

THE HIGH COURT

[2011 No. 152 S.P.]

BETWEEN

LEEDS BUILDING SOCIETY
AND
PATRICK BRADY AND MARGARET BRADY

PLAINTIFF

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 11th day of July, 2014

1. This matter comes before the court as an application for possession of an investment property owned by the defendants and comprising Folio No. 19230F County Cavan. The application is brought pursuant to the provisions of s. 62(7) of the Registration of Title Act 1964 (*"the Act"*). A special summons issued on 2nd March, 2011.

Background

2. On 8th November, 2007, the defendants applied in writing to the plaintiff for a loan of €900,000. A letter of loan offer was issued on 19th November, 2007, for an amount of €760,000, subject to the plaintiff's mortgage terms and general conditions. The offer letter was signed and accepted by the defendants on 21st November, 2007, and the draw down of funds occurred on 29th November, 2007.

3. On 29th November, 2007, in accordance with the loan agreement, a deed of mortgage and charge was executed by the defendants in respect of the lands and was registered in the Land Registry on 12th August, 2008.

4. The defendants fell into arrears in their payments under the loan agreement and by November 2010, there were approximately six months arrears amounting to a sum of €8,768.10. On 15th November, 2010, the solicitors for the plaintiff sent a letter to the defendants demanding vacant possession of the properties on account of their breach of the loan agreement in failing to make the repayments as they fell due.

5. The proceedings were listed before the Master of the High Court on 27th May, 2011, and were subsequently adjourned on five occasions with the final hearing date before the Master on 6th July, 2012. In the period leading up to that hearing, one affidavit was filed by the Building Society on 19th April, 2011, and one was filed in response by the first named defendant on 10th February, 2012. In the grounding affidavit of the plaintiff, the claim for possession was clearly based upon the failure to make repayments as they fell due and on no other ground. The affidavit was in support of the special summons in which the plaintiff had stated that it was relying on the charge which had been registered and, *"...the principal sum secured by the said Instrument of Charge hereinbefore referred to, having become due within the meaning of the said section 62(7) of the Registration of Title Act 1964"*.

6. At the hearing on 6th July, 2012, the parties agreed to adjourn the proceedings to enable the defendants to engage with the plaintiff to see if the dispute could be resolved and the plaintiff was given liberty to reapply if no agreement was reached.

7. A meeting was organised at the plaintiff's offices in Leeds in the United Kingdom to enable the first named defendant to meet with representatives of the plaintiff. This meeting took place on 21st November, 2012, and was held on a *"without prejudice"* basis.

8. The plaintiff contends that no agreement was reached between the parties at the meeting whereas the defendants argue that an agreement was reached. I am satisfied on the basis of the evidence adduced on affidavit, that no agreement was concluded. What did occur is that the first named defendant left with the plaintiff an envelope containing a document purporting to be a Promissory Note in the sum of €900,000. The document, which has a number of PJB/26782039A promised to pay the bearer of the Note, the sum of €900,000 on demand. The Note was passed on to the plaintiff's solicitors who perused the document and wrote to the defendant inquiring about it. A question was raised as to why the sum of €900,000 was the figure in the purported Promissory Note instead of the sum then due on the account which was €811,119.95? A request was then made of the first named defendant that if he was in a position to pay the balance due on foot of the mortgage would he provide a bank draft in the sum of the balance then outstanding namely €811,119.95. No response was received to that request. The defendants never gave an explanation as to why they offered a Promissory Note in a sum which exceeded the balance due on the loan by €88,880.05.

9. The furnishing of the document purporting to a Promissory Note created some disagreement between the parties and the defendants lodged a request to the Property Registration Authority seeking to have the charge over the property and lands cancelled as a result of the purported payment offered by them to the plaintiff. Notice of this was conveyed to the plaintiff by the PRA on 4th April, 2013. Affidavits were filed on behalf of the parties with the PRA and the defendants' request was ultimately refused on 6th August, 2013, on the basis that the PRA was not satisfied that the charge had been discharged.

10. It is worth noting that during the course of the hearing before me, I asked the first named defendant whether he had the funds to satisfy the debt when he furnished the document purporting to be a Promissory Note to the plaintiff. He conspicuously declined to answer this question.

11. The defendants later forwarded to the plaintiff, a statement of account which purported to cancel out the mortgage debt through the *"consented off setting settlement in full"* of the Promissory Note mentioned earlier. The plaintiff's solicitors wrote to the defendants explaining that the debt was not cleared by the Note and there had been no consent to the debts being off set by that document. The decision of the PRA was reiterated to the defendants along with a reminder of the total amount due on the account which as of 27th August, 2013, stood at €818,136.70.

12. The plaintiff re-entered the proceedings and a notice of motion was issued and made returnable to 2nd May, 2014, for hearing before the Master. The matter was subsequently transferred to the High Court.

Submissions

13. Counsel for the plaintiff argues that the defendants have defaulted on the mortgage and as a result they are entitled to possession of the lands and premises pursuant to s. 62(7) of the Registration of Title Act 1964. The plaintiff also argues that the defendants have acted contrary to the terms of the loan agreement in that they did not register a charge in favour of the Building Society at the time the deed of mortgage was executed. At the time, the deed was executed a first charge in favour of Bank of Ireland existed on the lands and premises which was cancelled on 24th February, 2009. The charge in favour of the plaintiff was registered on 12th August, 2008. This point was not raised in the special summons nor the principal grounding affidavit as forming the basis of the claim. In any event, no prejudice has been alleged to the plaintiff since it is now the holder of the only registered charge over the lands. The charge in favour of Bank of Ireland was cancelled more than one year and eight months before the demand for possession was made in this case.

