NEUTRAL CITATION NUMBER [2012] IEHC 331

THE HIGH COURT

[2011 No. 3505 P]

BETWEEN

BRIAN McENERY

PLAINTIFF

AND

TIM SHEAHAN

DEFENDANT

Judgment of Mr. Justice Feeney delivered on 30th day of July, 2012.

1.1 The defendant is the owner of a retail garage and service station comprised in Folios KY12523 and KY13290, County Kerry which are located at Glenbeigh, County Kerry ("the Property"). The plaintiff was appointed as receiver of the defendant's property on the 12th April, 2011.

1.2 On the 26th October, 2007 the defendant entered into a mortgage debenture agreement with Ulster Bank Ireland Limited ("the Bank") in respect of the Property. Clause 2 of that agreement provided that there was security to Ulster Bank Ireland Ltd. for "all present and/future indebtedness of the mortgagor to the Bank". The mortgage was made as a continuing security for all the defendant's present or future indebtedness to the Bank.

1.3 Pursuant to a facility letter issued by the Bank to the defendant on the 9th December, 2010, the defendant was granted two overdraft facilities, both in the sum of €20,000. In addition, there was a facility for a demand loan in the amount of €230,958, a committed loan for €1,484,994 and three bond facilities in the sum of €1,500, €11,200 and €1,500 respectively. The Bank issued a demand letter to the defendant dated the 11th April, 2011 seeking immediate repayment of the sum of €1,833,671.67 together with interest in the sum of €9,000 and €25,000.17. No payment was received from the defendant on foot of the letter of demand and on the following day, the 12th April, 2011, the plaintiff was appointed receiver of the Property.

1.4 The deed of appointment of the 12th April, 2011 appointed the plaintiff as receiver and manager of all the property described in the schedule to that deed and provided for the plaintiff to enter upon, take possession and manage the Property. The schedule to the deed identified the Property as "part of the property comprised in Folios KY 12523 and KY 13290 the subject matter of land registry dealing D2009LR109560E.

The Bank's charge was not registered at the date of the appointment of the receiver nor on the date when the proceedings commenced but on both of those dates registration was pending. Application for registration of the charge over the mortgaged property was made on the 15th June, 2009 and was completed in August 2011.

1.5 On the day of his appointment, on the 12th April, 2011, the plaintiff attended at the Property and attempted to take possession but was refused by the defendant. The plaintiff was appointed by deed of appointment executed on the 12th April, 2011 and notice of acceptance of appointment was duly executed by the receiver (the plaintiff) on the same date. After the defendant refused to hand over possession, the plaintiffs solicitors wrote to the defendant's solicitors on 12th April, 2011 and the solicitor for the defendant responded on the following day, the 13th April, 2011, disputing the Bank's entitlement to possession of the Property.

1.6 On the 15th April, 2011, the plaintiff issued the plenary summons and applied *ex parte* on that date and obtained an interim order for possession of the Property.

The plaintiff's application for an interlocutory order for possession of the Property came before the Court on the 20th April, 2011 and was adjourned to the 29th April, 2011. On that date, following a hearing, the Court made an interlocutory order granting possession of the Property to the plaintiff, the plaintiff having given an undertaking as to damages and the proceedings were adjourned for full hearing.

2.1 The plaintiff seeks an order compelling the defendant to deliver up possession of the Property together with declaratory relief. The defendant claims that the Bank had no power to appoint a receiver and that the plaintiff has no right to enter on to his properties and that not having such a right the plaintiff should not have been granted either an interim or an interlocutory order. In his defence and counterclaim the defendant contends that the charge upon which the plaintiff seeks to rely has not been registered and does not affect the Property as described by the plaintiff in his claim. The defendant pleads, at paragraph 22 of the defence and counterclaim, that it is denied that pursuant to s. 19(1)(ii) of the Conveyancing and Law of Property Act 1881, that Ulster Bank became entitled to appoint a receiver to the property of the defendant as alleged or at all. It was further pleaded that the plaintiff at no material time had a right to enter the defendant's premises since the Bank's power of sale was not exercisable as the mortgage document had not been registered. The defendant counterclaims seeking damages for trespass, breach of contract or alternatively on foot of the undertaking by the plaintiff as to damages. In the reply and defence to counterclaim the plaintiff admits that the charge upon which the plaintiff seeks to rely had not been registered, as of the date of the Reply and Counterclaim, and that the plaintiff denies that the said charge does not affect the Property in circumstances where an application to register has been lodged since the 15th June, 2009 and registration remains pending since that date. The plaintiff seeks a declaration that pursuant to the provisions of the Interpretation Act 2005 and, in particular, s. 27(1)(c) thereof that the right of Ulster Bank Ireland Limited to appoint a receiver to the premises pursuant to the provisions of the Conveyancing and Law of Property Act 1881 has not been affected by the enactment of the Land and Conveyancing Law Reform Act 2009.

