

**APPROVED**

**[2023] IEHC 7**



THE HIGH COURT

2020 No. 155 SP

BETWEEN

PROMONTORIA (OYSTER) DAC

PLAINTIFF

AND

J.J. KEARNEY

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 11 January 2023**

## **INTRODUCTION**

1. These proceedings seek to enforce an equitable mortgage in respect of unregistered land. The principal reliefs sought are a well charging order and an order for the sale of the land. The sole defence raised to the proceedings is that the application is inadmissible by reason of delay. The defendant submits that the proceedings are statute-barred under Section 9 of the Civil Liability Act 1961 and that the plaintiff has been guilty of laches.

NO REDACTION REQUIRED

## CIVIL LIABILITY ACT 1961

2. Section 8 of the Civil Liability Act 1961 provides that, on the death of a person, all causes of action subsisting against him shall survive against his estate.
3. Section 9(2) of the Act provides as follows:

“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.”
4. As appears, if a cause of action had already accrued prior to the date of death, but no proceedings were yet pending, any proceedings would have to be instituted within two years of the date of death (or such shorter period as might apply under the Statute of Limitations 1957).
5. The application of these provisions to proceedings which seek to enforce a mortgage has recently been considered by the Court of Appeal in *Bank of Ireland v. Matthews* [2020] IECA 214. It was held that, if on the proper interpretation of the relevant mortgage, the principal monies became due only upon the making of demand for payment, then the mortgagee’s cause of action does not accrue unless and until such demand is first made. In such a scenario, no cause of action would be subsisting as of the date of death of the mortgagor unless demand for payment had been made during his or her lifetime. In reaching this conclusion, the Court of Appeal in *Matthews* expressly approved of the judgment of the High Court in *Bank of Ireland v. O’Keeffe* [1987] I.R. 47.

6. This point proved crucial on the facts of *Matthews*. Under the terms of the mortgage deed, a demand for payment was required in order to trigger the mortgagor's covenant to pay the principal monies. A formal demand for payment had not been made until some three years *after* the death of the mortgagor. Thus, there was no cause of action subsisting as of the date of death and Section 9 of the Civil Liability Act 1961 did not apply. Instead, the proceedings were subject to the twelve-year limitation period applicable under the Statute of Limitations 1957.

#### **FACTUAL BACKGROUND**

7. The loan agreement in the present case took the form of an overdraft facility in the sum of €130,000. The loan agreement is set out in a facility letter dated 23 June 2008 entered into between Ulster Bank Ireland Ltd ("*Ulster Bank*") and William Kearney and Margaret Purcell Kearney ("*the borrowers*"). The borrowers indicated their acceptance of the terms and conditions of the loan agreement by signing the letter on 25 June 2008.
8. The loan agreement is stated to be subject to the terms and conditions set out in the facility letter itself and also subject to Ulster Bank's standard terms and conditions governing business lending to partnerships ("*the general conditions*"). It is expressly stated in the general conditions, at clause 1.2, that if any specific terms and conditions set out in a facility letter conflict with the general conditions, then the former apply. Put otherwise, a special condition prevails over a general condition in the event of a conflict between the two.
9. The repayment terms are stated as follows:

“Subject to the Bank's right to demand repayment at any time, the Facility will be available until notification to you

by the Bank of its intention to cancel the Facility. Without prejudice to the Bank's rights under this Clause, the Facility will be subject to review on 30<sup>th</sup> of September 2008."

10. The loan agreement was subject to the following special condition:

"Overdraft facility extended until 30<sup>th</sup> September 2008 at which stage it is to be cleared in full from sale proceeds of site in Littleton.

Alternatively, the overdraft facility is to be restructured on to a loan with overdraft facility of €10,000.00 to cover working capital requirements."

11. The security for the loan agreement is described as comprising an equitable deposit held over title deeds to commercial property at Littleton, Thurles, Co. Tipperary, containing office, workshop, non-residential house and boat yards. This land is the subject of the application for the well charging order and order for sale ("*the mortgaged property*").

