

THE HIGH COURT

COMMERCIAL

[2013 No. 64 S.P.]

[2013 No. 19 COM]

BETWEEN

ACC BANK

PLAINTIFF

AND

DECLAN FAGAN (A BANKRUPT) AND BERNADETTE FAGAN (A BANKRUPT)

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 23rd day of July 2013

1. ACC Bank plc ("ACC") in these proceedings seeks possession pursuant to s. 62(7) of the Registration of Title Act 1964, of the property comprised in Folio 7758 County Westmeath. Whilst that is the claim made on the special summons and is the order sought, it appears that the defendants ("Mr. and Mrs. Fagan") are only in possession of a part of the property comprised in Folio 7758 County Westmeath, which has been referred to as Temple House (their private dwelling house) and approximately 14.5 acres at Temple, Horseleap, County Westmeath.

Background

2. Mr. and Mrs. Fagan are the registered owners of the property in Folio 7758 County Westmeath. They are or were directors and shareholders of the company Temple Spa Limited ("the Company"). Folio 7758 County Westmeath records the grant of a lease for 21 years by Mr. and Mrs. Fagan to the Company over a portion of the property comprised in the folio on 12th March, 2003.

3. In 2004, ACC granted facilities to the Company to part fund the construction and fit out of a new extension to Temple House Spa. The initial facility was a 12 month bridging loan, followed by a term loan of €4,825,000 for a period of 192 months. The security required included a personal guarantee given by the Company directors, Mr. and Mrs. Fagan, supported by a first legal charge on what is referred to in the facility letter of 13th July, 2004 as "Temple House & 20 acres" and "70 acres of land at Temple, Horseleap, Co. Westmeath".

4. ACC relies upon a deed of charge dated 19th November, 2004, ("the Charge"), made between the Company, Mr. and Mrs. Fagan as guarantor and ACC. The copy of Folio 7758 produced in these proceedings records the registration on 17th May, 2006, of a "charge for present and future advances repayable with interest" and ACC is recorded as the owner of the charge. It is not in dispute that the deed of charge registered in 2006 is the Charge of 19th November, 2004.

5. In February, 2007, ACC granted an additional loan facility of €307,500 to the Company, guaranteed by Mr. and Mrs. Fagan and a home loan of €250,000 to Mr. and Mrs. Fagan. ACC contends that the security relied upon for the guarantee by Mr. and Mrs. Fagan of 23rd April, 2007, given for the loan to the Company and their personal liability for the home loan, included the existing Charge registered over their private dwelling house, Temple House and 14.5 acres in Folio 7758 County Westmeath.

6. ACC contends that the facilities were in arrears by September, 2009, and have exhibited two letters dated 16th September, 2009, to the Company specifying the amount of the arrears at that date. The letters do not, however, demand repayment. ACC in the letters indicate that they will discuss the position at the next review.

7. It is common case that no demand was made by ACC on the Company or Mr. and Mrs. Fagan for repayment of facilities prior to 1st December, 2009.

8. A letter of demand dated 28th October, 2010, was issued to the Company and a letter of demand dated 1st November, 2010, issued to Mr. and Mrs. Fagan.

9. On 16th November, 2010, ACC appointed Mr. Simon Coyle as receiver and manager over the properties comprised in the Charge, and a subsequent debenture of 20th April, 2007, stated to have been granted to ACC by the Company. It appears that the receiver went into possession of the properties then occupied by the Company which comprised the Spa and adjoining lands. He has not gone into possession of Temple House and the adjoining 14.5 acres. He did request that Mr. and Mrs. Fagan deliver up vacant possession of the private dwelling house and 14.5 acres in March, 2011. Possession was refused and at the time solicitors on behalf of the Mr. and Mrs. Fagan contended that the charge on the private dwelling house and 14.5 acres was only security for the home loan mortgage of €250,000 granted in February, 2007, in respect of which repayments were being made by Mr. and Mrs. Fagan.

10. In 2011, ACC commenced summary proceedings against Mr. and Mrs. Fagan in respect of all their liabilities to it, and on 9th May, 2011, judgment was given against Mr. and Mrs. Fagan in the sum of €5,780,460.28.

11. The amount of the judgment was not discharged and ACC issued a bankruptcy petition against Mr. and Mrs. Fagan. Orders of adjudication of bankruptcy were made by the High Court on 21st May, 2012.

