the absence of any separate charge or other security in favour of the Bank thereover, the net proceeds of sale thereof shall be payable to the Mortgagor on demand. The provisions of this clause shall not be construed or operate to confer on the bank any right to any chattels of the Mortgagor or the proceeds of sale thereof which would constitute this Mortgage a bill of sale within the meaning of the Bills of Sale (Ireland) Acts, 1979 and 1883.

8.3 *At any time after the security hereby constituted has become enforceable* by the Bank, the Bank may without further notice or demand enter into possession of the Mortgaged property. The rights of the Bank under this clause are without prejudice to and in addition to any right of possession express or implied) to which it is at any time otherwise entitled (whether by virtue of this Mortgage, operation of law, contract or otherwise)." (emphasis added)

20. Clause 9 is entitled is entitled "Appointment and Powers of Receiver" sub-clause 9.1 of which provides the following:-

"At any time after the security hereby constituted has become enforceable, or at any time after being so requested by the Mortgagor, the Bank may from time to time appoint under seal or under hand of a duly authorised officer of the Bank, any person or persons to be receiver and manager or receivers and managers (herein called the "Receiver" which expression shall, where the context so admits, include the plural and any substituted receiver and manager or receivers and managers) of the Mortgaged Assets or any parts of parts thereof, and may from time to time under seal or under hand of a duly authorised office of the Bank remove any one or more person or persons so appointed and may so appoint another or other in his/their stead. (emphasis added)

Clause 9.4 provides:-

"A Receiver shall have and be entitled to exercise all powers conferred by the Conveyancing Acts, 1881 to 1911 in the same way as if the Receiver had been duly appointed thereunder and shall furthermore but without limiting any powers hereinbefore referred to have power:- [it goes on to list the various powers of the receiver, including, of course, the power to take possession of, collect and get in the mortgaged assets].

Was a letter of demand required at all?

21. The borrowers contend that Permanent TSB had no entitlement to appoint Mr. Lowe as Receiver under the March 2008 mortgage because a valid demand was required under the terms of the mortgage, and that there was no valid demand for the debt secured under that mortgage. They contend that the same problem renders invalid the subsequent appointment of Mr. Tennant. In support of the contention that a demand for all sums due was required, the borrowers pointed in particular to clauses 2.1 and 7.1 of the March 2008 mortgage. They also contrasted the wording of clause 7.1 with the wording of the February 2008 mortgage which, because it, unlike the March 2008 mortgage, incorporated the Permanent TSB 2002 Mortgage Conditions, made it clear that a demand letter was *not* required before the appointment of a receiver under the February 2008 mortgage. (Clause 7.1 of the 2002 Mortgage Conditions provides that the total debt shall become immediately payable if the mortgagor defaults in the making of two monthly repayments or for two months in the payment of any other monies payable under the mortgage, without any reference to a demand).

22. Permanent TSB contends that the March 2008 Mortgage became immediately enforceable once an event of default occurred,

without any requirement for any letter of demand. It bases this submission upon the terms of the mortgage itself and says that this is set out in clauses 7.1.1 to 7.1.12 (set out in full above). Furthermore, it submits that, under clause 9.1, also set out above, the Bank had a contractual right to appoint a receiver at any time after the security became enforceable and that the bank was also entitled to appoint a receiver as a result of the mortgagor's undisputed default in making repayments from time to time, and had the powers specified in clause 9.4.1 to 9.4.16 in addition to powers conferred by statute including the power to "take possession, collect and get in" the assets. It contends that clause 8.1 of the March 2008 mortgage conferred a statutory power of sale on the bank without the restriction as to giving of notice or otherwise contained in s. 20 of the Conveyancing Act 1861 and that therefore the power of sale became exercisable under clause 7.1 of the mortgage once the mortgage became enforceable. Furthermore, the bank contends that the contractual right to appoint a receiver was separate and distinct from the statutory power of sale and if section 20(i) of the 1881 Act had not been dispensed with then the 3rd October, 2011 demand letters constituted such notice and that prior exercise by the Bank of its contractual right to appoint a receiver did not operate to prevent the Bank exercising its power of sale.

