THE HIGH COURT

[2017 No. 11496 P]

BETWEEN

ACC LOAN MANAGEMENT DAC AND STEPHEN TENNANT

PLAINTIFF

AND

KELLYS LONDIS SUPERMARKET LIMITED, DANIEL KENNEDY AND OLIVE KENNEDY

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 25th day of September, 2018

1. By notice of motion dated the 11th January, 2018 the plaintiffs sought an order requiring the first named defendant to surrender vacant possession of the property known as The Crescent, Bridge Street, Boyle, County Roscommon (the "Secured Property") and an order prohibiting the defendants from interfering with, impeding and/or obstructing the second named plaintiff, his servants and/or agents in the conduct of the receivership and/or other efforts to take possession of and sell the Secured Property and various related reliefs.

Facts

2. By a letter of loan sanction and agreement dated 16th September, 2002 ACC Bank Plc ("the Bank") offered the second and third named defendants a facility to purchase a 10,000 square feet retail premises at The Crescent, Boyle, County Roscommon. The facility was to be secured by a first legal mortgage and charge on the Secured Property. It was a special condition of the loan facility that no lettings or renewal of lettings in or of the Secured Property would be made without the Bank's prior consent in writing. The facility was subject to the general conditions for commercial loans with the Bank. Clause 18 provided that where security over the Secured Property has been created for the purpose of securing advances then the Secured Property or any part of it may not be assigned, leased, sublet, licensed, alienated or otherwise allowed out of the possession, ownership or control of the borrower without the prior consent in writing of the Bank while any sum due to the Bank remains outstanding. The second and third named defendants accepted the facility on the 20th September, 2002.

3. On the 4th October, 2002 the second and third named defendants granted the Bank a first legal mortgage over the Secured Property. At Clause 14 (h) of the mortgage deed the second and third named defendants covenanted with the Bank during the continuance of the mortgage that they would not assign, lease, sublet or part with possession of the mortgaged premises or any part thereof without the consent in writing of the Bank previously had and obtained. The mortgage was duly registered in the Registry of Deeds on the 8th July, 2003.

4. By letter of sanction dated the 3rd December, 2003 the Bank offered the second and third named defendants a term loan in the amount of €1,350,000 to finance an additional €400,000 to complete fit out of a new retail store in Boyle, County Roscommon. The security for the facility was an extension of the Bank's existing first legal mortgage and charge over the Secured Property. The second and third named defendants accepted the facility on the 5th and 6th December, 2003, respectively. The facility was subject to the Bank's general terms and conditions applicable to commercial credit facilities. Clause 4.11 provided:

> *"In availing of a facility the borrower undertakes to the bank that so long as the facility is available for utilisation (whether or not subject to preconditions) or remains outstanding:*
>
> > *(a) The borrower will not, without the prior consent in writing of the bank, create or agree to create or permit to subsist any mortgage charge, pledge, lien or other encumbrance of any nature over any of the secured assets except for security in favour of the bank…"*

5. The second and third named defendants leased the Secured Property to the first named defendant by an indenture of lease dated the 9th January, 2004 for a term of 35 years commencing on the 17th October, 2003 at a rent of €96,000 per annum for the first five years and thereafter to be reviewed every five years. Part III of the first schedule provided that the revised rent referred to in the lease

> *"in respect of any of the periods therein mentioned may be agreed at any time between the landlord and the tenant or (in the absence of agreement) be determined …by an arbitrator …the revised rent so to be determined by the arbitrator shall be such as in his opinion represents at the review date the open market yearly rent for the premises let as a whole without fine or premium…"*

The landlord had a right to re-enter the premises if the rent or any part thereof remained unpaid for 28 business days after becoming payable (whether formally demanded or not).

6. In June 2014 ACC Bank Plc reregistered as a private company, ACC Bank Ltd and then changed its name to ACC Loan Management Ltd. By special resolution dated 13th July, 2016 ACC Loan Management Ltd changed its name to ACC Loan Management Designated Activity Company.

7. The first named defendant carried on business from the Secured Property as a Londis supermarket and at all material times paid the rent due pursuant to the lease to the second and third named defendants. Mr. Neil Kennedy, director of the first named defendant, explained in an affidavit sworn on the 19th February, 2018 that, as a result of the general downturn in the economy and difficult trading conditions in County Roscommon, the parties to the lease entered into a side agreement dated 1st January, 2014 whereby it was agreed to vary the lease. The side agreement provided:

> *"This agreement is supplemental to the deed of lease between the landlord and the tenant dated the 9th day of January, 2004 whereby the landlord let the property more particularly described therein to the tenant from the 17th day of October, 2003 for a term of 35 years at an annual rent of €96,000.00.*
>
> *Now it is hereby agreed as follows:*

The landlord and tenant have agreed to vary the rent payable under the terms of the said lease to €30,000 per annum. In all other respects the terms of the lease remain unchanged."

