Neutral Citation Number: [2012] IEHC 228

THE HIGH COURT

[2011 No. 21 COS]

IN THE MATTER OF N17 ELECTRICS LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

BETWEEN

KENNETH FENNELL AND ACC BANK PLC.

APPLICANTS

AND

N17 ELECTRICS LIMITED (IN LIQUIDATION)

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered on the 11th day of May 2012

1. This is an application by Kenneth Fennell and ACC Bank plc. (the applicants) for a declaration pursuant to s. 236 of the Companies Act 1963 to 2009, that a business lease agreement dated 1st April, 2005, in respect of "N17 Electrics Superstore in Milltown and Terryland Retail Park" is not binding on the applicants and is not an asset of the company for the purposes of the winding up. Other related relief is also sought.

2. The basis of the applicants' contention is that as a result of entering into four charges with ACC Bank plc, Mr. Tom Naughton, the owner of the retail units, was unable to avail of the statutory power of leasing conferred by s. 18 of the Conveyancing Act 1881, which power was expressly excluded in the four charges.

3. The respondent contends that it is entitled to rely on the business lease agreement as the basis for its occupation of the properties known as the Terryland units and the Milltown premises and asserts that the lease is an asset of the respondent.

4. It is not in dispute between the parties that as the four charges concerned predate the coming into force of the Land and Conveyancing Law Reform Act 2009, that Act has no bearing upon the issues that arise in this case.

The Charges

5. The first of the charges was dated 19th November, 2004 ("the Milltown Charge") and was made between Tom Naughton, the borrower, and the bank, whereby the borrower charged premises described therein, being retail premises at Milltown, Tuam, County Galway, comprised in Folio No. 61301F of the Register of Freeholders County Galway, as security for the liabilities described therein. The other charges related to three retail units at Terryland Retail Park ("the Terryland Units"), Galway, and they were as follows:

> (a) A mortgage/charge dated 29th June, 2001, in which the borrower, as security for monies advanced by the bank, mortgaged and charged premises known as Unit A3 (registered under Folio No. 43871F County Galway) to the bank.
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> (b) The second mortgage/charge was dated 12th September, 2002 ("the Second Terryland Mortgage"). The borrower, as security for monies advanced by the bank, charged the premises known as Unit 2 (registered under Folio No. 43758F County Galway to the bank.
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> (c) The third mortgage/charge was dated 30th May, 2003 ("the Third Terryland Mortgage") whereby the borrower, as security for the monies advanced by the bank on foot of same, charged the premises known as Unit A1 registered under Folio No. 65397F County Galway to the bank.

6. The Milltown Charge contained the following provision at clause 6.1 headed 'Negative Pledge' in the following terms:

> "The borrower shall not, except with the prior written consent of the bank,
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> (a) create, extend or permit to subsist any encumbrance over the secured assets or any of them ranking in priority to or *pari passu* with or after the security hereby created, or
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> (b) part with, sell, convey, assign, transfer, lend, lease or otherwise dispose of, whether by means of one or of a number of transactions related or not and whether at one time or over a period of time, the whole or any part of the secured assets or any interest therein."

7. All of the Terryland Mortgages contained similar clauses as follows: "The borrower covenants with the bank during the continuance of the mortgage ... that he will not assign, lease, sublet or part with the possession of the mortgaged premises or any part thereof without the consent in writing of the bank previously had and obtained."

The various mortgages/charges provided for the bank to appoint a receiver in the event that an act of default under the terms of the respective mortgages/charges occurred and in consequence of such an act of default occurring, the receiver was, by deed of appointment dated 20th January, 2011, appointed by the bank as receiver over the three Terryland retail units, and by a similar deed, was appointed as receiver over the Milltown premises on the same date. No issue arises in relation to the appointment of the receiver.

8. The position in relation to the company is that it was wound up by order of the Court on 31st January, 2011, a petition having been presented to the Court in the first instance on 11th January, 2011.

The Business Lease Agreement

9. The business lease agreement is dated 1st April, 2005 and is very short. It describes the lessor as Tom Naughton and the lessee as

N17 Electrics Ltd. of Milltown, Tuam, County Galway. The premises are described as "N17 Electrics Superstore in Milltown and Terryland Retail Park". The permitted user is described as N17 Electrics. The term of the lease is described as being "from 1st April, 2005 to 1st April 2020". The rent payable is said to be "€30,000 with a rent review to take place at five-year intervals" and the manner payable is described as "monthly direct debit".

