

Ireland Update: Court of Appeal confirms that a Receiver does not require a Court Order for taking Possession of a Mortgaged Property

What You Need to Know

- a) A recent decision of the Court of Appeal has clarified that receivers, in contrast to mortgagees, are not required to obtain court orders prior to possessing mortgaged properties in Ireland.
- b) This decision is a welcome confirmation for lenders, receivers, and practitioners following the prior High Court decision that had created uncertainty in respect of the established legal requirements.

Background

The Court of Appeal heard the appeal of the High Court decision in the case of Bank of Ireland Mortgage Bank UC v Hade & Anor¹ (the "Hade Case") on 7 December 2023. The earlier decision of the High Court in December 2022 had created confusion in the area of receiver sales of mortgaged property as the trial judge in the High Court had interpreted Section 97 of the Land and Conveyancing Law Reform Act 2009 (the "LCLRA 2009") as applying to both receivers and mortgagees.

Section 97 of the LCLRA 2009 ("Section 97") sets out the statutory criteria for taking possession of mortgaged property. The High Court decision had created uncertainty in respect of the established legal requirements

applicable to a receiver when possessing mortgaged property. This then had a knock-on effect on the sale of mortgaged properties by receivers as well as for the subsequent application for the registration of title to these properties by Tailte Éireann. The decision of the Court of Appeal has now clarified the uncertainty created by the High Court decision in the Hade Case.

Application of the LCLRA 2009

The provisions of Part 10, Chapter 3 of the LCLRA 2009 ("Chapter 3") apply to both housing loans and non-housing loans. However, Chapter 3 may be disapplied in the case of loans which are not "housing loan mortgages" and this is the common practice in lending documents for non-housing loans. Chapter 3 cannot be excluded from the mortgage where the loan is a "housing loan mortgage".

The provisions of Chapter 3 require a mortgagee to obtain a court order both to take possession of mortgaged property and to sell mortgaged property unless it has the prior written consent of the mortgagor to the repossession and/or sale. Section 97 sets out the criteria for a mortgagee taking possession of mortgaged property and Section 100 of the LCLRA 2009 ("Section 100") sets out the statutory criteria for effecting the power of sale of mortgaged property.

¹ 2023 IECA 292.

Briefly, housing loans are agreements to provide credit (whether by way of an initial financing or a re-financing) to borrowers for the purposes of constructing / improving / acquiring a property which is or will be used as their principal residence. A housing loan also includes an agreement to provide credit for the acquisition or construction of a house where the person to whom the credit is provided is acting as a "consumer".

High Court Decision

The trial judge in the Hade Case considered whether the defendants acted as 'consumers' when entering the underlying loans. The trial judge was satisfied that the defendants did not act as consumers as entering the loans was a business activity and not merely a personal investment opportunity. The defendants actively managed the properties by renting them and were engaged in the business activity of acquiring and renting a portfolio of properties. The fact that the defendants also had the goal of providing for themselves and their children did not mean that they acted as consumers when entering the loans.

Next the trial judge considered whether the loans in question were "housing loans". It was held that the loans were not housing loans under the applicable legislation as they were entered into to refinance or purchase properties which were not the principal residence of the defendants or their dependents.

However, the trial judge then proceeded to consider whether there was an agreement between the lender and the defendants to treat the loans as housing loans notwithstanding that they did not come within the statutory definition of same. It was held by the trial judge in the High Court that the lender had agreed to treat the relevant loans as housing loans based both on descriptions in the loan documents and on certain conditions included in the loan documents. These conditions stated that the loans were subject to the

statutory provisions governing housing loans. As such the trial judge held the defendants were entitled to the protections under the LCLRA 2009 in respect of the underlying loans. As a result, the High Court, in interpreting the LCLRA 2009, held that the receiver acted unlawfully in taking possession of and in selling the mortgaged properties without first obtaining court orders. The High Court awarded exemplary damages against the receiver as a consequence of this action.

Decision on Appeal to the Court of Appeal

The Court of Appeal disagreed with the finding of the trial judge in the High Court that the loans in question should be treated as housing loans. The court stated that although the loan documents incorporated general conditions stating that the powers of the lender and receiver were subject to compliance with the LCLRA 2009, this did not mean that there was an agreement to treat the underlying loans as housing loans.

Crucially, the court noted that Section 97 refers specifically to a mortgagee taking possession of mortgaged property and does not refer to a receiver. Accordingly, the Court of Appeal held that the receiver in the Hade Case was not in breach of Section 97 by failing to obtain a court order to possess the mortgaged properties. It is important to highlight that this would have been the case even if the loans in question had been found to have been housing loans. In the Hade Case the receiver obtained possession of the mortgaged properties either through direct negotiations with the tenants of the properties or by obtaining rulings from the Residential Tenancies Board. In this way the Court of Appeal confirmed the receiver lawfully possessed the mortgaged properties. Accordingly, the Court of Appeal also allowed the receiver's appeal against the award of exemplary damages made against the receiver by the High Court.

In the Hade Case the receiver accepted that a court order to effect the power of sale in respect of the mortgaged properties should have been obtained by the receiver prior to selling these properties. As a result, the question as to whether or not a receiver would require a court order for the sale of mortgaged property under Section 100 was not considered by the Court of Appeal. However, critically, it should be noted that Section 100 would not apply to a non-housing loan if the provisions of Chapter 3 are contracted out of the underlying loan documents (which is the usual practice of lenders in respect of non-housing loans).

Summary

The decision of the Court of Appeal is a welcome confirmation for lenders, receivers, and practitioners alike that even in the case of housing loans, receivers, in contrast to mortgagees, are not required to obtain court orders prior to possessing mortgaged properties.

As noted above the issue around the application of Section 100 remains somewhat open. However, we would highlight the fact that the usual practice is to contract out of the provisions of Chapter 3 in relation to non-housing loans.

Further Information

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The Maples Group's Irish legal services team is independently ranked first among legal service providers in Ireland in terms of total number of funds advised (based on the most recent Monterey Insight Ireland Fund Report, as at 30 June 2022).

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