

THE HIGH COURT
COMMERCIAL

[2012 No. 2701 P]

BETWEEN

WILLIAM MORAN, SHEILA MORAN AND MICHAEL MORAN

PLAINTIFFS

AND

AIB MORTGAGE BANK, ALLIED IRISH BANKS PLC. AND JIM LUBY

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 27th day of July, 2012

1. In this action, the plaintiffs have challenged the appointment of the third named defendant ("the Receiver") by the first and second named defendants on foot of 24 separate Deeds of Appointment in respect of 24 separate mortgages. Fifteen of the mortgages are with the first named defendant and the remaining nine mortgages are with the second named defendant. All the relevant provisions of both the AIB and Mortgage Bank mortgages are identical.

2. The plaintiffs claim that the power to appoint a receiver is incorporated into the mortgages by reference to the Conveyancing Acts. Under the terms of the mortgages, the Conveyancing Acts include the Conveyancing Act 1881 and *"any statutory modification thereof, whether by way of amendment. .. or appeal"*. The plaintiffs claim that the relevant provisions of the Conveyancing Act 1881 were repealed with effect from 1st December, 2009, by the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). Accordingly, the plaintiffs maintain that the power to appoint a receiver incorporated into the mortgages is now solely that contained in the 2009 Act. The plaintiffs claim that the 2009 Act contains specific notice provisions in relation to the appointment of a receiver which have not been complied with by the first and second named defendants, and that as a consequence, the appointment of the third named defendant as Receiver is invalid.

3. Both the AIB and the AIB Mortgage Bank mortgages contain interpretation provisions which provide, *inter alia*:-

"Reference to any enactment includes reference to any statutory modification thereof, whether by way of amendment, addition, deletion or appeal and re-enactment with or without amendment."

4. By Clause 8.01, the AIB mortgage provides, *inter alia*, as follows:-

"The Bank shall have the statutory powers conferred on mortgagees by the Conveyancing Acts with and subject to the following variation and extensions, that is to say:

(a) The secured monies (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of these presents.

(b) The power of sale shall be exercisable without the restrictions on its exercise imposed by section 20 of the Act of 1881 . .."

5. The mortgages relevant to this case predate the commencement of the 2009 Act. In each case, the Mortgage Deed expressly provides that the mortgage debt is deemed to have accrued due on the date of execution of the Mortgage Deed. Thus, the right to appoint a receiver accrued prior to 1st December, 2009. Clause 8.02 of the Mortgage Deed and Clause 7.2 of the AIB Mortgage Conditions expressly excluded the restrictions on the exercise of the power of sale imposed by s. 20 of the 1881 Act. Section 20 of the 1881 Act provides:-

"A mortgagee shall not exercise the power of sale conferred by this Act unless and until-

(i) Notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or part thereof for three months after service; or

(ii) some interest under the mortgage is in arrears and unpaid for two months after becoming due; or

(iii) there has been a breach of some provision contained in the Mortgage Deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."

6. Pursuant to s. 24(1) of the 1881 Act, the restrictions imposed by s. 20 effectively apply also to a power to appoint a receiver. Section 24(1) states:-

"A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver unless he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be a receiver."

However, the restrictions imposed by s. 20 were varied by the terms of the Mortgage Deeds and the Mortgage Conditions so that the power of sale was exercisable without the restrictions imposed by s. 20 of the 1881 Act. Furthermore, the secured monies were deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of the mortgage. Therefore, as soon as the Deed was executed and the contract entered into, the power of sale was exercisable and, as a result, the right to appoint a receiver had accrued.

7. Both parties, in their written submissions, refer the court to the decision of Laffoy J. in *Kavanagh v. Lynch* [2011] IEHC 348, in which the court was considering the power to appoint a receiver under a mortgage which incorporated the provisions of the 1881 Act. At pp. 10-11 of her judgment, Laffoy J. stated:-

"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."

I accept this as a correct statement of the law to be applicable in this case. All the mortgages which are relevant to these proceedings were created prior to 1st December, 2009.

