THE COURT OF APPEAL

Appeal Record No. 2021 126
Neutral Citation Number [2022] IECA 286

Barniville P.
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF/RESPONDENT

-AND-

RICHARD FINBARR FITZGERALD

DEFENDANT

-AND-

EILEEN DALY

NOTICE PARTY/APPELLANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 13th day of December 2022

1. This appeal arises in proceedings brought by the Plaintiff (hereinafter "**the Bank**") to recover possession of premises pursuant to a mortgage entered into between it and the defendant in 1995 (and therefore on a date prior to the Conveyancing and Land Law Reform Act 2009 which is a point of significance). The mortgage contained a provision usually referred

to as a negative pledge clause. The defendant (variously "**the defendant" or "the Borrower")** did not take part in the High Court proceedings; he had been adjudicated a bankrupt by the time of the hearing and the Official Assignee did not offer opposition to the orders sought. The appeal is brought by the Notice Party (hereinafter "**the appellant")** who had entered into a 35-year lease with the defendant in 2002, and therefore some 7 years after the mortgage. There was no evidence before the High Court that the Bank gave its consent to the lease. Nonetheless the appellant maintains that the Bank must comply with the Residential Tenancies Act 2004 with regard to the notice provisions concerning the termination of her tenancy under the lease and that no order for possession should have been made by the High Court as against her.

2. I am of the view that the High Court was correct in determining that the 2004 Act does not apply in the circumstances of this case, and that it was correct in following the approach taken by the Court in *Kennedy v. O'Kelly* [2020] IECA 288, albeit that the latter concerned an interlocutory injunction in plenary proceedings. The following sets out the circumstances of this case and the reasons for this conclusion.

Background

3. On 1 June 1995, the defendant/Borrower granted a mortgage in respect of certain premises at Pembroke Road in Dublin ("**the premises")** to the Bank. The mortgage was stated to secure all monies for which the defendant may be in any way liable to the Bank, either as principal or surety. The Bank sought to enforce the mortgage in circumstances where there was a debt outstanding to it under the terms of loan facilities accepted by the defendant on 13 September 2015 and issued a summary summons. The defendant was declared a bankrupt on 27 January 2020 and neither he nor the Official Assignee took any part in the proceedings in the High Court.

4. It appears that the defendant had entered into a lease with the appellant in 2002. A copy of a document entitled "Memorandum of Agreement", dated 3 April 2002 and agreed between the defendant and the appellant, was exhibited on behalf of the Bank. The second schedule of this agreement indicates that the term of the lease was 35 years, commencing on 3 April 2002. The rent payable was €800 per month, which was to be paid by set-off of a sum of €800,000 said to be due by the defendant to the appellant.

5. The mortgage contained the following, typically referred to as a negative pledge clause:-

> "IT IS HEREBY AGREED AND DECLARED that the provisions of the Conveyancing Act 1881, as amended by the Conveyancing Act 1911 shall in their application to this security be modified as follows
>
> (1) The power of sale conferred upon mortgagees by the Conveyancing Act 1881 shall apply to this present security without the restrictions therein contained as to the giving notice or otherwise and for the purpose of any sale under such power the moneys hereby secured shall be deemed to have become due immediately after the execution of these presents although no demand of payment shall have been made.
>
> (2) The Mortgagor *shall not be entitled without the consent in writing of the Bank* to exercise the powers vested in him by section 18 of the said Conveyancing Act of 1881 so long as any moneys shall remain unpaid on this present security."

(Emphasis added)

The First High Court Judgment

6. The Bank issued a special summons on 5 June 2019 claiming possession of the premises. An affidavit of a Ms. Orlaith Tierney was sworn on 7 June 2019. The proceedings sought *inter alia* an order pursuant to O. 54 of the Rules of the Superior Courts 1986 (as amended) for possession of the lands and premises described in the Schedule to the summons, which had been charged by the defendant to the Bank pursuant to an Indenture of Mortgage dated 1 June 1995. Ms. Tierney set out the history as between the Bank and the Borrower and the latter's default. She then referred to the lease agreement dated 3 April 2002 as between the defendant and the appellant. She stated clearly on affidavit that there was no consent from the Bank to the lease, and that the notice party was a trespasser on the premises.

7. On 16 September 2019, the proceedings were served upon the defendant. There were various attempts at serving papers upon the occupants. It is not necessary for present purposes to detail the attempts that were made as detailed in the affidavits of service for reasons that will become apparent.

The first judgment of the High Court

8. The High Court (Simons J.) delivered two judgments in the proceedings. The first arose out of a hearing conducted on 9 March 2020 and was delivered on the 27 April 2020, [2020] IEHC 197. As already noted, the defendant did not take part and the Official Assignee did not oppose the application. The appellant was not involved in this first hearing.

