

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND
PATRICK McCABE

DEFENDANT

JUDGMENT of Mr Justice Garrett Simons delivered on 28 January 2019.

INTRODUCTION

1. This is an application for an order for possession of certain lands in County Louth. The title of the relevant lands is registered under Folio 1074 and Folio 9730 of the Register of County Louth. The application arises out of a mortgage granted in favour of two related banks, AIB Mortgage Bank and Allied Irish Banks plc. Each bank has registered a charge as a burden on each of the two folios.

2. The mortgage was created prior to 1 December 2009. Accordingly, the application for possession is governed by section 62(7) of the Registration of Title Act 1964. (See section 1 of the Land and Conveyancing Law Reform Act 2013).

3. To assist in understanding the dispute which has arisen between the parties, it may be helpful to set out the provisions of section 62(7) in full.

"(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."

*Emphasis added.

4. As appears, the entitlement to apply for an order for possession is predicated on the principal money having become due. The dispute in the present case centres on whether a lawful demand for the principal money was ever made.

PROCEDURAL HISTORY

5. The Defendant to the proceedings, Mr Patrick McCabe, has entered an appearance dated 26 April 2018. Mr McCabe has also sworn an affidavit in opposition to the application dated 18 October 2018. The matter came on for hearing before me on 14 January 2019. Allied Irish Bank plc was represented by counsel, Mr John O'Regan, BL, and Mr McCabe was represented by his solicitor, Ms Sarah O'Mahoney.

THE MORTGAGE

6. The principal defence advanced is to the effect that no valid letter of demand was ever served in respect of the principal money. In particular, it is said that the various letters of demand which did issue were, first, issued without the requisite consent from AIB Mortgage Bank, and, secondly, were mistakenly issued in the name of both banks rather than in the sole name of Allied Irish Banks plc.

7. In order to understand these arguments, it is necessary to consider the provisions of the mortgage. The mortgage is dated 24 April 2007.

8. Clause 4 of the mortgage provides as follows.

"4. AIB Mortgage Conditions

The AIB Mortgage Conditions are hereby incorporated in this Mortgage. In the event of any conflict between the terms of the AIB Mortgage Conditions and this Mortgage, the terms of this Mortgage shall prevail."

9. Clause 5 of the mortgage provides as follows.

"5. Ranking of Security

5.1 The Lenders hereby agree and the Mortgagor hereby acknowledges that regardless of anything else to the contrary in this Mortgage:

(a) until AIB Mortgage Bank has granted a full release or discharge of this Mortgage (the "AIB Mortgage Bank Release Date");

(i) this Mortgage shall rank as first security for the Total Debt owing to AIB Mortgage Bank in priority in all respects to the security held under this Mortgage by AIB; and

(ii) thereafter shall rank next as security for the Total Debt owing to AIB; and

(b) after the AIB Mortgage Bank Release Date, for so long as any Total Debt remains owing to AIB, this Mortgage shall rank as security for the Total Debt owing to AIB, regardless of: –

(i) the order, registration, notice, execution, or date of any of the security contained in this Mortgage; or

(ii) the creation in favour of either of the Lenders of any further or additional security over the undertaking, properties or assets of the Mortgagor; or

(iii) any fluctuation in any Total Debt from time to time owing to either of the Lenders or the date on which any Total Debt is incurred; or

(iv) any contrary provision in any agreement between the Mortgagor and any Lender.

5.2 Until the AIB Mortgage Bank Release Date, this Mortgage may be enforced only by AIB Mortgage Bank and AIB shall not take any steps to enforce this mortgage, appoint any receiver or take possession of the Mortgaged Property without the prior written consent of AIB Mortgage Bank."

10. The mortgage thus contemplates that there may be separate debts owing to AIB Mortgage Bank and Allied Irish Banks plc, respectively. In the event, however, the only monies advanced to the Defendant in this case were by Allied Irish Banks plc alone.

11. There has been no payment made pursuant to the mortgage since 12 March 2012. As of January 2018, there was a sum of €2,410,928.01 outstanding in terms of principal and interest. (Exhibit "CR5" to the affidavit of Colette Rooney of 5 March 2018).

12. As discussed presently, the argument advanced on behalf of the Defendant is that the act of issuing a notice for demand calling for the payment of the principal money is in itself a *step to enforce* the mortgage. On this argument, no such letter of demand could be served until the prior written consent of AIB Mortgage Bank had first been obtained.

THREE LETTERS OF DEMAND

13. As explained in the affidavit filed on behalf of the bank by Colette Rooney of 5 March 2018, three letters of demand for the repayment of the principal and interest due were issued as follows.

