Neutral Citation [2013] IEHC 380

THE HIGH COURT

[2013 No. 4877P]

MARTIN FERRIS

PLAINTIFF

AND

JOHN MEAGHER

AND

ECHOFORDE LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 31st day of July 2013

1. The matter before the Court sees the plaintiff, as receiver of certain assets of the first named defendant, John Meagher seeking orders restraining the defendants from preventing, impeding or obstructing him from taking possession of, getting in, collecting and accessing property at 4, 5, 6, 7 and 8 Charlemont Street (hereinafter "the Property"). The background to the application is that on the 20th December, 2012, the plaintiff was appointed or perhaps at this stage it is better to say was purportedly appointed as receiver of the assets of Mr. Meagher comprised in two deeds of mortgage dated the 5th January, 2000, and the 15th July, 2003. Each of the deeds of mortgages contained a provision in the following terms:-

> "That the mortgagor shall not except with the written consent of the Bank grant or agree to grant any lease or tenancy of the mortgaged property or any part or parts thereof or part with possession thereof or accept or agree to accept a surrender of any lease or tenancy thereof and sub-section (1) of Section 18 of the Conveyancing and Law of Property Act 1881 shall not apply to this security."

2. Each mortgage granted the plaintiff upon appointment power, to, *inter alia* enter upon and take possession of the property, grant or accept surrenders of leases of tenancies affecting the property upon such terms and conditions as he thinks fit, and to sell the property and on behalf of the mortgagor. On appointment the plaintiff learnt from Mr. Donal Scully, property credit manager, in the SME property section of Danske Bank that Citi Hostels and/or Echoforde Limited, the second named defendant may have been in occupation of a portion of the property. Accordingly, he wrote to Echoforde and Citi Hostels advising them of his appointment, enclosing copies of his Deed of Appointment and inquiring as to the legal basis, if any, for their occupation of the property. He also requested copies of any lease in existence. Initially no response was received and in these circumstances the plaintiff wrote again.

3. Searches were conducted at the Companies Registration Office. These indicated that Echoforde was incorporated on the 11th March, 2009, and filed annual returns in the CRO up to the 1st March, 2012, and recorded that the first named defendant was the sole shareholder of Echoforde. However, more recently on the 26th March, 2013, a further annual return was filed in relation to Echoforde up to the 1st March, 2013, which on this occasion showed that Mr. Alin Christian Tarcau was now the sole shareholder.

4. There followed correspondence between the plaintiff on the one hand and Mr. Liam Kilkenny, who emerged as an advisor to Echoforde and then between Mr. Tarcau and the plaintiff and his advisors.

5. Eventually, by letter dated the 21st March, 2013, from solicitors acting on behalf of Echoforde, details in relation to the lease between Mr. Meagher and Echoforde Limited were furnished in that reference was made to a lease for a period of ten years from the 1st May, 2012, reserving a full rent of €87,500 per annum. After some further delay a copy of the lease between Mr. Meagher, the first named defendant as landlord and Echoforde Limited, the second named defendant as tenant was furnished by letter dated the 12th April, 2013.

6. It is not in dispute that the lease between Mr. Meagher and Echoforde Limited was entered into without the written consent of Danske Bank or National Irish Bank Limited as it was previously known.

7. So far as the lease is concerned there are some noteworthy features. These include the fact that while the purported lease is dated the 30th April, 2012, it was not stamped until the 28th January, 2013, some five or six weeks after the appointment of a receiver. In addition while the lease provides for a rent of €87,500 per annum to be paid a special condition provides that Echoforde will continue to pay "the current rent level" as per another memorandum of agreement dated the 28th October, 2010, "until such time as the refurbishment works of 7/8 Charlemont Street are completed and the building is fit for its intended purposes". A further condition of the lease is that the landlord agrees to refund to the tenant any vouched expenses relating to the refurbishment works at 7/8 Charlement Street.

8. Under cover of a letter dated the 3rd May, 2013, a cheque in the sum of €9,375 was furnished in respect of a quarter's rent. To state the obvious payment of €9,375 per quarter does not reflect an annual rent of €87,500.

9. The implications and legal consequences of a lease granted without the consent of a bank/mortgagee has been considered in a number of cases. In that regard in in *The Matter of N17 Electrics Limited (in liquidation) and in The Matter of the Companies Acts 1963 to 2009 Kenneth Fennell and ACC Bank Plc. v. N17 Electrics Limited (in liquidation)* [2012] IEHC 228 (Unreported, High Court, Dunne J., 11th May, 2012) the law in this area was the subject of a detailed review by Dunne J. She referred to extracts from leading text books in the area such as Wiley on *Law of Landlord and Tenant*, 2nd Ed., paragraph 6.10, Megarry and Wade, *Law of Real Property* 7th Ed., paragraph 25-080, Fisher and Lightwoods, *Law of Mortgage* para. 29.18, and Woodfall, *Landlord and Tenant Act*, para. 2.169. She also referred to and analysed in some detail a number of decision including *Iron Trades Employers Assurance Association Limited v. Union Land and House Investors Limited* [1937] Ch. 313, In *Re O'Rourke's Estate* [1889] 23 L.R. I.R. 497 and *Taylor v. Ellis* [1960] 1 Ch. 368.