12. The loan agreement contains the following statement towards its conclusion:

"This Facility Letter supercedes all prior agreements, arrangements or correspondence between the Bank and the Borrower in relation to the Facility."

13. The general conditions define an overdraft facility as being "*repayable on demand*" as follows:

"3.2 An overdraft Facility is repayable on demand and the Bank may at any time by written notice:

- (a) terminate the Facility; and/or
- (b) demand immediate repayment of all or any amounts drawn and outstanding under the Facility and all accrued interest and other sums payable in respect of the Facility.

Immediately upon such a demand being made the Borrower shall be liable to pay all such amounts, interest and other sums.

The inclusion of conditions precedent, covenants, representations and warranties, events of default and

review dates in this Agreement shall not prejudice the demand nature of a Facility stated to be repayable on demand.”

14. The plaintiff, Promontoria (Oyster) DAC, has since succeeded to Ulster Bank’s interest in the loan agreement and the equitable mortgage.
15. It is common case that the sum of €130,000 was not repaid on 30 September 2008. The first borrower, William Kearney, died intestate on 25 August 2011. The defendant herein, J.J. Kearney, is the personal representative of the first borrower, having taken out letters of administration on 25 November 2019. A demand for repayment was sent to the defendant, as personal representative, on 2 April 2020.
16. The second borrower, Margaret Purcell Kearney, died on 21 December 2016.
17. The present proceedings were instituted on 18 June 2020. The proceedings were thus commenced within three months of the date of the letter of demand, albeit more than eleven years after the repayment date specified in the loan agreement had expired.

## **DISCUSSION AND DECISION**

18. The principal issue for determination in this judgment is whether the mortgagee’s cause of action was subsisting as of the date of death of the mortgagor. If so, then proceedings to enforce the equitable mortgage should have been commenced within two years of the date of death. In the event, these proceedings were not commenced until almost nine years had elapsed since the date of death.
19. The resolution of this issue turns on whether the contractual obligation to repay the sum of €130,000 arose automatically on 30 September 2008, or whether,

alternatively, the making of a formal demand for payment was a condition precedent. The contractual terms are to be found solely in the loan agreement and general conditions. In contrast to cases involving a legal mortgage, such as *Bank of Ireland v. Matthews* [2020] IECA 214, there is no mortgage deed. The plaintiff relies on an equitable mortgage created by the deposit of title deeds.

20. It is submitted on behalf of the plaintiff that, on the proper interpretation of the loan agreement, 30 September 2008 did not represent the date for repayment. Rather, the date for repayment of the overdraft facility was instead deferred until one of the following contingencies occurred: (a) the making of a demand for payment by Ulster Bank (or its successor), (b) the first borrower, at his own election, repaying the overdraft facility out of the proceeds of sale of the property at Littleton, or (c) the first borrower electing to restructure the overdraft facility into a loan.
21. With respect, I cannot accept these submissions. The meaning of the loan agreement is clear. The repayment date is governed by the special condition. This special condition prevails over the general conditions. The default position is that the overdraft facility was to be repaid in full on 30 September 2008. This was to be achieved by the sale of the land at Littleton, i.e. the mortgaged property.
22. The special condition goes on then to indicate that there might, possibly, be an alternative approach, whereby the overdraft facility would be restructured into a loan. Crucially, however, this alternative approach would necessitate a fresh agreement between the parties. The borrowers and Ulster Bank would both have had to agree to the restructuring of the borrowings into a loan. In the absence of

such a fresh agreement, the default position is that the overdraft facility was to be repaid in full by 30 September 2008.

