THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 214
Court of Appeal Record Number: 2018/298

High Court Record Number: 2016/502SP

Noonan J.

Power J.

Collins J.

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Plaintiffs/Respondents

AND

JANET MATTHEWS

Defendant/Appellant

JUDGMENT of Mr. Justice Maurice Collins delivered on 31 July 2020

1. I agree with the judgment given by Noonan J and with the order that he proposes.

2. I would like to add some brief observations on the second issue in this appeal, namely whether the Plaintiff's claim is statute-barred.

3. The Appellant does not question the correctness of *Bank of Ireland v O' Keefe* [1987] IR 47. Accordingly, if on the proper construction of the mortgage here, the principal monies became due only upon demand – as the High Court (Costello J) held was the case – it would follow that the Bank's cause of action arose only upon demand first being made for payment of the principal monies in August 2016. If that is so, then it would follow further that, Mr Melsop having died in February 2013, the Bank's cause of action was not one that "*survived*" against his estate and section 9(2) of the Civil Liability Act 1961 would therefore have no application to the Bank's claim.

4. As it happens, the question of when monies secured by a mortgage become due is one that has received significant judicial attention in this jurisdiction in the past 10 years, arising from the fallout from the repeal of section 62(7) of the Registration of Title Act 1964 by the Land and Conveyancing Law Reform Act 2009 and the absence from the 2009 Act of any specific transitional regime in respect of mortgages/charges entered into prior to 1 December 2009 (when the 2009 Act commenced) That resulted in a series of cases, commencing with *Start Mortgages v Gunn* [2011] IEHC 275, where the mortgagee/charge holder argued that their right of action had "*accrued*" before 1 December 2009 and thus that, by virtue of section 27(1) (and in particular section 27(1)(c)) of the Interpretation Act 2005, they were entitled to rely on section 62(7) notwithstanding its repeal. Many of these cases were referred to in the submissions in this appeal.

5. Some time after the enactment of the 2009 Act, the Oireachtas enacted the Land and Conveyancing Law Reform Act 2013 the effect of which was to reanimate (*inter alia*) section 62(7) of the 1964 Act in respect of pre-1 December 2009 mortgages. The terms of section 3 of the 2013 Act give rise to the first issue in this appeal which has been addressed by Noonan J and I have nothing to add to his analysis.

6. As explained by Clarke J (as he was then) in his judgment in *Irish Life & Permanent plc v Dunne* [2015] IESC 46, [2016] 1 IR 92 (with which judgment Denham CJ and O' Donnell, Laffoy and Charleton JJ agreed):

> "*The first port of call for determining whether those monies had become due is to identify the terms of the contract between the lender and borrower as to when the entire principal can be said to fall due. Terms in that regard can, and do in practice, differ. It may be that, on a proper interpretation of the contractual documents in one case, a demand for payment following some form of default may be necessary. It might, however, be the case that, in other circumstances and in the light of the terms contained in a particular mortgage deed, the full sum may become due without demand in certain, specified circumstances.*"[1]

7. In *Dunne*, the relevant provisions of the mortgage provided that the total mortgage debt would become "*immediately payable*" if the mortgagor defaulted in making two

[1] Paragraph 80 (page 124).

monthly repayments. Thus no letter of demand was necessary. To the extent that such a term might be regarded as "*harsh*", Clarke J emphasised that, in the absence of any statutory provision depriving such a provision of effect or conferring a jurisdiction on the court to consider the merits of any particular contractual clause, "*lending contracts are no different to any other form of contract and simply mean what they say*."[2]

8. The same essential point was made by Lord Hoffman in a case referred to in argument, *West Bromwich BS v Wilkinson* [2005] UKHL 44, [2005] 1 WLR 2303. While noting that that mortgages *"come to us laden with old equitable doctrines which mean that the legal effect of the document sometimes has to be qualified*", in his view, "*that does not mean that they are subject to special artificial rules of construction. The document must be construed in the same way as any other co conveyancing transaction.*"[3]

9. Paragraph 4(b) of the ICS loan offer of 23 March 2005 states clearly that "*in the event of any payment not being made on the due dates or any of them, or any breach of the Conditions of the Loan or the covenants or conditions contained in any of the security documents referred to in clause 2(a), the Society may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan*."

[2] Paragraph 6.8

[3] At paragraph 20.

