THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 214
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

PLAINTIFF/RESPONDENT

-AND-

JANET MATTHEWS

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 31st day of July, 2020

1. This appeal is brought from the Judgment and Order of the High Court (Costello J.) of the 8th and 15th June, 2018 respectively whereby the Court granted an Order for possession of the premises known as 16, The Glen, Inse Bay, Laytown, County Meath, which are alleged by the appellant to be her principal private residence. Two issues are engaged in this appeal, first whether the proceedings ought to have been brought in the Circuit Court and second, whether they are statute barred.

Relevant facts

2. The facts are fully set out in the judgment of the High Court and accordingly a brief synopsis will suffice. The appellant is the partner of the late John Melsop who died on the 14th February, 2013. The appellant alleges that he made a will appointing her as his executrix and devising the above property to her. The will was not put in evidence before the High Court.

3. On the 24th March, 2005, Mr. Melsop entered into a loan agreement with the respondent's predecessor, ICS Building Society ("ICS") for a mortgage loan in the amount of €234,000. The loan was repayable by monthly instalments over a 15 year period and was secured by a mortgage on the property, which Mr. Melsop executed on the 27th April, 2005. From in or about July 2009, Mr. Melsop made default in meeting the monthly payments so that by the date of his death, arrears had accrued in the sum of €31,890.32. However, he did continue to make intermittent payments and importantly, ICS did not move to call in the loan or enforce the security at any time before his death.

4. When Mr. Melsop died, the appellant was residing in the property with him and shortly thereafter, she instructed solicitors to correspond with ICS on the express basis that she was Mr. Melsop's executrix. For almost a year after Mr. Melsop's death, the appellant continued to make payments to ICS on foot of the mortgage, the last being made on the 28th January, 2014. On the 10th March, 2014, the appellant's solicitors wrote to ICS stating that the appellant had agreed to extract a grant of probate and thereafter proposed selling the property. In September 2014, the ICS loan was transferred to the respondent by operation of law.

5. Contrary to her earlier position, the appellant's solicitors wrote to the respondent in September 2015 stating that she now did not intend to take out a grant of probate and intended to continue residing in the property for the foreseeable future. Her solicitors stated that they would no longer be involved in the matter.

6. On the 16th August, 2016, the respondent made a formal demand for payment of the outstanding arrears and the balance of the loan facility. This was followed up by a demand for possession from the respondent's solicitors on the 8th September, 2016. Both of these demands were addressed to the appellant in her capacity as personal representative of the estate of the deceased and, in relation to the demand for possession, in her capacity as occupant of the property.

Judgment of the High Court

7. At the outset, the trial judge identified the two principle issues to be determined, first whether the respondent was entitled to sue the appellant as executrix when she had not taken out a grant of probate and secondly, whether the proceedings were statute barred. Although the trial judge did not expressly identify the issue concerning the commencement of proceedings in the Circuit Court, she considered and determined that issue also in the course of her judgment. On the first issue, the trial judge concluded that the appellant had intermeddled with the estate of the deceased and held herself out as the executrix and her purported renunciation of the office was in the circumstances invalid. The Court accordingly concluded that the appellant had constituted herself executor *de son tort*. The appellant has not appealed that finding.

8. The judge then turned to the appellant's contention that the proceedings ought to have been commenced in the Circuit Court by virtue of s.3 of the Land and Conveyancing Law Reform Act, 2013 ("the 2013 Act") which, in so far as relevant to these proceedings, provides: -

> "3(1) This section applies to land which is the principal private residence of –
>
> (a) The mortgagor of the land concerned…
> and the mortgage concerned was created prior to 1 December 2009.
>
> (2) Subject to subsection (4), proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court."

9. For the section to apply therefore, the appellant must establish that she is the "mortgagor" within the meaning of that section. The 2013 Act does not define the expression "mortgagor". However, a definition is to be found in section 3 of the Land and Conveyancing Reform Act, 2009 ("the 2009 Act") which provides: -

> "'Mortgagor' includes any person deriving title to the mortgaged property under the original mortgagor or entitled to redeem the mortgage…"

10. The respondent submitted in the High Court that "mortgagor" in s. 3 of the 2013 Act should be construed by reference to the above definition in the 2009 Act and that until a personal representative has taken out a grant of probate or administration, they have no entitlement to redeem the mortgage of a deceased mortgagor. The trial judge accepted this submission and held that the appellant was therefore not a "mortgagor" within the meaning of the 2013 Act and was thus not entitled to rely on s. 3 of that Act. Notably at the hearing of the appeal, the respondent resiled from this argument.

