

THE HIGH COURT

2018 No. 271 SP

BETWEEN

WF SHAP (IRELAND) DAC

PLAINTIFF

AND

DONAL FINGLETON

(AS ADMINISTRATOR AD LITEM OF THE ESTATE OF LAURENCE JOHNSON DECEASED)

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 February 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application for an order for possession. The right to possession is said to arise under a mortgage which had been entered into between the late Laurence Johnson (*"the Deceased"*) and Seniors Finance Ireland Ltd. The proceedings are taken as between the lawful assignee of the mortgagee's interest, WF Shap (Ireland) DAC, and the administrator *ad litem* of the Deceased's estate. The loan underlying the mortgage is what is described colloquially as a "lifetime loan" or a "reverse mortgage".
2. The application for possession is predicated, primarily, on the provisions of section 62(7) of the Registration of Title Act 1964. Reliance is also placed, in the alternative, on a contractual right to possession.
3. The central question to be addressed in this judgment is whether the proceedings have been brought within time. The answer to this question turns on whether or not the proceedings are subject to the two-year limitation period applicable to certain causes of action against a deceased person's estate. (Section 8 of the Civil Liability Act 1961).

FACTUAL BACKGROUND

4. The Deceased, the late Laurence (otherwise Lawrence) Johnson, had been registered as the full owner of lands at 36 Assumpta Park, Limerick on 23 September 2005.
5. By letter dated 5 April 2007, Seniors Finance Ireland Ltd. offered to advance the sum of €52,700 to the Deceased. It was a pre-condition to the drawdown of the principal monies that the Deceased execute a deed of mortgage over the premises at 36 Assumpta Park, Limerick. The terms and conditions specified in the letter of offer of 5 April 2007 stated that the Deceased would not be obliged to make any monthly repayment of principal, interest or any other amount during the term of the loan. The principal monies would, instead, become due and payable on the happening of any one of eight specified events. These included, relevantly, the death of the Deceased.
6. The Deceased entered into a loan agreement, on the terms and conditions specified, with Seniors Finance Ireland Ltd. on 20 June 2007.
7. The loan agreement underlying the mortgage is what is described colloquially as a "lifetime loan" or "reverse mortgage". These financial products are designed to allow

elderly homeowners to borrow against the value of their home, with the intention that the principal monies will be paid out of their estate following their death.

8. The key feature of such financial products is that the principal monies are not repaid by way of regular instalments as in the case of a conventional mortgage loan. Rather, it is envisaged that the entire of the principal monies will be repaid (together with interest) on the happening of certain events, including the death of the borrower or the sale of the mortgaged property.
9. The Deceased duly executed a mortgage and charge ("*the Mortgage*") in favour of Seniors Finance Ireland Ltd. on 17 October 2007. The "Mortgaged Property" had been identified in the Mortgage by reference to the dealing number which had been allocated by the Land Registry. An affidavit has been filed confirming that the Mortgaged Property is the same as the lands which are now comprised in Folio 58695F of County Limerick ("*the Folio*").
10. The Mortgage was subsequently registered on the Folio as a charge against the lands on 14 November 2007.
11. Insofar as relevant to the point in respect of the limitation period, the key provisions of the Mortgage are as follows.

"1.2 All moneys remaining unpaid by the Mortgagor to the Mortgagee and secured by this Mortgage shall immediately become due and payable on demand to the Mortgagee on the occurrence of any of the following events that is to say:

- (a) on the happening of any event of default other than an event specified in paragraph (i) of sub- clause 7.1 hereof; or
- (b) on the death of the mortgagor or where two or more persons constitute the mortgagor the death of the survivor of such persons; or
- (c) if the Mortgaged Property shall be compulsorily acquired or purchased;

and the Mortgagor hereby further covenants with the Mortgagee to pay to the Mortgagee forthwith the sum so demanded together with further interest thereon 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 before any judgment or order of the Court.

1.3 the demand herein referred to shall mean a demand for payment of the secured moneys made by the Mortgagee or on behalf of the Mortgagee by any law agent or solicitor, secretary, manager or other officer of the Mortgagee upon the Mortgagor and such demand in case of moneys due or owing on current account may be made at any time and in other cases may be made when or at any time after the Mortgagee becomes entitled to call for payment of the moneys and separate demands may be made in respect of separate accounts at different times."