14. The defendants raise a challenge to the plaintiff's claim pursuant to s. 62(7) of the Act. The section was repealed by the enactment of the Land and Conveyancing Reform Act 2009. The defendants argue that as the section was repealed by the 2009 Act, the plaintiff's application for possession must fail for a lack of any legal basis. They rely on the decision of Dunne J. in *Start Mortgages Limited v. Gunn* [2011] IEHC 275. In that case, Dunne J. set out the following principles:-

- "1. Proceedings commenced prior to the 1st December, 2009 can be continued after that date.*
- 2. Proceedings can be instituted after that date provided that the lender had acquired the right to apply for an order pursuant to s. 62(7) by the 1st December, 2009.*
- 3. A lender has not acquired the right to apply for an order pursuant to s. 62(7) if the principal monies secured by the mortgage have not become due.*
- 4. The principal monies do not become due until default or certain other events have occurred and demand for repayment of the principal monies has been made.*
- 5. In any case in which demand is made for repayment of the principal sums due after the 1st December, 2009, the lender has neither an acquired or accrued right to apply for an order pursuant to s. 62(7) and consequently the provisions of s. 27 of the 2005 Act will not avail such a lender."*

The last reference is to the Interpretation Act 2005.

15. In response to this argument, the plaintiff relies on the judgment of Laffoy J. in *EBS Limited v. Gillespie* [2012] IEHC 243, where Laffoy J. stated at para. 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. Apart from those two requirements, the Court must be satisfied that it would have been proper to afford the plaintiff the statutory remedy of an order for possession against the defendant to enforce the right acquired. Having regard to the observations of Geoghegan J. in *Bank of Ireland v. Smyth* quoted earlier, I consider the Court would have to be satisfied not only that the application was made bona fide with a view to realising the plaintiffs security, but also that the power of sale had arisen and was exercisable by virtue of the terms of the agreement between the plaintiff and the defendant contained in the Charge."*

16. Section 14 of the Leeds Building Society Mortgage Conditions 2006 (Ireland) provides, *inter alia*:-

"14.1 At anytime after the Whole Debt or any part thereof becomes due and payable we may forthwith without any further demand on or notice to you exercise the statutory power of sale conferred on mortgagees by the Act free from the restrictions imposed by section 20 of the Act of 1881 thereof and section 17 of the Act of 1881 shall not apply to the mortgages and charges created pursuant to the Mortgage."

17. The initial demand for vacant possession of the lands and premises was made in writing to the defendants on 5th November, 2010, which post-dates the 1st December, 2009, expiry date referred to in the *Gunn* and *Gillespie* decisions. It becomes pertinent, therefore, to analyse the loan agreement made between the parties to see whether or not a right of possession under the Act would have existed.

18. Clause 14.4 of the conditions state:-

"If any of the following events occur then notwithstanding any other provisions of these Conditions the Whole Debt shall immediately become due and payable:

- (a) If you are in default of paying 2 or more Monthly Payments.*
- (b) If you fail to observe and perform any of your covenants or agreements (other than for payment of the Monthly Payments) contained in the Agreement or the Mortgage."*

19. Clearly, the defendants have defaulted under the terms of the loan agreement and are in breach of clause (a) above. Insofar as clause (b) is concerned, the plaintiffs submit that it was the condition of the mortgage that a charge in favour of the plaintiff be registered on the Folio and that this was done some nine months after the deed of mortgage was created. Clause 4.4 of the mortgage deed of 29th November, 2007, states:-

"The security referred to in clauses 4.1 – 4.3 above shall be first ranking mortgages, fixed charges and/or security assignments and are created subject to the mortgagor's right to redeem contained in the mortgage conditions."

Clause 5 of the same document is an assent by the defendants to the charge being created.

20. The plaintiff has not established any prejudice by the delay in registering the charge. All earlier charges have been cancelled and it remains the only registered charge. In the affidavit of Andrew Briggs grounding the application for possession he states at para. 13:-

"I say that on 29th day of November, 2007, in accordance with the Loan Agreement, the Defendants executed a Deed of Mortgage and charge in respect of the lands and premises described in the special summons herein..."

In para. 14 he says that the charge created by the said Deed was duly registered in the Land Registry on 12th day of August, 2008. Furthermore, in an affidavit sworn on 12th June, 2013, the plaintiff's solicitor stated:-

"4. I say that on 29th November, 2007, in accordance with the loan agreement the Bradys executed a Deed of Mortgage and Charge in respect of the lands comprised and described in Folio 19230F County Cavan.

5. I say the charge created by the said Deed was duly registered in the Land Registry on 12th August, 2008."

Conclusions

21. No evidence was adduced to show that there was a time limit for the registration of the charge. But even if there was, no complaint was made on affidavit concerning the delay in registering the charge and since these proceedings are clearly based on an entitlement to possession pursuant to the provisions of s. 62(7) of the Registration of Title Act 1964, on account of the defendants' default in making payments as they fell due, I hold that the plaintiff is not entitled to rely on the late registration as an event of default giving rise to a claim for possession. There is no prejudice to the plaintiff since the earlier charges were all cancelled before the default in making repayments occurred and the demand for possession was made.

22. Insofar as the claim on the special summons is concerned, it seems to me that it comes within the scope of the judgment of Dunne J. in *Start Mortgages v. Gunn* and the claim for possession does not meet the test set out in the conclusions therein and accordingly, I must dismiss the plaintiff's claim. While the lacuna uncovered in that case has now been cured by s. 1 of the Land and Conveyancing Law Reform Act 2013, the section does not apply to proceedings initiated before the coming into operation of the section on 24th July, 2013. My decision in this case should not be interpreted as meaning the defendants are absolved from their obligations under the terms of the loan agreement and mortgage and it will be a matter for the plaintiff as to how it wishes to proceed from here.