11. The trial judge then turned to the final issue being the accrual of the cause of action. In this regard, the appellant placed reliance on s.9(2) of the Civil Liability Act, 1961 ("the 1961 Act"): -

> "(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."

12. The judge considered the terms of a number of relevant provisions of the mortgage, to which I refer further below. She noted that clause 1 of the mortgage provided that the secured monies were payable on demand on the happening of an event of default. This was to be contrasted with clause 6 which provides that the secured monies shall be deemed to have become due on the execution of the mortgage and the mortgagee shall have all the statutory powers conferred on mortgagees by the Conveyancing Acts. Clause 7 provides that the powers provided for in clause 6 shall not be exercisable until a default in payment is made.

13. The judge observed that the monies due under the mortgage do not immediately become payable on the occurrence of an event of default, but the default triggers the right to demand payment. She noted that although clause 6 suggests that the secured monies are deemed to be "due" on the execution of the mortgage, the purpose of this clause was to ensure that the mortgagee could avail of the statutory powers conferred by the Conveyancing Acts. This provision was a long standing one included for the protection of third parties dealing with mortgagees. On the construction contended for by the appellant, it would mean that the mortgagee was entitled to go into possession of the

secured property and all the money would be due from the date of execution of the mortgage which flies in the face of the purpose of the entire transaction. It would also mean that the provisions of clause 1 concerning the necessity for demand would become otiose. The judge therefore concluded on this issue that the principal sum secured by the mortgage only became due when demanded and not before.

14. The Court also noted the provisions of s. 62(7) of the Registration of Title Act, 1964 by which the respondent seeks possession: -

> "62(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."

15. The court referred to *Start Mortgages Limited v Gunn and Anor* [2011] IEHC 275 and *Irish Life v Dunne* [2015] IESC 46 as authorities for the proposition that it is only once repayment of the principal monies secured by the mortgage has become due that the owner of the charge may apply for relief under s. 62(7).

16. The court's overall conclusion therefore on this issue was that the cause of action did not accrue in favour of the respondent until the demand for payment and possession was made in 2016 and was accordingly not captured by the provisions of s. 9(2) of the 1961 Act.

Grounds of Appeal

17. In her admirably succinct Notice of Appeal, the appellant raises two grounds, first that the trial judge was wrong to conclude that proceedings should not have been instituted in the Circuit Court and secondly that the trial judge erred in determining that the proceedings were not statute barred. In that respect, the appellant contends that there was a conflict between clause 1 and clauses 6 and 7 which should have been determined in favour of the appellant by virtue of the *contra proferentem* rule. The appellant contends that the accrual of the cause of action did not require the making of a demand for payment.

18. I propose to deal with each of these issues in turn.

Ought the proceedings have been commenced in the Circuit Court?

19. In order to succeed in this argument, the appellant must establish that she is the "mortgagor" of the property within the meaning of the 2013 Act. As I have noted already, "mortgagor" is not defined in the 2013 Act but it is defined in the 2009 Act. It is also defined in the mortgage deed itself in the "Definitions" section at para. (14): -

> "The 'Mortgagor' means the person or persons named as such in recital A.1 of the Mortgage Particulars and the personal representative or personal representatives of

the Mortgagor and the person or persons deriving title under the Mortgagor to the Mortgaged Property;"

20. The appellant contends that she comes within that definition as she is the personal representative of the mortgagor. At this juncture, that is of course no more than an assertion as not only has the alleged will not been admitted to probate, but it has not been put in evidence. The fact that the High Court held that the appellant is the deceased's executor *de son tort* does not confer any title to the estate of the deceased on her – see *Attorney General v New York Breweries Co*. [1898] 1 QB 205. The consequence of the finding is, in the words of Lord O'Brien LCJ in *Atthill v Woods* [1903] 2 IR 305 (at 308) that she "has all the liabilities, with none of the privileges, of a rightful executor". Although s.10 of the Succession Act, 1965 provides that: -

"(1) The real and personal estate of a deceased person shall on his death, notwithstanding any testamentary disposition, devolve on and become vested in his personal representatives",

no title devolves to the personal representative, nor can the personal representative deal with the estate, until such time as he or she takes out a grant of probate or administration. Unless and until that happens, the personal representative cannot be regarded as a person deriving title under the mortgagor. Although it may be arguable that the appellant is the personal representative of the mortgagor within the definition in the deed, it is not in any event material because it cannot be correct to suggest that the meaning of words in a statute fall to be determined by the definition accorded to them by the parties to a private contract. This would have the anomalous consequence that the statute would or would not apply depending on how the parties chose to describe themselves.

