THE HIGH COURT

2009 1397 SP

BETWEEN

START MORTGAGES LIMITED

PLAINTIFF

AND

ROBERT GUNN AND MAURA GUNN

DEFENDANTS

AND

THE HIGH COURT

2010 695 SP

BETWEEN

SECURED PROPERTY LOANS LIMITED

PLAINTIFF

AND

TOM CLAIR AND MARY CLAIR

DEFENDANTS

AND

THE HIGH COURT

2010 605 SP

BETWEEN

G.E. CAPITAL WOODCHESTER HOMELOANS LIMITED

PLAINTIFF

AND

COLM MULKERRINS

DEFENDANT

AND

THE HIGH COURT

2010 340 SP

BETWEEN

G.E. CAPITAL WOODCHESTER HOMELOANS LIMITED

PLAINTIFF

AND

MICHAEL GROGAN AND SINEAD GROGAN

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered the 25th day of July 2011

An issue has arisen in a number of cases in which it is sought to recover possession of registered land pursuant to the provisions of s. 62(7) of the Registration of Title Act 1964. The issue arising for consideration in these cases relates to the consequences of the repeal of s. 62(7) of the Registration of Title Act 1964 ("s. 62(7)") by virtue of the provisions of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). Three cases were listed for hearing on this issue on the 22nd June, 2011 and as the issue raised in each case is the same, albeit that there are some differences in the facts and circumstances of each case, it was convenient to hear the cases at the same time and it is likewise convenient to deliver one judgment in respect of the three cases. A further case was listed for mention on that date but it was not possible to hear at that stage and that case which raised the same issue was subsequently heard on the 14th July, 2011. Insofar as that case refers to the same issue in respect of s. 62(7) it is likewise convenient to deal with that case in the course of this judgment.

I propose in the course this judgment to refer in each case to the security held by the plaintiffs as "the mortgage" or the "the charge". Different terms are described in the various cases for the security document but for ease of reference, I will use those terms interchangeably.

I now propose to set out specific details in respect of each case.

1. Start Mortgages Limited v. Robert Gunn and Maura Gunn
The mortgage in this case was entered into on the 21st September, 2007. The property concerned is the family home of the defendants. The loan sought by the defendants was €210,000 and a loan in the amount of €209,264 was offered. This was accepted by the defendants on the 21st September, 2007. The loan was advanced on the 28th September, 2007. The charge created by the mortgage was registered in the Land Registry on the 20th May, 2008. The defendants have been in default of payments on foot of the mortgage since July 2008. By letter dated the 14th September, 2009, possession was demanded of the property and demand was made of the sums due on foot of the mortgage.

2. Secured Property Loans Limited v. Tom Clair and Mary Clair
The mortgage in this case was entered into on the 16th October, 2008. The property concerned is not the family home of the defendants. The loan in this case was offered in the sum of €100,000 for a term of one year, the terms of which included certain charges so that the actual amount advanced was €93,000. The charge was registered in the Land Registry on the 28th October, 2008. The defendants defaulted in making payments in accordance with the terms of the commitment letter and mortgage. Demand for vacant possession and payment of the amount due was made on the 13th July, 2010. (A number of other issues were raised by way of defence in these proceedings but for the purpose of this judgment I am solely considering the effect of the repeal of section 62(7).)

3. G.E. Capital Woodchester Homeloans Limited v. Colm Mulkerrins
The mortgage in this case was entered into on the 27th March, 2008. The property concerned is not a family home. The loan was for a total sum of €320,000 of which €295,000 was advanced on the 27th March, 2008. A further sum of €25,000 agreed to be provided by way of loan was not drawn down. The charge was registered in the Land Registry on the 29th September, 2008. The account went into default almost immediately and demand was made by letter on the 16th March, 2009, for vacant possession and payment of the arrears. There were further demands made on the 9th April, 2009 and the 5th July, 2010.

4. G.E. Capital Woodchester Homeloans Limited v. Michael Grogan and Sinead Grogan
As mentioned previously the submissions in this case were made on a later date. The mortgage in this case was entered into on the 20th December, 2006. The sum advanced was €399,500. The charge was registered on the 21st December, 2006. The account went into default in November 2008 and demand for payment and vacant possession was made by letter dated the 19th January, 2010. The property is the family home of the defendants.