12. Mr. Fagan had applied to the Property Registration Authority for cancellation of the charge registered in favour of ACC over Folio 7758 County Westmeath. That application was refused on 19th June, 2012.

13. Subsequent to judgment and prior to adjudication on the bankruptcy petition, there were significant negotiations between ACC and Mr. and Mrs. Fagan, some of which were on an open basis and have been disclosed in this application. Notwithstanding agreement was not reached.

14. The special summons seeking possession was issued on 7th February, 2013 against Mr. and Mrs. Fagan. It was also served on their daughter Ciara, who was 18 years of age, due to sit her Leaving Certificate in June, 2013 and living in the home.

15. In advance of the commencement of the present possession proceedings, the solicitors for ACC had been informed by the Official Assignee, as he had informed Mr. and Mrs. Fagan that, having taken Senior Counsel's opinion, he had determined not to challenge the security relied upon by ACC against Mr. and Mrs. Fagan. He also indicated that he would not therefore be opposing any possession proceedings to be taken by ACC for the purpose of enforcing its security. The Official Assignee is not joined in the proceeding and did not appear at the hearing before me.

Issues

16. In advance of the hearing, Mr. and Mrs. Fagan had been permitted pursuant to directions given in the Commercial list to file affidavits in response to ACC's claim for possession. In those affidavits, they seek to raise a number of defences which go to the validity of ACC's charge over the property and ACC's entitlement to an order for possession of Temple House and that part of Folio 7758 County Westmeath which they continue to occupy. At the hearing of ACC's claim for possession, Mr. and Mrs. Fagan appeared and represented themselves. The first issue which arose was their entitlement to oppose the application for possession and make submissions in relation thereto having regard to their adjudication as bankrupts and the attitude of the Official Assignee to ACC's claim

17. Having heard submissions from counsel for ACC and Mr. and Mrs. Fagan in relation to their entitlement to appear and oppose ACC's application for possession, I ruled in the course of the hearing that:

(a) Mr. and Mrs. Fagan, by reason of their adjudication as bankrupts, were not entitled to challenge the validity of the charge registered on Folio 7758 County Westmeath in favour of ACC as the ownership of the said Folio now vests in the Official Assignee; and

(b) As Mr. and Mrs. Fagan were in possession of their private dwelling house, Temple House as their family home and the adjoining 14.5 acres and the proceedings for possession are against them I would permit them to make submissions in opposition to the application for possession, but only upon the basis that ACC is the registered owner of a charge over the property in Folio 7758 County Westmeath pursuant to the Charge.

18. The reasons for which I reached that decision are the following. Upon adjudication as bankrupts all property of Mr. and Mrs. Fagan including their interests in Folio 7758 County Westmeath vested in the Official Assignee pursuant to s. 44 of the Bankruptcy Act 1988. Hence they have no standing to defend any claim in relation to property now vested in the Official Assignee. See *inter alia* *Quinn v Irish Bank Resolution Corporation limited and Ors* [2012] IEHC 261. This precludes them having any entitlement to challenge the validity of the Charge.

19. However the present claim is a claim for possession of their private dwelling house which is currently their home of and in their possession. ACC, even as registered owner of the Charge over Folio 7758 Co. Westmeath, is only entitled to an order for possession of and enter the dwelling house in accordance with law. Article 40.5 of the Constitution guarantees this position. ACC's proceedings for possession are against Mr. and Mrs. Fagan as defendants and they have been permitted to file affidavits in response. Mr. and Mrs. Fagan in their affidavits raised issues as to the present entitlement of the Bank to an order for possession pursuant to s. 62(7) of the Registration of Title Act 1964 having regard to the decisions of the High Court referred to below.

20. In such circumstances, the principles of fair administration of justice and access to the courts require that Mr. and Mrs. Fagan should be entitled to make submissions in defence of the application for possession based upon the facts set out in their affidavits limited to the issue as to whether the Bank as registered owner of the Charge is now entitled to an order for possession of Temple House and adjoining 14.5 acres pursuant to s. 62(7) of the Act of 1964.