21. The 2009 Act defines "mortgagor" as including "any person deriving title to the mortgaged property under the original mortgagor or entitled to redeem the mortgage", a definition which the trial judge considered applied in this case. A personal representative could only be said to derive title to the mortgaged property on taking out a grant of representation and the mortgaged property would thereupon become an asset for the payment of debts, including the mortgage debt, by virtue of s. 45 of the Succession Act, 1965. Although the appellant alleges that the property was devised to her by the will of the deceased, she could not acquire title to it until such time as the duly appointed personal representative executes an assent to the vesting of the property in her. Had the appellant taken out a grant, she could not assent to the vesting until such time as the undisputed indebtedness of the deceased to the respondent was discharged, since the property remains an asset for the payment of those debts.

22. She would equally have no entitlement to redeem the mortgage in the absence of taking out a grant. It is in my view therefore clear that the appellant cannot come within the definition of "mortgagor" contained in the 2009 Act. However, I would respectfully differ from the trial judge's view that this is in fact the definition that applies in this case. There is no provision in the 2013 Act to the effect that it and the 2009 Act are to be read as

one. Furthermore, the 2009 Act includes, for example, a definition of the "Act of 1964" as meaning the Registration of Title Act, 1964, a definition which is replicated in the 2013 Act.

23. Such replication would have been unnecessary were the two statutes to be construed as one. It seems to me therefore that the expression "mortgagor" in the 2013 Act must be construed by reference to its natural and ordinary meaning, being the person who created the mortgage. Clearly that cannot be the appellant. Even adopting a more expansive definition of the kind to be found in the 2009 Act, it is to my mind clear that the appellant cannot on any reasonable interpretation of the expression be regarded as a "mortgagor" for the purposes of the 2013 Act. Accordingly, s. 3 of that Act does not apply to the appellant and this ground of appeal must fail.

Is the claim statute barred?

In order to answer this question, it is necessary to determine when the cause of action accrued for the purposes of s. 9(2) of the 1961 Act. "Cause of action" was defined by Lord Esher MR in *Read v Brown* [1888] 22 QBD 128 as: -

> "[E]very fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

24. The relevant clauses of the mortgage requiring consideration in this regard are Clauses 1, 6 and 7. Clause 1 is entitled "Covenants for Payment" and provides, insofar as relevant to these proceedings: -

> "1.01 The Mortgagor hereby covenants with the Society to pay to the Society on demand the secured monies…
>
> 1.02 All monies remaining unpaid by the Mortgagor to the Society and secured by this mortgage shall immediately become due and payable on demand to the Society on the occurrence of any of the following events, that is to say:
>
> (a) On the happening of any event of default …
>
> AND THE MORTGAGOR HEREBY FURTHER covenants with the Society to pay to the Society forthwith the sum so demanded…
>
> 1.03 The demand herein referred to shall mean a demand for payment of the secured monies … and may be made when or at any time after the Society becomes entitled to call for payment of the monies…"

25. The definition section of the mortgage defines "event of default" as meaning any of the events stipulated in paras. (a) – (j) inclusive of sub-clause 7.01. Clause 6 is entitled "The Society's Powers" and provides, again in relevant part: -

"6.01 At any time after the execution of this Mortgage, the Society may without any further consent from or notice to the Mortgagor or any other person, enter into possession of the Mortgaged Property or any part thereof or into receipt of the rents and profits of the Mortgaged Property or any part thereof.

6.02 The Society 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 monies shall be deemed to have become due within the meaning and for all purposes of the Conveyancing Acts on the execution of this mortgage."

26. The Definition section defines "Conveyancing Acts" as meaning the Conveyancing Acts 1881 to 1911 and the Registration of Title Act 1964. Section 7 is entitled "Exercise of the Society's Powers", and provides, again insofar as relevant here: -

"7.01 The Society shall not exercise any of the powers provided for in Clause 6 hereof or conferred by statute until any of the following events shall occur;

(a) default is made in payment of any monthly or any other periodic payment or in payment of any other of the secured monies hereunder…"

27. Clause 6 on its face therefore appears to suggest that on the execution of the mortgage, the mortgagee has a right to enter into possession and the secured monies shall be deemed to have become due, giving rise to the statutory powers of mortgagees under the Conveyancing Acts including s. 62(7) of the Registration of Title Act, 1964 which provides: -