9. In this judgment, the High Court held that it was satisfied that the Bank was entitled to an order for possession. The uncontested evidence before the Court indicated that the principal monies secured on the mortgage were due for payment, and that the loans were repayable on demand, with an alternative timeline for repayment being set out without prejudice to the requirement of repayment upon demand. Both dates had passed without repayment being made. In reaching this conclusion, Simons J. relied upon *ACC Bank plc v. Kelly* [2011] IEHC 7 and *Allied Irish Banks plc v. McKeown* [2019] IECA 296. He pointed out that the mortgage provided that the Bank may exercise the statutory power of sale under the Conveyancing Act 1881 without the restrictions therein contained, and that the power of sale would be ineffective without vacant possession of the premises.

10. Simons J. went on to consider the 2002 lease. He noted that Section 18(1) of the Conveyancing Act 1881 had provided that a mortgagor of land, while in possession, shall have power to make, from time to time, any such lease of the mortgaged land, but that the parties to a mortgage were allowed to contract out of this provision. See section 18(13) provides:

> "This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained."

11. He noted also that section 18 of the Conveyancing Act 1881 has since been repealed by the Land and Conveyancing Law Reform Act 2009, section 112 of which now provides that a mortgagor of land, while in possession, may lease the land with the consent in writing of the mortgagee, which consent shall not be unreasonably withheld. He observed that this repeal did

not affect the interpretation of the mortgage of 1 June 1995 because it did not contain a retrospective provision. He noted that this conclusion, as to the implications of the repeal of the 1881 Act for an existing mortgage, had been reached by the High Court (Laffoy J.) in *Kavanagh v. Lynch and St Angela's Student Residences Ltd* [2011] IEHC 348, albeit in the context of the statutory power of a mortgagor to appoint a receiver.

12. In considering whether the lease as between the appellant and the Borrower was void as against the Bank, he referred to the judgment of the High Court in *Fennell v. N17 Electrics Ltd* [2012] IEHC 228; [2012] 4 I.R. 634 ("*N17 Electrics Ltd"*), where Dunne J., having conducted a careful review of the authorities, summarised the consequences of section 18 of the Conveyancing Act 1881, as follows (at paragraph 30 of her judgment):

> "A number of useful observations can be made from the authorities referred to above. I think, first of all, that it is clear that a mortgagor and mortgagee can expressly agree to exclude the power conferred by s. 18 of the 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."

13. Simons J. noted that towards the end of her judgment (at paragraph 47), Dunne J. referenced the rationale underlying the requirement for the consent of the mortgagee, namely that any potential impediment to the realisation of the security must be approved of by the lender:

> "There might be an argument to be made that modern commercial realities are somewhat different to the facts and circumstances outlined in those authorities which are of some vintage. However, the answer to that argument may be simply that those principles have stood the test of time because the logic of the principles is unassailable; the one thing I am sure of is that on the facts of this case no commercial reality would justify departing from those well established authorities. 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 had furnished its consent. That is the importance and the function of the negative pledge clause contained in the various mortgages/charges. From the bank's point of view in this case, there was no commercial reality apparent in the business lease agreement. It is inconceivable that the bank would ever have consented to a lease in the terms of the business lease agreement had it been asked to do so. Its conduct in granting loans from time to time without appropriate leases having been put in place does not alter the position."

14. Simons J. observed that the principles in *N17 Electrics Ltd* had been applied consistently in the subsequent case law, including the judgments in *Ferris v. Meagher* [2013] IEHC

380; *Stafford v. McCourt* [2017] IEHC 726; *Havbell DAC v Dias* [2018] IEHC 175; and *Fennell v. Corrigan* [2020] IEHC 79.

15. Simons J. concluded that nothing in the papers before the Court suggested that the Bank had consented to the lease. The onus of proving that a mortgagee had consented to a lease which contravened a mortgage, he said, lies with the party seeking to rely upon the terms of the lease. This onus had not been discharged and the lease was, therefore, void as against the Bank.

16. Although Simons J. had been satisfied that the proceedings had been properly served, he was nonetheless anxious to ensure that the appellant be served with a copy of the principal judgment and afforded an opportunity to make submissions on the length of the proposed stay on execution. Simons J. directed that the Bank correspond with the appellant and granted a stay of six months pending any further ruling of the Court on the matter.

17. By email dated 10 May 2020, the appellant indicated that she had not been served or put on notice of the proceedings prior to the first judgment. She requested that she be served with the full pleadings and be given an opportunity to address the court. Her address was given as a premises in Cork. There is no dispute but that the appellant does not and has not been residing in the premises the subject of the proceedings.