2.2 There is a legal issue between the parties as to the effect that the enactment of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009) has, if any, on the right of the Bank to appoint a receiver to the premises pursuant to the Conveyancing and Law of Property Act 1881 (the Act of 1881).

2.3 A separate issue which is in issue between the parties relates to the defendant's plea in paragraph 21 of his defence where it is pleaded that the letter of demand was an immediate demand for payment which was unreasonable and inequitable in all the circumstances and in breach of an implied term of the contract between the parties. The plaintiff denies that its immediate demand for repayment was unreasonable or inequitable or in breach of the alleged or any implied term of contract between the defendant and the Bank.

3.1 The first issue which the Court has to consider is the validity of the appointment of the receiver. The defendant claims that the Bank had no power to appoint a receiver.

3.2 All parties agree that the defendant and the Bank entered into a mortgage agreement in respect of the property by a deed executed on the 26th October, 2007. That mortgage was executed on foot of advances made by the Bank to the defendant.

3.3 The relevant statutory provision which was in force at the time of the execution of the mortgage deed on the 26th October, 2007 was the Act of 1881.

4.1 Section 19(1) of the Act of 1881 provides:

> "19(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely)- ...
>
> > (iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof;."

Section 8(3) of the Act of 2009 and Schedule II thereof repealed the provisions of the Conveyancing Acts 1881/1911 in respect of mortgages. The Act of 2009 was commenced by Statutory Instrument No. 356/2009 on the 1st December, 2009. The power of appointment of a receiver by a mortgagee is dealt with by s. 108 of the Act of 2009 which provides for the appointment of a receiver following specified events of default and provides, *inter alia,* that a mortgagee may appoint, by writing, a receiver over the income or the property. Chapter III of the Act of 2009 deals with the obligations, powers and rights of a mortgagee and s. 96 identifies the powers and rights generally and the following section, s. 97, deals with the taking of possession. The mortgage the subject matter of these proceedings predates the Act of 2009 and it follows that s. 109 of that Act has no application.

4.2 It is claimed by the defendant that the repeal of the Act of 1881 and, in particular, ss. 19 and 24 of that Act results in a situation where the mortgagee in this case no longer has a statutory power to appoint a receiver to the Property. It is further contended that as a result of that situation that a lacuna exists following the coming into effect of the Act of 2009 whereby the implicit statutory terms implied into every mortgage created from the commencement of the Act of 1881 up until the commencement of the Act of 2009 no longer apply with the consequence that a mortgagee's power of appointment of a receiver for all such mortgages has been lost.

4.3 In response to the defendant's claim that the mortgagee has no power to appoint a receiver, the plaintiff relies firstly on the provisions of the Interpretation Act 2005 (the Act of 2005) and, in particular, s. 27(1)(c). Secondly, based upon such reliance the plaintiff contends that the rights acquired by the mortgagee under the Act of 1881 continue to apply based upon a claim that the provisions of s. 19 of the Act of 1881 were incorporated as a term of mortgage at the date of the creation of the mortgage, that is, on the 26th October, 2007, and cannot be removed thereafter by operation of a subsequent statute.

4.4 A key issue in contention between the parties in this case concerns the Bank's power to appoint the plaintiff as its receiver. An examination of the terms of the mortgage establishes that there is no express power to so appoint in the mortgage instrument and in those circumstances the plaintiff relies on a claim that the rights acquired by the mortgagee under the Act of 1881 apply and continue to apply. The Bank and the plaintiff seek to rely on a claimed statutory power under s. 19 of the Act of 1881 and the defendant contends that that section has been repealed by s. 8(3) of the Act of 2009 as and from the 1st December, 2009. The area of dispute between the parties therefore centres on the plaintiffs contention that the Bank's power to appoint a receiver was unaffected by the repeal contained in the Act of 2009 because it had an acquired or accrued right to make the appointment. The plaintiff submitted that the rights that a mortgagee possessed under the Act of 1881 at the time of the creation of the mortgage were in fact accrued, or, perhaps more particularly, acquired rights and that those rights were implied into the deed of mortgage at the time of its creation. Section 19(1) of the Act of 1881 providing:

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

The plaintiff argues that the rights so identified are different in type and order from the mere hope or expectation that rights might be conferred at some later stage and they were incorporated at the time that the mortgage was completed as if they were terms of the deed itself. Whilst the plaintiff accepts that the powers implied by the Act of 1881 do not become exercisable until default by the mortgagor, that power arises automatically once there has been default by the mortgagor and the mortgagee does not require to take any further steps to prove his entitlement.

5.1 This Court has delivered two recent judgments concerning the law in relation to repossession and the appointment of a receiver. The first of those cases was *Start Mortgages v. Gunn and Ors.* [2011] IEHC 275 and the later case was *Kavanagh and Anor. v. Lynch and Anor*. (Unreported judgment of Ms. Justice Laffoy delivered on the 31st August, 2011).