10. A first legal mortgage or charge over Mr Melsop's Laytown property is one of the security documents referred to in clause 2(a) of the loan offer and a mortgage and charge was duly executed on 27 April 2005 ("*the Mortgage*").

11. Clause 1 of the Mortgage (headed "*Covenants for Payment*")[4] is in very clear terms. By Clause 1.01, the Mortgagor covenants to pay the secured moneys "*on demand"* (my emphasis) Clause 1.02 provides *that "[a]ll moneys remaining unpaid by the Mortgagor to the [Bank] and secured by this Mortgage shall immediately become due and payment on demand to the [Bank]y on the occurrence*" of any of the events set out at (a) – (c), where (a) refers to "*the happening of any event of default other than an event specified in paragraph (i) of sub-clause 7.01*" (again, my emphasis). Clause 1.02 then goes on to recite that the Mortgagor "***HEREBY FURTHER*** *covenants with the [Bank] to pay to the [Bank] forthwith the sum so demanded together with further interest … until the same shall have been repaid in full and shall be payable after as well as before any judgment or order of the Court*." (once again, my emphasis). Clause 1.03 warrants being set out in full:

> *"The demand herein referred to shall mean a demand for payment of the secured moneys made by the [Bank] or on behalf of the [Bank] by any law agent or solicitor, Secretary, manager or other officer of the Society upon the Mortgagor and may be made when or at any time after the Society becomes*

[4] Though the headings are for ease of reference only and do not form part of, and do not affect the interpretation of, the Mortgage: Recital C(5).

> *entitled to call for payment of the moneys and separate demands may be made in respect of separate accounts at different times."* (my emphasis)

Although not expressly stipulated in Clause 1, Clause 10 of the Mortgage clearly envisages that any demand will be in writing. The last reference to demand in clause 1 is in Clause 1.4, by which the Mortgagor *"covenants to pay to the Society on demand the expenses on the basis of a complete unlimited and unqualified indemnity of the Society by the Mortgagor"* (my emphasis).

12. While the Appellant invokes the so-called *contra proferentum* "*rule*", I did not understand Mr Donelon, in his succinct and forceful submissions, to suggest that there is, in truth, any ambiguity in Clause 1 of the Mortgage or that it is open to the Court to construe that clause as having the effect that the secured moneys become payable on the occurrence of an event of default, without the need for any prior demand for payment by the Bank. Even if some ambiguity could be detected in Clause 1, it is not at all clear that such a construction could properly be said to be *contra* the Bank (the *proferens* here). Rather, as Noonan J observes, such a construction would seem to be *contra* the interests of the mortgagor.

13. In *Irish Life & Permanent plc v Dunne,* Clarke J appears to have regarded a provision that had the effect of automatically giving the lender the right to seek possession, without a requirement for a prior demand, in the event that the mortgagor missed two monthly payments as "*harsh*". Here, if Clause 1 was open to the construction that the principal amount secured by the Mortgage becomes payable simply on the

occurrence of an event of default, it would follow that missing a single monthly payment would trigger a liability on the part of the mortgagor to repay all of the secured moneys.[5] That would seem to be harsh indeed and would hardly be in the interests of those mortgagors of the Bank with mortgages in the terms of the Mortgage here. In addition, a requirement for a formal demand allows for clarity and certainty. Unless and until a demand is made, the mortgagor can be certain that, whatever default there may have been on their part, no right to possession has arisen and the mortgagor has an opportunity to address any such default before – so to speak – the lender pulls the trigger. The *contra proferentum* rule is not an interpretative wildcard that permits varying constructions to be given to one contractual provision, depending on the non-*proferens'* perception of what may, in any given situation, be to its advantage.

14. The kernel of the Appellant's argument, as I understand it, is not that Clause 1 of the Mortgage can and/or should be construed as having the effect that the secured moneys become payable on the occurrence of an event of default, without the need for any prior demand for payment by the Bank. Rather, it is said that such is the effect of Clauses 6 and (especially) 7 of the Mortgage and – so the argument goes – there is therefore a conflict between Clause 1 on the one hand and those latter clauses on the other. That conflict should, the argument continues, be resolved in the manner

[5] Clause 7.01(a). In addition, *any* breach by the mortgagor of any covenant, condition or agreement in the Mortgage or in any offer letter would trigger the mortgagor's liability to repay the entirety of the secured moneys: clause 7.01(b).

most favourable to the Appellant and the court should therefore effectively strike Clause 1 from the Mortgage.