Thereafter the first named defendant paid the reduced rent to the second and third named defendants.

8. The Bank employed Capita Assets Services (Ireland) Ltd ("Capita") to act as its agent in relation to the facilities granted to the second and third named defendants. By letter dated the 7th May, 2015 addressed to the solicitors for the second and third named defendants Mr. David Greally on behalf of Capita wrote as follows:

"Please be advised that our client does not dispute the existence of the lease dated 9th January, 2004 made between your clients and Kelly's Londis Supermarket ("the lease") in the amount of €96,000 per annum which is in place over the supermarket premises at The Crescent, Boyle, County Roscommon. The said premises were provided as security by your clients as per deed of mortgage/charge dated 4th October, 2002 and registered accordingly with the registry of deeds on the 8th July, 2003 at Book 11 entry number 83.

As you are aware, it is a standard clause within a mortgage document that the letting or granting of a lease of any Secured Property requires the consent of the mortgagee. Therefore, by implication, any variation of the said lease also requires the mortgagee's consent. I was provided on 19th August, 2014 with a copy of a side agreement dated 1st January, 2014 which varied the rent from €96,000 to €30,000. From a review of our files, it appears that this side letter had not previously been provided to ACC LM and its existence was not known until 19th August, 2014 when it was provided to me by Ahern & Co.

Therefore, I reiterate on behalf of ACC Loan Management that there is no dispute as to the existence of the aforementioned lease. As previously stated in correspondence, please note that ACC Loan Management Ltd, having been made aware on 19th August, 2014 of the side letter dated 1st January, 2014 varying the rent payable from €96,000 to €30,000, has not consented to this variation of the rent."

9. By letters dated 27th January, 2017 the first named plaintiff demanded immediate repayment of all sums then due and owing by the second and third named defendants in the amount of €759,300.28. The second and third named defendants failed to repay the moneys outstanding and by deed of appointment dated 7th March, 2017 the first named plaintiff appointed the second named plaintiff as receiver pursuant to the powers contained in the deed of mortgage dated 4th October, 2002 over all the assets referred to and comprised in the mortgage.

10. On the 9th March, 2017 the second named plaintiff ("the receiver") wrote to the first named defendant advising it of his appointment. The letter provided that all rental payments must now be paid to him in his capacity as receiver and stated that new bank account details would be furnished shortly. The first named defendant was advised that rent should not be paid to any party other than the receiver unless otherwise notified by him in writing. He requested that copies of all leases/rental agreements effecting the occupancy of the premises be forwarded to him.

11. On the 9th March, 2017 the receiver wrote to the second and third named defendants in relation to his appointment as receiver over the Secured Property. He requested the second and third named defendants to provide him with copies of all the tenant leases/rental agreements, the most recent rental accounts and to return all rental deposits held to him in his capacity as receiver to the Secured Property.

12. The solicitors then acting for the second and third named defendants wrote on the 13th March, 2017 to the receiver asking for details of the account and stating that they would arrange to notify the tenant for the purpose of the future payment of rent to the account of the receiver. On the 20th March, 2017 the receiver wrote to the first named defendant providing the relevant account details and advising that all rental payments in accordance with the lease should be made to the receivership account only. In accordance with the terms of the side agreement, the first named defendant remitted the quarterly rent due on the 3rd April, 2017 in the sum of €7,500. By letter dated the 10th April, 2017 the receiver claimed that the quarterly rent due was €24,000 and requested that the shortfall of €16,500 be discharged by the 18th April, 2017.

13. The solicitors for the first named defendant wrote to the receiver on the 11th April, 2017 stating:

"As we are sure you are aware our clients agreed a variation to the letting agreement/lease whereby the rent was agreed to be reduced from €96,000 to €30,000."

The letter enclosed a copy of the side agreement of the 1st January, 2014.

14. The receiver's solicitors replied on the 13th April, 2017 requesting that the first named defendant provide the receiver's solicitors with a copy of the Bank's consent to the side letter dated the 1st January, 2014. In reply the solicitors for the first named defendant stated that they had advised the first named plaintiff that the Bank's consent was not required to the side letter as the Bank was not a party to the lease.