Claim for Possession

21. ACC claims to be entitled to possession of Temple House and adjoining lands pursuant to s. 62(7) of the Registration of Title Act 1964. This provision was repealed by s. 8 and Part 5 of Schedule 2 of the Land and Conveyancing Law Reform Act 2009 ("the Act of 2009"), with effect from 1st December, 2009. Chapter 3 of Part 10 of the Act of 2009, which contains the obligations, powers and rights of a mortgagee, only applies to mortgages and charges created after the commencement of that part i.e. 1st December, 2009.

22. The difficulty presented by the repeal of s. 62(7) and inapplicability of the provisions in Chapter 3 of Part 10 of the Act of 2009 to charges created prior to 1st December, 2009, has been the subject of a number of High Court judgments. In particular, I was referred to the decisions of Dunne J. in *Start Mortgages v. Gunn* [2011] IEHC 275, Laffoy J. in *EBS v. Gillespie* [2012] IEHC 243, and in *G.E. Capital Woodchester v. Reade* [2012] IEHC 363.

23. In *EBS v. Gillespie* delivered by Laffoy J. after the decision of Dunne J. in *Start Mortgages v. Gunn*, and to which she referred, Laffoy J. analysed and set out her conclusions in relation to the position of a person now making an application for possession pursuant to s. 62(7) of the Registration of Title Act 1964, pursuant to a deed of charge created prior to 1st December, 2009. I respectfully concur with her conclusions at paras. 22 to 25 inclusive and propose applying the principles and conclusions therein to ACC's claim in these proceedings. There, she stated:

"22. The plaintiff has invoked the statutory jurisdiction conferred by s. 62(7) of the Act of 1964. That sub-section before its repeal by the Act of 2009 provided:

'When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge ... 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'.

It is instructive to consider subs. (7) in the overall context of s. 62. Sub-section (1) gave a registered owner of land power to charge the land with payment of money. Sub-section (2) stipulated that there should be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form but added -

'until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land'.

Sub-section (6) provided:

'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-sections (1), (2) and (6) were amended by the Act of 2009 but the amendments are not material for present purposes.

23. It is also instructive to refer to the observations of Geoghegan J. in *Bank of Ireland v. Smyth* [1993] 2 I.R. 102, which were obiter, as to the nature of the discretion conferred on the Court by s. 62, subs. (7). He said (at p. 111):

'The words "may, if it so thinks proper" in s. 62, sub-s. 7 mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession. This means that the court must be satisfied that the application is made bona fide with a view to realising the security.... It had been held in *Northern Banking Company Ltd. v. Devlin* [1924] 1 I.R. 90 that even though the Registration of Title Act, 1891, conferred on a registered owner of a charge the rights of a legal mortgagee under the Conveyancing Act, 1881, nevertheless a registered owner of a charge, unlike a legal mortgagee, could not obtain an order for possession for the purposes of a sale out of court, because the legal mortgagee's right to possession arose by virtue of his estate in the land at common law, and not by virtue of the Conveyancing Act, 1881. This yawning gap in the rights of a legal chargeant was heavily criticised by Glover in his *Registration of Land in Ireland*, 1933. The position was corrected by s. 13 of the Registration of Title Act, 1942, which is in identical terms to s. 62, sub-s. 7 of the Registration of Title Act, 1964. The historical background to the subsection therefore reinforces me in the interpretation which I give to it. I do not believe that the Oireachtas intended a wide discretion which could take sympathetic factors into account'.

24. The initiation of these proceedings post-dated the repeal of s. 62(7) by virtue of the Act of 2009 with effect from 1st December, 2009. The repeal of s. 62(7), as is the case in relation to the repeal of any enactment, is subject to the provisions of s. 27 of the Interpretation Act 2005 (the Act of 2005). Section 27(1) of the Act of 2005 provides that the repeal does not -

'... affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment'.

Sub-section (2) of s. 27 provides that, where an enactment is repealed, any legal proceedings, including civil proceedings, in respect of a right, privilege, obligation or liability acquired, accrued or incurred under the enactment-

'may be instituted, continued or enforced ... as if the enactment had not been repealed'.

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.

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 plaintiff's 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."

24. Applying the above principles to the claim of ACC, herein, it must establish that prior to 1st December, 2009, it was:

(a) the registered owner of the charge upon which it is relying i.e. the Charge of 19th November, 2004;

(b) that repayment of the principal monies secured by the Charge had become due and payable by that date; and

(c) that the power of sale had arisen and was exercisable by virtue of the terms of the agreement between the plaintiff

and the defendants contained in the `Charge.