8. The plaintiffs refer to the definitions and interpretation section of the mortgages where it is stated:-

"The Conveyancing Acts ' means the Conveyancing Acts, 1881 to 1911, and the Registration of Title Act, 1964, and 'the Act of 1881 'means the Conveyancing Act, 1881 ...

Reference to any enactment includes reference to any statutory modification thereof whether by way of amendment, addition, deletion or repeal and enactment with or without amendment."

On that basis, the plaintiffs argue that references in the mortgages, or mortgage conditions to the Conveyancing Acts are now - insofar as the appointment of a receiver is concerned - references to the equivalent powers in the Land and Conveyancing Law Reform Act 2009.

9. Section 108(1) of the Land and Conveyancing Reform Act 2009 provides that:-

"Where-

(a) following service of notice on the mortgagor requiring payment of the mortgage debt, default has been made in payment of that debt, or part of it, for 3 months after such service, or

(b) some interest under the mortgage or, in the case of a mortgage debt payable by instalments, some instalment representing interest or part interest and part capital is in arrears and unpaid for 2 months after becoming due, or

(c) there has been a breach by the mortgagor, or some person concurring in the mortgage, of some other provision contained in the mortgage or any statutory provision, including this Act, other than a covenant for payment of the mortgage debt or interest, the mortgagee or any other person for the time being entitled to receive, and give a discharge for, the mortgage debt, may appoint, by writing, such person as the mortgagee or that other person thinks fit to be a receiver of-

(i) the income of the mortgaged property. ..."

10. The second named defendant demanded repayment of all sums due to it by letter of 2nd December, 2011, which was sent to the first and second named plaintiffs by post and email and the plaintiffs claim to be entitled to rely upon the provisions of s. 108 of the 2009 Act. The third named defendant was appointed as Receiver on 2nd March, 2011. Relying on the notice provisions in the terms and conditions of the facility granted, the plaintiffs assert that as the letter of 2nd December, 2011, was sent by post, it was deemed to have been received 24 hours later on Saturday 3rd December, 2011. They claim that leaving aside the issue as to whether the letters were served within the meaning of the notice provisions on 2nd or 3rd December, 2011, it is clear that the right under s. 108(1)(a) of the Act of 2009 to appoint a receiver could only have accrued at the earliest, on 3rd March, 2012, the day after the purported appointment was made. The plaintiffs also rely on s. 18(h) of the Interpretation Act 2005, which states:

"Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period."

11. The defendants argue that the reference in the Interpretation section to any amendments, repeals or additions to the 1881 Act must be read as amendments, additions or repeals extant at the time when the contract was concluded. To find otherwise would be to suggest that the parties were willing to bind themselves to terms which might vary subject to the vagaries of future legislation. They rely on the decision in *Mannai Investment Co. Ltd. v. Eagle Star Life Insurance Co. Ltd.* [1997] A.C. 749, where Lord Steyn said at p. 771:-

"In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties."

12. In that context, the defendants argue that the parties to the mortgage should be presumed to have intended that the rights they were acquiring and the obligations they were assuming would be certain. It could not be presumed that they were willing to be bound by terms which were on loan to them at the time the contract was concluded. In each case, the relevant Mortgage Deeds predate the commencement of the 2009 Act on 1st December, 2009. The defendants ask whether any sensible business organisation would commit itself to being bound by future changes in the law of which they had no knowledge? I think the answer to that question has to be 'no'.

13. A fundamental problem for the plaintiffs in this action is the fact that s. 96 of the 2009 Act only applies to mortgages created by Deed after the commencement of Chapter 3 of the Act (*i.e.* after 1st December, 2009). Section 96 provides:-

"(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 ..."

14. The effect of s. 96 of the Act does indeed appear to be clear on its face and provides that the terms of the Act on which the plaintiffs seek to rely do not apply to mortgages created prior to 1st December, 2009.

15. The provisions of the 1881 Act were incorporated into the mortgage and must be read as forming part of the terms of the contract. Any reference to amending legislation must be interpreted as a reference to amending legislation in force at the time that the contract was entered into.

16. The Receiver was validly appointed in this case and there is no valid basis on which the plaintiffs can challenge his appointment.

17. I dismiss the plaintiffs' claim.