The Law
I first want to refer to the provisions of s. 62 of the Registration of Title Act 1964, which are to the following effect:

> "62(1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such.
>
> (2) There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form (or an instrument in such other form as may appear to the Registrar to be sufficient to charge the land, provided that such instrument shall expressly charge or reserve out of the land the payment of the money secured) but, 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.
>
> . . .
>
> (6) 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.
>
> (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.
>
> . . ."

I also wish to refer to certain provisions of the Land and Conveyancing Law Reform Act 2009. Section 8 of that Act provides for

amendments and repeals and those amendments and repeals are set out in Schedule 1 of the Act. Part 5 of Schedule 1 refers to Acts of the Oireachtas and sets out the name of the Act concerned together with the extent of the repeal. Accordingly, the effect of s. 8 of the 2009 Act is that s. 62(7) of the Registration of Title Act 1964 has been repealed. By virtue of S.I. No. 356/2009 the day on which the Land and Conveyancing and Law Reform Act 2009 (other than s. 132) came into operation was the 1st December 2009.

It is also necessary to have regard to certain provisions of the Interpretation Act 2005. Again I think it is necessary to set out in full the provisions of s. 27 of that Act. It provides as follows:-

> "27(1) Where an enactment is repealed, the repeal does not –
>
> (a) revive anything not in force or not existing immediately before the repeal
>
> (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or
>
> (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.
>
> (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."

Submissions
I now want to consider the submissions made in the various cases.

The Gunn Case
Mr. Rutherdale, counsel for the plaintiff pointed out that the mortgage in the Gunn case pre-dated the repeal of s. 62(7); there was default prior to the 1st December, 2009; the demand was made prior to that date and the proceedings were issued prior to the 1st December, 2009. On that basis, it was submitted that the plaintiff was entitled to relief pursuant to section 62(7). It was submitted that the plaintiff was entitled to rely on the provisions of s. 27 of the Interpretation Act 2005, and in this case reliance was placed in particular on the provisions of section 26(1)(e). Reliance was also placed on the provisions of section 27(2). It was said that these proceedings are concerned about a right accrued by the relevant date, ie. 1st December, 2009. It was submitted that the right to take possession of the premises on the part of the plaintiff was a right acquired prior to the 1st December, 2009. In fact, this was a case in which the right to possession was one not just acquired by also accrued.

The first point made by Mr. Maguire S.C. on behalf of the defendants was that as s. 62(7) have now been repealed it cannot be relied on by the plaintiff. He accepted that the proceedings were issued prior to the repeal of the provisions. He placed emphasis on the wording of s. 62(7) and in particular that part which provides:-

> "The court **may, if it so thinks proper**, order possession of the land . . . to be delivered to the applicant . . ."

He submitted that the words underlined conferred a discretion on the court as to whether to make an order for possession and in those circumstances there was no right of possession. A plaintiff had no more than a hope or expectation. In those circumstances, he submitted that there was neither an acquired nor accrued right of possession. It was accepted by Mr. Maguire that proceedings can be commenced in respect of a right by virtue of the provisions of s. 27(1)(e) but in the present case there is no right acquired, accrued or incurred as such right is dependent upon a decision of the court exercising its discretion in favour of the applicant claiming the right.

Mr. Rutherdale in his reply referred to the provisions of s. 62(6) before its amendment by the 2009 Act. He submitted that the wording of s. 62(6) indicated that the plaintiff had a right accrued. The effect of registering a charge is that the registered owner has "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". On that basis he submitted that the plaintiff has a right to bring proceedings in the event of default. Once the plaintiff made demand for possession he had a right to issue proceedings and come to court. No procedural step beyond that was required. He added that insofar as relief under s. 62(7) is to any extent discretionary that discretion is limited. The fact that the court has discretion under s. 62(7) does not mean that the plaintiff did not have a right acquired or accrued. Mr. Rutherdale then referred to a number of provisions contained in the mortgage in the Gunn case; he referred to Clause 3.01 which contains a covenant for payment by the borrower to the lender. Clause 5.04 is the operative part of the charge. Clause 7 contains a number of covenants on the part of the borrower and Clause 8 sets out the lender's powers. Clause 8.02 provides for the lender to have the statutory powers conferred on lenders by the Conveyancing Acts. Clause 9 provided that the lender would not exercise the powers provided for in Clause 8 until certain specified events had occurred including default in payment. He concluded by submitting that as a result of registration of the charge pursuant to the provisions of s. 62(6) the plaintiff obtained powers under the Conveyancing Acts 1881 to 1911, the Registration of Title Act 1964. Accordingly the plaintiff acquired the right to bring proceedings before the repeal of the Act.