5.2 The *Start Mortgages* decision dealt with a common issue which had arisen in a number of related cases concerning the consequences of the repeal of s. 62(7) of the Registration of Title Act 1964 (the Act of 1964) by s. 8 of the Act of 2009. The judgment delivered by Dunne J. in the *Start Mortgage* case covered not only that case but also the related cases.

5.3 Section 62 of the Act of 1964 deals with the creation and effect of charge on registered land and provides at s. 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."

Section 27 of the Act 2005 provides at subss. (1)(c) and (e):

"(1) Where an enactment is repealed, the repeal does not ...

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment, ...

(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention."

Section 27(2) of the Act of2005 provides that:

"(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

5.4 In all of the cases under consideration in the *Start Mortgages* decision, the facts were in each instance similar in that the plaintiffs held security in the form of mortgages over properties owned by the defendants. The mortgages in issue provided for the agreement of the borrowers to make payment and that in the event that monies were unpaid, that unpaid monies were due and payable on demand in the event of default. The cases under consideration covered mortgages which had been created between the years 2006 and 2008. The mortgages provided that the lenders could enter into possession of the property and that they had the statutory powers conferred on lenders by the Conveyancing Acts. The mortgagee's powers could not be exercised until a default had occurred. In those cases it was accepted by the parties to the litigation that until a charge was registered, a lender posses no interest in the property nor was there any dispute that if it transpired that the various plaintiffs could not rely on s. 62(7) of the Act of 1964, that there was in those circumstances no basis for an order for possession. The matter in issue before the Court centred on whether any reliance could be placed on s. 62(7) by the plaintiffs in the various actions.

5.5 In the *Start Mortgage* decision, in addressing the issue as to whether the Court could place any reliance on s. 62(7) of the 1964 Act, Dunne J. considered the meaning of the word "right" and the issue of the right to apply for possession together with the meanings of "accrued" and "acquired". In the case before Dunne J., the plaintiffs contended that when considering the provisions of s. 27(1)(c) and (e), the word "right" was to be interpreted on the basis that it was the right to apply for possession pursuant to s. 62(7) of the Act of 1964. On page 16 of her judgment, Dunne J. stated:

"I was referred in the course of the submissions to a number of judgments which refer to the exercise of the court's power to make orders under s. 62(7) or its equivalent. The first of the cases referred to was the decision in *Birmingham Citizens Permanent Building Society v. Caunt* [1962] 1 Ch. 883. Russell J. in that case considered at p. 912 the nature of the court's jurisdiction to decline to make an order for possession in the following terms:-

'Accordingly, in my judgment where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend and so forth'."

5.6 *Bank of Ireland v. Smyth* [1993] 2 I.R. 102, was also considered by Dunne J. in the *Start Mortgages* decision at p. 18, and in the *Bank of Ireland* case, Geoghegan J. dealt with the suggestion that s. 62(7) gives the Court discretion to refuse an application for possession and stated (at p. 111) of his judgment:

"The words 'may, if it so thinks proper' ins. 62(7) mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession."

Having considered the authorities, Dunne J. held (at p. 19):

"It is clear from the authorities referred to above that s. 62(7) conferred on a registered owner of a charge the right to obtain an order for possession for the purposes of a sale out of court. It can clearly be seen from the decision in the *Smyth* case, the decisions in the *Birmingham Citizens Permanent Building Society v. Caunt and Anglo Irish Bank v. Fanning* that the scope of the discretion conferred on the court is very limited. In practical terms if the principal sum due on foot of the charge has become payable the registered owner of the charge is entitled to an order for possession. That is not to say that the borrower is not entitled to an adjournment of proceedings to pay off the mortgage in full or alternatively to come to an arrangement with the lender as to the repayment of the mortgage. However, if the proofs of a plaintiff are in order and there is no other bar to an order being made, then it seems, the court has no discretion but to make the order."

It was on that basis that counsel for the plaintiff in *Start Mortgages* argued that there was a right to apply for an order for possession when repayment of the principal monies secured by the instrument of charge had become due. The defendant's counsel contended that s. 62(7) did not provide a right per se because the granting of such an order was merely discretionary. Dunne J. went on to consider the findings in *Director of Public Works v. Ho Po Sang* [1961] AC 901 and in *Chief Adjudication Officer v. Maguire* [1999] 1 WLR 1778 and the statement in Bennion on *Statutory Interpretations* (5th Ed.) at page 309 and held (at p. 22):

"It seems to me to be clear from the authorities referred to above that if the right at issue has, to use the words referred to in Bennion, become vested by the date of repeal, then the right is one that can be enforced not withstanding the repeal of the particular statutory provision. That being so, it is necessary to look again at the wording of section 62(7) ...."