"(7) When repayment of the principal monies 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…"

28. By the provisions of clause 7, the mortgagee covenants not to exercise the powers arising under clause 6 until default is made in payment of any of the monthly payments due under the mortgage. The appellant's position is that as the secured monies become due on the execution of the mortgage, the right to apply for an order for possession under s. 62(7) is triggered, but is not exercisable until a default in making the monthly payment occurs. At that point, the appellant says the cause of action accrues. The appellant accordingly argues that the cause of action in this case had accrued in July 2009 when the first default occurred and was therefore subsisting at the date of death of the deceased, so that s. 9(2) of the 1961 Act applies. Insofar as this appears to conflict with the requirements for a demand under Clause 1, the appellant says that this conflict must be resolved in the appellant's favour by the operation of the *contra proferentem* rule and so the Court should effectively ignore Clause 1.

29. The operation of clauses 6 and 7 and their equivalents in other cases gave rise to considerable difficulty in the wake of the enactment of the 2009 Act which repealed, *inter alia*, s.62(7) of the 1964 Act. This had the unintended consequence that mortgagees lost their statutory right to seek orders for possession, unless that right could be said to have been acquired or to have accrued prior to the 1st December, 2009. The lacuna thus arising was remedied by the enactment of the 2013 Act but before that happened, the High Court was called upon to consider the issue in *Start Mortgages Limited v Gunn and Anor* [2011] IEHC 275. These were four joined cases where the same issue arose. In each case the mortgage had been entered into before 2009 but in some of the cases, the loans were called in before the operative date and in others, afterwards. The mortgagors sought to contend that where the demands post-dated the 1st of December, 2009, the cause of action only accrued after that date for the purposes of s.62(7) and the claims would therefore have to fail. The court (Dunne J.) said (at pp. 26-27): -

> "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 *(sic)* 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 s.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…

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."

30. This decision was cited with approval in the judgment of the Supreme Court in *Irish Life and Permanent plc v Dunne* [2015] IESC 46 where Clarke J. (as he then was) said (at pp. 34 – 36):

"6.3. The effect of the decision in *Start Mortgages* is that, if the principal monies secured by a charge on registered land have not become due before the 1st December, 2009, the mortgagee was found not to be entitled to maintain a claim for possession of the charged property as a result of the repeal of s.62(7) of the 1964 Act with effect from that date. The rationale of the decision is that a mortgagee could only acquire a right to apply for an order under s.62(7) when the principal monies secured by the relevant mortgage had become due and, if that had not happened before the repeal of s.62(7), s.27 of the Interpretation Act 2005 was of no assistance to the mortgagee in negating the effect of the repeal…

6.6. In the course of their written submissions, Irish Life and Permanent suggested that in each case the appropriate test was as to whether, having regard to the provisions of the relevant mortgage and/or loan and to the facts insofar as they are relevant to the operation of those provisions, the payment of the principal money secured by the charge is due. It seems to me that counsel for Irish Life and Permanent was correct in suggesting that the test was as thus described. 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."

31. A similar issue arose in *McAteer v Sheahan* [2013] 2 IR 328. The High Court (O'Malley J.) considered whether a mortgagee could still seek an order for possession under s.62(7) of the 1964 Act, despite its repeal, by the operation of s.27 of the Interpretation Act, 2005. The mortgages under consideration were similar in terms to those arising in this case including clause 6 whereby the principal monies were "deemed" to become due on execution of the mortgage. O'Malley J. was invited to depart from the earlier judgment in

Start Mortgages on the basis that it was incorrectly decided and she declined to do so. In commenting on the effect of the deeming provision, O'Malley J. said (at pp. 365 – 366):

"[135] Counsel also relies upon the decision of the House of Lords in *West Bromwich BS v. Wilkinson* [2005] UKHL 44, [2005] 1 W.L.R. 2303. In that case the plaintiff had repossessed and sold the mortgaged property. As the full amount of the debt had not been realised by the sale, it now sued for the balance. One of the issues raised by the defendants was a limitation argument. Relying on a clause similar to that under consideration in this case, it was submitted that time in respect of the debt ran from the expiration of one month from the date of execution of the charge.