The Clair Case
The factual position in this case is somewhat different to that pertaining in the Gunn case. It was emphasised by Mr. Rutherdale on behalf of the plaintiff that the principal difference is that the proceedings herein were issued after the 1st December, 2009. The charge had been registered before that date; the term of the loan was twelve months and accordingly the whole amount became due and owing on the 5th October, 2009; therefore, the default had occurred before the 1st December, 2009. The difference in this case was that proceedings were issued after that date and I would add that the demand was made after that date. A number of factual matters were disputed in an affidavit sworn herein by Tom Clair as to the circumstances in which the loan was obtained in this case, but I do not propose to deal with those matters in the course of this judgment. Mr. Rutherdale relied on the submissions he had made in the Gunn case. He submitted that the plaintiff came within the definition of s. 27(1) of the 2005 Act in that he had a right acquired by virtue of the following matters:

(i) The execution of the charge and the advance of the monies which gave the plaintiff a contract to complete a registered charge and an equitable mortgage.

(ii) The registration of that charge at a time when the instrument would operate as a mortgage by deed within the meaning of Conveyancing Act based on the provisions of s. 62(6) as it was prior to its amendment by the 2009 Act.

(iii) The default in payment which arose from the 14th July, 2009 and the fact that the full amount was required to be repaid by the 14th October, 2009 and the defendant was in default in that regard. It was submitted that no demand was necessary in that regard.

On that basis it was submitted that the plaintiff had a "right acquired" and accrued prior to the 1st December 2009.

Ms. Ronan on behalf of the defendants pointed out that the demand for the possession and payment was made after the repeal. She relied on the submissions made by Mr. Maguire S.C. and also submitted that the plaintiff had an expectation only and not a right acquired or accrued. There was no right acquired or accrued by the plaintiff by reason only of the default by the defendants. Accordingly it was not possible for the plaintiffs to rely on s. 62(7) in this case. Mr Rutherdale emphasised that point that even in the absence of a demand there was a right acquired or accrued by virtue of the default. The default in this case took place prior to the 1st December, 2009. He had a right to issue proceedings once there was a default. Indeed, he emphasised that it is his case that the right to issue proceedings is acquired as soon as the charge is registered.

The Mulkerrins case
Mr. Ronan Murphy S.C. appeared on behalf of the plaintiff in this case. There was no appearance on behalf of the defendant. It was pointed out that in this case the defendant went into default in May 2008. A number of letters of demand were sent to the defendant, two which were sent prior to the 1st December, 2009. In this case the special summons was issued on the 18th August, 2010. Mr. Murphy adopted the submissions made by Mr. Rutherdale. The only difference between the facts of this case and the Gunn case is that these proceedings were issued after the repeal of section 62(7)

Mr. Murphy made the point that the proofs in this case were in order and that the only issue that arose was the point raised in respect of the repeal of section 26(7). Mr. Murphy in the course of his submissions argued that the operative date giving legal effect to a mortgage is the date of registration of the charge. He accepted that the plaintiff cannot rely upon the replacement provisions for the enforcement of charges contained in Chap. 3 of the 2009 Act which is applicable only to any mortgage created by deed after the commencement of the Act. In those circumstances he submitted that he was entitled to rely on the provisions of the Interpretation Act 2005. He made the point that in circumstances where the new remedies provided for in the 2009 Act did not apply to mortgages or charges created prior to the commencement of the Act it was necessarily the intention of the Oireachtas to rely on the provisions of the Interpretation Act 2005. On that basis he submitted that the effect of the repeal of s. 62(7) does not create a lacuna. He relied on the provisions of ss. 27(1)(c), 27(1)(e) and in particular section 27(2). He made the point that the inclusion of legal proceedings commenced prior to the commencement of the Act at s. 27(1)(e) in the list of unaffected matters contained in s. 27(1) indicated that s. 27(1)(c) refers to and preserves substantive rights other than those already asserted at the time of commencement and allowed for the institution of new proceedings after the commencement of a repealed Act in relation to rights preserved. He submitted that this approach was consistent with the words emphasised in s. 27(2) to the following effect that:

> "Where an enactment is repealed, any legal proceedings . . . in respect of a right . . . acquired, accrued or incurred under . . . the enactment may be instituted, continued or enforced . . . ."