Dunne J. held that accordingly the right to apply for an order for possession of the lands is saved by s. 27 notwithstanding the repeal of s. 62(7), as it is a right which confers an entitlement and not merely an exception. Having so held, the Judge then addressed the question as to whether the right was acquired or accrued. On that issue, in the case of *Director of Public Works v. Ho Po Sang*, it was held by Simon Brown L.J. (at p. 1788]:

"... that whether or not there is an acquired right depends upon whether at the date of the repeal the claimant had an

> entitlement (at least contingent) to money or other certain benefit receivable by him provided only that he takes all appropriate steps by way of notices and/or claims thereafter."

Dunne J. also considered the case of *O'Sullivan v. Superintendent in Charge of Togher Garda Station* [2008] 4 I.R. 212 in relation to the issue as to when rights are acquired. That case concerned the amendment of s. 29 of the Road Traffic Act 1961 by s. 7 of the Road Traffic Act 2006. Section 7 of the Act of 2006 changed the basis upon which a person in respect of whom a consequential disqualification order of not less than two years had been made on conviction for a road traffic offence was entitled to apply for its removal. Under the old provisions of the Act of 1961, an application to restore the driving licence could be made after nine months. Following the repeal, it was not possible in the case of a person disqualified for a period of more than two years to apply for the restoration of the licence before the completion of one half of the period specified, *i.e*. twelve months. In the *O'Sullivan* case the Court considered the words "acquired" and "accrued" and identified that at pages 222 and 223 of the *O'Sullivan* case the judgment had stated:

> "I am of the view that the applicants acquired the right or came into possession of the right to apply for the restoration of their driving licences on their conviction and consequential disqualification. The legislature in enacting s. 27(1)(c) and also s. 27(2), clearly saw a distinction between a right acquired and a right accrued. I accept the argument of the applicants that the right to apply arose following conviction and that the right then accrued after the lapse of nine months."

The plaintiffs in the *Start Mortgages* case argued that the right was accrued and acquired at the date of registration of the charges and Dunne J. opined that that issue lay in the future. She identified the issue as to whether the lender had a right to apply for possession on the date of repeal and Dunne J. agreed that the right to apply for an order accrued only when the monies were due and until such time as demand for repayment was made. She concluded (at p. 26):

> "... having regard to the provisions of s. 62(7) that repayment of the principal monies secured did not become due until such time as demand for repayment of same was made. I agree with her submissions."

It followed that Dunne J. held that where monies secured by charge became due and demand had been made prior to the 1st December, 2009, the proceedings were not barred, notwithstanding the repeal of s. 62(7). In those circumstances the rights of the lender to apply for an order of possession were saved and proceedings could be continued or instituted, provided that the monies had become due and demand had been made before the date of repeal. If demand was made after the 1st December, 2009, the lender could not have acquired or accrued a right to apply for an order of possession.

5.7 The effect of the *Start Mortgages* decision is that there is a lacuna in the law following the repeal of s. 62(7). The consequences of the repeal, as identified in the *Start Mortgages* decision, was that those lenders who did not have an entitlement to apply for an order pursuant to s. 62(7) by the 1st December, 2009 could not after the repeal apply for an order pursuant to s. 62(7). It was also the case that the provisions in the 2009 Act which replaced s. 62(7) applied only to mortgages registered as and from the 1st December, 2009. That situation gave rise to a situation which Dunne J. described (at p. 30) in her judgment in the following terms:

> "It (the repeal of s. 62(7)) only applies therefore to mortgages created by deed after the 1st December, 2009. It appears that there is a lacuna created by the repeal of s. 62(7) in that, as I have found, those lenders who did not have an entitlement to apply for an order pursuant to s. 62(7) by the 1st December, 2009, are not in a position of avail of the provisions of the 2009 Act to apply for an order of possession as their right to apply for such an order is not saved by the provisions of the 2005 Act. It is not for the court to supply that which is not contained in the 2009 Act."

5.8 The judgment in the *Start Mortgages* case was expressly limited to the particular facts of that case. As Dunne J. (at p. 30) of her judgment:

> "I reiterate the fact that this judgment is not intended to deal with any issue other than the right of the lender to apply for an order pursuant to s. 62(7) of the 1964 Act notwithstanding its repeal by s. 8 of the 2009 Act. Any other issues that may arise by way of defence can be dealt with in due course."