15. I emphasise that the argument is not that the construction that Clause 1 appears to bear when considered in isolation changes when regard is had to Clauses 6 and 7. That Clause 1 must be considered in the context of the entire Mortgage is, of course, a well-established principle of contractual construction. However, the Appellant's argument, if accepted, would result not in any different construction of Clause 1 but, instead, in its effective excision from the Mortgage.

16. For obvious reasons, courts are reluctant to hold that parts of a contract are inconsistent with one another and seek instead to find a construction that gives effect to all of its parts.[6] It has been said that "*to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth irreconcilable"*: per Lord Goff giving the majority judgment[7] of the Privy Council in *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1989] LRC (Comm) 527.[8] Where a contract has been drafted as a coherent whole (and is not, for instance, the product of special conditions being grafted on to a set of standard contractual terms) "*repugnancy is extremely unlikely to occur*"; the "*contract has, after all, to be*

[6] Lewinson, *The Interpretation of Contracts* (6th ed; 2015) at paragraph 9.13.

[7] The majority and minority differed on the application of the relevant principles, not as to what those principles were.

[8] At 534d

read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction."[9]

17. With these observations in mind, I turn to Clauses 6 and 7 of the Mortgage. They are, so far as relevant, set out in the judgment of Noonan J, Clause 6.02(a) is particularly relied on by the Appellant. It provides that the Bank shall "*have all the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by this Mortgage including the power to appoint a receiver and in particular subject to the following variations and extensions, that is to say:*

> *(a) the secured moneys shall be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of this Mortgage."*

18. As I read Clause 6, there is nothing in it that contradicts or conflicts with Clause 1. Clause 6 is concerned with the powers of the Bank. Clause 6.02 is specifically concerned with the statutory powers of the Bank as mortgagee and clause 6.02(a) is one of a number of provisions directed to the variation or extension of those statutory powers. For that purpose – and, it appears, that purpose alone – it *deems* the secured moneys to have become due within the meaning of the Conveyancing Acts on the execution of the Mortgage. Clause 6 does not contain any language that purports to qualify the clear and imperative terms of Clause 1 of the Mortgage or affect its operation as between mortgagor and mortgagee. In particular, there is nothing in

[9] *Ibid*, at 534e

Clause 6 that appears to modify the mortgagor's covenant (which is to pay the secured moneys "*on demand*") or relieve the Bank of the obligation to make a demand where it decides to seek payment of the secured moneys.

19. These are crucial provisions of the Mortgage and ought not to be displaced by a sidewind. Thus, even if it could properly be said that Clause 1 and Clause 6.02(a) were in conflict – and I do not consider that to be the case – it would not follow that Clause 6.02(a) ought to prevail. No authority to the effect that the *contra proferentum* rule has any application in this context was cited to the Court. There is authority to the effect that if a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails: *Forbes v Git* [1922] 1 AC 256.[10] However, in *Holloway v Damianus BV* [2015] IECA 19, this Court unsurprisingly evinced a marked lack of enthusiasm for such a mechanistic (and potentially arbitrary) approach: see at paragraphs 20 – 23 of the Court's judgment. Instead, the Court cited and applied the decision of the Supreme Court in *Welch v Bowmaker (Irl) Ltd* [1980] IR 251 where, faced with conflicting provisions in a debenture, that Court applied the principle *generalia specialibus non derogant*. That principle arguably applies here also, on the basis that Clause 1 is the special provision governing when and how, as between mortgagor and mortgagee, a liability to repay the secured moneys arises and, critically, contains the mortgagor's covenant to pay. More broadly, there appears to be a compelling argument that, on the assumption that there is a conflict between Clause 1 and Clause 6.02(a), Clause 1 ought to be given effect to, as reflecting the

[10] See generally, Lewinson, *op cit*, at paragraph 9.08.

true intention of the parties. All of these approaches point to the same conclusion – that effect should be given to the clear and unambiguous terms of Clause 1 of the Mortgage.

20. I would add that even the Appellant shrinks from any suggestion that Clause 6.02(a) has the effect that the secured moneys are payable as and from the date of execution of the Mortgage, presumably in recognition of the absurd consequences that such a construction of Clause 6.02(a) would produce. Rather, it is said that the combined effect of Clause 6.02(a) and Clause 7.01 is that the secured moneys become payable, without demand, on the occurrence of an event of default (and that time runs from that point for limitation purposes).