25. As previously indicated in this judgment, I only permitted Mr. and Mrs. Fagan to oppose the application for possession upon the basis that ACC was the registered owner of a charge on Folio 7758 County Westmeath. I am satisfied that the charge registered on the Folio is the Charge of 19th November, 2004.

26. The resolution of the remaining two issues depends upon the terms of the Charge. The Charge is expressed to be made between the Company, identified in the Schedule as Temple Spa Ltd., and a person, whilst initially referred to as "the Guarantor Company named in the Schedule hereto" and then called "the Guarantor" is stated in the Schedule to be "Declan and Bernadette Fagan" and the Bank. In construing the Charge for the purposes of considering this application for possession, the Guarantor must mean Mr. and Mrs. Fagan.

27. As Guarantor, Mr. and Mrs. Fagan covenanted with ACC in clause (A) of the Charge that they and the Company "shall and will on demand pay to ACCBANK . . . the balance or balances of monies which on any account or accounts between the Company and ACCBANK . . . shall for the time being be due or owing by the Company and/or the Guarantor to ACCBANK . . .". It is important to note that this joint and several covenant to pay is a covenant given by the Company and Mr. and Mrs. Fagan to pay on demand.

28. The relevant charging clause made by Mr. and Mrs. Fagan as the Guarantor is that contained in clause (B)(3). That provides, insofar as relevant:

"(B) That in further pursuance of the said agreement and for the consideration of aforesaid the Guarantor

. . .

(3) As registered owner . . . HEREBY CHARGES in favour of ACCBANK (by way of charge for present and future advances) so much of the Mortgaged Premises the ownership whereof . . . is registered or is required to be registered in the Land Registry . . . with payment to ACCBANK of all monies payable by the Company by virtue of the covenants herein contained . . ."

Again it is of importance to note that the charging clause is in respect of "all monies payable by the Company by virtue of the covenants herein contained" [emphasis added]. The primary covenant given by the Company in the deed of charge is that in clause (A) jointly and severally with the Guarantor to pay on demand monies for the time being due or owing by the Company to ACC.

29. ACC, in its submission, relies, in particular on clause 6(c) of the Charge to contend that the principal monies secured by the Charge had become due and payable on or before 1st December, 2009. Insofar as relevant, clause 6(c) provides:

"6. (c) If any payment whether of interest or principal not be made on the due date.

. . .

Then and in any such case the total balance outstanding together with interest thereon on at the date of such demand or the happening of such event shall immediately become due and payable to ACCBANK."

Clause 6, in addition, contains a number of other events at sub-paragraphs (a) to (l) inclusive, including at sub-paragraph (a) the making of a demand and thereafter typical events of default. Clause 7 contained a definition of what is meant by a demand and clause 8 then provides:

"On the happening of any one of the events at Condition 6 herein the Law Agent or any Officer of ACCBANK may forthwith demand repayment of the principal and interest outstanding (whether due or not) together with interest on the amount so demanded until repayment as provided for in Condition 4. All sums so demanded shall be immediately due and payable."

30. Mr. Paul Shaw, the deponent on behalf of ACC, exhibits in his affidavit in respect of the loans by the Company from ACC, two letters dated 16th September, 2009, which record on their face that each loan was then in arrears with outstanding arrears of €623,815.51 and €317,089.66, respectively. The letters also record the number of payments in arrears at 17 and 3, respectively, and the date upon which the accounts moved into arrears as being 28th April, 2008, and 1st May, 2008, respectively. ACC has with this evidence established that the Company was in arrears with its payments prior to 1st December, 2009, and that there were payments which had not been made by their due date. It is, however, also common case that no demand for repayment was made on the Company prior to 1st December, 2009. The letters of 16th September, 2009, exhibited, merely referred the Company to the information which was stated to be the "up to date position of your loan. ACC then indicated "[w]e will discuss this position at the next review".