10. She then summarised what emerged from the authorities in these terms at para. 30:-

> "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 1881 Act. 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 lesser, 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 the 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."

11. Earlier in the judgment Dunne J. had referred to the decision of Lynch J. in *ICC Bank Plc v. Richard Verling, Niamh Landy and Wine Dimensions Limited* [1995] 1 I.L.R.M. 123.

12. The facts of *ICC v. Verling* are similar in many respects to the facts of the present case. That case involved a dispute in relation to a well known Clontarf off-licence. The first named defendant had purported to let the mortgaged off-licence premises to the third named defendant. In the course of his judgment Lynch J. commented that the plaintiff had never acquiesced in or recognised the lease by any express or positive conduct such as by demanding or accepting rent thereunder in place of the first named defendant. He went on to add that the fact that the plaintiff had not rushed into litigation was hardly blameworthy in his opinion especially as such delay as had occurred had not been to the detriment of the defendants but rather to their benefit. Of significance is his approach to the test to be applied. He was of the view there was no doubt that the plaintiffs had made out an arguable case to support the claim for interlocutory relief. However, in a situation where the interlocutory relief sought took the form of a mandatory injunction and where the mandatory injunction would effectively conclude the matter as against the second and third named defendants, he felt that in the exercise of his discretion to grant or refuse interlocutory relief, that he should look for something more from the plaintiffs than a mere arguable case, and that when he did so, he found that the plaintiffs had made out a strong *prima facie* case. He also concluded that the balance of convenience lay with the plaintiff. In the present case the plaintiff argues that he has gone beyond establishing a good arguable case, and has made out a strong *prima facie* case with a likelihood of success, and indeed has gone further still in that the defendants, and more particularly the second named defendant who is the only defendant to participate in the case has failed to make out even an arguable case. In the circumstances it is said that as the defendant has failed to make out an arguable defence, that the Court can and indeed should grant the interlocutory relief sought without the necessity of applying the Campus Oil Test. However, if the Court chose to or found it necessary to address the Campus Oil principles, then the balance of convenience was in favour of granting the reliefs sought.

13. In opposing the interlocutory orders sought, a number of arguments have been advanced on behalf of the defendant. First of all, it is said that there is at least a major question mark in place over the validity of the appointment of the receiver. It may be noted that this issue was raised for the first time during the course of oral submissions by counsel on behalf of the defendant. There had been no reference to this issue in the course of any of these various affidavits filed on behalf of the second named defendant nor was the issue mentioned at any stage in correspondence. Essentially the argument made is that the mortgage had referred to s. 18 of the Conveyancing and Law of Property Act 1881, but that the Act of 1881 had been repealed by the Land and Conveyancing Law Reform Act 2009.

14. It is also argued that Echoforde Limited can rely on the lease against Mr. Ferris just as it could rely on it against John Meagher.

15. The significance of the repeal of provisions of the Conveyancing Act 1881, in a context such as this, was considered in *Kavanagh v.* Lynch [2011] IEHC 348 (Unreported, High Court, Laffoy J., 31st August, 2011). In that case Laffoy J. did not consider that the repeal of ss. 15 to 24 of the Act of 1881 by s.8 of the Land and Conveyancing Law Reform Act 2009, had the impact contended for by the defendants. She was satisfied that the considerations which arose in *Start Mortgages Limited v. Gunne and Others [*2011] IEHC 275 (Unreported, High Court, Dunne J., 25th July, 2011) in consequence of the repeal of s. 62(7) of the Registration of Title Act 1964 by s. 8 of the Act of 2009 did not arise in relation to the power of the lender to appoint a receiver or the nature of the powers conferred on the receiver. On that point, she said that it seemed to her that there is clear distinction between the impact of the repeal of s. 62(7) of the Act of 1964, which provided a statutory remedy to the owner of registered land to apply to court in a summary manner for possession of the land when repayment of the money secured by the charge had become due, and the impact, if any of the repeal of the Act of 1881 provisions in force at the time of the creation of the security, with or without variation. Further support for this view is to be found in *McEnery v. Sheahan* [2012] IEHC 331 (Unreported, High Court, Feeney J., 30th July, 2012). Indeed, that decision goes significantly further than is required for present purposes. There, it was the situation that there was no express power to appoint a receiver in the mortgage instruments and in those circumstances the plaintiff argued that the right to appoint a receiver provided by s.19 of the Conveyancing Act 1881, survived the repeal of the section, an argument that was successful.