The Second High Court judgment

18. A fundamental disagreement then arose between the parties over and above the issue of the length of the stay. The appellant's position was that by virtue of the lease agreement entered into between her and the defendant, her tenancy could only be lawfully terminated in accordance with the Residential Tenancies Act 2004 (as amended). This, she argued, would necessitate the Bank serving a notice of termination with a notice period of not less than 244 days.

19. The High Court judge gave her an opportunity to make written and oral submissions and made it clear that, in circumstances where no order had yet been drawn up pursuant to the principal judgment, and the proceedings were not yet finalised, it would be open to him, having heard submissions from her, to revisit the principal judgment and to reach different findings if appropriate. Directions were given to ensure that she would receive a full set of pleadings and a copy of the transcript of the hearing on 9 March 2020. Thereafter, the hearing of the appellant's application to revisit the principal judgment was adjourned on a number of occasions to facilitate her. Initially she was representing herself, but ultimately she was represented by solicitor and counsel at a second hearing, before which written submissions had been delivered to the Court. This second hearing took place on the 15 March 2021, a full year after the original hearing. The judge's second judgment was delivered on the 22 March 2021.

20. The appellant's first affidavit sworn on the 23 November 2020 was devoted in large part to complaining about the absence of service on her prior to the first hearing. With regard to the issue of the Bank's consent to the lease, the relevant averments made by her in her affidavit of 23 November 2020 were as follows:

"I say the Defendant, Richard Finbarr Fitzgerald, in or around Dec 2001 approached your Deponent regarding a residential lease for the said property, of which was duly executed on the 3rd April 2002, to formalise and to secure tenure within the said property, by way of a lifetime interest, and your Deponent was advised all and any interested parties were on notice of same" (para 7).

"I say that at all material times your Deponent sought to rely on the advices from the Defendant, Richard Finbarr Fitzgerald and his professional advisers, ex AIB Bank Manager Ray Reidy, that your Deponent's entitlement to the said Apartment was secure by way of a lease executed on the 3rd day of April 2002 with consent of the Plaintiff Bank.

I say and believe that the Plaintiff, the Defendant's financier for many years, was aware and provided consent for the said lease which was executed in lieu of monies due. I say the Plaintiff Bank is now estopped from claiming that the lease is void, as your deponent's interest is now an equitable interest with the passage of time in excess of twelve years and it would be unconscionable to permit such possession order to be granted.

I say your Deponent has since located the said Defendant, Richard Finbarr Fitzgerald, now resides in the UK and given the current restrictions we are unable to meet him and fully discuss matters with him. I say and believe that once the restrictions have been lifted, we intend to have the Defendant set out the factual position in relation to the Plaintiff Bank's consent on Affidavit. I say an equitable interest defeats any interest the Plaintiff now seeks to rely on given the position the Plaintiff took in the past, in agreeing and consent to the lease." (paras 18-21)

21. The reference to restrictions was of course to the restrictions necessitated by the pandemic. In her second affidavit dated the 19 February 2021, the appellant put forward similar points and introduced her arguments concerning the 2004 Act. Her argument was the same in the High Court as it was in this Court, namely that she was entitled to security of tenure as a tenant under Part 4 of the Residential Tenancies Act 2004. Counsel on her behalf placed particular emphasis on the wording of section 59 of the RTA 2004 as follows.

> "59.—Subject to section 60, neither—(a) any rule of law, nor (b) provision of any enactment in force immediately before the commencement of this Part, which applies in relation to the termination of a tenancy (and, in particular, requires a certain period of notice or a period of notice ending on a particular day to be given) shall apply in relation to the termination of a tenancy of a dwelling."

He submitted that section 18 of the Conveyancing Act 1881 cannot be relied upon to terminate a residential tenancy and that the case law relating to negative pledge clauses in leases of commercial premises had no application in the context of a residential tenancy.

22. Counsel also relied on the judgment of the High Court (Baker J.) in *Hennessy v Private Residential Tenancy Board* [2016] IEHC 174 as authority for the proposition that security of tenure for a tenant is of the first importance, and that the residential tenancies legislation must be construed to give effect to this where there is any ambiguity. The judgment of the ECtHR in *McCann v. United Kingdom* (2008) 47 EHRR 913 was also cited as emphasising the requirement for proportionality in any decision involving the loss of an individual's home. Applying the above analysis to the facts of the present case, it was argued that the 2002 lease agreement may only be lawfully terminated by the Bank notifying the lessee of its intention to

enter into a contract for the sale of the property (in accordance with section 34 of the RTA 2004) and serving a notice of termination with the requisite notice period.