[136] Rejecting that argument, and holding that time ran from the date of default, Lord Scott of Foscote said at para. 25, p. 2310:-

> 'I am unable to accept that submission. The submission ignores the words "be deemed to". It is very common to find in mortgages some such provision as clause 5(c). The purpose is not to advance the date on which the mortgage money becomes due. It is to protect purchasers from the mortgagee and relieve them of the need to inquire whether "the mortgage money has become due"… I do not think this commonplace provision can be given an extended meaning simply because this legal charge has been ineptly drafted.'

[137] On behalf of the bank, counsel says that this authority is in fact in his favour. The reason that the clause protects a person purchasing from the mortgagee where the latter is exercising a power of sale, it is submitted, is because it saves him from having to investigate how that power arose and whether it is being validly exercised. Because it is a 'deeming' provision, it does not operate so as to actually render the money payable and nor, according to counsel, would it on its own ground a right to apply for possession. The lender's covenant not to apply save in the event of default would prevent that. However, the clause does, he submits, serve the purpose of fulfilling the condition that the monies be due within the meaning of s. 62(7) before that section can be invoked. It also satisfies the similar conditions contained in s. 19 of the Conveyancing Act 1881 relating to receivers.

[138] This is indeed a new argument, and one which could be described as significant. However, on balance I think that it must fail. It is not simply that it might be thought odd that a clause having such an important effect should have escaped the notice of so many experienced practitioners and judges for so long, for such things can happen – in this context counsel points to the lapse in time between the passage of the Act of 1881 and the judgment in *Northern Banking Co. v. Devlin* [1924] 1 I.R. 90 in 1924. Rather, it seems to me that the 'deeming' provision, described in *West Bromwich BS v. Wilkinson* [2005] UKHL 44, [2005] 1 W.L.R. 2303 as 'commonplace' and as being designed to protect the position of a third party buying the property from the mortgagee, cannot be interpreted as overriding the legal relationship between the parties to the agreement in all other respects.

[139] Counsel expressly disavows any suggestion that the clause could ground an application, because of the lender's covenant. However, if a borrower was making payments as they fell due under the terms of the contract and the lender nonetheless made demand for the entirety of the principal, I am not convinced that the only reason a court would refuse an order for possession would be the lender's covenant. The money would not be 'due' within the meaning of clause 1.02 set out above because none of the events described therein had occurred and the borrower was in compliance with the covenant to pay.

[140] I consider that I do not have to determine whether there is a conflict between the two clauses, or whether the 'deeming' provision is only directed towards third party rights. The issue, in my view, ultimately comes back to the question whether, as of the relevant date, the bank had an acquired right to apply for the statutory remedy. The bank, in essence, says that it had an acquired but as-yet-unexercisable right. Dunne J. considered that the right in question could not be described as acquired unless the conditions for its exercise had arisen."

32. I respectfully agree with these observations and the conclusion of the trial judge in the instant case that the deeming provisions in clause 6 of the mortgage, apparently commonplace for upwards of a century as the above authorities suggest, are there to provide comfort to third parties dealing with the mortgagee. It would clearly be illogical and contrary to the plain intention of the agreement construed as a whole were the mortgagee to have an immediately enforceable right to possession and payment on the execution of the mortgage. It seems to me that the expression "due" in clause 6 is to be equated with "owed" in recognising the existence of a present obligation to be fulfilled in the future. "Due" in clause 6 is thus to be contrasted with "due and payable" as the latter expression appears in clause 1. As *Start Mortgages* shows, it does not result in a presently enforceable right to possession in the absence of a demand.

33. The appellant however, argues to the contrary and submits that since clause 7 provides that the mortgagee's powers shall not be exercisable until a default in making the periodic payment has occurred, the cause of action then accrues, rendering clause 1 superfluous. In *McAteer*, O'Malley J. took the view that she did not have to determine whether there was in fact such a conflict arising.

34. In construing any written instrument, the court is seeking to ascertain the intention of the parties from a reading of the document as a whole. Various rules of construction have been developed to assist in that exercise. One such is the *contra proferentem* rule which may be availed of where there is a patent ambiguity in a particular term, so that the ambiguity will be resolved against the *proferens*.

35. Clause 7 precludes the mortgagee from exercising the powers in clause 6 until any of the events described in clause 7 shall occur. Those events are set out in 10 sub-clauses, one of which relates to default in payment of the monthly instalment. This is an "event of default" as defined in the Definitions section. However, clause 1 makes clear that the occurrence of an event of default does not of itself cause the secured sums to become

payable. That only occurs when an event of default is coupled with a demand for payment. There is no internal inconsistency in the mortgage in this regard and I cannot see any conflict arising that calls for resolution.