23. A number of authorities concerning s.62(7) of the Registration of Title Act 1964 were cited to me. Some of these authorities are relevant in the present context, even though the present case concerns the appointment of a receiver and not an application to the court for possession pursuant to s.62(7), because they discuss whether and when the security comprised by a mortgage deed may become enforceable without demand.

24. It may be helpful to contextualise a discussion of those authorities by setting out relevant provisions of section 62(7) of the Act of 1964. Sub-section 62(1) provides that a registered owner of land may charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such. Sub-section 62(6) provides that 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. Sub-section 62(7) provides that 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.

25. The decision in *Start Mortgages v. Gunn* [2011] IEHC 275 dealt with the impact of the repeal of s.62(7) of the Act of 1964 by the Land and Conveyancing Law Reform Act, 2009 upon a lender's application for possession. It was held that a lender could acquire the right to apply for an order under s.62(7) if the principal monies had become due before the date of repeal; and further, that monies became due if default or certain events had occurred and a demand for repayment of the principal monies had been made. However, it is important to read that conclusion in light of the specific facts of the cases before the High Court (Dunne J). She pointed out that the starting point for discussion is the mortgage/charge itself. Having set out earlier in her judgment the specific terms of the documents before her, she continued as follows at p. 14 of the judgment:

> "The mortgages are similar in their terms. They each contain a covenant for payment by the borrower. *Each provides that the monies remaining unpaid by the borrower to the lender and secured by the mortgage shall immediately become due and payable on demand to the lender on the occurrence of default. The demand referred to is a demand for payment of the secured monies made by or on behalf of the lender.* The mortgage then proceeds to set out the lender's powers and again I have set out the relevant provisions from Clause 8 and in particular Clause 8.01 and Clause 8.02 to the effect that the lender may enter into possession of the mortgage property and shall have the statutory powers conferred on lenders by the Conveyancing Acts. The mortgage typically provides that the mortgagee's powers shall not be exercised until certain specified events shall occur and they include default in payment of any monthly or other periodic payment or in payment of any of the secured monies." [emphasis added]

What is clear from this is that the conclusion of Dunne J. that a letter of demand was required before the principal money became due followed from her reading of the express provisions of the charges in question. She went on to consider the question of when the right to apply for an order under s.62(7) was acquired, but this aspect of her decision is not relevant in the present case.

26. In *EBS v Gillespie* [2012] IEHC 243, one of the questions which arose was whether the letter of demand sent to the borrower was valid for the purpose of an application for possession under s.62(7). However, the Court (Laffoy J.) held that even if the demand letter was not valid, the security was enforceable in any event because, by virtue of clause 5.01(a), once the defendant had defaulted in making payments due under the charge, all of the monies secured had become immediately payable and the security immediately enforceable. Clause 5.01 provided, 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]…"

Therefore, the money became due either on demand for repayment or, in the alternative, if the borrower failed to pay on the due date.

27. I note also that towards the end of her judgment, Laffoy J. referenced the need to construe the particular provisions of whatever charge is before the Court:-

> "In order to determine whether, notwithstanding the repeal of s. 62(7), the jurisdiction of the Court to make an order for possession under that provision is alive as regards the plaintiff's claim against the defendant in these proceedings, the crucial question is whether it has been established that the plaintiff had acquired as against the defendant a right to seek the statutory remedy in the form of an order for possession of the property secured by the Charge prior to 1st December, 2009. The answer to that question turns on the application of the requirements of s. 62(7) *in the context of the agreement between the plaintiff and the defendant embodied in the Charge to the facts*. In performing that exercise, because it is the easiest course to adopt, I propose looking at the matter from the historic perspective and considering whether the plaintiff has established that it had a right to seek an order for possession prior to 1st December, 2009. However, it is not to be inferred that I consider that such approach is the only approach to answering the crucial question.
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> 25. In order to establish that its claim for possession came within s. 62(7) prior to 1st December, 2009, the plaintiff has to establish compliance with the two requirements expressly set out in the sub-section, namely:

> (a) that repayment of the principal monies secured by the Charge had become due by that date; and (b) that the plaintiff was the registered owner of the Charge. Requirement (b) was clearly complied with. As regards requirement (a), *it is necessary to consider what was agreed between the plaintiff and the defendant in relation to repayment of the principal money secured by the Charge*." (emphasis added)

At para 27 of her judgment, Laffoy J. indicated that she considered the demand letter to be valid in any event, notwithstanding a typographical error concerning the amount due, because it was clear that what was being demanded was repayment of the entire monies on foot of the two loan accounts.