15. The receiver did not accept the position of the first named defendant and indicated that he would institute proceedings to have the first named defendant evicted for non-payment of rent in accordance with the original terms of the lease dated 9th January, 2004 and to have the side agreement set aside on the basis that the Bank's consent was not obtained and that the side agreement prejudiced the Bank's position.

16. By letter dated 10th August, 2017 the receiver's solicitors formally demanded immediate payment of a sum of €33,000, being the shortfall in the rent due since the date of the appointment of the receiver. The letter provided that if payment was not received within seven days that the receiver reserved the right without further notice to seek to forfeit the lease for non-payment of rent and/or to seek possession of the property. By letter dated the 14th August, 2017 the first named defendant's solicitors replied stating that the first named defendant was not in default in respect of the lease agreement and that there were no arrears of rent and that therefore there was no basis upon which the receiver was entitled to seek forfeiture for non-payment of rent and/or possession of the property.

The Lease

17. The primary relief sought in the notice of motion by the plaintiffs is an order for vacant possession of the Secured Property. It is to be born in mind that this is an interlocutory application and that I am not making final determinations of the factual and legal issues in dispute between the parties. I am concerned with whether the plaintiffs are entitled to the reliefs they seek on an interlocutory

basis and not after a plenary hearing, where the court will have heard all the evidence and be in a position to adjudicate on the issues between the parties.

18. The receiver Mr. Tennant swore the grounding affidavit on behalf of the plaintiffs. He does not assert that the Bank did not consent to the grant of the lease in January 2004 and that it is not bound by the lease. The letter from Capita to the second and third named defendant dated 7th May, 2015 does not dispute the existence of the lease. It specifically says that the Bank did not consent to the variation of the rent and by implication no case is advanced that the lease itself is not binding upon the Bank as mortgagee. The receiver demanded payment of the rent from the first named defendant and received rent in the sum of €7,500 from the first named defendant in April, 2017. In the letter of demand of the 10th August, 2017 the solicitors for the receiver demanded payment of a shortfall of rent due under the lease and indicated that if the payment was not received they would seek to forfeit the lease for non-payment of rent.

19. In *Fennel v. N17 Electrics Ltd (in liquidation)* [2012] 4 I.R. 634 Dunne J. had to consider whether a lease granted by a mortgagor in breach of a negative pledge covenant in the mortgage deed was binding on the mortgagee. At para. 30 of the judgment she held:

> *"…it is clear that a mortgagor and mortgagee can expressly agree to exclude the power conferred by s. 18 of the [Conveyancing Act] of 1881. If the power is excluded, it may be done in a way that permits the mortgagor to grant a lease subject to the prior consent of the mortgagee. If such prior written consent is not obtained by the mortgagor and the mortgagor proceeds to enter into a lease with a tenant, the lease will be binding on the mortgagor as lessor, but as against the mortgagee, the lease will not be binding. It is also clear that in certain circumstances, the lease may be binding on the mortgagee in circumstances such as those described in the authorities referred, where, for example, the mortgagee "serves a notice on the tenant to pay the rent to him". It is also clear from the authorities referred to above, that the mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not, of itself, sufficient to create a relationship between the mortgagor's tenant and the mortgagee."*

She also held that the onus of proving that a mortgagee had consent to a lease which contravene the mortgage lay on the party seeking to rely upon the terms of the lease.

20. In this case there was no averment that the consent in writing of the Bank to the granting of the lease of 2004 was obtained prior to the execution of the lease. The rent was paid by the first named defendant to the second and third named defendant who in turn discharged their repayment obligations to the Bank. The Bank was aware of the existence of the lease but these facts alone are insufficient to make the lease binding upon the Bank as mortgagee of the Secured Property.

21. However, it is clear that Capita, the agent of the Bank accepted the existence of the lease and did not contest that the lease was binding upon the Bank. The receiver demanded rent directly from the first named defendant and accepted monies paid by way of rent from the first named defendant. In those circumstances, following the decision in *N17 Electrics*, it seems clear to me that there is a strong case that the lease is binding on the mortgagee and upon the receiver and indeed the plaintiffs did not seek interlocutory relief on the basis that the lease did not bind either of the plaintiffs.

The side agreement

22. The plaintiffs are seeking mandatory reliefs and are seeking an order for possession against the defendants. Therefore, the appropriate standard to apply is that in *Maha Lingam* [2005] 17 ELR 137 so the onus is on the plaintiffs to establish that they have a strong case against the defendants.