5.9 The implications of the *Start Mortgages* decision were considered by Laffoy J. in *Kavanagh & Anor. v. Jeremiah Lynch & Anor.* (Unreported, judgment of Ms. Justice Laffoy of 31st August, 2011). In that case the Court held that where a mortgagee's statutory rights, powers and remedies, such as the right to appoint a receiver, pursuant to the Act of 1881 had been contractually incorporated into a mortgage granted prior to the 1st December, 2009, then such rights, powers and remedies are enforceable by the mortgagee notwithstanding the repeal of the relevant sections of the Act of 1881 by the Act of 2009. In the *Kavanagh* case it was argued by the defendants that by extension of the ruling in the *Start Mortgages* case any appointment of a receiver which was reliant in any way upon the terms of the Act of 1881 was ineffective. Having considered the authorities, including the *Start Mortgages* case, the Court held that receivers were validly appointed in the cases before the Court in that the relevant mortgages contained express provisions to the effect that the mortgagees had the relevant rights, even though those rights were incorporated by reference to the Act of 1881. Laffoy J. held (at p. 10 and p. 11) as follows:

> "3.5 On the basis of the provisions of the 2007 Mortgage and the Mortgage Conditions to which I have referred and the contents and provisions of the documents exhibited by Mr. Lowe, I am satisfied that on the 13th May, 2010 the power of Permanent to appoint a receiver was exercisable and, further, that it was properly exercised by the deed of appointment of that date. By the combined operation of the 2007 Mortgage and the Mortgage Conditions, certain rights, remedies and powers were given to Permanent, in some instances by reference to the Act of 1881. At the time the 2007 Mortgage and those rights, remedies and powers were created, the Act of 1881 was in force. In properly construing the extent of the mortgagee's rights, remedies and powers, one must read into the 2007 Mortgage and the Mortgage Conditions, where appropriate, the relevant provisions of the Act of 1881 where they have been incorporated therein, subject to any variations which are expressly provided for. The fact that since the commencement of the Act of 2009, on the 1st December, 2009, ss. 15 to 24 of the Act of 1881 have been repealed cannot vary the proper construction of the 2007 Mortgage or impact on the contractual relationship of the mortgagors and Permanent, as mortgagee, thereby created. The rights, remedies and powers conferred on Permanent *ab initio* in the 2007 Mortgage still apply.
>
> 3.6 Accordingly, in my view, the considerations which arose in *Start Mortgages Limited v. Gunn and Others* [2011] I.E.H.C. 275 in consequence of the repeal of s. 62(7) of the Registration of Title Act 1964 (the Act of 1964) by s. 8 of the Act of 2009 do not arise in relation to the power of Permanent to appoint Mr. Lowe as receiver or the nature of the powers conferred on Mr. Lowe as such receiver, insofar as they are conferred by reference to the provisions of the Act of 1881."

The Court read into the mortgages being considered in the Kavanagh case the relevant provisions of the Act of 1881 subject to any variations expressly provided for. The Court also held that the repeal of the relevant statutory provisions did not alter that construction of the mortgages or the contractual entitlements thereby created as they existed at the time of the repeal. Laffoy J. concluded (at p. 20 and p. 21) in her judgment as follows:

> "7.4 On this application, the defendants have raised issues about the title of the plaintiffs as receivers and their powers, which I have addressed earlier, by reference to the provisions of the 2005 Mortgage and the 2007 Mortgage, and they have done so in reliance on the fact that the provisions of the Act of 1881, by reference to which powers were conferred on the mortgagees and receivers appointed by them, have been repealed. On this point, it seems to me that there is a clear distinction between the impact of the repeal of s. 62(7) of the Act of 1964, which provided a statutory remedy to the owner of registered land to apply to court in a summary matter for possession of the land when repayment of the money secured by the charge had become due, as found by Dunne J. in *Start Mortgages Limited & Ors v. Gunn & Ors*, and the impact, if any, of the repeal of the Act of 1881 on the drafting device universally availed of by draftsmen of security documents of conferring powers on mortgagees by incorporating statutory provisions in force at the time of creation of the security, with or without variation. As I have found, in the latter situation, the ascertainment of the rights and liabilities of the parties to the security document is a matter of construction of the document and the repeal of the statutory provisions does not have the impact advocated by counsel for the defendants. Nonetheless, the issue may be the subject of further debate at the trial of the action. However, at this juncture, on the basis that all of the immovable property the subject of this application was mortgaged by the 2005 Mortgage or the 2007 Mortgage and that both Mr. Kavanagh and Mr. Lowe have been validly appointed as receivers with power to take possession of the respective parts of that property over which each has been appointed a receiver, I am satisfied that the title of each of the plaintiffs to possession cannot be in issue."

This Court will follow the approach identified by Laffoy J. and, on the facts of this case, is satisfied that there is also a clear distinction between the impact of the repeal of s. 62(7) of the Act of 1964, which was being considered by Dunne J. in *Start Mortgages*, namely, the entitlement to apply for summary relief and this case where the entitlement to appoint a receiver had been in place by reference to the Act of 1881 at the date of the repeal.

