

THE HIGH COURT

[2024] IEHC 41

Record No. 2019/424/SP

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

TERESA GILLESPIE

DEFENDANT

JUDGMENT of Mr. Justice Nolan delivered the 6th day of February, 2024

Introduction

1. The plaintiff seeks possession of property comprised in Folio 15133F County Sligo at Mount Edwards Heights, Ballinfull, County Sligo, which was the home of the late Brigid Cunningham, who died on the 6th of July 2008 (hereinafter the “deceased”).
2. The defendant is the daughter of the late Brigid Cunningham who is sued in her capacity as executrix of the estate of the deceased.

Factual Background

3. On the 22nd of November 2006, the plaintiff issued a life loan mortgage offer letter to the deceased which offered a life loan facility (hereinafter the “life loan”) to the deceased on terms that the life loan would be secured by a first legal mortgage or charge over the property. On the 15th of December 2006, the deceased signed the life loan mortgage letter offer indicating her acceptance of its terms. Thereafter on the 10th of January 2007, the deceased executed a mortgage deed (hereinafter the “mortgage”) over the property in favour of the plaintiff. On the 7th of February 2007, the mortgage was registered on the Folio.
4. On foot of the security of the mortgage the plaintiff advanced the sum of €60,000 to the deceased by way of a loan account.
5. Sadly, less than a year later, the deceased passed away leaving the defendant named as her executrix.
6. The issue in this case is whether these proceedings have been brought within time. To that extent, this case raises a potential conflict between the provisions of Section 9 of the Civil Liability Act, 1961 and Section 13 of the Statute of Limitations Act, 1957. If the former applies, then a two-year limitation period is applicable and the case is statute barred, while if it is the latter, the appropriate limitation period is twelve years, in which case the case is not statute barred.

Chronology

The plaintiff has set out a very helpful chronology, the key dates of which are as follows: -

- (i) On the 22nd of November 2006, the plaintiff issued a life loan mortgage offer letter to the deceased.
- (ii) On the 10th of January 2007, the deceased executed a mortgage in favour of the plaintiff.

- (iii) On the 7th of February 2007, the mortgage was registered as a charge on Folio 15133 County Sligo.
- (iv) On the 6th of July 2008, the deceased passed away.
- (v) 30th of May 2011, the plaintiff commenced writing to the solicitors who had represented the estate, asking that an executor be appointed. Nothing happened until November 2014, when the plaintiff wrote to the defendant personally asking her to extract a grant of probate. They also sought possession. Thereafter they continued to write every year, sometimes twice a year until 2019, when Robert O'Byrne was appointed administrator ad litem, by the High Court in July, in order to extract a grant of probate.

The timeline continued as follows: –.

- (vi) 20th of September 2019, solicitors for the plaintiff wrote to Robert O'Brien.
- (vii) 23rd of September 2019, the special summons was issued.
- (viii) 14th of November 2019, the Master struck out the summons.
- (ix) 9th of December 2019, the High Court set aside the order of the Master.
- (x) 21st of April 2021, the grant of probate was extracted by Robert O'Brien.
- (xi) 21st of October 2021, the Master substituted the defendant for Robert O'Brien.

7. As can be seen, no steps were taken by the plaintiff to realise their security for a period of excess of six years. There is no doubt that these proceedings seeking possession in September 2019, have focussed the parties' minds.

The Parties Respective Positions.

8. It is the case of the plaintiff that they are within time to bring these proceedings for possession. As things stand, the sums due and owing on foot of the life loan, together with

interest, amounts to over €145,000, as of the 22nd of December 2022. As of December 2023, it would seem that the interest sum due is in excess of €90,000.

9. It is the case of the defendant that pursuant to Section 9(2) of the Civil Liability Act 1961, the relevant period in which proceedings can be instituted is two years. The second limb of the defendant's argument is that there has been laches, the equitable doctrine relating to delay. The third limb of the defendant's case is that the interest charges on the loan are statute barred.

10. In response the plaintiff says that a defence of laches can only be raised where the defendant has acted to her detriment by reason of the plaintiff's delay in instituting proceedings. In relation to the argument relating to interest, the plaintiff relies upon clause 4 (c) of the life loan agreement where the deceased is said to have agreed that interest would continue to accrue "*until the loan, interest and any other amounts are repayable in full*". As such, the plaintiff alleges that the deceased expressly waived any entitlement to rely on Section 37(1) of the Statute of Limitations Act 1957, as amended. Finally, it is argued that the exact amount of the sums due arising out of the life loan is not a relevant factor in an application for possession.