In other words once a right was acquired under an enactment or accrued it was possible by virtue of s. 27(1) and (2) to institute, continue or enforce such right notwithstanding the repeal of the particular legislation. He submitted that s. 27(1)(c) provided for the preservation of rights even though proceedings have not issued. He made the point that the right to seek possession in the event of default, though a conditional right, is nonetheless a right which is acquired by and accrued to a charge holder on the date of registration of its charge and secondly, that, if contrary to that submission, the right to seek possession is held not to accrue until the chargeant defaults and the principal monies thus become due, nevertheless in this case the right to seek possession had been acquired and accrued at the date of commencement of the Act of 2009 because the present defendant had been in arrears for more than a year and it was more than five months since the plaintiff had demanded repayment of the balance.

Mr. Murphy made the point that having regard to the provisions of s. 62(2) of the 1964 Act, until the owner of a charge is registered as such the instrument shall not confer on the owner of the charge any interest in the land. He went on to submit that the right to seek possession in the event of default for the purposes of sale to recover the sums secured represents the whole substance of what a lender obtains on receipt of a charge in its favour. The charge creates such a right and that comprises most of the "interest" mentioned in the final words of s. 62(2) and postponed until registration by the provision. After the date of registration the holder of the charge has done all that must be done to acquire the interest. The fact that the right cannot be exercised until a default causes the principal monies to become due is of no significance. This is not a postponement of the creation of the acquisition or the accrual of rights concerned but is simply the fact that they are addressed to a situation that may or may not arise, mainly the default of the borrower. It was his submission that the right may or may not have to be exercised but exists from the date of the charge.

Emphasis was also placed on the provisions of s. 62(6) of the 1964 Act which is set out above. The provisions of s. 62(6) have been amended by the 2009 Act and it now reads as follows:-

> "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 legal mortgage under Part 10 of the Land and Conveyancing Law Reform Act 2009 and the registered owner of the charge shall, for the purpose of enforcing this charge have all the rights and powers of a mortgagee under such mortgage, including the power to sell the estate or interest which is subject to the charge."

Based on the provisions of s. 62(6) it is submitted by the plaintiff that the right under the mortgage including the right to possession or the right to sell property was "acquired" upon the registration of the plaintiffs' charge on the Folio. That occurred on the 29th September, 2008.

It was further submitted that if the contention in respect of s. 62(6) as to when the right to apply for possession was acquired or accrued was incorrect then the right was acquired or accrued when the principle money secured by the charge became due. This was stated in reliance upon section 62(7). Thereby it was argued that the plaintiff's right to apply for possession pursuant to s. 62(7) was acquired or accrued if not on registration of the charge then on the default by the defendant in or around May, 2008. At that point in accordance with the terms of the mortgage, the principal money secured on the mortgage became due.

To conclude, it was submitted that the fact that s. 62(7) may give a discretion to some extent to the court does not mean that a right does not exist or has not been acquired or accrued.

The Grogan Case
The hearing in this case took place subsequent to the hearing in the last three cases. The submissions on behalf of the plaintiff were in identical terms to those furnished in the Mulkerrins case. I will refer in some detail to the submissions on behalf of the defendants at a later point in this judgement.

Discussion
I think the starting point for the discussion in respect of the various submissions made herein must be the mortgage/charge itself. I have already referred in some detail to the relevant provisions of the mortgage in one of the cases. The mortgages are similar in their terms. They each contain a covenant for payment by the borrower. Each provides that the monies remaining unpaid by the borrower to the lender and secured by the mortgage shall immediately become due and payable on demand to the lender on the occurrence of default. The demand referred to is a demand for payment of the secured monies made by or on behalf of the lender. The mortgage then proceeds to set out the lender's powers and again I have set out the relevant provisions from Clause 8 and in particular Clause 8.01 and Clause 8.02 to the effect that the lender may enter into possession of the mortgage property and shall have the statutory powers conferred on lenders by the Conveyancing Acts. The mortgage typically provides that the mortgagee's powers shall not be exercised until certain specified events shall occur and they include default in payment of any monthly or other periodic payment or in payment of any of the secured monies.