6.1 The decision in the *Start Mortgages* case dealt only with the issue of the entitlement to apply to court for an order for possession on a summary basis. In this case what is in issue is the right to appoint a receiver. The Court is satisfied that the right to appoint a receiver is of a different nature or order to the right to apply to the Court for an order for possession on a summary basis. The right to appoint a receiver is different in character. A consideration of what is involved leads to the conclusion that a lender who loses the right to apply for possession of mortgaged property on a summary basis still retains the right to apply on a plenary basis. Therefore, what is in issue is the loss of a procedural facility and there is no loss of a substantive right. In contrast, the loss of the right to appoint a receiver would result in the loss of a substantive right. It is also the case that the right to appoint a receiver and in what circumstances was fully in place at the date of repeal. The nature of the distinction between the effect of a change to a right of a procedural nature as opposed to a right of a substantive nature was considered in *Wilson v. First County Trust Ltd. (No. 2)* [2004] 1 AC 816 at p. 881. Lord Rodger stated in relation to the issue of statutes altering matters of pure procedure as follows:

> "199 So far I have been dealing with changes in substantive law. As can be seen from the statement of Wright J in *In re Athlumney* [1898] 2 QB 547, 552 which I quoted above, changes in matters of pure procedure have been treated differently. Wilde B stated the position most starkly in *Wright v Hale* (1860) 6 H & N 227, 232: 'where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act'. The justification for treating matters of pure procedure differently was stated by Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62, 69: 'No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done'."

The decision in the *Start Mortgages* cases relates to the loss of a procedural facility and to extend its scope beyond procedural facilities to substantive rights would be to disregard the established rights of mortgagees as recognised in legislation for over one hundred years. The judgment in *Start Mortgages* was expressly limited to issue before the Court and did not deal with any other issue. The provisions of the Act of 1881 and the implied power of the appointment of a receiver by a mortgagee are well established. The re-enactment of the 1881 provisions in the Act of 2009 in a substantially similar form by way of s. 108 of that Act leads to the conclusion that applying the canons of statutory interpretation and, in particular, the provisions of the Act of 2005, that if the Oireachtas had intended to abolish the statutory power of the appointment of a receiver such abolition would have been expressly provided for in the legislation. Section 27(1)(c) of the Act of 2005 expressly provides that where an enactment is repealed, the repeal does not:

> "(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment."

It is a well established principle consistent with the Act of 2005 that the legislature does not intend to change the law beyond the immediate scope and object of an enactment and that the more radical a change can be said to be, the more weight is given to such presumption. See judgment of Finnegan J. in *Meagher v. Luke J. Healy Pharmacy Ltd.* [2010] IESC 40 (Unreported, Supreme Court, 16th June, 2010) where Finnegan J. adopted with approval (At p. 19) the statement of the law contained in the textbook *Statutory Interpretation*- Bennion (2nd Ed.) set forth at s. 269 which stated:

> "It is a principle of legal policy that laws should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is."

6.2 In applying the above approach to the facts of this case, the Court is satisfied that the abolition of a substantive right is not comparable with or to be compared with the abolition of a procedural right. The presumption against radical amendments applies with particular force to a purported abolition of a well established substantive right. In those circumstances when the Court comes to ascertain the intention of the Oireachtas it is satisfied that if it had been the intention of the Oireachtas to disapply the provisions of the previously existing law, in particular, the provisions of the Act of 1881 to mortgages created prior to December 2009, the Act of 2009 would have expressly so provided. In applying the provisions of s. 27 of the Act of 2005 to substantive rights as opposed to procedural rights, the Court is satisfied that the facts of this case can be distinguished from *Start Mortgages*. The provisions of s. 62(7) of the Act of 1964 are unique and provide for an additional procedural right without removing the substantive right. The Court has already indicated that if the Oireachtas had intended to make a radical change to a substantive right it would have expressly and explicitly stated such a change. It was submitted on behalf of the plaintiff in this action that if the intention of the Oireachtas had

been to disapply the provisions of the previously existing law, in particular, the provisions of the Act of 1881, to mortgages created prior to 1st December, 2009, the Act of 2009 would have expressly so provided. In this context, it is informative that when s. 111 of the Act of 2009 amends the law in relation to future advances, s.111(4)(a) expressly provides that it applies to mortgages made both before and after the commencement of Chapter 3 of the Act of 2009. It was contended that that demonstrated a clear intention on the part of the Oireachtas to disapply the previous legislation to mortgages created before 1st December, 2009. The Court adopts that argument and is satisfied that if the intention of the Oireachtas had been to disapply other aspects of the pre-existing law to mortgages created by deed prior to the commencement of the Act of 2009, it would have done so by express provision.