23. Counsel on behalf of the Bank made extensive reference to the decision of the Court of Appeal in *Kennedy v. O'Kelly* [2020] IECA 288. There, an argument in almost identical terms to that advanced in the present case had been made, and rejected by the Court, albeit in the context of an application for an interlocutory injunction in plenary proceedings. Counsel submitted that were the 2002 lease agreement to be enforceable as against the Bank, the security would become meaningless because the Bank would have no recourse to the mortgaged property for the 35-year term of the lease, contrary to the principles identified in *N17 Electrics Ltd*. He also submitted that there was nothing in the case law to suggest that the principles derived from *N17 Electrics Ltd* are confined to cases involving commercial (as opposed to residential) premises. He also pointed out that the appellant did not actually reside at the mortgaged property but had instead sub-let it to others.

24. Simons J. delivered his second judgment on the 22 March 2021 and granted an order for possession in favour of the Bank. He granted a 28-day stay on the order (or, in the event of an appeal, pending further order of this Court) and ordered the appellant to pay the costs from the time of her participation in the proceedings (only).

25. In this second judgment, Simons J. quoted with approval an article by M. O'Connell in (2018) 23(4) Conveyancing and Property Law Journal 82, in which the language of a "hybrid" lease was used:-

> "Although void as against the mortgagee, a lease entered into without mortgagee consent will create binding obligations on the parties to it, namely the mortgagor/lessor and the

lessee. This is a form of tenancy by estoppel, because, although the lease may be void, at law, the courts will not countenance a party to a deed resiling from his own deed by virtue of a third party's right to avoid the deed. Moreover, if the mortgagor were to satisfy the mortgage and redeem his title, the estoppel would be fed and the lessee would thereafter hold a lawful tenancy in the property. The concept of a tenancy by estoppel serves a very important purpose in everyday life: although only a handful of cases make their way to the courts, the reality on the ground is that leases are granted every day of the week by property owners whose title is still subject to mortgages, without reference to the mortgagee. If such a landlord could assert the invalidity of his own lease by reference to his mortgagee's right to avoid it, then he would be entitled to deprive his lessees of their lease and indeed their statutory rights (e.g. of renewal) by reference of his own default."

..

A lease which has been granted without the consent of a mortgagee, where required, enjoys a hybrid status. As between the mortgagor/landlord and the tenant, the lease operates by estoppel. The mortgagor/landlord is precluded from denying the lease. However, as between the mortgagor/landlord and the mortgagee, the lease is void. This has the legal consequence that there is no relationship of landlord-and-tenant as between the mortgagee and the tenant. The tenant cannot rely on the existence of a lease to resist complying with an order for possession in favour of the mortgagee."

26. Simons J. then referred to *N17 Electrics Ltd*, which he had discussed in his first judgment, and identified the question which now arose for determination as being how a lease with such a hybrid status fell to be treated under the Residential Tenancies Act 2004. As between the mortgagor/landlord and tenant, he said, the position was clear-cut. The mortgagor/landlord may not assert the absence of consent from the mortgagee so as to avoid his statutory obligations

under the 2004 Act, and cannot rely on his own default, i.e. the failure to obtain the requisite consent from the mortgagee, so as to deny his tenant their statutory rights. However, the position as between the mortgagee and the tenant was different. It was unnecessary for a mortgagee to terminate a lease in circumstances where the mortgagee was not bound by the lease at all, and therefore the 2004 Act simply did not apply. He accepted the analysis at paras 10 and 11 of the judgment of Collins J. in *Kennedy v. O'Kelly* [2020] IECA 288, even though it was carried out the context of an application for an interlocutory injunction. Simons J. considered that, having had the benefit of full argument on the issue in the present proceedings, the analysis in *Kennedy v. O'Kelly* was correct and should be applied to the case before him.

27. He then addressed some further arguments, including that a mortgagee fulfils the statutory definition of a "landlord" under section 5 of the RTA 2004, which is defined as the person for the time being entitled to receive the rent paid in respect of a dwelling by the tenant. Simons J. was satisfied that the Bank was not a landlord of the purpose of the 2004 Act, as a mortgagee was not privy to any tenancy agreement which had been entered into between the mortgagor and a third party without the mortgagee's consent. There was no contractual relationship between the mortgagee and the third party. The mortgagee had no right to call for the rent. That remained the legal position unless and until the mortgagee chose to ratify the tenancy agreement or otherwise acted in a manner which indicates that the mortgagee intended to enter into a relationship of landlord-and-tenant.