The Life Loan Agreement

11. The life loan agreement provides that the period of the agreement was until the death of the last surviving borrower. Clause 1(b) states the conditions of the life loan agreement are an addition to the terms, conditions and covenants contained in the bank's deed of mortgage and charge and were all incorporated into the agreement with the borrower.

12. Clause 4 deals with repayment. The crucial part reads as follows: -

"(a) The borrower should not be obliged to make any monthly repayment of principle, interest or any other amount payable during the term of a loan. The loan shall

become due and payable on behalf of the earliest of the following (which shall be the due date): -

- (i) *The death of the borrower and where there are two or more borrowers, the death of the last surviving borrower.*

13. The parties have accepted that in this case the life loan became due and payable upon the death of the deceased. That was the 6th of July 2008. However, the proceedings were not issued until the 23rd of September 2019, in excess of eleven years after the death of the deceased.

Sections 8 and 9 of the Civil Liability Act, 1961

14. The crucial parts of the Civil Liability Act dealing with the survival of certain causes of action subsisting against deceased persons is set out in s. 8 of the Act which reads as follows:-

“(1) On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate.”

15. Section 9 of the 1961 Act is entitled “*Time limit in respect of causes of action which survive against estate of deceased person*” and it provides:

“(1) In this section ‘the relevant period’ means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.

(2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either—

- (a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or*

(b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires.”

16. The defendant says that the life loan agreement states that the period of the agreement expired on the death of the borrower. The loan is expected to be due and payable on the death of the borrower. That being the case, the “*cause of action*” accrued on the death of Mrs. Cunningham. Therefore, since the proceedings were issued eleven years later, they are clearly statute barred.

17. However, the plaintiff says that in point of fact the appropriate limitation period to look at is Section 13(2) of the Statute of Limitations Act which provides as follows:

“(2) The following provisions shall apply to an action by a person (other than a State authority) to recover land—

(a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person”.

The parties rely on similar cases. For example, *Promontoria (Oyster) DAC v. Kearney* [2023] IEHC 7, *AIB v. Pollock* [2016] IEHC 581, *Bank of Ireland v. Mathews* [2020] IECA 204, and *Seniors Money Mortgages (Ireland) Ltd v. Gately* reported 26th of January 2017. (Baker J. a decision which was referred to in the Supreme Court decision of same name at [2020] 2 IR 441.)

18. It seems to me that *W.F. Shap (Ireland) DAC v. Fingleton* [2020] IEHC 50 and *W.F. Shap (Ireland) DAC v. Duane* unreported 5th of February 2020, MacGrath J., are pertinent to the issues in this case.

Discussion

19. It seems to me that the kernel of this case revolves around whether the cause of action was subsisting (to use the words of Section 8 of the 1961 Act) at the time of the deceased's death. If it was then it would seem to me that the bank would indeed be statute barred from maintaining their action issued eleven years later. However, I do not believe that to be the case. I agree with the views of Simons J. in *W.F. Shap (Ireland) DAC v. Fingleton* where he said as follows:

“The essence of these financial products is that the event which triggers the entitlement to serve a demand for the repayment of the principal monies will normally be the death of the mortgagor. An entitlement which is contingent on the death of the mortgagor is not, by definition, one which can be said to be ‘subsisting’ as of their date of death, or one which ‘survives’ their death. Rather, the entitlement only arises after the mortgagor's death. Put shortly, any proceedings which were instituted prior to death would be premature.”

20. It is worthy to note that in a similar case decided shortly thereafter, MacGrath J. came to the same view. In *W.F. Shap (Ireland) DAC v. Duane*. He said:

“Section 9 of the Act of 1961 applies to a cause of action which subsists at the date of death and not one which arises after death. I must therefore conclude in the circumstances of the case that the cause of action in respect of a repayment is not a cause of action which subsisted for the lifetime of the deceased or at the date of his death and is not statute barred pursuant to the provisions of s. 9(2) of the Civil Liability Act, 1961.”

21. In those circumstances it seems to me these proceedings are not statute barred bearing in mind that the proceedings are for possession. It would be a different argument if the proceedings were an attempt to reclaim a debt, however that is for another day.

The Defence of Laches

22. In *ACC Loan Management Ltd v Stephens and Stephens* [2017] IECA 229, Irvine J.

(as she then was) set out the principles of the equitable doctrine of laches where she said:-

“Laches is of course an equitable doctrine open to a defendant who can establish that the plaintiff’s delay in the manner of their approach to their claim is unfair and unconscionable to the point that they should be denied the relief to which they would otherwise be lawfully entitled”.