16. The argument that the second named defendant can rely on the lease against the plaintiff, just as it could against the first named defendant takes as its starting point that the receiver is the agent of the mortgagor. However, the nature of the receiver's agency is an unusual one. This matter was discussed by the Court of Appeal in *Silven Properties Ltd and another v. Royal Bank of Scotland plc and others* [2003] E.W.C.A. Civ 1409 [2004] 1 W.L.R. 997. The issue was addressed by Lightman J. at para. 25 and subsequent paragraphs:-

> "... The issue raised is whether receivers who are appointed by a mortgagee to act as agents of the mortgagor as in a like legal position and owe a like duty to the mortgagor. The character and incidents of such receivers' agency has been the subject of judicial and extra-judicial consideration. Mr. Peter Millet in "The Conveyancing Powers of Receivers After Liquidation" (1977) 41 Conv (NS) 83, 88, wrote "the so called 'agency' of the [receivers] is not a true agency, but merely a formula for making the company, rather than the [mortgagee], liable for its acts..." But this agency of the receivers is a real one, even though it has some peculiar incidents: see *In Re Offshore Ventilation* (1998) 5 BCC 160, 166A-B. Its reality is reflected in the continuity after the appointment of receivers of the rateable occupation of the mortgagor through the agency of the receivers (see *Ratford v. Northhavon District Council* [1987] QB 357) and in the absence of personal liability of the receivers for tax in respect of receipts which come to the hands of the receivers as agents: see In *Re Piacentini [*2003] QB 1497.
>
> The peculiar incidents of the agency are significant. In particular:
>
> (1) The agency is one where the principal the mortgagor has no say in the appointment or identity of the receiver, and is not entitled to give any instructions to the receiver or to dismiss the receiver. In the words of Rigby L.J. in *Gaskell v. Gosling* [1896] 1QB 669, 692: "For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with";

(2) There is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only: see *Medforth v. Blake* [2000] Ch. 86 and *Raja v. Austin Gray* [2003] 1 EGLR 91;

(3) The equitable duty is owed to the mortgagee as well as the mortgagor. The relationship created by the mortgage is tripartite involving the mortgagor, the mortgage and the receiver;

(4) The duty owed by the receiver (like the duty owed by a mortgagee) to the mortgagor is not owed to him individually but to him as one of the persons interested in the equity of redemption...

See *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301, 1305B - D (Hoffman J) and *Gomba Holdings UK Ltd v. Minories Finance Ltd* [1988] 1 WLR 1231, 1233D-H (Fox LJ)..."

17. It seems to me that entirely different considerations apply to the question of whether a tenant who has gone into occupation on foot of a lease which had not received approval that was required can rely on the lease against a receiver, then the question whether the lease can be relied on as against the landlord who granted that very lease. It would clearly be inequitable to allow a party who had granted a lease, without obtaining consent, to benefit from his failure by being able to point to the absence of consent in order to invalidate the lease. However, the position so far as the receiver, who had no hand, act or part in granting the lease is altogether different.

18. The second named defendant has raised a point about the form of the proceeding and says that the proceedings cannot be maintained in the sole name of the receiver as plaintiff. I do not believe there is substance in this point. An examination of the title of a number of cases in this area shows that sometimes proceedings have been brought in the name of the lender, e.g. *ICC v. Verling and Others*, sometimes with both the lender and nominated receiver named e.g. *Kenneth Fennell and ACC Bank v. N17 Electricals Limited* (in liquidation) and sometimes in the name of the receiver alone e.g. *Lowe v. Byrnes* [2012] IEHC 162, (Unreported, High Court, Laffoy J., 17th April, 2012). Accordingly, I do not believe that the form of proceeding chosen gives rise to difficulty.

19. In conclusion then it is my view that the second named defendant has not made out an arguable defence. It has no entitlement to remain in occupation and is a trespasser. On that basis the plaintiff is entitled to the order that it seeks without the necessity of considering the Campus Oil principles.

20. However, I am, in any event, of the view that the balance of convenience favours the plaintiff and clearly so. Mr. Meagher is heavily indebted to his bank and the bank is being frustrated in seeking to enforce its security. So long as Echoforde remains in occupation the property will be very difficult if not impossible to sell. This is more particularly so given that the lease contains unusual provisions such as the provision for payment of rent that is only a fraction of the rent reserved and that this arrangement is to continue until refurbishment works at 7/8 Charlemont Street are completed and the building is fit for its intended purpose, with no provision for ascertaining whether the refurbishment is complete or determining whether the building is fit for purpose.

21. I am conscious that my decision may have implications for the eleven employees of the hostel and may serve to inconvenience visitors who have made bookings. While I regret that, it seems to me to be clear that the plaintiff is entitled to the orders that he seeks and I must therefore grant the orders sought. The plaintiff is entitled to the orders sought against the first named defendant who has not participated in the proceedings, but also against the second named defendant.