It is not in dispute that until such time as the charge is registered, the lender has no interest in the land. It is clear from the decision in the case of *Northern Banking Company Limited v. Devlin* [1924] 1 I.R. 90 that the holder of a charge did not by virtue of the charge have an estate or interest in the land sufficient to enable them to recover possession. Section 62(7) conferred the power on the holder of a charge when repayment of the principal money secured by the charge had become due to apply to court in a summary manner for possession of the land.

It is not in dispute that if the plaintiffs in each of the cases cannot rely on the provisions of s. 62(7) there is no basis upon which an order for possession in a summary manner can be made. Following the repeal of s. 62(7) by the provisions of s. 8 of the 2009 Act, the question arises as to the extent, if any, to which the provisions of s. 62(7) are saved by the provisions of s. 27(1) and (2) of the Interpretation Act 2005.

The key to that question lies in the interpretation to s. 27 of the 2005 Act. Reliance is placed by the plaintiffs principally on the provisions of s. 27(1)(c) and (e) and section 27(2). The focus in the submissions before me was on the meaning of the following words appearing in that section, namely, "right" "acquired" and "accrued".

It would be useful at the outset to consider the nature of the "right" in this case. The "right" contended for by the plaintiffs in these cases is the right to apply for possession pursuant to section 62(7). Different submissions have been made as to when that right could be said to have been "acquired" or "accrued". I will consider the submissions in that regard at a later stage in the course of this judgment.

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."

I was also referred to the decision of this Court *in Anglo Irish Bank Corporation v. Fanning* [2009] I.E.H.C. 141 in which the decision in *Birmingham Citizens Permanent Building Society* was quoted with approval. In that case a different passage from the judgment of Russell J. was cited where he said at p. 891:

> "There appears no trace, prior to 1936, of any right in any court to deny a mortgagee asserting or claiming his right to possession, the appropriate order - though to this a qualification has to be made in that a court in the exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee or otherwise satisfy him if there was a reasonable prospect of either of those events occurring. Indeed, it would be to me surprising if there had been such a trace, having regard to the fact that a legal mortgagee does not necessarily require any assistance from the court to assert his right to possession. Moreover, a mortgagee once rightfully in possession could never be ousted by the mortgagor except on paying off in full."

The reference to 1936 in that passage is a reference to the fact that rules of the Supreme Court in United Kingdom were changed at that time.

The position in the Anglo case was that the defendant had on affidavit asserted that he was entitled to seek an indemnity from a third party in respect of some of the indebtedness to the plaintiff which was secured on foot of the mortgage in that case. Having cited with approval the passage from the judgment of Russell J. at p. 891, I accepted the submission on the part of the plaintiff that as there was default in respect of the home loan element of the borrowing the plaintiff was entitled to possession, saying:

> "I am of the view that in any event the plaintiff is entitled to possession by reason of the default in the home-loan element of the borrowing secured by the mortgage."

I should, for completeness, refer at this point, to the decision in the case of *Bank of Ireland v. Smyth* [1993] 2 I.R. 102 in which Geoghegan J. had to consider the provisions of section 62(7). At p. 111 of his judgment he stated:-

> "It is submitted on behalf of the defendants that, as a matter of discretion, I ought to refuse the application for possession. It is suggested that the wording of s. 62(7) of the Registration of Title Act, 1964, gives the court this discretion, and that the judgment of Denham J. in *First National Building Society v. Ring* [1992] 1 I.R. 375 supports the view that I should exercise it against the plaintiff, I disagree. I do not think that *First National Building Society v. Ring* [1992] 1 I.R. 375 has any relevance to this case. The decision of Denham J. turned on an interpretation of s. 4 of the Partition Act, 1868. But the wording of that section is totally different from the wording of s. 62(7) of the Registration of Title Act, 1964. The words 'may, if it so thinks proper' in s. 62(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."