12. The events of default are defined at Clause 7.1. Insofar as relevant to these proceedings, same read as follows.

"7 EXERCISE OF MORTGAGEE'S POWERS

7.1 The Mortgagee 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:

[...]"

13. A series of events are then set out, including, for example, breach of covenant, and the conveying or transferring of the Mortgaged Property without prior consent in writing.
14. For the sake of completeness, it should be noted that Clause 7.1(i), which appears to be excluded by Clause 1.2 (set out earlier), reads as follows.

"(i) default is made in complying with the demand made under sub-clause 1.2 of this Mortgage in consequence of:

 - (i) the death of the mortgagor or where two or more persons constitute the mortgagor the death of the survivor of such person; or
 - (ii) the compulsory acquisition of the Mortgaged Property;"
15. Clause 6.1 provides, in brief, that the Mortgagee may enter into possession of the mortgaged property at any time after the execution of the Mortgage. Clause 6.2 provides that the mortgagee shall have the statutory powers conferred on mortgagees by the Conveyancing Acts, and goes on to provide, *inter alia*, that 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 the Mortgage.
16. The mortgagee's interest under the Mortgage has since been transferred from Senior Finance Ireland Ltd. to WF Shap Ireland DAC ("*WF Shap*") by deed of assignment and transfer dated 8 July 2016. The latter's ownership of the charge was subsequently registered on the Folio on 30 September 2016.
17. The Deceased died intestate on 2 December 2015. Under the terms of the Mortgage, the death of the mortgagor represented an event of default. On the proper interpretation of the Mortgage, however, the right of the mortgagee to possession of the land does not arise automatically on the death, rather a demand for repayment of the principal monies must have been made thereafter.
18. WF Shap first sought to demand repayment of the principal monies by letter dated 2 March 2017 addressed to the "LPR of Laurence Johnson Deceased". The abbreviation "LPR" presumably was intended to refer to legal personal representatives.
19. Steps were then taken to have an administrator *ad litem* appointed pursuant to section 27(4) of the Succession Act 1965 for the purposes of substantiating proceedings. Donal Fingleton, Solicitor, was given liberty to apply to extract a grant of letters of administration *ad litem* by order of the High Court (Baker J.) dated 30 November 2017.

20. Thereafter, a letter of demand in proper form was sent to the administrator *ad litem* on 14 February 2018. This letter sought the payment of the sum of €101,599.77. This demand remains unsatisfied. WF Shap Ireland subsequently instituted the within proceedings on 29 May 2018.

PROCEDURAL HISTORY

21. The within proceedings are brought by way of special summons, and, in accordance with Order 38 of the Rules of the Superior Courts, were initially listed before the Master of the High Court. The Master is obliged, in all cases in which he shall not have jurisdiction, to transfer the summons, when in order for hearing, to the Judge's List for hearing on the first opportunity. See, generally, *Permanent TSB (Formerly Irish Life and Permanent Plc) v. Carr* [2019] IEHC 14, and the case law cited therein.
22. In the present case, the Master purported to make an order on 26 February 2019 striking out the summons. The reason stated in the order was that the summons was statute-barred. The Master had no jurisdiction to make this order. The Master's function is administrative only, and any dispute as to whether the proceedings were statute-barred is a matter reserved to the High Court. Moreover, as explained under the next heading below, the purported finding that the proceedings are statute-barred is, in any event, incorrect as a matter of law.
23. The Master's order was subsequently discharged by the High Court (Eagar J.) on 25 March 2019, and the proceedings were transferred to the Chancery Special Summons List. The application for an order for possession came on for hearing before me on 13 January 2020. The parties each filed very helpful written legal submissions in advance of the hearing.

CALCULATION OF LIMITATION PERIOD

24. An action to recover the possession of mortgaged lands is, generally, subject to a limitation period of twelve years under the Statute of Limitations 1957. Special rules apply, however, to limitation periods in respect of claims against the estate of a deceased person. These rules are set out under the Civil Liability Act 1961 (as amended). Proceedings in respect of causes of action which were *subsisting* on the death of a person must, generally, be brought within two years of the date of death.
25. If this shorter, two-year period were found to apply to the present case, then it is accepted by the parties that the proceedings would be statute-barred. The death occurred on 2 December 2015, and the proceedings were not instituted until 29 May 2018, i.e. some two and a half years later.
26. In order to determine whether the two-year limitation period applies, it is necessary to consider the detail of the rules under the Civil Liability Act 1961. Section 8(1) of the 1961 Act provides as follows.
- 8.(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.