28. In *GE Capital Woodchester Home Loans Ltd v. Reade* [2012] IEHC 363, which arose in the context of an application for possession under s.62(7), the question arose as to whether the repayment of the principal money had become due, as required by the sub-section. The High Court (Laffoy J.) delivered two judgments. In her judgment of the 22nd August, 2012, she held that a valid demand was necessary to render the monies remaining unpaid immediately due because this is what the charge in question provided. Further, and separately, she held that the demand letter was not valid because there had been no demand for the entire balance, but rather an assumption that it was owing and a demand for vacant possession; and in those circumstances, it could not be said that repayment of the principal money had become due prior to the initiation of the proceedings. Accordingly, while the borrower remained personally liable under the covenant in the charge for the secured monies, she said, the plaintiff had failed to establish an entitlement to an order for possession under s.62(7). Laffoy J. was subsequently asked by the plaintiff to revisit the findings in her judgment concerning the letters of demand and she was referred, *inter alia*, to the decision in *Wise Finance Company v. Lanigan* [2004] IESC 4 which discussed the requirements of a valid demand letter. She delivered a further judgment on the 12th November, 2012 in which she stood over her conclusion that the demand letter in the case before her was not valid.

29. Although the borrowers in the present case rely heavily upon the decision in *Reade* case to suggest that a demand letter was required, it does not seem to support the proposition that there must always be a demand letter before security becomes enforceable; rather, the conclusion of Laffoy J. that a demand was required in that particular case was anchored upon a reading of the express provisions of the documents before her. Clause 3.02 provided that all monies remaining unpaid and secured by the charge should "immediately become due and payable *on demand*" on the happening of any of the events of default. Indeed, it seems to me that the decisions in *EBS v. Gillespie* and *Reade*, are reconcilable with each other on the issue of whether a demand letter is required precisely because of the difference in the terms of the charges under consideration in each of the cases.

30. I also note that in *Irish Life and Permanent plc v. Dunne* [2016] 1IR 92, one of the conclusions of the Supreme Court was that the function of a court considering a case in which a lender seeks possession is to determine whether, as a matter of law, and on the evidence, the conditions that entitled the lender to possession have been shown to exist. Where the court is being invited to make an order pursuant to s.62(7) of the Act of 1964, it is obliged to ask whether as a matter of law it could properly be said that the principal monies secured by the charge on registered land had become due as of the 1st December, 2009 (the date of the repeal of the sub-section). The Court said:

> "In order for the power to seek an order for possession under s.62(7) of the 1964 Act to have arisen, what was required was that the principal monies were due. It follows that the question which any court invited to apply the jurisdiction arising under that section must ask itself is as to whether, as a matter of law, it can properly be said that the principal monies had become due. The first port of call for determining whether those monies had become due is to identify the terms of the contract between the lender and the borrower as to when the entire principal sum can be said to fall due. *Terms in that regard can, and do in practice, differ. It may be that, on a proper interpretation of the contractual documents in one case, a demand for payment following some form of default may be necessary. It might, however, be the case that, in other circumstances and in the light of the terms contained in a particular mortgage deed, the full sum may become due without demand in certain, specified circumstances*." (emphasis added)

31. It seems to me in light of the above authorities that in deciding whether or not a demand letter is required before principal monies fall due, the Court must look carefully at the relevant provisions within the charge or mortgage in question. There is no "yes or no" answer to the question; "Is a demand letter required before the principal monies fall due"? The only correct answer to that question is the answer: "That depends upon the terms of the mortgage/charge".

32. Before I turn to the specific terms of the mortgage in the present case, I should mention a number of authorities concerning the interpretation of contracts to which I was referred; *Analog Device B.V. v. Zurich Insurance Company* [2005] IESC 12; In *re J.D. Brian Limited (in liquidation)* [2011] 3 IR 244 (High Court) and [2016] 1 IR 131 (Supreme Court); *UPM Kymmene Corporation v. BWG Ltd* (Unreported, High Court, Laffoy J. 11th June 1999; Unreported, Supreme Court, 4th April 2001);and *ICS Ltd v. West Bromwich B.S.* [1998] 1 WLR 896.