Geoghegan J. continued that passage by looking the history of the right of a legal charge holder to obtain an order for possession for the purposes of a sale out of court. He stated:-

> "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(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."

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. Accordingly, it was argued by the plaintiffs that there is a right to apply for an order for possession, when repayment of the principal monies secured by the instrument of charge has become due.

In the course of the submissions on behalf of the defendants, reliance was placed on the decision of the Privy Council in *Director of Public Works v. Ho Po Sang* [1961] A.C. 901 to argue that s. 62(7) does not provide a right as the order that can be granted under the section is discretionary. The decision in that case was considered in *Chief Adjudication Officer v. Maguire* [1999] 1 W.L.R. 1778, a decision of the Court of Appeal. Simon Brown L.J. in the course of his judgment referred to *Director of Public Works v. Ho Po Sang* at p. 1783 and said:-

> "The position there was that under the relevant Hong Kong legislation prior to its repeal the lessee was entitled to call on his under-lessees to quit if the Director of Public Works gave a rebuilding certificate. The lessee applied for such a certificate and was notified by the Director that he intended to give it. Thereupon, in compliance with the legislation, the lessee served notices of that intention upon his under-lessees who, again as provided for in the legislation, appealed by way of petition to the Governor in Council, his under-lessees cross-petitioning. It was at that stage that the legislation was repealed, no decision having by then been taken by the Governor in Council with regard to the petitions. The Privy Council held that the lessee (and the Director of Public Works) had no accrued right at that stage. Giving the judgment of the Board, Lord Morris of Borth-y-Gest said at pp. 922 to 926:
>
> > 'The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects . . . he did not have any right even of a contingent nature . . . The difference between that case [*Hamilton Gell v. White*] and the present is that in that case a right existed and the investigation, which was unaffected, was an investigation in respect of it; whereas in the present case no right existed or had accrued, and the intended investigation which had not taken place before the time of the repeal (i.e. the consideration by the Governor in Council) was an investigation in order to decide whether a right should or should not be given. It was not itself a right or privilege which was preserved by the [The Hong Kong legislation corresponding to s. 16(1)(c) of the Act of 178]'"

Simon Brown L.J. went on to say at p. 1788 as follows:-

> "What to my mind all these cases establish is essentially this: that whether or not there is an acquired right depends upon whether at the date of repeal the claimant has 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. The tenant had such a contingent right to compensation in *Hamilton Gell v White*. The *County Council of Moray* had such a right once the owner had voluntarily alienated his improved property there. Mr Ranasinghe, as I believe, had that right as soon as he was injured by the insured person. Convex Ltd had that right merely through their patent having lapsed. The Secretary of State in the *Plewa* case had the right as soon as he overpaid benefits there. In none of these cases was the final claim made until later. In my judgment Mr Maguire's right accrued on 1st April 1985 when VWF (a disease from which he already suffered) was first prescribed. It matters not that he claimed only after repeal."

Waller L.J. in the course of his judgment in the same case went on to discuss the distinction between a right acquired and a right accrued. A similar discussion is to be found in the judgment of Clarke L.J.

I was also referred to Bennion on *Statutory Interpretation* (5th Ed.) p. 309 in which the following is stated as to the provisions of section 16(1)(c) and (e) at p. 309 as follows:

> "The right etc. must have become in some way vested by the date of repeal, ie. it must not have been a mere right to take advantage of the enactment now repealed. If a right to damages has accrued, it is immaterial that the amount has not been quantified. Being able to avail oneself of a statutory defence is not a 'right' for this purpose. A liability was held to be 'incurred' when the debtor had committed an act of bankruptcy"

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) which is as follows:-

> "When repayment of the principal monies 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 . . . 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 . . ."

It is my view that the right to apply for possession of the lands is a right within the meaning of s. 27 of the 2005 Act which confers on the owner of a registered owner of land an entitlement to an order of possession and not a mere hope or expectation . The fact that there may be discretion, limited as it is, as can be seen in *Bank of Ireland v. Smyth, Birmingham Citizens Permanent Building Society v. Caunt* and *Anglo Irish Bank plc v. Fanning* does not alter the fact that the right to apply to court for relief is such a right.