23. In that case, the High Court had found that the bank was not guilty of unreasonable delay on the basis of promises made by the appellant. This case is somewhat different for the reasons that I set out. The plaintiff says it was open to the defendant to move quickly to extract a grant of probate in order to address the liabilities of the estate. The property could have been sold or finances raised to pay off the life loan. The defendant took no steps and did not lodge an application to the probate office until very late in the day. Mr. McGuckian BL, for the bank, urges me to consider that if there had been any prejudice by the delay, that should lie at the feet of the defendant. He quotes from Canny, *Limitation of Actions* (3rd edition, Round Hall Press, 2022), that the defence of laches only arises where the relief sought is equitable. In this case an application for possession of property is not an equitable relief.

24. Further, in the case of *Lindsay Petroleum Co v Hurd* (1873) LR 5 PC 211, the court said as follows:-*“Now the doctrine of Leches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waving that remedy, yet put the other party in a situation in which it would not be reasonable to place them if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are*

most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the act done during the interval, which might affect either party and cause the balance of justice or injustice in taking the one course or the other, so far as relates to the remedy”.

25. The defendant *qua Executrix*, has not acted to her detriment by reason of any delay on the part of the plaintiff in instituting proceedings.

26. On the other hand, the defendant says that the bank was aware of the death of Mrs. Cunningham since 2011. In *J. H. v W. J. H.* Unreported High Court 20th of December 1979, Keane J., as he then was, said as follows: – *“I have no doubt that the interval of time which elapsed before the proceedings were issued in the present case could properly be described as substantial. That, however, is not sufficient.... There must also be circumstances which render it inequitable to enforce the claim after such a lapse of time. I must accordingly consider the circumstances in which the defendant will now find himself if the plaintiff’s claim is allowed, as contrasted with the circumstances in which he would defend himself proceedings in 1973 or earlier”.*

27. As noted above there is a significant increase in the sums due by virtue of the interest that has accrued from the date of death of Mrs. Cunningham, or shortly thereafter, and the present day. The amount of interest substantially exceeds the original life loan. The defendant says that the opportunity to raise finances is now lost compared to the position had the proceedings been instituted at an earlier time.

28. There has been no explanation for the enormous delay in this case. Mr. McGuckian very fairly says that he cannot go beyond the affidavits. It was open to the bank to explain the

delay, but they have chosen not to. What the bank has done however is to try to blame the defendant, for not acting sooner. I do not accept that argument. If it were not for other factors, I believe that it would be at least arguable that the defence of laches arises in this case. An opportunity of dealing with the case in a different way, from the plaintiff's perspective, may have arisen. However, in their book on trusts Keogan, Mee and Wylie say that where "*the Statute of Limitations 1957 provides for a relevant limitation period, there is no scope for the application of the equitable doctrine of laches*" *The Law & Taxation of Trusts* (Tottel Publishing Ltd, 2007) at para 20.008. Therefore, the defence of laches does not apply in this case.

The Interest Charges.

29. The plaintiff says that the Mrs. Cunningham explicitly agreed to the charging of interest which would continue to accrue "*until the loan, interest and any other amounts are repayable in full*". I was referred to clause 4(c) of the life loan agreement. The copy exhibited in the papers is exceedingly hard to read. I have no idea as to the ability of Mrs. Cunningham to understand the import of legal documents or the clause in question, but I found it difficult to read or understand.

30. The plaintiff however does make the argument that no matter what the size of the debt now owing, that is not a relevant factor in an application for possession.

31. The defendant says that Section 37 (1) of the Statute of limitations 1957 deals with the issue of interest. It reads as follows: – "*no action shall be brought to recover arrears of interest payable in respect of any principle sum of money secured by a mortgage or charge on land or personal property (other than a ship) or to recover damages in respect of such arrears after the expiration of six years from the date on which the interest became due*".

Decision

32. As noted above this is an application for possession. It seems to me that the plaintiff is entitled to possession. I do not believe that the case for possession is statute barred and I respectfully adopt the views of Simons J. and MacGrath J. in the *W.F. Shap (Ireland)* line of cases all. The whole purpose of the loan facility was that the principal monies would not become payable until the death of the mortgagor. To quote Simons J. again, “*An entitlement which is contingent on the debt of the mortgagor is not, by definition, one which can be said to be “subsisting” as of the date of death, or one which “survives” their death. Rather, the entitlement only arises after the mortgagor’s death. Put shortly, any proceedings which were instituted prior to death would be premature*”.

33. However, the reason why the bank is entitled to possession is because the life loan has not been repaid. There is in my view at least an arguable case that the defence of the statute of limitations arises in regard to the interest claimed. Therefore, there is an issue to be determined in regard to the status of the interest claimed. That is an issue which should go to plenary hearing.

34. In those circumstances I will hear the parties as to the type of order which should be made.