7.1 Applying s. 27(1)(c) of the Act of2005 to this case, the Court is satisfied that the mortgagee's statutory right to appoint a receiver was acquired under the Act of 1881 at the time of the execution of the mortgage and that therefore the operation of the relevant section in the Act of 2005 results in a situation where such acquired or accrued right cannot be abrogated by the operation of a subsequent statute which purports to abolish such a right. Section 19(1) of the Act of 1881 provided:

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

The facts in this case demonstrate that the right to appoint a receiver was conferred immediately upon the creation of the mortgage. Even though as of that date the mortgagee could not exercise that right but could only do so when the mortgage monies became due, the entitlement to do so and the circumstances which would permit the exercise of the entitlement were identified and required no further agreement. The Court is satisfied that a correct analysis of the contractual agreement between the parties and the application of the then relevant legislative provisions as contained in the Act of 1881 to the agreement results in the situation that the power to appoint a receiver was acquired at the time of the creation of the mortgage even though the power did not actually accrue or become capable of exercise until mortgage monies had fallen due. The restriction on the appointment of a receiver until after the mortgage monies had become due can be correctly categorised as a procedural restriction which is placed on the exercise of the power rather than a substantive restriction placed upon the acquisition of the power. Section 24 of the Act of 1881 specifically commences with the words "A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act ...." There is no doubt but that the right sought to be relied upon by the plaintiff in this case must have been acquired or accrued, as provided for in the words of s. 27(1)(c) of the Act of2005 and not merely capable of being acquired or accrued to benefit from that provision. The provisions within s. 27 of the Act of 2005 are similar to those contained in the English Interpretation Act 1978. Those provisions have been the subject of review by the English courts in a number of cases which have addressed the issue as to when a right is to be deemed to be acquired or accrued and thus saved by the equivalent English provision to that contained in the Act of 2005.

8.1 In the case of *Chief Adjudication Officer & Anor. v. Maguire* [1999] 2 All ER 859, the Court of Appeal considered the issue of whether for the purposes of s. 16 of the English Act of 1978, a right could be acquired under enactment before its repeal even though that right was contingent upon an event which occurred only after the repeal. In a paragraph in the judgment headed "Conclusion", Simon Brown L.J. in giving judgment held (at p. 868):

> "I greatly prefer Mr. Howell's argument. Indeed I think that much of Mr. Drabble's argument proceeds on a fundamentally false premise. The court is not, in my judgment, engaged on a two stage inquiry, first deciding whether there is a right and then deciding whether it is an 'acquired' or 'accrued' right. (Incidentally, despite what Lord Hunter said in *Moray CC*, and perhaps what Atkin LJ hinted at in *Hamilton Gell v White*, I for my part see no distinction in this context between 'acquired' and 'accrued'. I would note, indeed, that certain of the saving legislation refers to only one of these words- the Ceylon Ordinance in the *Free Lanka* case to 'any right acquired'; the relevant provision in *Abbott's* case to 'all rights accrued'.) Rather the court is concerned with a single question: has the claimant established that at the time of repeal he had a right? True, as Lord Evershed observed in the *Free Lanka* case: 'The distinction between what is and what is not "a right" must often be one of great fineness.' But there are now to be found in the authorities helpful touchstones by which to reach the correct answer. A mere hope or expectation of acquiring a right is insufficient. An entitlement, however, even if inchoate or contingent, suffices. The fact that further steps may still be necessary to provide that the entitlement existed before repeal, or to prove its true extent, does not preclude it being regarded as a right."

This Court adopts the approach identified in the judgment of Simon Brown LJ. It is then necessary to apply that statement of the law to the facts of this case and to consider the single question; has the plaintiff in this case established that at the time of repeal he had a right? In addressing that question, the Court proceeds on the basis that a mere hope or expectation of acquiring a right is insufficient but that an entitlement, however, even if inchoate or contingent suffices. The plaintiff in this case had the rights that a mortgagee possessed under the 1881 Act at the time that the mortgage was created and those rights were acquired rights. Those rights were expressly implied into the deed of mortgage at the time of its creation given that s. 19(1) provided:

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

The rights identified therein are not rights which could be categorised as falling within the hope or expectation category or rights that might be conferred at some future date but were rights which were incorporated as if they were terms of the deed itself. The facts of this case establish that the powers which were incorporated by reference to the Act of 1881 did not become exercisable until default by the defendant. However, the power to exercise such right arises automatically on default and is not a mere hope or expectation and can be correctly identified as a contingent right as of the date upon which the parties entered into the mortgage. The right to appoint a receiver was inchoate as of the date upon which the mortgage was agreed but applying the statement of the law from Simon Brown LJ, set out above, such right was nevertheless a real and acquired right and not a right based upon hope or expectation. The right to appoint was present as and from the date when the mortgage was completed and was not dependent upon any further action being taken or any future agreement.