Acquired and Accrued Rights
Having reached the conclusion that the right to apply for an order of possession is a right saved by the provisions of s. 27(1) and (2) notwithstanding the repeal of s. 62(7), it is now important to focus on when that right can be said to have been acquired or accrued.

It would be useful at this stage to refer to a passage from the judgment of Lord Morris of Borth-y-Gest in the case of *Director of Public Works v. Ho Po Sang* referred to above where it was stated at p. 53 of the judgment as follows:-

> "It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act. The latter is not. Their Lordships agree with the observation of Blair-Kerr J. that:
>
> > 'It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to say that, irrespective of whether any right exists at the date of the repeal, if any procedural step is take prior to the repeal, then, even after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion.'"

That brings into question the debate around the interpretation of the words "right", "acquired" and "accrued". Accordingly, I now want to look at some of the specific submissions made on that point.

It was strongly urged on the court that the right to apply for an order for possession was acquired and accrued at the date of registration. In making that argument reference was made to the specific terms of s. 62(2) of the 1964 Act. I have already set out in full, the terms of that provision which provides that 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. It was submitted that the business of the charge is such as to create the right to recover the sum secured. That is the essence of the charge. It was further submitted that, in effect, that is what is comprised to a large extent in the "interest" mentioned towards the end of s. 62(2) of the 1964 Act. Further reliance was placed on the provisions of section 62(6), which provides that on registration the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts and further provides that 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. It was submitted that by using the words "on registration" it was clear that the Act viewed the registered charge holder as having rights from the time of registration. In this context, I was referred to the decision in the case of *Chief Adjudication Officer v. Maguire* to which reference has previously been made. Simon Brown L.J. in that case had said at p. 1788:-

> "Whether or not there is an acquired right depends upon whether at the date of repeal the claimant has 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."

The question of when rights are acquired was also considered in the case of *O'Sullivan v. Superintendent in Charge of Togher Garda Station* [2008] 4 I.R. 212. 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 that case, this Court considered the words "acquired" and "accrued". At p. 223 of the judgment it was 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 that the right to apply arose following conviction and that the right then accrued after the lapse of nine months."

I disagree with the argument that the right to apply for an order of possession is acquired or accrued on the date of registration. To paraphrase what was stated about the right at issue in the *Ho Po Sang* case, the issue rested in the future. To put it another way, did the lender have an entitlement at the date of repeal to make an application for possession? In the helpful submissions furnished by Ms. Glazier-Farmer on behalf of the defendants in the Grogan case, emphasis was placed on the specific provisions of section 62(7). It was submitted that the registered owner of the charge only acquired the right or the right accrued to the registered owner to initiate proceedings when the repayment of the principal monies became "due". She placed emphasis on the provisions of s. 62(7) of the 1964 Act and on the wording of the mortgage. She referred to Clause 8, to which reference has been previously been made, Clause 9 and to Clause 3.02 which states:-

> "All monies remaining unpaid by the borrower to the lender and secured by this mortgage shall immediately become due and payable on demand to the lender on the occurrence of any of the following events that is to say:
>
> (a) On the happening of any event of default . . .
>
> The borrower hereby further covenants with the lender to pay to the lender forthwith the sum so demanded

> together with further interest at the rate applicable to the relevant secured loan from time to time and at any time until the same shall have been repaid in full and shall be payable after as well as well as before any judgment or order of the court."

On that basis she submitted that 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.

The answer to the question posed in these cases on this issue can be found by examining once again the provisions of section 62(7). The right under s. 62(7) is a right to apply for an order of possession. The application for such an order can only be made when the principal monies secured by the charge have become due. When the principal monies have become due then the lender has acquired the right to bring proceedings to recover possession. A lender could not, on registration of the charge, bring proceedings to recover possession. It is worth repeating the words of Simon Brown L.J. in *Chief Adjudication Officer v. Maguire* referred to above:-

> "Whether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to take money or other certain benefit receivable by him provided only that he takes all appropriate steps by way of notices and/or claims thereafter."