36. On the appellant's analysis, if a mortgagor were to miss a single payment, the mortgagee would thereupon have an automatic right to seek possession and no obligation, despite the plain words of the mortgage, to make any formal demand before doing so. I cannot accept that there is any warrant to be found in the mortgage for arriving at such a startling conclusion. Further, on any view of the matter, clause 1 is there for the benefit of the mortgagor so it is difficult to understand how its exclusion, contended for by the appellant, could be regarded as contra *proferentum*.

37. Where the contract calls for a demand before action, the cause of action does not accrue unless and until such demand is made. That much is clear from *Bank of Ireland v O'Keeffe* [1987] IR 47. That case also concerned s.9(2) of the 1961 Act where proceedings were instituted against the defendant as the personal representative of a deceased guarantor. The guarantee was payable on demand and such demand was made following his death. The demand was made more than two years after the death and the personal representative argued that the claim was barred. Barron J. rejected that argument saying (at p. 50): -

> "The claim which is brought is one which was not maintainable until after demand made and no cause of action could have arisen until such demand was made — see *In re: J. Brown's Estate. Brown v. Brown* [1893] 2 Ch. 300."

38. In contrast, the same judge dismissed a similar claim on foot of a promissory note where no demand was required before it became enforceable. In *First Southern Bank v Maher* [1990] 2 IR 477, the promissory note provided that in the event of default for a period of one month from its due date in payment of any of the instalments, the whole of the sum due should become immediately payable, in contrast to the guarantee in *Bank of Ireland v O'Keeffe*. The court's observations on the operation of s. 62(7) of the 1964 Act are also worthy of note (at p. 480): -

> "In the result it seems to me that the several remedies which the plaintiff may have had to enforce its security accrued once default had been made in payment. Even so, these proceedings are concerned only with the particular relief sought. It is a claim for possession under the provisions of s. 62, sub-s. 7 of the Registration of Title Act, 1964. Under that sub-section the right to seek possession arises "when repayment of the principal money secured by the instrument of charge has become due". In my view 'due' in this context means 'due and payable'. This date was May, 1981. This cause of action was not pursued until more than two years after the date of the death of Daniel Maher and in my view is therefore barred by the provisions of s. 9, sub-s. 2 of the Civil Liability Act, 1961."

39. A similar conclusion was reached by the High Court (McGovern J.) in *Bank of Ireland v Stafford* [2013] IEHC 546. In his judgment, McGovern J. said (at p. 6):

> "The Deceased died on 17th July, 2008, and the summary summons was issued on 29th March, 2012. The first and second named defendants argue that the plaintiff's claim against the Deceased and/or the first and second named defendants' claim against the Deceased were not claims that survived against his estate within the meaning of the Civil Liability Act. They rely on *Bank of Ireland v. O'Keeffe* [1987] I.R. 47, in which Baron J. held that the plaintiff's claim on foot of a guarantee made against the estate of a deceased was not time-barred since the demand was made after the death of the Deceased and it was not a claim that survived against the Deceased's estate within the meaning of the 1961 Act. He held that the plaintiff's claim was triggered by the demand that was made after the Deceased's death. Therefore, the limitation period prescribed by s. 9 of the 1961 Act did not apply. It seems to me that this is what occurred in the present case. The demand for payment was made after the Deceased's death and was not a claim subsisting at his death or one that survived against the Deceased's estate within the meaning of the 1961 Act. The monies did not fall due and were not repayable at any time prior to the Deceased's death."

40. In the present case, in my judgment it was only following upon the making of the demand for payment on the 16th August, 2016 that the facts were in place which, if proved, would have entitled the respondent to judgment. It follows therefore that the cause of action only accrued on that date and is not a cause of action that was pending at the date of Mr. Melsop's death or one that survived against his estate. The claim herein is therefore not statute barred and the second ground of appeal also fails.

Conclusion

41. For the reasons I have identified, I would dismiss this appeal. This will result in the order for possession granted by the High Court taking immediate effect, but if the appellant wishes to seek a stay, she will have liberty to deliver a written submission in that regard not exceeding 2,000 words within 14 days and the respondent will have the same period to respond. The submissions should also deal with the question of costs. In default of such submissions being received, as costs follow the event in the normal way, an order for costs will be made in favour of the respondent.

42. As this judgment is being delivered electronically, Power J. has indicated her agreement with it. Power J. and I have had the advantage of reading in draft the judgment to be delivered by Collins J. and we both agree with his reasoning and conclusions.