33. In *Analog Devices,* the Supreme Court at paragraph 13 cited with approval the following passage of Lord Hoffmann in *ICS Ltd v. West Bromwich B.S:-*

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are

ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Ltd. v. Eagle Star Ass. Co. Ltd*. [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania S.A. v. Salen A.B. [1985] A.C. 191, 201:

'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

34. These principles were applied in the context of construction of a debenture by Finlay Geoghegan J.in *Re J.D Brian Limited*. She also cited the following statement of Laffoy J. in *UPM Kymmene Corporation v BWG* as a succinct expression of the same principles at p. 273:-

"[T]he basic rules of construction which the court must apply in interpreting documents which contain the parties' agreement are not in dispute. The Court's task is to ascertain the intention of the parties and that intention must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. Moreover, in attempting to ascertain the presumed intention of the parties, the court should adopt an objective, rather than a subjective, approach and should consider what would have been the intention of reasonable persons in the position of the parties"

Finlay Geoghegan J. went on to say in relation to the above statement:-

"The above is of course a correct statement of the general principles which apply to the construction of an agreement between parties which would include a debenture"

35. On appeal the Supreme Court agreed with this approach:-

"Moreover, there was no dispute as to then general principles which apply to the construction of an agreement between the parties which would include a debenture, reference being made to the decision of the Court in *Analog Devices BV v Zurich Insurance Company* [2005] IESC 12"

Application to present case

36. The relevant provisions of the mortgage in the present case are set out above in some detail. It will be recalled that the appointment of a receiver under clause 9 is triggered by the security having become enforceable; clause 9.1 providing: " *At any time after the security hereby constituted has become enforceable…* the Bank may from time to time appoint under seal or under hand of a duly authorised officer of the Bank, any person or persons to be receiver and manager or receivers and managers (herein called the "Receiver" …) of the Mortgaged Assets".

37. When, then, does the security become enforceable under this particular mortgage? The answer to that appears to turn on the construction of clause 7.1, which reads in relevant part as follows: " The Bank shall cease to be under any further commitment to the Mortgagor *and any* of the Secured Liabilities not already payable on demand shall become immediately due and payable on demand *and* the security constituted by this mortgage shall become immediately enforceable *and* the Mortgagor shall provide immediate cash cover for all contingent liabilities of the Mortgagor to the bank in the event:-…" [that any of the events in the ensuing list of default events ,listed in subparagraphs 7.1.1 to 7.1.12 inclusive, takes place].

38. My interpretation of this is as follows: In the event that one of the "trigger" events of default (listed in subparagraphs 7.1.1 to 7.1.12 inclusive) takes place, a number of distinct consequences flow; (i) the bank ceases to be under any further commitment to the mortgagor; (ii) any of the secured liabilities not already payable on demand shall become immediately due and payable on demand; (iii) the security constituted by the mortgage shall become immediately enforceable; (iv) the mortgagor shall provide immediate cash cover for all contingent liabilities of the mortgagor. The repeated use of the word "and" in the relevant portion of clause 7 (highlighted in italics above) means that the four consequences are four separate consequences. I cannot accept the interpretation of clause 7 put forward on behalf of the borrowers, which was at the heart of their case. It was argued that the phrase "any of the secured liabilities not already payable on demand shall become immediately due and payable on demand" was (in their words) a "*prerequisite*" to the phrase "and the security constituted by this Mortgage shall immediately become enforceable". I cannot see, as a matter of plain English, how the first phrase could be interpreted as a "prerequisite" to the second phrase if one looks at the totality of the opening of clause 7.1 and the four different consequences provided for. The mere fact that (iii) is placed *after* (ii) cannot mean that a condition internal to (ii) (namely, the demand condition) must also apply to (iii). To put it another way, the borrower's submission in effect invites the court to import the words "on demand" into (iii) even though the contracting parties did not put them there. This would seem to me to run counter to the principles of contractual interpretation set out earlier.

39. If my interpretation of clause 7.1 is correct, it follows that a failure to pay the security rendered the security immediately enforceable, without the need for a letter of demand. Accordingly, I find in favour of Permanent TSB on this argument and hold that, on the wording of the mortgage between the parties in this particular case, no letter of demand was required.