The decision in the *O'Sullivan v. Superintendent in Charge of Togher Garda Station* is also of assistance. In that case, following the conviction, the applicant suffered a consequential disqualification. The applicant thereupon acquired the right to apply for the restoration of the driving licence. No further procedural step was necessary or required. After the relevant period of time had elapsed, the applicant had an accrued right and was entitled to apply for the restoration of the driving licence. In the case of the holder of a charge, it was argued that on registration, the owner of the charge had an acquired right to apply for possession of the land secured by the charge. Unlike the applicant in the *O'Sullivan* case, the holder of a registered charge cannot apply for an order of possession until certain events have occurred: (1) there must be default and (2) there must be a demand for repayment of the principal monies secured. The registered owner of a charge is not entitled to apply for an order of possession until those events have occurred.

Accordingly, I am of the view that a lender has not an acquired right to apply for an order under s. 62(7) unless and until the principal monies have become due and that only occurs after demand has been made. If the principal monies have become due by the 1st December, 2009 following a demand, then there is no bar to the lender bringing proceedings to recover possession of the lands secured by the charge notwithstanding that s. 62(7) has been repealed. Thus, the registered owner of the charge has a right to apply to court for possession of the land as soon as the repayment of the principal monies secured by the instrument of charge has become due. In those circumstances, I am satisfied that the provisions of s. 62(7) are saved by the relevant parts of s. 27 of the 2005 Act.

Therefore, it seems to me that there can be no doubt but that assuming the principal monies secured by the charge have become due, the plaintiff in the case of any proceedings commenced before the repeal of the Act are entitled by virtue of the provisions of s. 27 (1) and (2) of the 2005 Act to continue those proceedings.

So far as the Gunn case is concerned, it is clear that the facts of that case fall within the provisions of s. 27 (1) (e) and (2) of the 2005 Act. The legal proceedings in respect of the right vested in the plaintiff had already been instituted prior to the repeal of s. 62(7) and it is clear from the provisions of s. 27 (1) (e) and (2) that proceedings in respect of a right acquired or accrued may be continued as if the enactment had not been repealed.

In other cases where the facts are that: a mortgage was registered as a charge before the 1st December, 2009; the default occurred before that date; demand was made before that date and proceedings were issued before that date, there can be no doubt but that the rights of the lender to apply for an order of possession are saved by the provisions of s. 27 of the 2005 Act, notwithstanding the repeal of section 62(7). The position in relation to those cases where some of those events have occurred before the 1st December, 2009 and some of those events have occurred after that date is relatively straightforward. Provided that default occurred and demand was made for the repayment of the principal monies due before that date, proceedings can be continued or instituted.

Accordingly, as the demand in the Clair case was made after the 1st December 2009, the right to apply for an order of possession following the repeal of s. 62(7) had neither been acquired nor accrued by that date and I will strike out the proceedings in that case. The position in the Mulkerrins case is that all necessary events had occurred before the 1st December, 2009, and accordingly, those proceedings may be continued, subject to any defence that may arise. The actual demand for repayment of the principal monies due in the Grogan case was made on the 19th January, 2010. There was a letter headed "Formal Demand" of the 5th October 2009 but that letter did not call for repayment of the principal monies due and therefore, the plaintiff in that case cannot seek an order pursuant to section 62 (7).

Conclusions
There are a number of conclusions that can be set out at this point.

1. Proceedings commenced prior to the 1st December, 2009 can be continued after that date.

2. Proceedings can be instituted after that date provided that the lender had acquired the right to apply for an order pursuant to s. 62(7) by the 1st December, 2009.

3. A lender has not acquired the right to apply for an order pursuant to s. 62(7) if the principal monies secured by the mortgage have not become due.

4. The principal monies do not become due until default or certain other events have occurred and demand for repayment of the principal monies has been made.

5. In any case in which demand is made for repayment of the principal sums due after the 1st December, 2009, the lender has neither an acquired or accrued right to apply for an order pursuant to s. 62(7) and consequently the provisions of s. 27 of the 2005 Act will not avail such a lender.

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.

It may be that the repeal of s. 62(7) by s. 8 of the 2009 Act has had unintended consequences. The 2009 Act, sets out the

obligations, powers and rights of mortgagees in Chap. 3, commencing at section 96. The provisions of s. 96(1) provides expressly as follows:

> "(1) Subject to this Part, the powers and rights of a mortgagee under **sections 97 to 111**
>
> (a) apply to any mortgage created by deed after the commencement of this Chapter"

It 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.