14. The first letter of demand is dated 1 August 2013. The letter is addressed to the Defendant. The letter is headed up "Your facilities with Allied Irish Banks, plc ('AIB')". The letter refers to the facility letter of 8 April 2011, described as the "Loan Agreement", entered into between the Defendant and AIB, and makes a formal demand for the repayment of principal and interest due within fourteen days of the date of the letter. (The letter of 8 April 2011 is stated to be for the purpose of an extension of the original loan facility).

15. The criticism made by the Defendant of this letter is that it constitutes a step to enforce the mortgage, and could not have lawfully issued without the prior written consent of AIB Home Mortgages as required by Clause 5.2 of the Mortgage.

16. A second letter of demand was sent to the Defendant on 2 December 2015. This letter was sent by Gartlan Furey Solicitors, and is headed up "Our Clients – AIB Mortgage Bank and Allied Irish Banks plc". The account number is then given, as is what is stated to be the account balance (€2,656,023.80dr).

17. The letter opens by advising the Defendant that the solicitors act for AIB Mortgage Bank and Allied Irish Banks plc.

18. This letter is criticised by the Defendant on the basis (i) that it fails to comply with the requirement under Clause 5.2 for the prior written consent of AIB Mortgage Bank, and (ii) that it incorrectly purports to be a demand in respect of both of banks when, in fact, the debt was due to Allied Irish Banks plc alone.

19. It seems that in the early part of 2018, the two banks sought to remedy any possible defect in the making of a demand for the payment of the principal money by taking the following measures.

20. First, a letter was sent from AIB Mortgage Bank to Allied Irish Banks plc in the following terms on 31 January 2018.

"Re: 120 acres of land at Hacklim, Ardee, Co Louth

Account Number: [...]

Charge/Mortgage Dated 11th June 2007

To Whom It May Concern

Pursuant to clause 5.2 of the mortgage and charge dated the 24th of April 2007, between AIB Mortgage Bank and Allied Irish Banks plc as mortgagee, and Mr Patrick McCabe Junior as mortgagor, AIB mortgage bank hereby gives its consent to AIB plc to enforce the mortgage and to take all steps necessary to recover possession of the property comprised in the schedule of that mortgage.

AIB Mortgage Bank also hereby confirms that no debt is owed to AIB Mortgage Bank on foot of the above mortgage."

21. Secondly a further letter of demand was then sent to the Defendant. This letter is dated 7 February 2018, i.e. it was sent subsequent to the letter of consent of 31 January 2018 set out above. The letter of demand refers to the earlier letter of demand of 1 August 2013. The letter is headed up "Our clients – AIB Mortgage Banks and Allied Irish Banks plc". Both banks are also named in the body of the letter. The letter states as follows.

"By letter of 1 August 2013 our clients demanded payment of the amounts due in respect of the above property and our client has informed us that the amounts due still remain outstanding.

Accordingly, we hereby demand on behalf of our clients payment of the account balance now due as set out above. Please note that unless the sum is paid within 7 days from the date hereof, our further instructions are to immediately institute legal proceedings against you without further notice to include an application for Order for Possession and Sale of the land and property the subject matter of the Bank's security.

Take notice that our client now formally calls upon you to give up possession to it of the property the subject matter of the security so that same may be sold by them, as mortgagees in possession. The property in question is as follows: –

[...]"

DEFENDANT'S ARGUMENT

22. The Defendant's argument is helpfully summarised as follows in the affidavit of Mr McCabe dated 18 October 2018.

"5. By the purported demand of 2 December 2015, through their solicitors, the Plaintiff and the AIBMB, erroneously claimed that the demand of 1 August 2013, was on behalf of both the Plaintiff and AIBMB in an ineffective attempt to retroactively validate the status of the said demand. In purporting to demand the sums and possession referenced in the letter of 2 December 2015 the Plaintiff acted without the consent which it now claims in the within proceedings was required of it pursuant to Clause 5.2 of the Deed of Mortgage, and therefore the said demand was ineffective. The letter of 2 December 2015 further interchangeably refers to our 'Clients' in the context of the demand for payment and our 'Client' in the context of the demand for possession without specifying which Client on behalf of which that demand was being made and in the circumstances the said demand further demonstrated a lack of clarity as to the entity entitled to demand and/or possess the property.

6. To the extent that reliance is placed upon the letter of 7 February 2018 as constituting a demand in the within proceedings, that correspondence in identical terms fails to specify the Client on behalf of which demand for possession is made. The Plaintiff was not copied with the letter of 31 January 2018 at exhibit "CR8" and in the premises could not have known of its contents or the implications thereof."