10. The longest part of the Memorandum of Agreement is the final paragraph which states as follows:

> "Whereby the lessor agrees to lease and the lessee agrees to take the premises for the term of and at the rent details of which as set out above and the lessee agrees to pay the amount of the rent and other payments in the manner and at the times described herein and each of the said parties further agree and accept the terms and conditions on their respective parts to be observed and performed and which are set out in the Special and General Conditions attached to this agreement."

It is then signed by Mr. Naughton as the lessor and there is a signature on behalf of the company, which is a signature by an individual, and there is nothing in relation to the capacity of that individual to sign on behalf of the company and there is nothing to indicate that the document was executed in the manner that would be normally required by a company. The description of the properties to be leased is terse and not very descriptive. It is, to say the least, an unusual form of document to be relied on as amounting to a binding commercial lease.

The Conveyancing Act 1881

11. Certain provisions of s. 18 of the Conveyancing Act 1881 (the 1881 Act) are of relevance to the matters before the Court and therefore it would be useful to set them out here. They are as follows:

> "18(1) A mortgagor of land while in possession shall, as against every encumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof as is in this section described and authorised .
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> …
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> 18(6) Every such lease shall reserve the best rent that can be reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.
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> …
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> 18(7) Every such lease shall contain a covenant by the lessee for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified not exceeding 30 days.
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> …
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> 18(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery, the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.
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> …
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> 18(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and the 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."

Submissions and Discussion

12. The applicants in this case make the point that the terms of the charges expressly reflect such a contrary intention and, accordingly, the statutory power of leasing contained in the 1881 Act has been excluded and replaced by a conditional power to grant a lease subject to the prior written consent of the bank being obtained, which has not been satisfied in this case. Very simply put, the bank's case is that as there was no prior written consent in accordance with the terms of the charges, the 2005 business lease agreement is not binding on the bank.

13. In the course of submissions, I was referred to some of the leading textbooks on this topic. Wiley, in *'Law of Landlord and Tenant'* (2nd Ed.), stated at para. 6.10 as follows:

> "Though both the mortgagor and mortgagee have power to lease the land at common law, such leases were of limited effect since, while binding between the lesser and lessee, they could not prejudice the rights of the other party to the mortgage *i.e.* in the case of a lease by the mortgagor, the mortgagee's paramount rights to take possession or otherwise realise his security ... these difficulties were removed by s. 18 of the Conveyancing Act 1881, which conferred a statutory power of leasing upon both mortgagor and mortgagee, exercisable while either is in possession of the mortgaged land. A lease granted by the mortgagor under his statutory power binds every mortgagee ... provided in each case the statutory powers are complied with ... it is also important to note that most mortgage deeds restrict the mortgagor's power of leasing, by requiring the consent of the mortgagee, if the power is not excluded altogether. The point is that the existence of a tenant on the land may hinder the exercise by the mortgagee of his powers to realise his security, e.g. to take possession or to sell the land. If a tenancy is binding on the mortgagee, it may also affect the value of his security, especially if the tenant acquires renewal rights. In *ICC Bank v. Verling*, the mortgage of an off-licence premises contained a clause that, during the continuance of the security, 'the statutory and other power of leasing, letting, entering into agreements for leases and letting ...' were not exercisable by the borrower. Lynch J. held that this clause was a sufficient indication of a 'contrary intention' so as to exclude the statutory powers of leasing conferred by s. 18 of the Conveyancing Act 1881. Furthermore, following a concession by counsel, he held that a purported lease granted by the mortgagor was null and void when first granted."

14. Reference was made in that passage to the decision in the case of *ICC Bank plc. v. Verling* in which Lynch J., having referred to the provisions of s. 18(13) of the 1881 Act, went on to say:

> "Clause 15 of the mortgage deed of 31st May 1991, which I have quoted above, is, of course, such a contrary intention as is referred to in s. 18(13) of the Conveyancing Act 1881, and it is clear therefore and indeed counsel for the second and third defendants conceded that the lease of 23rd March 1993 was null and void when it was first granted by the first defendant to the second and third defendants ..."