31. On those facts, I have concluded that the principal monies secured by the Charge had not become due and payable prior to 1st December, 2009, notwithstanding the arrears and the fact that there were payments of interest or principal which had not been made by the Company on the relevant due dates pursuant to the loan agreements. This conclusion is by reason of the express terms of the Charge. Mr. and Mrs. Fagan, in the charging clause at (B)(3), charged the property in Folio 7758, County Westmeath, with all monies payable by the Company by virtue of the covenants contained in the Charge. The principal covenant given jointly and severally by the Company and the Guarantor in the Charge is at clause (A) a covenant to pay to ACC on demand. There is no covenant in the Charge to pay on the happening of an event of default specified in Clause 6. Clause 6 (c) specifies that a payment not made on the due date is an event of default, with the consequence that the total balance outstanding then becomes due and payable immediately to ACC. That factual situation entitles ACC pursuant to clause 8 to make a demand for the total balance outstanding. Once demanded, the Company has covenanted under clause (A) to pay same. However, crucially, the Charge does not contain any covenant by the Company to pay the balance outstanding in the absence of a demand.

32. This conclusion alone is sufficient to dispose of ACC's application for possession. Nevertheless, it appears to me that I should also express my conclusion on the issue as to whether the power of sale had arisen and was exercisable by ACC prior to 1st December, 2009 as much of the submissions focused on this.

33. An express contractual power of sale is given to ACC by clause 9 of the Charge. Insofar as relevant, this provides:

"9. If and when the demand herein shall be made then ACCBANK may at any time after the said demand has been made

. . .

(d) Sell the Mortgaged Premises or any part or parts thereof either together or in parcels by Public Auction, by Tender or by Private Contract in the same manner as if the statutory power of sale had arisen and the provisions of the Conveyancing and Law of Property Act 1881 and 1911 relating to the exercise of the statutory power of sale shall apply to the power of sale hereby conferred as if such power were the statutory power but the restrictions and the exercise and the power of sale contained in Section 20 of the Conveyancing Law of Property Act 1881 shall not apply to this security . . .”

ACC does not seek to rely upon the contractual power of sale as it accepts that no demand was made prior to 1st December, 2009. However, it contends that the statutory power of sale, pursuant to s. 19 of the Conveyancing and Law of Property Act 1881, had arisen.

34. Section 19 of the 1881 Act, insofar as relevant, provides:

“19(1) A mortgagee, where the mortgage is made by deed, 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):

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby;

. . .

(2) (2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in this Act.

(3) (3.) This section applies only if and as far as contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained . . .”

35. The power of sale conferred by s. 19(1)(i) only arises “when the mortgage money has become due”. The mortgage money is the money secured on the property mortgaged or charged. For the reasons already stated, in the absence of a demand the payments secured on the charged property had not become due.

36. In addition to the forgoing conclusion, s. 19 of the 1881 Act, pursuant to s. 19(3) only applies “if and as far as a contrary intention is not expressed in the mortgage deed”. In my judgment, the Charge at clause 9 does express a contrary intention insofar as it contains the circumstances in which the parties had agreed a power of sale would arise and does not express the power of sale in clause 9(d) to be in addition to the powers conferred on ACC by s. 19 of the Act of 1881. Rather, it provides that it may sell, in the circumstances set out, “as if the statutory power of sale had arisen”.

37. Accordingly, I have concluded that ACC is not now entitled to an order for possession of Temple House and the adjoining 14.5 acres being a part of the property comprised in Folio 7758 County Westmeath pursuant to s. 62(7) of the Registration of Title Act 1964 (now repealed).

Code of Conduct and Mortgage Arrears

38. By reason of the conclusion reached above, it is not necessary for me to consider the submissions made by Mr. and Mrs. Fagan to the effect that ACC was in breach of its obligations under the Central Bank’s code of conduct in relation to mortgage arrears such that it was precluded from obtaining an order for possession in the present proceedings.

Addendum

It is important to emphasise that the conclusion reached in this judgment is by reason of the repeal of s. 62(7) of the Registration of Title Act 1964 by s. 8 and Part 5 of Schedule 2 of the Land and Conveyancing Law Reform Act 2009 (“the Act of 2009”), with effect from 1st December, 2009 and the application of s. 27 of the Interpretation Act 2005 (the Act of 2005) in accordance with the judgments cited. It does not affect the position of ACC as the registered owner of the charge on Folio 7758 Co. Westmeath pursuant to the Charge of 19th November 2004. I have noted since the preparation of this judgment of the passing by both houses of the Oireachtas on 18th July of the Land and Conveyancing Law Reform Bill 2013.