28. He quoted from the judgment in *In re O'Rourke's Estate* (1889) 23 L.R. Ir. 497 (at page 500), in a passage cited with approval in *N17 Electrics Ltd*.

> "I take it that the law on this subject is free from all manner of doubt. A lease made by a mortgagor, subsequent to the mortgage, and not coming within the provisions of the

> Conveyancing and Law of Property Act, 1881 … is absolutely void as against the mortgagee. He can treat the tenant as a trespasser, and evict him without notice. It is open, however, to the mortgagee and the tenant by agreement, express or implied, to create a new tenancy; and the question which always arises is the mere question of fact, whether such an agreement has been made in the particular case. If the mortgagee enters into the receipt of the rents and continues to take them from the tenants, this is almost conclusive evidence of an agreement between the mortgagee and the tenant for a new tenancy from year to year on the terms of the old tenancy; or, if the mortgagee serve notice on the tenant, requiring him to pay his rents direct to the mortgagee, and the tenants do not dissent, these are facts from which a jury may, and probably ought, to infer the existence of such a contract of tenancy …".

29. Simons J. also pointed out that the appellant did not fulfil the "occupation" requirement of the 2004 Act. To avail of the statutory protections afforded to a "Part 4 tenancy" (as defined under sections 28 and 29 of the RTA 2004), a person must have been in occupation of a dwelling, under a tenancy, for a continuous period of 6 months. Here, there was no evidence of such occupation: on the contrary, the evidence was that the dwelling had been occupied by third parties, described variously as sub-tenants or caretakers by counsel in his submission.

30. Simons J. also addressed the argument that the effect of the European Convention on Human Rights Act 2003 was that where the tenancy was residential, the 2004 Act should be interpreted as applying to a mortgagee even in the case of a lease entered into in breach of a negative pledge clause. He was not persuaded by this argument, holding that in its ordinary and natural meaning, Part 5 of the Residential Tenancy Act 2004 applies only to the termination of a tenancy by a landlord or tenant and has no application to a mortgagee where the tenancy

has been entered into in breach of a negative pledge clause under the mortgage. There was nothing in the case law of the ECtHR which mandated a different interpretation. Rather, the jurisprudence recognised that cases involving mortgages and tenants cannot be considered solely by reference to Article 8 (respect for one's home) but must also be considered by reference to property rights of lending institutions as protected under Article 1 of the First Protocol. The ECtHR had distinguished the judgment in *McCann v. United Kingdom* in mortgage repossession cases on the basis that the applicants there were living in State-owned or socially-owned accommodation and an important aspect of finding a violation in that case had been the fact that there was no other private interest at stake. Simons J. quoted from *F.J.M. v. United Kingdom*, Application No. 76202/16 (at paragraph 42 of the decision).

> "[…] there are many instances in which the domestic courts are called upon to strike a fair balance between the Convention rights of two individuals. What sets claims for possession by private sector owners against residential occupiers apart is that the two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected (see paragraph 16 above). If the domestic courts could override the balance struck by the legislation in such a case, the Convention would be directly enforceable between private citizens so as to alter the contractual rights and obligations that they had freely entered into."

31. In any event, he said, as the appellant did not reside in the dwelling in question, it did not represent her "home" for the purposes of the ECtHR jurisprudence.

The Appeal

32. In summary, the appellant's grounds of appeal were that:

1) The High Court judge erred by failing to take cognisance of her constitutional property rights;
2) The High Court judge erred by not applying the law relevant to the service of a special summons in accordance with O.9, r.9 RSC which states that in actions for the recovery of land, it shall be necessary to serve every person in actual possession, or in receipt of the rents and profits, of the lands or any part thereof, unless the court otherwise direct;
3) The High Court judge erred by disregarding the demand letter whereby no actual demand for possession was made;
4) The High Court judge erred in failing to apply the principles set out in *Bank of Ireland v O'Malley* [2020] 2 ILRM 423, whereby the Bank had failed to particularise the amount due and owing by the defendant;
5) The High Court judge erred in so far as any mortgage that the defendant assigned to the Bank was null and void for want of authority;
6) The High Court judge erred in failing to assess the appellant's position as a tenant in common which entitled her to an interest in the property;
7) The High Court judge erred in awarding the costs of the proceedings to the Bank in circumstances where the appellant was not part of the initial proceedings and was caught by surprise;
8) The High Court judge failed to take cognisance of the unfair burden placed on the appellant to set out the defendant's position on the issue of consent, in

circumstances where the restrictions imposed on the country [during the pandemic] restricted her efforts to track down the defendant who she believed to reside in the UK;

9) The High Court judge erred in failing to interpret the Residential Tenancies Act 2004 correctly which would have protected her property rights.