On the basis of those authorities, it was contended that the charges in this case evinced a contrary intention such as that referred to in s. 13 and, thus, it was argued that the statutory power contained therein was excluded expressly and the power to grant a lease could only be exercised in accordance with the terms of the charge which required the prior written consent of the mortgagee.

15. It was also submitted that although it is the contention that the statutory power had been excluded, that even if that were not the case, then, notwithstanding that, the statutory conditions which permit the grant of a lease had not been complied with. That being so, it was argued that the business lease agreement still could not bind the bank, one of the obligations of the lessor created by s. 18 of the 1881 Act being to obtain the best rent that can reasonably be obtained. Reliance was placed on English authority in that regard and I was referred to a passage from Megarry and Wade, *'Law of Real Property'*, 7th Ed., at para. 25-080, a passage which referred to leases granted outside the statutory power, wherein it was stated as follows:

> "If the power is excluded and the mortgagor nevertheless grants an unauthorised lease, the lease is void against the mortgagee and his successors in title (unless they are estopped from asserting this), but valid as between the parties to it. The statutory powers of leasing do not deprive the parties of their common law rights to create leases not binding upon each other. For example, if the mortgage contains a covenant by the mortgagor not to exercise a statutory power of leasing without the mortgagor's written consent, the mortgagor may, nevertheless, grant a yearly tenancy which binds the mortgagor under the principle of estoppel but which does not bind the mortgagee."

16. It was submitted on behalf of the bank that that is precisely what has occurred in the circumstances of this case.

17. Further reliance was placed on a passage from Fisher and Lightwood's *'Law of Mortgage'* at para. 29.18, in which it is stated:

> "The mortgagor is unable to confer upon another a greater right than he himself possesses. Thus, in the absence of a statutory or express power of leasing, where, after the mortgage, the mortgagor purports to grant a lease without the privity of the mortgagee, the tenancy will subsist by estoppel between the mortgagor and tenant but will be void against the mortgagee. Such a tenant is liable, like his lessor, to be ejected without notice. His only remedy is against the mortgagor ..."

18. A further passage was referred to in support of the bank's arguments from Woodfall *'Landlord and Tenant Act'* para 2.169, in which the following passage appears:

> "If the mortgage was made before January 15 1882, or if the statutory powers of leasing are excluded or modified, a lease granted by a mortgagor confers on the tenant a precarious title. Although it is good by estoppel as between the tenant and the mortgagor and the world in general, it is liable to be defeated by the mortgagee asserting his paramount title. This principle is not affected by the fact that the tenant is, against the mortgagor, a protected or a statutory tenant under the Rent Act. Where a lease made after the mortgage operates as a precarious tenancy, the mortgagee may treat the tenants of the mortgagor as trespassers; they are not his tenants and he cannot distrain or sue for rent unless a new tenancy has been created as between him and the tenant in possession by an attornment or otherwise. A tenancy was not created:
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> …
>
> (e) Where the mortgagee received rent under an express authority from the mortgagor."

19. Thus, it was argued that in circumstances where the mortgagor had provided for the mortgagee to receive the rent under an express authority or by means of an assignment, that still did not create a tenancy binding on the mortgagee under the provisions of the 1881 Act. On that basis, it was submitted that there was no question that the bank was bound by the business lease agreement herein.

20. It was pointed out on behalf of the bank and the receiver that the explanation for the legal position contended for was quite simple, namely, if the position were not so, a mortgagee would simply not be able to enforce its security by obtaining its right to possession, and thus, the value of the security would be rendered pointless or nonexistent.

21. I now want to look at a number of authorities that were opened in the course of the submissions on behalf of the applicants. The first of those is the decision in the case of *Iron Trades Employers Assurance Association Ltd. v. Union Land and House Investors Ltd*. [1937] Ch. 313. In that case, there was a legal mortgage and the defendants had covenanted with the plaintiffs that they would not, except with the previous written consent of the plaintiffs, exercise the power of leasing. By a tenancy agreement, the defendants granted a lease of part of premises included in the legal charge upon a yearly tenancy. The plaintiffs were not asked for and did not give their consent to the execution of the tenancy agreement. In those circumstances, it was held that the defendants, in granting the lease, were not exercising their statutory power and, consequently, they did not commit any breach of the covenant contained in the legal charge. Judgment in that case was opened extensively and I want to refer to a number of short passages from it. It was pointed out in the judgment that the purpose of the proceedings was to have the question determined by the Court as to the respective rights of the parties as to whether the granting of a lease was not a breach of the covenant contained in the charge. Farwell J. stated at p. 317 of his judgment as follows:

> "In order to determine this question it is necessary to consider quite briefly the position between mortgagors and mortgagees before the passing of either the Act of 1925 or the Conveyancing Act, 1881. Under the law as it was before the Act of 1881 the position was this, that in the case of a legal mortgage the mortgagor, although in possession, had no power at all to grant a lease which was binding on the mortgagee. Any lease granted by him to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment. So far as the mortgagor, who had granted the lease, was concerned, it was binding upon him as against the lessee, and he was estopped from disputing it and as against the mortgagor or against any one other than a person having a title paramount to the mortgagor, e.g., the mortgagee, such a lease was good and the lessee was entitled to the benefit conferred thereby, but so far as the mortgagee was concerned the lessee had no estate or interest as against him, except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession of the property which had been leased to him by the mortgagor, but beyond that right

> to redeem he had no rights as against the mortgagee nor had he any estate or interest as against the mortgagee in the land at all ..."

Farwell J. continued:

> "That position was altered by the Conveyancing Act, 1881, because by that Act express power was given to the mortgagor in possession to grant leases on certain terms and subject to certain conditions which were good as against the mortgagee. The effect of that statutory power was to enable the mortgagor for the first time to do something which hitherto it had not been possible for him to do-namely, to grant a lease during the continuance of the charge which would be binding on the mortgagee. The fact that that power was given to the mortgagor did not, and as the law now stands does not, in my judgment, deprive the mortgagor of the power of doing that which he could have done apart from the Act - namely, grant a lease to a third party, which without the consent of the mortgagee is not binding on him, but is binding as between the lessor and the lessee. I cannot find that the power which the mortgagor had in that regard was taken away by the Act, which merely gave the mortgagor a wider power of granting leases on certain conditions which were binding on the mortgagee. The position, apart from the Act, in my judgment, remained the same. The mortgagee as soon as he ascertained that the mortgagor had granted a lease to a third party was entitled to take steps immediately to evict the tenant, to treat him as a trespasser, and, subject to the tenant's right to redeem, the mortgagee could evict him and recover possession of the property."

So far as those passages are concerned, it was submitted that they are a useful exposition of the law before the enactment of the 1881 Act, and following its enactment and I see no reason to disagree with that submission. There was a further passage from that judgment which it was stated by Mr. McDonald on behalf of the applicants did not represent the law, and in that passage, Farwell J. commented:

> "On the other hand, he might, if he desired, confirm what had been done, but if, knowing the facts, he stayed his hand and did nothing, he might find himself in danger of being held to have acquiesced in and thereby confirmed the lease and, therefore, not entitled to oust the tenant."

There are some further passages which I think it would be useful to refer to from the judgment of Farwell J. in that case. He continued at p. 322 as follows:

> "There is nothing to prevent the mortgagor and mortgagee agreeing that the statutory powers shall not be exercised or shall be exercised in a wider or less restricted manner than that provided by the Statute. In my judgment, the effect of inserting in the mortgage a covenant by the defendants that they will not, except with the consent in writing of the mortgagee, exercise the power of leasing given by the Statute is to impose a further and additional term on the obligations which are contained in the Act itself, and that the exercise or purported exercise of a power for which no previous consent has been obtained is not an exercise of the statutory power at all, because, as the result of the agreement made between the parties, the only power of leasing given by the Statute is the power of leasing with the consent of the mortgagee. If I read into the section an overriding obligation on the mortgagor to obtain the written consent of the plaintiffs, the effect must be that if there is no such written consent, then the power which otherwise would have been exercisable by the mortgagor has not been validly exercised."

22. That paragraph seems to me to set out the position that applies as a general rule.

23. Farwell J. continued at p. 323 to state:

> "They had deprived themselves of the power of granting statutory leases without the written consent of the plaintiffs, and consequently when they granted this lease they were not exercising and could not have been exercising the power under the Statute and were only doing that which they could do apart from the Statute - namely, grant a lease which was not binding on the mortgagees."