21. Clause 7 operates to qualify the exercise of the powers conferred on the Bank by Clause 6 and/or by statute by providing that no such power shall be exercised until the occurrence of one of the events set out at (a) – (j) occurs. These are "*events of default*". The Appellant places particular emphasis on clause 7.01(a) as follows:

> *"(a) default is made in payment of any monthly or other periodic payment or in payment of other of the secured moneys hereunder.."*

22. For my part, I can see no inconsistency between Clause 7.01 – which is essentially negative in its effect – and the positive requirement for a demand in Clause 1. Where a default of the kind referred to in Clause 7.01(a) occurs, the powers of the Bank become *exercisable* but their *exercise* nonetheless remains subject to the terms of the

Mortgage, including Clause 1. Accordingly, a demand is required in order to trigger the mortgagor's covenant to pay the secured moneys. Thus Clause 1 and Clause 7.01(a) operate harmoniously together.

23. Accordingly, in my view, the provisions of the Mortgage can and should be construed in a manner which gives effect to all of them and I therefore agree with the approach adopted by Costello J in the High Court and that of Noonan J in his judgment on this appeal. The making of a demand was an essential element of the Bank's claim here. If the Bank had applied for possession of the Laytown property without first making a demand, I have no doubt that the Appellant would have – correctly – opposed that application on the basis that it could not be maintained in the absence of a demand.

24. That conclusion is consistent with authority. Many of the relevant decisions were referred to by the High Court (O' Malley J) in *McAteer v Sheahan* [2013] IEHC 417, [2013] 2 IR 328. Of these decisions, that of the High Court (Laffoy J) in *GE Capital Woodchester Home Loans Limited v Reade* [2012] IEHC 363 warrants particular mention as it involved a mortgage that appears to have been in materially identical terms to the Mortgage here. Laffoy J was clear in her view that, before the principal monies could be said to have become due, a demand for payment was necessary: see for instance paragraphs 14(a) and 15-19 of the judgment. The judgment of the High Court (Finlay-Geoghegan J) in *ACC Bank v Fagan* [2013] IEHC 346 should also be noticed, emphasising as it does the key importance of the mortgagor's covenant to pay being expressed by reference to a demand being made by the mortgagee, as is the case here also.

25. The Appellant complains that the High Court Judge failed to address the decision in *McAteer v Sheahan*. However, that decision does not assist her. The mortgage there was in terms similar to the Mortgage here. The lender argued that the effect of Clause 6.02(a) was to give it an immediate right to apply under section 62(7) of the Registration of Title Act 1964, subject only to its covenant not to exercise that entitlement in the absence of default. On that basis, it was argued, section 27 of the Interpretation Act 2005 operated so as to permit the lender to rely on section 62(7) notwithstanding its repeal, without having to establish the making of a demand prior to 1 December 2009.

26. As the lender recognised, that was a novel argument which was inconsistent with the decision in *Start Mortgages Limited v Gunn*. Although O' Malley J considered that she did not have to decide whether there was a conflict between Clause 1.02 and Clause 6.02, and effectively followed *Start Mortgages v Gunn* on the basis of *stare deci*sis/comity, she did nonetheless express the view that the deeming provision in Clause 6.02(a) "*cannot be interpreted as overriding the legal relationship between the parties to the agreement in all other respects.*"[11] I respectfully agree. That, however, is the flawed premise on which the Appellant's argument on limitation is founded – that what has been characterised as "*a mere conveyancing device*"[12] should be allowed to override the fundamental legal relationship between the parties to the

[11] At paragraph 138.

[12] Wylie, *Irish Land Law* (5th ed; 2013) at para 14.31. The observations of Lord Scott at paragraph 25 of *West Bromwich Building Society v Wilkinson* are also relevant in this context. The purpose of such a deeming provisions, according to Lord Scott, is not to "*advance the date on which the mortgage money becomes due*" but to "*protect purchasers from the mortgagee*".

Mortgage and, in particular, the clear provisions of Clause 1 that require the mortgagor to pay the secured moneys where, and only where, payment has first been demanded by the Bank in accordance with that clause. I am not persuaded by that argument.

27. For the reasons set out in the judgment of Noonan J, as well as the additional reasons set out above in relation to the second of the issues on appeal, I would dismiss this appeal.