33. In her submissions, the appellant makes considerable complaint in connection with the service issue and the fact that she did not participate in the first hearing. On the issue of her position *vis-à-vis* the Bank with regard to the lease, she submits that the various authorities relied on by the Bank and the High Court all stem from plenary actions albeit that the applications were interlocutory in nature. She submits that in her case, in which the proceedings had been commenced by special summons, there was a "*fast roll of the dice*" without her having any opportunity to seek evidence that would substantiate her position.

34. The respondent Bank objected that the appellant was seeking to raise a number of issues on appeal which were not raised before the trial judge, in particular grounds of appeal (3), (4), (5) and (6). It pleaded that, in any event, a letter of demand issued and was exhibited in the affidavit of Ms. Orla Tierney dated 7 June 2019; that the claim was adequately particularised, particularly in circumstances where the claim was one of possession; and that there was no legal or factual basis upon which the applicant claims to be a tenant in common. Any interest she purported to have in the property arose after an indirect conflict to a negative pledge provided by the defendant to the Bank. She could not be a tenant in common in circumstances where the defendant had no right to enter into such an agreement.

35. With regard to the remaining grounds, the Bank maintained that the trial judge had all due regard to the constitutional property rights of the applicant and relied upon its position as stated in the High Court with regard to a property leased despite a negative pledge clause in the mortgage requiring the express written consent prior to the creation of any lease, relying in particular on the decisions in *N17 Electrics Ltd* and *Kennedy v. O'Kelly.* In its submissions, the Bank points out that the appellant had averred in her affidavit that she had located the defendant who now resides in the United Kingdom. It submits that at no point has it been explained by the appellant why the defendant could not set out his position other than in a face-to-face meeting. It submits that if she seeks to rely upon the express written consent of the Bank, the responsibility falls upon the appellant to produce documentation in support of this. The Bank submits that if the defendant misrepresented to the appellant that he had obtained the consent of the Bank, any claim for misrepresentation rests in an action against him, not against the Bank. The Bank has always maintained that no written consent was ever provided to the lease.

36. The Bank also pleads while there was confusion in respect of the service of the proceedings on the appellant, no prejudice arose in circumstances where the trial judge afforded her every opportunity to have her claim heard before conducting a second hearing and writing a second judgment in which all of the appellant's submissions were considered.

37. As regards the issue of costs, the Bank pleads that Ground 7 of the appeal was simply erroneous in circumstances where the Court had clearly ordered that the costs be awarded only from the date upon which the appellant began her participation, on or about 10 May 2020. The order reflects this as being the correct position.

38. The Bank submits that the only issue falling for determination by the Court is whether the lease relied upon is of subsisting effect as against the Bank, in circumstances where there is an express negative clause contained in the deed of mortgage.

Decision of the Court

The service issue

39. On the issue of compliance with the Rules as to service, it is clear that the appellant was afforded every opportunity by the High Court judge to make her case once she made it known that she wished to participate in the proceedings, even though he was satisfied that service had been properly effected in the first instance. He facilitated the appellant with adjournments and opportunities to swear (two) affidavits; to brief solicitor and counsel; he then conducted a second hearing; and wrote a second judgment in which he considered all of her submissions, having made it clear that he would revisit and alter his earlier conclusions if he thought it appropriate.

40. The suggestion that the outcome is invalid simply because the appellant was not served prior to the first hearing is in those circumstances entirely without substance. The underlying purpose of the rules on service is to ensure procedural fairness and the High Court judge took great pains to ensure that the appellant received such fairness before reaching a final decision. The High Court judge's approach to ensuring that the appellant had a full opportunity to present her submissions was impeccable and the appellant's complaints about service are no longer of any practical importance.

The Residential Tenancies Act 2004 and the question of the Bank's consent

41. The key point in the appeal is whether the 2004 Act applies to the appellant's situation and/or whether she has any interest in the premises by virtue of the 2002 lease which would prevent an order for possession being made in these proceedings. I am of the view that the High Court's analysis of the status of the lease and the position of the Bank *vis-à-vis* the appellant was entirely correct. I do not propose to repeat the analysis, which I have already set out at some length above.