DISCUSSION

23. The language employed in Clause 5.2 of the mortgage presents two issues of interpretation as follows. First, a question arises as to whether the issuing of a letter of demand calling in the principal money constitutes the taking of a *step to enforce* the Mortgage for the purposes of Clause 5.2. Ms O'Mahoney submitted that it is a condition precedent to an application under section 62(7) of the Registration of Title Act 1964 that the principal money has become due for payment. The letter of demand was said to be an essential "step" in this regard. Clause 5.2 was said to be a mandatory requirement, and it was not complied with.

24. Complaint is also made that the letter of February 2018 is defective in that it refers to both banks, notwithstanding that there was no money owing to AIB Mortgage Bank. It was said that it was impossible for the Defendant to know which of the banks was claiming possession.

25. Ms O'Mahoney very properly accepted that it would be open to the bank to remedy all of these alleged defects by issuing a fresh letter of demand in proper form, and then issuing fresh proceedings in reliance of same.

26. In response to these arguments, Mr O'Regan, BL, submitted that the issuing of a letter of demand is not a step to enforce, but rather occurs prior to any enforcement proceedings. Counsel further submitted that the naming of the two banks did not render the letters of demand ineffective. The letters were peremptory and unequivocal, and clearly demanded payment of the principal money and interest. Finally, Mr O'Regan says that there is no requirement under the mortgage that the mortgagor be furnished with a copy of the letter of consent under Clause 5.2.

27. Strictly speaking, it is not necessary for me to resolve the dispute as to the meaning of the phrase "any steps to enforce". This is because, as explained in the next paragraph below, any defect has since been cured by the events of January and February 2018. For what it is worth, however, I tend to agree with the submission made on behalf of the Defendant by Ms O'Mahoney. It is an essential element of an application under section 62(7) that the principal money secured by the instrument of charge has become due. Under the terms of the mortgage, this necessitated Allied Irish Bank plc making a formal demand in this regard. The letter of demand is so inextricably linked to the bringing of an application for an order for possession that it seems reasonable to regard it as a step to enforce.

28. As I say, however, this issue is not, ultimately, dispositive of the proceedings. This is because any deficiency in this regard has since been remedied by the fact that the written consent of AIB Mortgage Bank has been secured, and a fresh letter of demand issued after that event. The legal effect of Clause 5.2 is that—until the AIB Mortgage Bank Release Date (as defined) has passed—Allied Irish Bank plc cannot take any steps to enforce the mortgage "without the prior written consent" of AIB Mortgage Bank. As outlined at paragraph 20 above, a letter of consent was ultimately forthcoming on 31 January 2018. Thereafter, the (third) letter of demand was served. This sequence of events indicates that—whatever the legal position in respect of the first and second purported letters of demand—there has now been compliance with the requirements of Clause 5.2. Whereas it appears that the Defendant was not provided with a copy of the letter of consent at the time it was given to Allied Irish Bank plc, i.e. 31 January 2018, the letter of consent is expressly referenced in the Special Summons of 14 March 2018. The Defendant was thus on notice, from the very outset of the proceedings, that the letter of consent had been given.

29. In any event, the purpose of Clause 5 of the mortgage is to regulate the position of the two banks *inter se*. The clause is for their benefit, and the banks were entitled to waive compliance with same. It is difficult to understand how the Defendant could rely on any alleged breach of same.

30. Insofar as the mistaken references to AIB Mortgage Bank are concerned, I accept the submission of counsel on behalf of the plaintiff bank to the effect that this error does not invalidate the letter of demand of 7 February 2018. The letter is clear in its terms, and, on receipt of same, the Defendant cannot have been in any doubt but that the entire of the principal money was being called in. Certainly, the Defendant has not adduced any evidence as to actual confusion or prejudice on his part. It is also relevant to note that the debt is not denied, and that no repayment has been made since 2012. There is no suggestion, for example, that the Defendant wished to make further payments but was confused as to which of the two banks such payment should be made to. Similarly, there is no suggestion that the Defendant intended to give up possession.

CONCLUSION

31. For the reasons set out above, I have concluded that a proper letter of demand was issued—at the very latest—on 7 February 2018. The proceedings were instituted *subsequent* to that date, and, accordingly, the requirements of section 62(7) of the Registration of Title Act 1964 were satisfied at that time. In circumstances where no other defence has been offered to the application under section 62(7), I am satisfied that the plaintiff bank is entitled to the orders which it seeks.

32. I will hear the parties as to the length of a stay, if any, to be granted on the order for possession.