

THE HIGH COURT

2017 No. 93 SP

BETWEEN

ENNIS PROPERTY FINANCE DAC

PLAINTIFF

AND

HENRY GREALLY

DEFENDANT

**JUDGMENT of Mr Justice Garrett Simons delivered on 3 February 2020**

**Introduction**

1. This matter comes before the High Court by way of an application for an order for possession pursuant to section 62(7) of the Registration of Title Act 1964. The application is brought by a company, Ennis Property Finance DAC ("*Ennis Property*"), which asserts that it has succeeded to the mortgagee's interest in a mortgage and charge entered into by the defendant, Mr Henry Greally, on 5 April 2004 with Bank of Scotland (Ireland) Ltd.
2. Mr Greally opposes the application for an order for possession. Mr Greally has filed an affidavit, and was represented at the hearing before me on 27 January 2020 by solicitor and counsel. The unusual feature of this case is that the content of Mr Greally's affidavit is almost entirely irrelevant to the present proceedings, and, instead, appears to be directed to *separate* proceedings which Ennis Property has taken against him. More specifically, the content of the affidavit responds to an application for summary judgment brought by way of Summary Summons. This affidavit does not engage with the issues which are relevant to an application for an order for possession.

**Relevant Statutory Provisions**

3. The application for an order for possession is made pursuant to section 62(7) of the Registration of Title Act 1964. This section had been repealed by the Land and Conveyancing Law Reform Act 2009. The repeal is, however, now subject to transitional provisions under the Land and Conveyancing Law Reform Act 2013. The effect of section 1 of the 2013 Act is that, as respects a mortgage created prior to 1 December 2009, section 62(7) of the Registration of Title Act 1964 continues to apply, and may be invoked or exercised by any person as *if* those provisions had not been repealed.
4. The mortgage in the present case is dated 5 April 2004, and was registered as a charge on the folio on 21 April 2005 (County Galway, Folio 26535). The transitional provisions thus apply, and Ennis Property is entitled to invoke section 62(7).
5. Section 62(7) provides as follows.
  - (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.

6. The approach which a court must take on an application for an order for possession has been explained as follows by the Supreme Court in *Irish Life and Permanent Plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92, [80].

"[...] In order for the power to seek an order for possession under s.62(7) of the 1964 Act to have arisen, what was required was that the principal monies were due. It follows that the question which any court invited to apply the jurisdiction arising under that section must ask itself is as to whether, as a matter of law, it can properly be said that the principal monies had become due. 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 the borrower as to when the entire principal sum 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."

7. The Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352 held, at paragraphs [67] and [68], that the correctness of the Register of Title cannot be challenged in possession proceedings.

#### **Mortgage and Charge**

8. The application for the order for possession is grounded upon the affidavit of Mr Jonathan Hanly sworn herein on 24 February 2017. Mr Hanly identifies himself as an "officer" of Ennis Property. He further avers that he is duly authorised to make his affidavit on behalf of Ennis Property, and does so from, inter alia, knowledge which was derived from books and records in his custody and/or power and/or possession. Mr Hanly avers as follows at paragraph 2 of his affidavit.

"2. I say that any and all of the books and records perused by me are part of and contained within the ordinary books and records of the Plaintiff and were made in the usual and ordinary course of business of the Plaintiff and I further say that all of the said books and records are in the control and custody of the Plaintiff. I say that I have examined the originals of the said books and records and compared them to any copies thereof referred to in the within proceedings and I am satisfied that they are correct."