42. As the trial judge pointed out, in *Kennedy v. O'Kelly*, the judgment of Collins J. addressed the argument which is now to the fore in the present case:-

> "The argument that Part 5 [of the Residential Tenancies Act 2004] constrains the receiver rests on the contention that the receiver (and/or MARS) on the one hand and the Notice Party on the other are in a relationship of landlord and tenant. But it follows from *Fennell v N17 Electrics Ltd (in liquidation)* that, as a matter of general principle, a letting entered into by a mortgagor and a third party in breach of a negative pledge clause in the mortgage does not give rise to any relationship of landlord and tenant between the third party and the mortgagee. That being so, it does not seem to me that the principle in *Fennell v N17 Electrics Ltd (in liquidation)* is properly characterised as a rule of law 'which applies in relation to the termination of a tenancy' any more than section 18 of the Conveyancing Act 1881 can properly be characterised as a provision of an enactment having such application. *Fennell* is not concerned with the termination of any tenancy by the mortgagee; rather it is concerned with the distinct issue of whether a tenancy entered into by a mortgagor, in breach of a negative pledge clause, affects the rights of the mortgagee,

and in particular its rights of recourse to the mortgaged property as security: see *Fennell*, at paragraph 47. Put another way, the effect of the principle in *Fennell* is to preclude the creation of a tenancy relationship between mortgagee and third party, rather than providing for the subsequent termination of such relationship.

The argument that, in enacting Part 5 of [the Residential Tenancies Act 2004], the Oireachtas intended to abrogate the principle in *Fennell v N17 Electrics Ltd (in liquidation)* appears to me to be inherently implausible. Had the Oireachtas intended to change the law in this area, one would expect that it would do so in clear terms: see, by way of illustration, *Minister for Industry & Commence v Hales* [1967] IR 50. That is not to suggest that the principle [in] *Fennell v N17 Electrics Ltd (in liquidation)* is beyond legislative reform. Clearly it is open to the Oireachtas to legislate in this area and it has in fact done so in the Land and Conveyancing Law Reform Act 2009."

43. The other two judges (of which I was one, and Power J. the other) agreed with the judgment of Collins J. on that point. In my judgment in that case, which primarily concerned the circumstances in which a lender may be considered to have stepped into the landlord-tenant relationship by its words or actions, I commented that the argument of the appellant with regard to the 2004 Act was "*to put the 'cart before the horse', as it were, and that the appropriate sequence is to inquire as to whether there is a valid tenancy (whether a residential tenancy or other form of tenancy", in the first instance; and only if that question is answered in the affirmative does the Act come into play*."

44. The fact that the argument as to the application of the 2004 Act now arises in the context of summary proceedings does not affect the above analysis in my view. For the reasons identified both by Collins J. in *Kennedy v. O'Kelly*, and by the trial judge in the present case,

the principle set out in *N17 Electrics* apply, and there is no 'carve-out' from those principles for residential tenancies (in circumstances where the relevant mortgage was created prior to 2009). To summarise the position with regard to a pre-2009 mortgage:

(1) The general principle is that a lease which has been granted to a third party without the consent of a mortgagee, where required, enjoys a hybrid status. As between the mortgagor and the third party, the mortgagor cannot rely upon his own default and is precluded from denying the lease. However, as between the mortgagor and the third party, the lease is void. There is no relationship of landlord-and-tenant as between the mortgagee and the third party and the latter cannot rely on the existence of a lease between himself and the mortgagor to resist complying with an order for possession in favour of the mortgagee.

(2) The decision in *N17 Electrics Ltd* concerns the question of whether or not a tenancy *exists* as between the mortgagor and tenant. It focuses in particular on the state of knowledge and/or actions of the mortgagor in the context of assessing whether the mortgagor may subsequently have 'opted in' to the tenancy despite the absence of written consent in accordance with the mortgage at the time of the creation of the lease. However, the decision does not concern the separate and distinct issue of the *termination* of a tenancy.

(3) The requirements as to notice of termination in the 2004 Act apply where a tenancy is in existence. Logically, they do not apply where there is no tenancy between the parties. In circumstance where no tenancy exists as between a mortgagor and a third party by reason of principle (1) above, the provisions of the 2004 Act do not apply even if the third party's agreement with the borrower/mortgagor would be classified as a residential tenancy. To suggest that the mortgagor is required to give notice in accordance with the 2004 Act is to reverse the correct sequence of

questions: (i) Is there a tenancy? (ii) If so, what notice of termination must be given if it is a residential tenancy under the 2004 Act? It is only if the first question is answered in the affirmative that one proceeds to the second question. In the present context, *N17 Electrics Ltd* and the authorities referred to therein answer the first question in the negative and therefore the provisions of the 2004 Act simply do not apply. The appellant did not acquire any interest in 2002 which can be asserted as against the Bank, whether as tenant in common or otherwise.