That decision, it was submitted, is a clear illustration that one can have a situation where a mortgagor grants a lease but the lease will not be binding on the mortgagee by virtue of the terms of the charge between the mortgagor and the mortgagee.

24. The next case to which I want to refer is the case of *In Re O'Rourke's Estate* [1889] 23 LR Ir. 497. As appears from the head note in that case, where, subsequently to a mortgage, the mortgagor creates new tenancies, and submits rental to mortgagee, who raises no objection, such tacit acquiescence does not suffice to create a new tenancy as against the mortgagee. The act of the solicitor having carriage, in approving the rental which sets out such tenancies, will not create a new tenancy. The act of the receiver, in accepting rent from such tenants, and paying interest there out to the mortgagee, will not create a new tenancy. At p. 500 of the judgment, Monroe J. stated:

> "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
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> ...
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> 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 served 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 :... I have therefore to enquire in this case whether there are facts proved from which I ought to infer the existence of such an agreement. Three matters were relied upon not to set up the leases, but to create a tenancy from year to year on the terms of those leases, respectively:-
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> (i) The actions of Judge Lefroy [a party to the proceedings] who was all through representing the mortgagee;
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> (ii) the action of the solicitor having carriage who filed the petition for the mortgagee, and approved of the rental furnished by the agent; and

(iii) the action of the receiver in receiving the rents and paying the interest thereto to the mortgagee.

As regards the action of Judge Lefroy, which applies to M'Breen's case alone, what is said is this:- He was furnished with the rentals; he knew that at the date of sale to the O'Rourkes, the lands were in the owner's hands; he saw the name of M'Breen included in the list of tenants; he saw that rent was being paid by him; he knew that out of that rent his interest was being paid; and as he took no steps to object to such a tenancy, he must now be presumed to have adopted it. I certainly cannot infer the creation of a new tenancy between the tenant and the mortgagee merely because the mortgagee takes no active steps to disavow a tenancy created by the mortgagor. The mortgagor, while in possession, and bound to keep down the interest on his mortgage, is at liberty to manage the lands as he pleases. It is not for the mortgagee to interfere with that management unless he chooses to go into possession. He treats the tenancy as one binding on the mortgagor, but in no way binding upon himself if he find it afterwards for his interest to repudiate it."

25. The final decision referred to in the course of these submissions on behalf of the applicants was the case of *Taylor v. Ellis* [1960] 1 Ch. 368. That was a case which concerned a mortgage dated 27th October, 1924, which excluded the mortgagor's statutory power of leasing unless the mortgagee should consent in writing to the lease. Subsequently, the surviving mortgagor purported to grant a monthly tenancy to W.H. The surviving mortgagor, who granted the tenancy, died on 11th July, 1943, and the original mortgagee died on 21st July, 1957. There was no evidence that the mortgagee did give written consent to the grant of the tenancy, but there was no positive evidence that he did not and it was possible that he had: it was admitted that the mortgagee knew of the tenancy. No mortgage interest was paid after October 1950, and on 5th August, 1959, the mortgagee's personal representative issued an originating summons claiming possession of the property subject to the mortgage. It was held in that case:

(i) That the onus was on the tenant to prove that the mortgagee gave written consent to the grant of the tenancy, and, therefore, in the absence of any evidence of such consent, the tenancy was not, to begin with, binding on the mortgagee.

(ii) that the tenancy had not become binding on the mortgagee by reason of the events subsequent to the grant of the tenancy, for it would be wrong to infer merely from the facts that the mortgagee, having knowledge of the tenancy, allowed the tenant to remain in possession, and that no interest had been paid for nine years, that the mortgagee had consented to take the tenant as his tenant. The plaintiff, accordingly, was entitled to possession against the tenant.

26. It appears from the head note that the decision in *In Re O'Rourkes Estate* was applied.

27. In the course of his judgment in that case, Cross J. commented on the evidence in relation to the issue of consent and stated as follows:

"... there is no positive evidence that he did not give his consent and it remains possible that he may have done so.

On those facts, the point that has been argued is on whom does the onus lie that the establish that the mortgagee either gave or did not give his consent in writing.