23. The fatal flaw in the rival interpretation contended for on behalf of the plaintiff is that it characterises the decision on whether or not to restructure the overdraft facility into a loan as a unilateral decision within the gift of the borrowers. The written submissions refer to the “*election*” of the borrowers, and to the borrowers having had “*options*” as to how to deal with any overdrawn balance, falling short of placing an obligation on them to make repayment on 30 September 2008.
24. These submissions cannot be reconciled with the wording of the special condition. The obligation to repay the sum of €130,000 in full on 30 September 2008 would only be displaced if a fresh agreement, i.e. to restructure the overdraft facility into a loan, had been entered into. There is no suggestion that such a fresh agreement was ever entered into. Accordingly, the contractual obligation to repay the principal sum of €130,000 arose automatically on 30 September 2008. There was no need for a formal demand for repayment. The cause of action had accrued as of 30 September 2008 and was thus subsisting as of the date of death (25 August 2011).
25. Indeed, it is telling that it is expressly pleaded by the plaintiff that the first borrower had failed to put the overdraft facility in credit *during his lifetime* as required by the terms and conditions of the letter of offer. (See, in particular, paragraph 7 of the special summons). The plaintiff itself has correctly identified that the contractual obligation to repay the overdraft facility had already arisen prior to the date of death and was not contingent on the service of a formal demand for payment. It will be recalled that a demand for payment was not made for several years after the date of death.

26. There is no conflict between the terms of the special condition and the notion of an overdraft facility being “*repayable on demand*” (as defined by clause 3.2 of the general conditions). The special condition imposes a longstop date by which the overdraft must be cleared in full. The contractual obligation to repay the monies on 30 September 2008 arose by effluxion of time and it was not necessary to serve a formal written notice demanding repayment.
27. The imposition of a longstop date did not prejudice the lender’s right to demand immediate payment at an earlier date. If, however, Ulster Bank had chosen to demand repayment ahead of the longstop date, it would have had to serve written notice. Put otherwise, a written notice demanding repayment would only have been required had Ulster Bank sought to call in the overdraft facility prior to 30 September 2008.
28. Alternatively, if and insofar as there might be thought to be any inconsistency between the special condition and the general conditions, the former prevails.
29. Finally, and subject to the caveat that the outcome of each case will turn on the contractual language used, the interpretation above is broadly consistent with the approach adopted by the High Court in *Allied Irish Banks plc v. Pollock* [2016] IEHC 581. On the facts of that case, Baker J. held that a contractual obligation to clear a loan in full by a specified date meant that payment became due on that date without demand, and that the right to take action on foot of a failure to pay on the agreed date happened automatically.

## **CONCLUSION AND PROPOSED FORM OF ORDER**

30. The mortgagee’s cause of action had accrued once the prescribed repayment date had passed without the overdraft facility being cleared in full. There was no



requirement to make a formal demand for payment in order to trigger the contractual obligation to repay. In circumstances where the repayment date had expired prior to the death of the mortgagor, the cause of action was subsisting as of the date of death.

31. Any proceedings seeking to enforce the equitable mortgage should have been instituted within two years of the date of death of the mortgagor on 25 August 2011. In the event, these proceedings were not instituted until 18 June 2020. The claim for a well charging order and an order for sale is statute-barred by the provisions of Section 9 of the Civil Liability Act 1961. These proceedings will, therefore, be dismissed.
32. As to costs, my provisional view is that the defendant, having been entirely successful in resisting the proceedings, is entitled to recover his costs as against the plaintiff. If the plaintiff wishes to contend for a different form of costs order, it should file written legal submissions by 30 January 2023. The defendant will have three weeks to reply. If the plaintiff does not file submissions by that date, the provisional costs order will become final.
33. Separately, the parties are directed, pursuant to Practice Direction HC 101, to file a copy of their written submissions of 9 November 2022 and 14 November 2022, respectively, in the Central Office of the High Court.

#### *Appearances*

Paul J. Brady for the plaintiff instructed by OSM Partners

Kevin Byrne for the defendant instructed by Donal T. Ryan Solicitors LLP (Cashel)