9. Presumably, this averment is intended to attract the provisions of the Bankers' Books Evidence Act 1879 (as amended).

10. Mr Hanly has exhibited a copy of a mortgage and charge dated 5 April 2004 (*"the 2004 Mortgage"*). The 2004 Mortgage is said to have been entered into between Henry Greally, as mortgagor, and Bank of Scotland (Ireland) Ltd, as mortgagee.
11. The "secured liabilities" are defined under the 2004 Mortgage as meaning, *inter alia*, all monies, obligations and liabilities whether actual or contingent which now are or at any time hereafter may become due owing or incurred by the mortgagor to the bank, i.e. Bank of Scotland (Ireland) Ltd.
12. An "event of default" is defined as meaning the happening of an event under any loan agreement, facility letter other arrangement with the bank whereby the secured obligations become immediately due and payable.
13. Clause 8 of the 2004 Mortgage provides for a power of sale at any time after the occurrence of an event of default or where the secured obligations have otherwise become due and payable. The clause, in full, reads as follows.
  - 8.1 At any time after the occurrence of an Event of Default or where the Secured Obligations have otherwise become due and payable the Bank may forthwith without any further demand on or notice to the Mortgagor exercise the statutory power of sale conferred on mortgagees by [the Conveyancing Act 1881] free from the restrictions imposed by Section 20 thereof and Section 17 of the Act shall not apply to the mortgages and charges hereby created.
  - 8.2 Immediately upon the Bank making demand upon the Mortgagor for payment and discharge of the Secured Obligations or any part thereof (as an when the same shall have become due and payable) or immediately upon the Secured Obligations becoming otherwise due and payable in accordance with the provisions hereof, the Secured Obligations shall be deemed to have become due within the meaning of Section 19 of the Act and this security shall immediately become enforceable and the power of sale and other powers conferred by the said Sections as varied or extended by this Deed and all other powers conferred upon the Bank by this Deed shall be immediately exercisable."
14. The 2004 Mortgage expressly provides, at clause 27 thereof for the assignment of the mortgagee's interest.
15. Mr Hanly has also exhibited a copy of the relevant folio, County Galway, Folio 26535 (*"the Folio"*). The Folio indicates that Henry Greally of 65, Henry Street, Galway is full owner. The charge in favour of Bank of Scotland (Ireland) Ltd has been registered since 21 April 2005. Note 10 on the Folio, which is dated 24 April 2015, indicates that Ennis Property Finance Ltd is now the owner of the charge.

#### **Two Loan Agreements**

16. Mr Hanly has also exhibited two loan agreements entered into as between Bank of Scotland (Ireland) Ltd and Mr Greally. The first of these loan agreements is dated 13 November 2003, and is for a sum of €450,000. The "purpose" of the loan is stated to be

mortgage redemption (€190,000), and capital expenditure (€260,000). The loan agreement is addressed to Mr Henry Greally at 84 Knocknacarra Park, Salthill, Galway. The security is stated to be a first specific charge over the freehold land and premises consisting of 1 Devon Place, Salthill, Galway.

17. The second loan agreement is dated 26 October 2006, and is for the sum of €110,000. Again, the loan offer is addressed to Mr Henry Greally, 84 Knocknacarra Park, Salthill, Galway. The security for the loan is stated to be, *inter alia*, an extension of Bank of Scotland (Ireland) Ltd's first specific charge over the freehold land and premises consisting of 1 Devon Place, Salthill, Galway.

#### **Transmission of Mortgagee's interest to Ennis Property**

18. Mr Hanly has set out in detail the circumstances in which the mortgagee's interest came to be transmitted to Ennis Property Finance DAC. In brief, the assets of Bank of Scotland (Ireland) Ltd were transferred by cross-border merger to Bank of Scotland plc on 31 December 2010. By purchase deed dated 29 November 2014, Bank of Scotland plc agreed to sell the purchased assets (as defined in the purchase deed) to ELQ Investors II Ltd. By deed of novation dated 12 December 2014, Ennis Property Finance Ltd was substituted in place of ELQ Investors II Ltd. By deed of assignment dated 20 April 2015 between Bank of Scotland plc and Ennis Property Finance DAC, the former lawfully assigned all its rights and obligations in the purchased assets to the latter. By a transfer of charge form (Form 56), also dated 20 April 2015, Bank of Scotland plc lawfully transferred the 2004 Mortgage to Ennis Property.
19. The relevant contractual documentation has been exhibited, albeit in redacted form, as part of Mr Hanly's affidavit. As explained under the next heading below, Mr Greally has not taken issue with any of this.

