



May 2013

The end of the Start Mortgages Issue?

Introduction

In a move that should be welcomed by mortgage lenders and other interested parties, such as purchasers of loans, structured credit or other assets backed by Irish real estate, the Minister for Justice, Equality and Defence, Alan Shatter T.D. published the Land and Conveyancing Law Reform Bill 2013 (the “**Bill**”) on 28th March, 2013¹. The primary purpose of the Bill is to address the uncertainty arising from the interpretation by the High Court of the changes to the law brought about by the Land and Conveyancing Law Reform Act 2009 (the “**2009 Act**”). In addition, the Bill also proposes the adjournment of repossession proceedings in respect of a borrower’s principal private residence where these could be resolved under the Personal Insolvency Act 2012.

Background

The background to the Bill involves the well-known Start Mortgages² decision, which found that the repeal by the 2009 Act of certain provisions of the Registration of Title Act 1964 (the “**1964 Act**”) had the unintended consequence of restricting mortgagees from exercising their right to repossession on a summary basis (i.e. using an expedited, simplified procedure).

Prior to the enactment of the 2009 Act, a mortgagee could apply to Court pursuant to the 1964 Act for an order for possession of land over which it had a registered charge, as soon as payment under that charge became due. However, in the Start Mortgages decision, the High Court held that, as the 2009 Act had repealed section 62(7) of the 1964 Act, mortgagees of registered property could not apply

¹ <http://www.oireachtas.ie/documents/bills28/bills/2013/3413/b3413d.pdf>

² Start Mortgages Ltd v. Gunn [2011] IEHC 275 (High Court, Dunne J, 25 July 2011)

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



Conor Houlihan

DD: + 353 (0)1 6731719

conor.houlihan@dilloneustace.ie



Kate Curneen

DD : + 353 (0)1 6731738

kate.curneen@dilloneustace.ie

for summary judgment unless the principal amount secured under the relevant charge became due prior to 1st December, 2009 (being the commencement date of the 2009 Act).

The High Court found that unless the monies secured under the relevant charge had become due and owing prior to 1st December, 2009, the mortgagee's right to obtain possession by summary proceedings had not been "*acquired*" nor had it "*accrued*" prior to the repeal of the 1964 Act by the 2009 Act. This meant that in the Start Mortgages decision, section 62(7) of the 1964 Act was not saved from repeal by the Interpretation Act 2005³, which provides that where an enactment is repealed, the repeal does not affect "*any right, privilege, obligation or liability acquired, accrued or incurred under the enactment.*"

Uncertainty

Understandably, the Start Mortgages decision created much uncertainty and presented a substantial headache for mortgagees who sought to enforce their security by way of summary proceedings. The decision meant that mortgagees who entered into mortgages in respect of registered land prior to 1st December 2009, under the Conveyancing Acts 1881 to 1911 (the "**Conveyancing Acts**"), were left in a position where it was unclear whether they could rely on the summary procedure provided for by section 62(7) of the 1964 Act, or on the powers granted to a mortgagee pursuant to the Conveyancing Acts. Such powers include the power of sale, the power to appoint a receiver, and the ability for a mortgagee to overreach subsequent encumbrances on title.

A number of subsequent High Court decisions mitigate the effect of the Start Mortgages decision⁴ somewhat and appear to limit the decision to its particular facts⁵. However, while impacting some mortgages more than others (i.e. depending on the particular fact pattern and how the relevant mortgage/charge was drafted) the Start Mortgages decision has remained an issue to be considered when assessing the availability of certain enforcement remedies; particularly the ability to obtain summary possession of registered land in circumstances where the charge was entered into prior to 1st December, 2009, but the monies owing under that charge did not become due until after 1st December, 2009.

The Bill

The Bill seeks to create clarity in the law in the aftermath of Start Mortgages and the subsequent High Court decisions, and provides confirmation that certain provisions of the Conveyancing Acts and of the 1964 Act will continue to apply to mortgages which pre-date the coming into force of the 2009 Act, despite the fact that those provisions were repealed by the 2009 Act.

The Bill, if enacted, would clarify that a mortgagee has the statutory powers provided for by the Conveyancing Acts, including the power of sale, the power to appoint a receiver, and the power to overreach subsequent encumbrances on title as well as the ability to seek to enforce their security by way of summary proceedings under the 1964 Act. However, notably, the current draft of the Bill provides that these provisions do not apply to any proceedings that have been initiated prior to the

³ Section 27(1)(c)

⁴ The Start Mortgages decision is currently under appeal to the Supreme Court.

⁵ In particular, the decisions in *Kavanagh and Ors v Lynch and Ors* [2011] IEHC 348 unreported, *EBS Limited v Gillespie* [2012] IEHC 243 unreported, and *McEnergy v Sheahan* [2012] IEHC 331 unreported.

Bill coming into operation. This means that the Bill will not be of assistance to those mortgagees who have already commenced proceedings and who are affected by the decision in Start Mortgages.

Conclusion

However, overall, the Bill is a most welcome development, which, if enacted, should operate to address the current legislative anomalies and provide greater certainty to mortgagees seeking to enforce their security over real property.

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.

Hong Kong

604 6F Printing House, 6 Duddell Street, Central, Hong Kong. Tel: +852 352 10352.

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:

© 2013 Dillon Eustace. All rights reserved.