27. Section 9 provides as follows.

9.(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.

28. In circumstances where the within proceedings were not “pending” at the date of death, the case turns on the interpretation of section 8(1) and section 9(2)(b) above. The issue to be determined in this judgment is whether the cause of action pursued in these proceedings, i.e. an action to recover possession of lands, was one which was “subsisting” at the date of death of the Deceased. If it was subsisting, then proceedings had to be commenced within the period of two years after the date of death.

29. In order to resolve this issue, it is necessary to examine the nature of the cause of action being pursued, with a view to identifying whether it had accrued as of the date of death. The application for possession is predicated, primarily, on the provisions of section 62(7) of the Registration of Title Act 1964. Reliance is also placed, in the alternative, on a contractual right to possession.

30. Section 62(7) 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.

31. The Mortgage in the present case is dated 17 October 2007. The Mortgage was registered as a charge on the Folio on 14 November 2007. The transitional provisions thus apply, and WF Shap Ireland is entitled to invoke section 62(7).

32. 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.

33. 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.”

34. It is necessary, therefore, to consider the terms of the Mortgage. The relevant provisions have been set out in full at paragraphs 10 to 12 above. As appears from clause 1.2, the legal consequence of the death of the mortgagor, i.e. the Deceased, was that the principal monies became “due and payable on demand”. The concept of a “demand” is defined at clause 1.3.
35. The effect of these clauses is that the making of a *demand* is a condition precedent to the accrual of the right to apply for possession of the lands. The principal monies do not become payable automatically on the death of the mortgagor: rather, a further step, i.e. the making of demand, is required. No such demand had been made prior to the death of the Deceased. Indeed, absent one of the *other* events of default having occurred, the mortgagee would not be entitled to serve a demand until the date of death. The death is the triggering event.
36. For the sake of completeness, it should be noted that this interpretation is entirely consistent with the terms of clause 6 of the Mortgage. Clause 6.1 provides, in brief, that the mortgagee may enter into possession of the mortgaged property at any time after the execution of the Mortgage. Clause 6.2 provides that the mortgagee shall have the statutory powers conferred on mortgagees by the Conveyancing Acts, and goes on to provide *inter alia* that 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 the Mortgage. These clauses, if read in isolation, might suggest that the principal monies were *immediately* due for payment on the date of the execution of the Mortgage, and that, consequently, the right to apply to recover possession of the lands had already accrued on 17 October 2007. On this analysis, the cause of action would have subsisted as of the date of death.

37. Clause 6 cannot, of course, be read in isolation from the other terms of the Mortgage. Clause 7.1 expressly provides that the mortgagee shall not exercise any of the powers provided for in clause 6 or conferred by statute until any of the events of default shall have occurred. Moreover, it would be entirely inconsistent with the contractual intention of the parties to interpret the Mortgage as imposing a requirement to repay the principal monies immediately on demand. The intention of the parties was to enter into what is described colloquially as a “lifetime loan” or a “reverse mortgage”. The key feature of such products is that the requirement to repay the principal monies will, generally, be deferred until after the death of the borrower/mortgagor. A requirement for immediate repayment would be the antithesis of this.
38. In reaching the above findings, I have obtained considerable assistance from the judgment of the High Court (Costello J.) in *Governor and Company of the Bank of Ireland v. Matthews* [2018] IEHC 335 (“*Matthews*”). The mortgage in that case was in almost identical terms to that in the present case. In particular, the mortgage contained a clause to the effect that the secured moneys shall be deemed to have become due on the execution of the mortgage (clause 6.02).
39. Costello J., having carried out a careful consideration of the terms of the mortgage, held as follows.
- “34. [...] The secured monies are deemed to have become due upon the execution of the mortgage ‘for all purposes of the Conveyancing Acts’. The clause does not state that the secured monies are deemed to have become due on the execution of the mortgage. They are deemed to have become due for all purposes of the Conveyancing Acts on the execution of the mortgage.
35. This is to ensure that the Society shall have all the statutory powers conferred on mortgagees by the Conveyancing Acts from the date of the execution of the mortgage, just as it is entitled under Clause 6.01 to enter into possession of the mortgaged property at any time after the execution of the mortgage. *These provisions have long been included in mortgages for the purpose of protecting third parties dealing with mortgagees. They do not alter the fundamental terms of the agreement between the mortgagor and the mortgagee.** On the construction contended for by the defendant, on the date of the execution of the mortgage, the mortgagee would be entitled to go into possession of the secured property and the entire of the monies secured by the mortgage would be due to the mortgagee on that date. Aside from the fact that this flies in the face of the purpose of the entire transaction, it makes the provisions of Clause 1 of the mortgage in relation to a demand otiose. Construing the deed as a whole, I am satisfied that the defendant’s construction of the deed is not correct.
36. Further, the Society’s powers set out in Clause 6 are expressly limited by Clause 7. Clause 7.01 clearly states that the Society shall not exercise any of the powers provided for in Clause 6 or conferred by statute until any of the specified events shall occur. The specified events are the events of default. This means that, until