#### **The position of the Defendant**

20. The defendant, Mr Greally, has filed an affidavit sworn herein on 31 October 2019. Although this affidavit is headed up with the title and record number of the within proceedings, it appears that most, if not all, of the content of same is directed towards separate summary proceedings which have been taken by Ennis Property against Mr Greally. Thus, for example, paragraph 2 of Mr Greally's affidavit states that he is making the affidavit in response to the grounding affidavit of Mr John Burke. Of course, the affidavit grounding the application for an order for possession in the within proceedings has been sworn by a different deponent, namely Mr Jonathan Hanly. It seems that Mr Burke is the principal deponent in the other proceedings.
21. Mr Greally's affidavit goes on, then, at paragraph 4 to complain that the sum of money alleged to be due and owing has not been fully explained to him in any breakdown of the sums which are being sought using the summary judgment procedure. This, again, appears to be relevant only to the summary summons proceedings.
22. At paragraphs 6 to 14 of his affidavit, Mr Greally disputes the validity of "the personal guarantees" which he says have been produced as exhibits. These averments make no sense in the context of the proceedings for an order for possession in circumstances

where no “personal guarantees” have been exhibited. Rather, the application for an order for possession is grounded on the two loan agreements which are said to have been entered into by Mr Greally himself. These loan agreements have been described earlier, at paragraphs 16 and 17 above.

23. At paragraph 22 of his affidavit, Mr Greally refers, for the first time, to the within proceedings as follows.

“22. I say and believe that the Plaintiff has been reckless in issuing proceedings were the paperwork in relation to the alleged debt is not correct and that *they have also brought High Court Proceedings for possession in relation to a property that I am not the legal or beneficial owner based on the documentation from the Property Registration Authority*”.\*

\*Emphasis (italics) added.

24. No explanation has been provided as to why it is said that Mr Greally is not the legal and beneficial owner. Nor is any explanation offered for how it is that the Folio which has been exhibited in behalf of Ennis Property (County Galway, Folio 26535) indicates that Mr Greally is the full owner. It has not been suggested, for example, that the Folio is incorrect or out of date.
25. An affidavit has also been sworn on behalf of Mr Greally by his solicitor, Gerardine Costello. Again, the content of this affidavit appears to be directed to the summary proceedings.
26. The final affidavit filed is that of John Burke. He identifies himself as a director of Ennis Property Finance DAC. Mr Burke has exhibited so-called “hello” and “goodbye” letters.

#### **Discussion**

27. As indicated by the Supreme Court judgment in *Irish Life and Permanent Plc v. Dunne* [2015] IESC 46; [2016] 1 I.R. 92, a court hearing an application for an order pursuant to section 62(7) of the Registration of Title Act 1964 must ask itself whether, as a matter of law, it can properly be said that the principal monies secured by the registered charge have become due.
28. The case made on behalf of Ennis Property is that it has succeeded to the mortgagee’s interest under the 2004 Mortgage, and that the monies advanced under the two loan agreements of 13 November 2003 and 26 October 2006, respectively, are secured by the 2004 Mortgage. The affidavits of Mr Hanly and Mr Burke indicate that there has been default in the payment of instalments under the two loan agreements, and that the principal monies are now due. The relevant letter of demand dated 22 February 2017 has been exhibited.
29. Mr Greally has not sought to contradict any of this in his own affidavit, and counsel on his behalf confirmed to the court at the hearing on 27 January 2020 that Mr Greally has not

denied on affidavit having entered into either the two loan agreements or the 2004 Mortgage.

30. In the absence of any challenge to the validity of the underlying loan documentation, I am satisfied that Ennis Property has discharged the onus of proof upon it. See, by analogy, the judgment of the Supreme Court in *Ulster Bank Ireland Ltd v. O'Brien* [2015] IESC 96; [2015] 2 I.R. 656. That judgment concerned an application for a summary judgment pursuant to Order 37 of the Rules of the Superior Courts (rather than an application for an order for possession). The plaintiff bank in that case had sought to prove the debt by filing an affidavit from a bank employee which exhibited the relevant loan documentation. The Supreme Court held that the swearing and service of an affidavit, which makes allegations that a sum is due, can be accepted, in the absence of denial, where the form and the content of what is deposed to and the exhibits supporting it carry sufficient indications of reliability.
31. No issue has been taken on behalf of Mr Greally in respect of the transmission of the mortgagee's interest from Bank of Scotland (Ireland) to Ennis Property Finance DAC.
32. In the circumstances of the present case, the uncontroverted evidence before the court establishes that Ennis Property is the owner of the registered charge, and that the principal monies under the two loan agreements are now due. It appears from the copy of the 2004 Mortgage which has been exhibited that the power of sale has arisen. I am satisfied, therefore, that Ennis Property is entitled to an order for possession pursuant to section 62(7).

**Form of Order**

33. I propose to make an order for possession pursuant to section 62(7) of the Registration of Title Act 1964. I will hear the parties further on the question of a stay on execution, and as to costs.