8.2 Applying the approach identified by Dunne J. in the *O'Sullivan v. Superintendent in Charge of Togher Garda Station* case, and, in particular, the statement of the law contained at p. 222 of that judgment, to the facts of this case, those facts demonstrate that the mortgagee acquired the right to appoint a receiver upon the creation of the deed of mortgage whilst the Act of 1881 was still in force and even though that right did not accrue until an act of default occurred by the defendant which occurred subsequent to the repeal of the Act of 1881 provisions in the Act of 2009 based upon the ratio of Dunne J. in the *O'Sullivan* case, leads to the conclusion that the right of the mortgagee to appoint a receiver survived the Act of 2009 by virtue of the provisions of s. 27(1)(c) of the Act of 2005.

9.1 During the course of argument before the Court a distinction was sought to be drawn between the words "acquired" and "accrued". Various authorities were referred to which indicated disagreement in various decisions of the English courts as to whether

or not there was a distinction between the words "acquired" and "accrued". However, in the light of the determination which this Court has made that the plaintiff had the right to appoint a receiver as of the date of the creation of the mortgage deed even though that right did not accrue until mortgage monies became due, it follows that given the wording of s. 27(1)(c) of the Act of 2005 which provides that a right that is either acquired or accrued is saved by the provisions of that section, this matter does not fall to be considered in this case. The plaintiff had acquired a right as of the date of the creation of the mortgage and that acquired right is saved by the provisions of s. 27(1)(c) of the Act of 2005 and can be relied upon by the plaintiff in this case. The Court is satisfied that the provisions of the Act of 2005 apply and accordingly the rights acquired by the mortgagee under the Act of 1881 continue to apply and that since the provisions of s. 19 of the Act of 1881 were incorporated as a term of the mortgage as of the date of the creation of the mortgage, that term cannot be removed by the operation of a subsequent statute. The plaintiff as mortgagee had a statutory right to appoint a receiver and the receiver had statutory powers under the statutory provision.

10.1 The defendants contended that the bank's deed of mortgage/charge was not registered and since it was not registered that the charge did not operate as a mortgage by deed and since the charge was not a mortgage by deed, the bank had no power of sale nor had it a power to appoint a receiver. It was therefore claimed that as a result of the non-registration that the bank had no right to summary possession of the premises. The facts are that an application for registration of the charge over the mortgaged property was made on the 15th June, 2009 and that charge was ultimately registered in August 2011. Since the charge is now registered, the issue which the defendant raises in relation to non-registration is moot due to the fact that the registration of the charge, which is now complete, is deemed effective from the date of application which is the 15th June, 2009. The Court must proceed on the basis that the registration was effective from 15th June, 2009, which is prior to the appointment of a receiver.

10.2 A further issue raised by the defendant was that it was claimed that the bank acted in a precipitous manner in sending in a receiver in that it did not give the defendant sufficient time or an adequate opportunity to make a proposal or to deal with the bank and had acted in an unreasonable manner. The evidence which was before the Court both on affidavit, which was admitted in evidence, and on oral evidence, makes it clear that a receiver was only appointed by the bank after there had been extensive discussions, negotiations and meetings between the defendant and his representatives and the bank and their employees and that notwithstanding those events, no agreement could be reached between the parties. The demand on the 11th April, 2011 was not a precipitous demand as it followed upon the extensive negotiations and contacts between the parties and the fact that that demand was made immediately prior to the appointment of the receiver in no way disentitles the bank to appoint the plaintiff as a receiver. As of the date that the plaintiff was appointed receiver there was a sum of over €1,800,000 due by the defendant to the bank and this Court is satisfied that pursuant to s. 19(1)(iii) of the Act of 1881 and pursuant to the provisions of the deed of mortgage, the Ulster Bank became and was entitled to appoint a receiver to the premises following an act of default by the defendant, namely, his failure to pay the monies due and owing to the bank upon demand and when such demand had been made.

11.1 In the light of the above findings, this Court is satisfied that the plaintiff is entitled to the declarations sought at paragraph (1) of the statement of claim, that is a declaration pursuant to the provisions of the Act of 2005 and, in particular, s. 27(1)(c) thereof that the right of Ulster Bank Ireland Ltd. to appoint a receiver to the premises pursuant to the provisions of the Act of 1881 has not been affected by the enactment of the Act of 2009 and that in the light of that declaration and based upon the findings made by this Court, it follows that the plaintiff is entitled to an order compelling the defendant to deliver up possession of the property. It also follows that the defendant's counterclaim and his claim for damages for trespass, breach of contract and for damages on foot of the undertaking given by the plaintiff to this Court, should be dismissed. The Court is satisfied that there was no trespass and that there was no breach of contract and that the bank as mortgagee had a right to appoint a receiver and that the receiver was appointed after demand had been made and at a time when the defendant was in default. It is also the case that following the plaintiff’s demand to the defendant that the defendant refused to deliver up possession of his premises until ordered by the Court. The Court, therefore, will grant the plaintiff the relief sought as indicated in this paragraph and will dismiss the claims made by the defendant as contained in his counterclaim.