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The High Court provides clarity on requests for inspection of title documents under s.91 of the Land and Conveyancing Law Reform Act, 2009 (the “**2009 Act**”).

Farrell v Everyday Finance DAC [2022] IEHC 303, judgment of Ms. Justice Stack dated 24 May 2022 (the “**Judgment**”).

Practice Focus

- Debt enforcement and defence litigation;
- Inspection of title documents requests by borrowers;
- Notices to produce.

Background:

- S. 91 of the 2009 Act provides:-

“a mortgagor, as long as the right to redeem exists, may from time to time, at reasonable times, inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the possession or power of the mortgagee.”

- Relatively recently and of note, in *Charleton v Hassett [2021] IEHC 746*, Mr. Justice Allen held that the Court could see no justification for the Defendant’s right for inspection of documents under s. 91 of the 2009 Act to be rejected by the Plaintiff.
- In the case the subject of this bulletin, the Plaintiff borrowed monies on foot of loan facilities from AIB Mortgage Bank and AIB plc “**AIB**” and mortgaged eleven properties in Dublin and Donegal (the “**Loan Facilities**”).

- In 2018, by global deeds of assignment (the “**Global Deed**”), the Defendant purchased the interest in the Loan Facilities from AIB.
- In 2021, the Plaintiff issued a motion seeking inspection of documents under O.31. r.18 of the RSC, s. 91 of the 2009 Act, O.50 r.4 of the RSC and under the inherent jurisdiction of the Court.

Ms. Justice Stack identified two main issues:-

- Whether the Defendant has adequately complied with the notice to produce by exhibiting redacted copies of the global deeds of assignment;
- Whether the Plaintiff was entitled to production of documents other than the title documents.

The Plaintiff delivered a broad statement of claim outlining *inter alia*:-

- The Defendant refused inspection of the documents of title documents pursuant to s. 91 of the 2009 Act;
- The Plaintiff entered a restructuring agreement with AIB in 2015, to take steps to sell property, thereby creating an estoppel which bound AIB and the Defendant;
- The Plaintiff was entitled to buy out his loans and securities from AIB;
- The Plaintiff was entitled redeem his mortgage at the price or value offered by the Defendant;
- The sale of the Plaintiff's loan and security savoured of maintenance and champerty;
- The Defendant had caused loss to the Plaintiff by causing several sales of mortgaged property to fall through;
- The Defendant is not entitled to appoint a receiver, given the Plaintiff had abided by the restructuring agreement with AIB.

The Defendant delivered a defence pleading *inter alia*:-

- The Loan Facilities remain repayable upon written demand on the Plaintiff;
- The Plaintiff had previously acknowledged the Defendant's title and was now estopped from challenging it;
- The Plaintiff was not entitled to claim for losses associated with sale of mortgaged properties that did not go through;

- The Defendant was the lawful successor of AIB pursuant to the Global Deed;
- S. 91 of the 2009 Act does not apply to documents executed between AIB and the Defendant;
- The statement of claim did not disclose a cause of action;
- There was no bar to transfer the Loan Facilities from AIB to the Defendant;
- The Plaintiff was not entitled to benefit from estoppel.

The Court's findings:-

The inherent jurisdiction of the Court to provide inspection or production of documents

- The Plaintiff sought a very broad and general category of documents, which is more akin to an order for discovery. The rules of court cannot be used to lay down a procedure which is contrary to or inconsistent with them. It is therefore not appropriate to use the inherent jurisdiction for inspection or production of documents;

Applications under O.50 r.4 RSC

- Ms. Justice Stack dismissed the application under O.50 r.4 RSC, as O.50 r.4 RSC relates to the preservation of physical evidence.

Application to produce documents pursuant to O.31 r. 18 RSC

- The Court noted "strictly speaking", this procedure is only open to inspection of documents referred to in an affidavit and not a within pleadings like a defence.

- In considering the notice to produce, the Court differentiated between “*individual documents*” and a “*category of documents*” and found that O.31 r.18 RSC only applies to the right to produce individual documents. The Plaintiff sought a category of documents which is more suitable for a discovery order.
- In considering the right of a borrower to view unredacted documents, the Court held that matters such as definition and interpretation provisions of a document should be disclosed unless they refer to commercially sensitive or confidential information such as price, which in this case is not material.
- A solicitor should view the unredacted document and provide an affidavit outlining why the levels of redaction are appropriate.

Application of right to inspect pursuant to O.31 r. 15 RSC

- The right to inspect attaches only to specific documents mentioned in the pleadings.
- If the relevant documents have not been identified by specific reference in the pleadings, then the discovery process is available for that purpose.

Application for inspection pursuant to s. 91 of the 2009 Act

- The Court highlighted that in the *Charleton v Hassett* judgment, which was an application under s. 91 of the 2009 Act for sight of the original deed of mortgage, facility letter and deed of appointment of receiver. The *Hassett* case concerned an application for possession of property by injunction proceedings. In the current case, the s. 91 request is for a category of documents.
- The Court differentiated the *Charleton v Hassett* judgment from the current application where in *Hassett* the crux of the issue centred around the validity of the appointment of receiver. In the current application, no receiver had been appointed.
- In consideration the scope of a s. 91 request, the Court found that agreements for transfer and any deeds of transfer which are registered in the Land Registry are outside the scope of s.91 of the 2009 Act.
- However with unregistered property, the applicant may be entitled to view documents of title under S.91 of the 2009 Act.
- The Court stated the real issue is whether any orders should be given, where “*there is no present intention or capacity to redeem*” the mortgages by the Plaintiff.

- Ms. Justice Stack took the view that the purpose of the S.91 request was to seek documents of title for advantage in the litigation which is not the purpose the section was enacted for and a s.91 request should not be used to obtain documents which would be ordinarily requested by way of discovery.

Conclusion

- In comparing the judgments in *Charleton v Hassett* and *Farrell v Everyday Finance DAC*, it appears the Courts have take the approach that a s. 91 request is a shield and not a sword.
- S. 91 requests may be useful in defending against a bank action in some circumstances, but where no cause of action arises, s. 91 requests cannot be used to litigate against a bank.
- As to argument that s. 91 was used to seek documents of title for advantage in litigation, that is not the purpose for which the section was enacted.

Key Takeaways

- O. 31.r.15 RSC requests should contain requests for individual documents and not a category of documents;
- S.91 requests should not be used as a means to circumvent discovery;
- S.91 requests do not apply to transfer agreements or transfer deeds registered in the Land Registry;
- S.91 requests are appropriate for title documents concerning unregistered property;
- S. 91 requests are designed to ensure that a mortgagor has the right to inspect such documents of title as are necessary for him/her to redeem, to convey his/her interest, and to satisfy himself/herself of the lawfulness of the exercise of any powers by a person purporting to be mortgagee.

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