I think the matter can best be decided how the point would be pleaded in an action of ejectment. It seems to me that the mortgagee, in his statement of claim against anybody in possession of the land, would have to do no more than set out the mortgage, which showed that he had the immediate legal estate, and claimed possession. It would not be necessary for him to allege that the defendant claimed to be in possession as a tenant, but that the tenancy was not binding on him: it would be sufficient for him to say that he had the legal estate as mortgagee, and that he claimed possession."

28. Cross J. went on to say:

"I think that it must be taken that to begin with, this tenancy was not binding on the plaintiff. Then the question arises: did the mortgagee become bound by the tenancy by reason of subsequent events? It is, of course, quite common for a mortgagee who was not previously bound by a tenancy to consent to take the mortgagor's tenant, whom he could have treated as a trespasser, as his own tenant. The commonest way in which that happens is when a mortgagor fails to pay the mortgage interest and the mortgagee serves a notice on the tenant to pay the rent to him. Then, a new tenancy is created between the mortgagee and the mortgagor's tenant. But all that happened in this case was that for a great many years, the tenant was allowed to remain in occupation of the property, and then there is the very curious circumstance that from October 5th 1950 onwards, no mortgage interest was paid.

Apart from the second point, it does not seem to me that the fact that the tenant of the mortgagor, who could have been treated by the mortgagee as a trespasser, was allowed to remain in possession for a long period could itself in any way preclude the mortgagee from treating him as a trespasser if and when he desired to do so. After all, as long as the mortgage interest is being paid, the mortgagee may perfectly well be content to allow the tenant to remain in possession. The only way in which he can turn him out of possession is by going into possession himself, which is a thing a mortgagee is very unwilling to do. I think that it would be quite wrong to infer, merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy - there is no doubt in this case, and it is accepted, that Thomas Taylor knew of the tenancy - that the mortgagee consented to take the tenant as his tenant."

29. Cross J. then went on to quote from one of the passages in the decision in *In Re O'Rourke's* Estate to the effect that one cannot infer the creation of a new tenancy between the tenant and the mortgagee because the mortgagee takes no active steps to disavow the tenancy created by the mortgagor.

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 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.

31. I think it is clear from the affidavits sworn herein, and in particular, from the affidavit of Michael McEvoy, the official liquidator of the respondent herein, and from the affidavit of Tom Naughton, the borrower, that no prior written consent of the bank had been obtained to the creation of the business lease agreement. The most that is asserted by Mr. Naughton, the borrower, is that he believed that he had delivered a copy of the agreement to the bank himself. Equally, I think it is fair to say that the bank was at all times aware of the fact that the respondent was in occupation of the premises, although there is a dispute as to whether or not the bank was aware of the existence of the business lease agreement.

32. The approach of the respondent as set out in the Points of Defence has been to assert that the building lease agreement constitutes a valid and binding tenancy agreement between the parties, presumably, that is the company and Mr. Naughton, the borrower. It is further pleaded that the company is a stranger to the allegation that the borrower did not seek the prior written consent of the bank to the business lease agreement, and insofar as that is alleged, it is asserted that it was not incumbent upon the company to seek any such written consent from the bank. It was also denied that the borrower had no power to grant the business lease agreement and that the negative covenants contained in the charges did not have the effect contended for by the bank. It was also pleaded in the points of claim as follows:

> "Insofar as the bank is not a party to the business lease agreement, it is admitted that the bank is not bound by same but it is denied that the bank is entitled to ignore the contractual reality as pertains between the respondent and the borrower."

The points of claim go on to state that the bank is "by virtue of the conduct referred to in the affidavits sworn on behalf of the respondent herein, and in the manner described in the respondent's outline legal submissions of 6th March, 2012, estopped from denying the validity of the company's tenancy pursuant to the agreement". It is also specifically pleaded that the bank waived any requirement for prior written consent articulated in the mortgages relied upon.

33. I now want to look at the submissions of the respondent in support of those pleas.

34. Mr. Redmond S.C. on behalf of the respondent referred to a number of factual matters. First of all, he pointed out that N17 Electrics Limited was in occupation of some of the premises prior to the first mortgage. Therefore, in those circumstances, he submitted it would not have been possible for the mortgagor to get prior written consent given that the tenancy was already in existence. It was further noted that the aim of the bank in dealing with Mr. Naughton was at all times to ensure that the rentals being paid by N17 Electrics Limited was sufficient to defray the payments required by the bank from Mr. Naughton. There was also a submission made on behalf of the respondent to the effect that the bank knowingly facilitated the non payment of tax by Mr. Naughton. This assertion was made on the basis that the business lease agreement provided for rent in the amount of €30,000 per annum in circumstances were the bank was aware that the rent actually being paid was a multiple of this figure. The point was made that the bank facilitated or acquiesced in this arrangement because the less tax paid to the Revenue, the more money would have been available to the bank to repay the amount due to the bank. This allegation was hotly contested on behalf of the applicant herein and I note that there is nothing in the affidavit sworn by Mr. Naughton on behalf of the respondent herein to support such a contention.