an event of default occurs, the Society may not go into possession of the mortgaged property under Clause 6.01 and the Society may not exercise any of the statutory powers conferred by the Conveyancing Acts. So while Clause 6.02 (a) deems the secured monies to have become due for the purposes of the Conveyancing Acts, Clause 7.01 (a) provides that the Society shall not exercise any of the powers provided for in Clause 6 until there is an actual default in payment of any monthly or other periodic payment or in payment of any other of the secured monies due under the mortgage. Upon default in payment of monies due under the mortgage the prohibition on exercising the powers set out in Clause 6 ceases to apply. It does not mean that the secured monies become immediately and automatically due.

37. I conclude that under the terms of the mortgage in these proceedings the principal sum secured by the mortgage became due when the Society lawfully demanded repayment of the sum and not before. The occurrence of an event of default was simply a necessary precondition to the Society's right to make the demand and did not render the deceased immediately liable to repay the secured monies."

*Emphasis (italics) added.

40. Costello J. turned next to consider the date at which the cause of action could be said to have arisen under section 62(7) of the Registration of Title Act 1964 as follows.

"40. Section 9(2) of the Civil Liability Act, 1961 provides that no proceedings shall be maintainable in respect of any cause of action which has survived against the estate of a deceased person unless the proceedings have been commenced within the relevant period. But this claim was not maintainable until after a demand was made. It follows no cause of action arose until such demand was made. No demand had been made prior to the death of the deceased and it follows that s.9(2) does not apply to the plaintiff's claim.

41. This conclusion follows the decision in *Bank of Ireland v. O'Keeffe* [1987] I.R. 47. Barron J. held it was necessary to establish that the plaintiff's cause of action was one which subsisted at the date of death of the guarantor. He found that no cause of action existed whereby the plaintiff could sue the guarantor either, while he was alive, or his estate, after his death, until demand on foot of the guarantee had been made. Since the demand was not made until after his death, it followed that there was no cause of action subsisting against the guarantor and therefore the case was not barred by virtue of the provisions of s.9(2) of the Act of 1961. See also *Bank of Ireland v. Stafford & Ors.* [2013] IEHC 546."

41. I respectfully adopt this analysis as a correct statement of the law. Where, as in the present case, the making of demand is required under the mortgage deed before the repayment of the principal monies secured by the charge will become due, then the cause of action cannot be said to have accrued until such demand has been made. On the facts, no demand had been made prior to the date of death, and, accordingly, the action to

recover the lands was not subsisting as of that date. Consequently, the proceedings are not subject to the two-year limitation period under section 9(1)(b) of the Civil Liability Act 1961.