40. I do not think that the wording of the covenant to pay in clause 2.1 of the mortgage, which clearly requires a demand letter, contradicts or conflicts with this interpretation of clause 7.1 in any way, because clause 2.1 concerns the personal contractual liability of the borrowers and therefore a matter distinct and different to the appointment of a receiver and the necessary preconditions for the taking of that action.

41. It also follows from the wording of clause 9.1 of the mortgage that the bank had a contractual power to appoint a receiver once the security had become enforceable. There is no doubt that a contractual term providing for the appointment of a receiver is valid: *Kavanagh v. Lynch* [2011] IEHC 348, *Kavanagh v. McLaughlin* [2015] 3 IR 555. If it be the case, as I have found, that clause 7.1 does not support an interpretation requiring that a demand be made before security is enforceable, it follows that the contractual power to appoint the receiver had been triggered upon the event of default taking place.

Was there a valid letter of demand upon which the Bank could rely?

42. If the above interpretation is correct, it is not necessary to answer the remaining questions, but I shall do so in lest the above be incorrect.

43. There were two letters of demand; the first, dated the 2nd December, 2010, requested payment of the arrears only, while the second, the 3rd October, 2011 sought repayment of all the monies. A number of submissions were made on behalf of the borrowers to support their contention that there was no valid demand letter in existence prior to the appointment of the first receiver.

44. It was submitted on behalf of the borrowers that the bank could not rely upon the letter of 3rd October 2011 because the bank itself did not rely upon this letter in appointing Mr. Tennant as receiver. Even if it is correct to say that the bank did not rely upon this letter (a fact which was in dispute between the parties), it seems to me that what is determinative is the objective position i.e. whether the basis for the appointment of the receiver existed from an objective point of view, not what the bank itself may have sought expressly to rely upon. In this regard, I accept the principle set out in *Brampton Manor (Leisure) Ltd. v. McLean* [2006] EWHC 2983 (Ch), where the court referred to "the principle that a debenture holder may rely on any circumstance, existing at the time of the appointment of receivers, which would justify their appointment notwithstanding that it was not being expressly relied on by the debenture holder at the time the appointment was made", citing *Byblos Bank SAL v. Al-Khudairy* (1986) 2 BCC 99 at 564. No contrary authority was cited to me in respect of this proposition.

45. It was submitted in the alternative on behalf of the borrowers that the letter of the 3rd October, 2011 was not a valid demand because it demanded payment of a composite sum under both mortgages and did not particularise the sum due under the March 2008 mortgage. In my view, having regard to the terms of the letter as set out above, there was sufficient information given and therefore compliance with the requirements of a valid demand as set out in *GE Capital Woodchester Home Loans Ltd. v. Madden* [2013] IEHC 540. In that case, Dunne J. cited with approval certain passages from the authorities on what constitutes a valid demand and it seems to me that the essential features described there are that there must be a clear, unequivocal, peremptory and unconditional request for payment. In my view, these conditions were satisfied and the borrower could have no doubt from the letter that the full amount was being called for and what the full amount consisted of.

46. It was further argued on behalf of the borrower that the letter of the 3rd October, 2011 was not in compliance with the requirement set out in *EBS v. Gillespie* [2012] IEHC 243 that a demand must be served "bona fide with a view to realising the Plaintiff's security. It was argued that because the letter of 3rd October, 2001 said they proposed to bring proceedings, rather than to appoint a receiver and sell, the letter could not be described as being written with the purpose of bona fide realising the bank's security. However, the "bona fide caveat", if I may so describe it, originates in *Bank of Ireland v. Smyth* [1993] 2 IR 102, and was meant to indicate that equitable principles should be applied to an application for possession pursuant to s.62(7). I do not see any reason why this comment should be transposed from this context into the different context of the appointment of a receiver pursuant to contract or that the comment should be used to require any additional feature in letters of demand over and above those features identified in the Madden case, as discussed above.

Conclusion

47. For the reasons set out above, I will answer the questions posed in the Special Case as follows: Question 1: Yes. Question 2: Yes. Question 3: Not applicable because of answer to question 1. Question 4: This appears to be premised on the first two questions being answered in the negative. Further, I cannot see how the plea of estoppel by conduct set out in the closing pages of the written submissions on behalf of the borrowers is made out and it was not pursued in oral argument.