35. The main point made by Mr. Redmond on behalf of the respondent was that at all times, the bank was aware of the occupation by N17 Electrics Limited of the relevant units at Terryland and Milltown and that the rent payable by N17 Electrics was used by Mr. Naughton to make the repayments due by him to the bank on foot of the various charges. It was further submitted that the bank was aware of the arrangements between the company and Mr. Naughton and expressed no dissatisfaction and is therefore estopped from relying on the negative pledge clauses contained in the various charges. To put it simply, it was submitted that the bank had taken the benefit of the arrangements between the company and Mr. Naughton and therefore the bank had to take the "flip side" of the arrangement.

36. There was also an issue raised as to the apparently inconsistent approach of the receiver in seeking to serve notice pursuant to s.290 of the Companies Act 1963. While this was done, I do not think that this fact in any way assists me to determine the issue in controversy between the parties which relates to the question as to the status of the 2005 Business Lease Agreement.

Decision

37. I now want to look more closely at the factual background to this matter. The first charge herein was made on 29th June 2001 and related to Unit A3 at Terryland; the second charge was made on 12h September 2002 and was in respect of Unit 2 at Terryland; the third charge was made on 30th May 2003 and was in respect of Unit A1 at Terryland and the final charge was made on 19th November 2004 in respect of the retail premises at Milltown, Tuam, County Galway.

38. Mr. Gavigan in an affidavit sworn herein on the 26th January 2012 on behalf of the bank accepted that a copy of the business lease agreement was found in the bank files but pointed out that there was no prior request for the bank's consent to that agreement and he stated that the bank had not furnished its consent to it.

39. I have also looked at the various letters of sanction relating to the provision of further facilities to Mr. Naughton. The various letters of sanction speak of the bank's requirement that leases be put in place with "rental payments sufficient to meet repayments" or "in an amount not less than the monthly repayment". The letters of sanction further required that "no lettings or renewal... are to be made without the bank's prior consent in writing".

40. I have read carefully the affidavit of Mr. McEvoy, the official liquidator and that of Mr. Naughton in regard to the issue of consent. I note that an issue is raised as to a 2002 tenancy agreement executed by Mr. Naughton and the company which Mr. Gavigan states was never on the bank's file but which was on the bank's solicitors file. I also note the criticism of the bank's dealings with Mr. Naughton contained in Mr. McEvoy's affidavit. It does appear that the bank was somewhat lax in its approach to the question as to whether appropriate formal leasing arrangements were in place as between the borrower, Mr Naughton, and the company, given the requirements contained in the various letters of sanction. Having said that I am satisfied on the evidence before me that no prior consent, written or otherwise, was furnished by the bank to the 2005 business lease agreement. The fact that the company was in occupation of the premises did not mean that that a formal lease could not be put in place on terms which would have met the bank's requirements and therefore, presumably, would have received it's consent.

41. That leaves the question as to how it can be asserted the bank is estopped from denying the validity of the 2005 business lease agreement. The high point of the arguments made on the respondent's behalf in this regard is to be found in para 30 and 31 of the affidavit of Mr. Naughton. Mr. Naughton averred that he was at "at loss to understand the bank's contention... that it was not aware or did not consent to the creation of the business lease agreement of the 1st April 2005". Mr. Naughton went on to say:-

> "I executed the said agreement to formulise the relationship of landlord and tenant which existed between the company and I at the bank's request and I believe that I delivered a copy of the agreement to the bank myself. I say and believe that in that circumstances where my dealings with the bank, both personally and as a director of the company, were always closely related to the company's trade from the Milltown and Terryland units, I am surprised that the bank is now contending that it was unaware of or had not consented to this occupation."