42. For the sake of completeness, it should be noted that there is—potentially at least—an *additional* reason for saying that proceedings which seek to recover possession of lands pursuant to a “reverse mortgage” or “lifetime loan” will not engage section 9 of the Civil Liability Act 1961, 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.
43. On this interpretation, the two-year limitation period would not apply even in circumstances where the terms of the mortgage did not require the making of a formal demand as a procedural step following the death of the mortgagor. The cause of action is not subsisting. To put the matter another way: whereas the time-limit point has been resolved in this case by reference to the fact that the Mortgage requires a formal demand, the case might, in principle, have been resolved by an interpretation of the term “subsisting” under section 8 of the Civil Liability Act 1961.
44. In this regard, counsel helpfully referred me to an (unapproved) note of an ex tempore judgment of the High Court (Baker J.) in *Seniors Money Mortgages (Ireland) Ltd. v. Gately (“Gately”)*. Baker J. held that in order for the two-year limitation period to apply the action must be in action which subsists at death rather than one which is triggered by, or crystallises at, the death of the mortgagor.
45. It is not necessary for the purposes of the proceedings before me to express any concluded view on the interpretation of section 8, and, in particular, on whether a cause of action which is only triggered by the death of an individual can be said to be “subsisting” as of the date of death. I simply note that the interpretation adopted by the High Court in *Gately* has much to commend it.
46. (For the sake of completeness, it should be noted that an appeal against the judgment in *Gately* has now been dismissed by the Supreme Court on the grounds that the appeal to the Court of Appeal had not been brought within time: *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3. It was unnecessary for the Supreme Court to address the point under the Statute of Limitations).
47. Finally, it might be thought anomalous that proceedings directed to the personal representatives of a deceased person can be taken well outside the two-year limitation period normally applicable, and that this might frustrate the legislative intent that proceedings against an estate should be brought within this shorter period so as to allow the administration of an estate to be completed promptly. The explanation for this

apparent anomaly may lie in the fact that proceedings which seek to recover the possession of lands might more properly be characterised as proceedings *in rem* rather than a cause of action against a deceased's person's estate. On this characterisation, the deceased's personal representatives are named as defendants *qua* owners and occupants of the land. Again, it is not necessary to express a concluded view on this issue for the purposes of resolving the within proceedings. The case can, instead, be resolved on the narrower ground that the Mortgage expressly requires the making of a formal demand. The observations in this paragraph are *obiter dicta*.

SECTION 62(7) OF THE REGISTRATION OF TITLE ACT 1964

48. In light of the above finding that the proceedings are not statute-barred, it is necessary next to consider the substantive merits of the application. Specifically, it is necessary to consider whether the requirements of section 62(7) of the Registration of Title Act 1964 have been met. These requirements have been summarised at paragraphs 32 and 33 above.
49. The evidence before the court establishes that WP Shap Ireland has succeeded to the mortgagee's interest under the Mortgage. The relevant deed of transfer has been exhibited. Crucially, the registration of the mortgage as a charge against the Deceased's interest in the lands, and WP Shap Ireland's interest in the charge, are evident from the folio exhibited in the proceedings.
50. The evidence also establishes that the principal monies are now due. More specifically, the monies are payable in circumstances where (i) a triggering event has occurred, i.e. the death of the Deceased, and (ii) a lawful demand for repayment has now been made and has not been satisfied.
51. Finally, no discretionary factors have been put forward which would justify the refusal of an order for possession.

CONCLUSION AND FORM OF ORDER

52. Under the terms of the mortgage of 17 October 2007, the making of a *demand* for the repayment of the principal monies is a condition precedent to the accrual of the right to apply for possession of the mortgaged lands. It follows, therefore, that the principal monies did not become payable automatically on the death of the mortgagor. Rather, a further step, i.e. the making of demand, was required.
53. Where, as in the present case, the making of demand is required under the mortgage deed before the repayment of the principal monies secured by the charge has become due, then the cause of action cannot be said to have accrued until such demand has been made. (*Governor and Company of the Bank of Ireland v. Matthews* [2018] IEHC 335 applied). On the facts of the present case, no demand had been made prior to the date of death, and, accordingly, the action to recover the lands was not subsisting as of that date. Consequently, the proceedings are not subject to the two-year limitation period under section 9(1)(b) of the Civil Liability Act 1961. The proceedings are, instead, subject to a twelve-year limitation period, and were instituted well within time.

54. For the reasons explained under the previous heading, I am satisfied that the conditions for the making of an order for possession under section 62(7) of the Registration of Title Act 1964 (as applied by the transitional provisions of the Conveyancing and Land Law Reform Act 2013) have been fulfilled.
55. Accordingly, an order for possession of the lands will be made pursuant to section 62(7). I will hear counsel further on whether any of the ancillary orders sought at paragraphs (b) and onwards of the Special Summons are necessary.
56. Finally, I wish to express my appreciation to counsel for their very helpful submissions on the limitation period point.

Appearances

Conal Ellis instructed by Denis I. Finn Solicitors for the plaintiff.

Dylan West instructed by Fingleton & Co Solicitors for the defendant.