23. The central issue between the parties in the interlocutory application was the effect of the side agreement of the 1st January, 2014. The agreement varied the rent payable under the lease. *Prima facie* it is binding as between the landlord (the second and third named defendants) and the tenant (the first named defendant). They accept that this is so. The first named defendant has paid the rent due in accordance with that side agreement. The first named defendant says that it is not in breach of the lease, there are no arrears of rent due and therefore there is no entitlement to forfeit the lease or recover possession of the Secured Property from it.

24. The plaintiffs say that the side agreement reduced the rent from €96,000 to €30,000 per annum and therefore prejudices the value of the first named plaintiff's security. The second and third named defendants, as mortgagor, had covenanted not to assign, lease, sublet or part with possession of the mortgaged premises or any part thereof without the consent in writing of the Bank previously had and obtained. They say that, by implication, any variation of the lease also requires the consent of the Bank as mortgagee. The mortgagee did not consent to the side agreement of the 1st January, 2014 and therefore it is not bound by the terms of that variation. It follows that the original rent of €96,000 per annum is due by the first named defendant to the receiver.

Legal authorities

25. When construing an agreement, the court's task is to ascertain the intention of the parties and that intention must be ascertained from the language they have used considered in the light of the surrounding circumstances and the object of the contract. Moreover, in attempting to ascertain the presumed intention of the parties, the court should adopt an objective, rather than a subjective approach, and should consider what would have been the intention of reasonable persons in the position of the parties (*UPM Kymmene Corporation v. BWG Ltd* (unreported High Court Laffoy J. 11th June, 1999).

26. The loans in this case were advanced for the purpose of purchasing the Secured Property and subsequently to complete a fit out of the new retail store in the premises. The object of the mortgage was to provide security for repayment of the loan in the event of a default by the borrower, the second and third named defendants. In Clause 14 of the mortgage deed the borrower entered into eleven covenants with the Bank which were to apply during the continuance of the mortgage. Clause 14(h) provided that the borrower would not assign, lease, sublet, or part with possession of the mortgaged premises or any part thereof without the prior consent in writing of the Bank. There was no express covenant not to vary any leases of the Secured Property without first obtaining the consent in writing of the mortgagee to the proposed variations to a lease previously approved by the Bank.

27. The purpose of a negative pledge in a mortgage deed such as Clause 14(h) was explained by Dunne J. in *Fennel v. N17 Electrics Ltd (in liquidation)* in para. 47 where she said:

> *"It is essential from a lender's point of view that the Secured Property is available as security in the event of default by the borrower. It is therefore important to ensure from the lender's point of view that any impediment to the realisation of its security by reason of a lease binding on the mortgagee should be one in respect of which the mortgagee has furnished its consent. That is the importance and function of the negative pledge clause contained in the various mortgages/charges."*

28. It seems to me that there is a strong argument that Clause 14 and in particular sub clause (h) is not concerned with or directed towards the ability of the mortgagor to repay the secured monies or the value of the security. There was no requirement in either facility letter that any rent received in respect of the Secured Property be paid directly to the Bank in discharge of the loans. There was no requirement even that the second and third named defendants remit any rent received in repayment of the loans due to the Bank, though that historically is in fact what occurred. It seems to me the extent of the clause is to safeguard the security for the loan in the event of default by the borrower, though on this interlocutory application the court cannot reach a conclusive view on the issue.

29. It is a well-established principle that in construing contractual documents, the courts must not rewrite the bargain made by the parties. The parties to an agreement must be held to it. See *Luxor Investments Ltd v. Beltany Property Finance Ltd.* [2015] IEHC 316. At this interlocutory stage of the proceedings it seems to me that the court cannot read words into Clause 14 (h) which do not appear in the clause and which are not required to give effect to the agreement of the parties. In my opinion, to insert the words contended for by the plaintiffs would be to rewrite the bargain of the parties, though I appreciate that this will be a matter for the trial judge.

Conclusion

30. This judgment is in respect of an interlocutory application and not of a plenary hearing. I am making no final determination on the issues between the parties. However, for the reasons I have set out, on the affidavit evidence before the court, the plaintiffs have not made out a case that the first named defendant is in breach of its obligations under the lease and in particular failed to pay the rent properly due so that the receiver is entitled to an immediate order for possession of the premises prior to a full plenary hearing of the case. The issue of whether the receiver is entitled to forfeit the lease and to recover possession of the premises are matters which require to be determined at a plenary hearing. I therefore refuse the plaintiffs the reliefs sought in the notice of motion herein.