45. Insofar as the appellant suggests that she had insufficient time, by reason of both the summary nature of the proceedings and the existence of the pandemic, to obtain evidence from the defendant on the issue of consent, I am of the view that this argument carries little weight in circumstances where (i) 11 months passed between the appellant being put on notice of the High Court's (first) judgment (March 2020) and the hearing at which she was represented (March 2021); and (ii) a further period of one year passed before the hearing of the appeal before this Court (March 2022). The appeal was listed for hearing on three occasions and was unable to proceed on the first two dates for various reasons. At no stage has any further information or documentation been forthcoming on behalf of the appellant to suggest there is any evidential basis whatsoever for her assertion that the Bank gave consent to the lease under which she claims an interest in the property and/or rights as a tenant. No affidavit has ever been sworn by the defendant. Nor, it may be noted, did the appellant ever apply to cross-examine the Bank's deponent. The height of her case, as appears from the averments in her affidavit set out earlier, is that she believed the Bank's consent was given because she had been so told: this is a hearsay assertion of a very general character. This does not in my view amount to a sufficient evidential foundation for a defence to the Bank's claim for possession which warrants the case being remitted to plenary hearing.

New grounds raised on appeal

46. As to the remaining substantive grounds of appeal, (the Bank's alleged failure to make a proper demand, and the alleged to particularise its claim), it has earlier been noted that the Bank objects that a number of the grounds were not raised in the High Court. In *Ennis v Allied Irish Bank plc* [2021] IESC 12, the Supreme Court discussed the question of raising new arguments on appeal. Speaking for the court, McMenamin J. reviewed the law concerning new evidence/arguments on appeal in different categories of cases including plenary proceedings, interlocutory proceedings and summary proceedings. It was well settled since *K.D. v M.C.* [1985] 1 IR 697 that save in the most exceptional circumstances, the appellate court should not hear and determine an issue which had not been tried and decided in the High Court, although there may be exceptions in the interests of justice. At para. 18 of the judgment, he set out the basic rationale for the general principle that new points should not be raised on appeal for the first time:

> "But, although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective. Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only

encourage either sloppiness, imprecision, or lead to attempts to take a tactical advantage (*per* Clarke J. (as he then was) in *Ambrose* paras. 4.11 – 4.13)."

47. It is true that at para. 21 of his judgment, McMenamin J. noted that "the courts tend to adopt a more flexible approach in applications to raise new arguments", referring to *Lopes v Minister for Justice, Equality and Law Reform* [2014] IESC 21; [2014] 2 IR 301; *Irish Bank Resolution Company (in special liquidation) v McCaughey* [2014] IESC 44; [2014] 1 IR 749; and *Moylist Construction Ltd v Doheny* [2016] IESC 9, [2016] 2 IR 283 as examples of cases of the "more flexible approach" in non-plenary cases. However, the Court emphasised in *Promontoria (Arrow) v. Mallon* [2021] IECA 130 that, notwithstanding this greater flexibility in non-plenary cases, the general principle is still of considerable importance. Noonan J. said:-

> "However, lest it be thought that the *Ennis* decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although McMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the *K.D.* principle remained "the general principle" i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be "clearly required in the interests of justice". McMenamin J. viewed the *Ennis* case as falling within the category of "truly exceptional"."

48. In the present case, there is no reason why the additional grounds now sought to be raised on behalf of the appellant could not have been raised in the High Court, she having had 11 months to consider her position and having been represented by solicitor and counsel in the

High Court. Further, none of them appears to raise an issue which requires an exception to be made in the interests of justice.

49. It remains to be said that while the outcome is no doubt unsatisfactory from the appellant's point of view, as was pointed out in *Kennedy v. O'Kelly*, the problematic nature of her position arises not by reason of the Bank's actions but rather by those of the defendant, who appears to have entered into a lease with the appellant without the consent of the Bank as required by the mortgage and who told the appellant that the consent had been obtained. At least that appears to be the position on the evidence before the Court in these proceedings; and the Court can act only on the basis of the evidence before it.

50. Having regard to all of the foregoing, I would dismiss the appeal.

51. As to the costs of the appeal, my provisional view is that the plaintiff/respondent is entitled to the costs of the appeal. If the appellant wishes to contend for a different order, she has liberty to apply to the Court of Appeal Office within 14 days for a brief hearing on the issue of costs. If such a hearing is requested and results in an order in the terms I have suggested, the appellant may be liable for the additional costs of that hearing. In default of receipt of such application within 14 days, an order in the terms proposed will be made. I do not propose to interfere with the High Court costs order in any way because it is clear on its face that the appellant was ordered to pay costs only from the time she participated in the proceedings, which was entirely fair.

52. As this judgment is being delivered electronically, I wish to record that my colleagues Barniville P. and Faherty J. have indicated their agreement with it.