



March 2019

Enforcing security without a letter of demand – French O'Carroll v. Permanent TSB PLC and others

Summary

A recent High Court judgement delivered by Ms. Justice Ní Faifeartaigh considered the question as to whether a lending bank had a contractual right to appoint a receiver over secured property without prior demand of monies. Ultimately, the Court found that it depends upon the relevant terms of the mortgage or charge in question.

Case Background

In 2007 two loan facilities were advanced by Permanent TSB (“PTSB”) to the borrowers, one of which was secured by a mortgage over the property known as Diep Le Shaker Restaurant (the “**2008 Mortgage**”). The borrowers subsequently defaulted on their repayment obligations under the loan agreements and letters of demand were then issued to the borrowers in December 2010 (the “**2010 Demand**”) and further demands in October 2011 (the “**2011 Demand**”). The 2010 Demand only stated the arrears under the loan agreements at that point in time, whereas the 2011 Demand included detail of the arrears and principal outstanding. Neither of the demand letters referred to any intended appointment of a receiver.

In February 2011, Mr. Keith Lowe was appointed receiver over the secured assets. In February 2015, Mr. Howe’s appointment was terminated and Mr. Stephen Tennant was appointed as receiver of the secured assets. In June 2015, PTSB assigned all its rights and interest in the loans and underlying security (to include the 2008 Mortgage) to Havbell Limited (now Havbell DAC).

For further information on any of the issues discussed in this article please contact:



Keith Robinson

DD:+ 353 (1) 674 1004

keith.robinson@dilloneustace.ie



David O'Shea

DD:+ 353 (1) 673 1718

david.oshea@dilloneustace.ie

Thereafter, the borrowers disputed the validity of the appointment of each of Mr. Lowe and Mr. Tennant under the 2008 Mortgage on the basis that there had been no valid demand. In relying upon the contractual provisions contained within the 2008 Mortgage, PTSB contended that upon the occurrence of an event of default under the 2008 Mortgage (i.e. default in making repayments from time to time), the security became immediately enforceable which then triggered the bank's contractual right to appoint a receiver.

High Court Decision

In considering a number of questions raised by way of Special Case, Ms. Justice Ní Faifeartaigh reviewed a number of authorities and noted that in deciding whether or not a demand letter is required depends on the terms of the mortgage. In adopting a strict interpretation of the terms of the 2008 Mortgage, Ms. Justice Ní Faifeartaigh noted that *"a failure to pay the security rendered the security immediately enforceable, without the need for a letter of demand"*. It was concluded that a contractual power to appoint a receiver had been triggered upon the event of default taking place, without any requirement for any demand letter.

On reviewing the question as to whether there was a valid demand upon which PTSB could rely, Ms. Justice Ní Faifeartaigh referred to authorities on what constitutes a valid demand and noted that *"the essential features...are that there must be a clear, unequivocal, peremptory and unconditional request for payment"*, all of which were deemed satisfied by the Court in the case at hand.

Commentary

This judgement demonstrates once again how, in considering whether a receiver has been lawfully appointed, the Courts will adopt a strict interpretation of the express terms of the relevant mortgage or charge. It also worth noting that to avoid any argument that there was an express or implied obligation to make such a demand under the relevant mortgage or charge, the prudent approach would be to serve a formal demand for repayment of the entirety of the debt owing on the relevant borrower(s).

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2018 Dillon Eustace. All rights reserved.