42. At para 31 of his affidavit he continued:-

> "I say and believe that the company's occupation of the said units has been well known to the bank for over ten years and that each of the three mortgages which I executed over the units was agreed against the backdrop of this use and occupation. Had the bank for a moment suggested that some formal written consent was need (sic) to regularise the company's use of the premises, I say and believe that I would have sought same. However, in circumstances were the bank was content to advance monies to me on more than one occasion over the ten years on the strength of security which they knew to occupied by the company by agreement, I say and believe that I at all times understood that this occupation was with the agreement and consent of the bank."

43. There are a number of observations to make in respect of those averments. There is no doubt whatsoever that the bank was aware of the company's occupation of the units. There is also no doubt that the bank was anxious that a formal leasing agreement be put in place between the company and Mr. Naughton and it is also the case that this requirement was referred to in various letters of sanction and it is also clear from those letters of sanction that what was necessary was the prior consent of the bank to any lease. However it is at this point, it seems to me, the arguments of the respondent fall down.

44. I have already indicated that I am satisfied that there was never any prior consent to the 2005 business lease agreement. When one considers its terms, it is not difficult to see the reason why the bank would not agree to be bound by a lease without its prior consent. The 2005 business lease agreement provided for a rent payable of €30,000. The terms of that agreement are somewhat unclear as to whether that was intended to be a payment of €30,000 per month or per annum but by and large it appears to be accepted by all parties that what was to be understood by the phrase in the business lease agreement was that the sum was payable per annum. The other unsatisfactory aspect of the business lease agreement relied on by the respondent herein is the reference in that business lease agreement to the fact that "each of the parties further agree and accept the terms and conditions on their respective parts to be observed and performed and which are set out in the schedule and general conditions attached to this agreement". It is a matter of significance that no term and conditions were attached to the agreement. It is accepted the rent payable by the company to the borrower was in multiples of the figure set out in the business lease agreement. It seems to be me to be inconceivable that the bank would ever have agreed to a lease of the various premises in those terms. In addition, it is extremely unusual to have one lease of separate properties at different locations. It would have I been entirely contrary to the bank's interests. There is nothing in the papers before me to indicate that any representatives of the bank conveyed to Mr. Naughton or the company in any way that it accepted the validity of the lease or that it was in any way binding on the bank.

45. I was referred also by the respondent to the decision *in First Energy (UK.) v. Hungarian International Bank Limited*, [1993] B 3 LV1409, a decision of the Court of Appeal in the United Kingdom, which concerned the issue of ostensible and actual authority and whether or not an official of a bank had ostensible or actual authority to sanction a credit facility and had authority to communicate the offer of credit facility and in that regard it was held in construing a letter of the 2nd August 1990, enclosing draft hire purchase agreements in respect of a number of contracts that "the Court would take into account the surrounding circumstances which reasonable persons in the position of the parties would have in mind. On the facts, a reasonable business man placed in the same objective setting as C would have read the letter as communicating an unconditional and firm offer. That offer was capable upon acceptance of being converted into a binding contract." The Court went on to indicate that on the facts, J.'s position as senior manager clothed him with ostensible authority to communicate that head office approval had been given for the facility offered in the letter of the 2nd August 1990. That decision was relied on to argue that while the bank's employees may not have had an authority to commit the bank they were in a position to communicate a decision made by the bank in relation to sanction of loans and to that extent it was argued that they had ostensible authority to bind the bank. That may be so but it does not seem to me that the fact that loans having been sanctioned on certain terms and then advanced to the borrower without those terms being fully implemented assists the respondent in this case.

46. I have already set out a number of authorities relied on by the applicant in support of the case made by the them to the effect that whilst a lease entered into between the borrower and its tenant, in this case the company, may be binding as between them, it is not binding on the mortgagee. The facts and circumstances described in the various authorities referred to above clearly establish that to be the case. I cannot see any basis for suggesting that the bank is, in any shape or form, estopped from denying the validity of the business lease agreement. It seems to me that the respondent has simply failed to engage with the principles to be found in the authorities.

47. 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 it's security by reason of a lease binding on the mortgagee should be one in respect of which the mortgagee had furnished it's 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. It's conduct in granting loans from time to time without appropriate leases having been put in place does not alter the position.

48. In the circumstances I am satisfied that the applicants herein are entitled to the declaration sought herein.