

THE HIGH COURT

[2013 No. 13289 P.]

BETWEEN

JOSEPH DELANEY

PLAINTIFF

AND

ALLIED IRISH BANK, DECLAN TAITE AND SHARON BARRETT

DEFENDANTS

JUDGMENT of Mr. Justice Kevin Cross delivered the 4th day of February, 2014

1. The plaintiff who appeared in person sought by notice of motion, an order restraining the defendants from trespassing or attempting to sell property at 82 JKL Street, Edenderry, Co. Offaly.
2. The court had the benefit of reading the affidavits sworn by the plaintiff together with his former wife, Marian Delaney and Mr. Michael Dunne, sworn on his behalf together with the affidavits of Mr. Declan Taite sworn on his behalf and on behalf of the third named defendant, and the affidavit of Frank Dennehy sworn on behalf of the first named defendant. The court also read the affidavit of Ms. Claire Dunne.
3. The court also had the benefit of the written submissions prepared on behalf of the plaintiff by his McKenzie Friend, Mr. Murphy, together with the written submissions on behalf of the first named defendant and also heard the plaintiff and counsel on behalf of the defendants.
4. On 28th January, the plaintiff made a further application to the court and filed a full book of pleadings and submissions as he contended that to an inadvertence or otherwise, I was not given the full book of his pleadings previously.

The Issue

5. The plaintiff has difficulties in literacy and notwithstanding that fact built up a substantial balance in his accounts at AIB in Edenderry, Co. Offaly. Initially, the plaintiff's account was in joint names with his then wife but in 2007, the account was transferred, with the consent of the plaintiff, into the sole name of his then wife due the plaintiff's literacy difficulties.
6. In September 2008, the plaintiff's wife with the agreement of the plaintiff withdrew substantial sums totalling nearly €400,000 on different dates and paid these sums to the plaintiff's former accountant, Mr. G.K. Mr. G.K. had advised the plaintiff that he was having some "cash flow" difficulties and he needed an injection of money.
7. In the course of the last withdrawal by Mrs. Delaney on 15th September, 2008, she was questioned by a member of the bank staff in relation to the withdrawing of so much money and queried whether she was being threatened or forced to withdraw the monies. After that was done, the plaintiff was somewhat concerned and had a discussion with Mr. G.K. who was a customer in the same branch in Edenderry and who indicated to the plaintiff that all was well financially and that he would grant to the plaintiff a lease of 24 years and 9 months on a premises at 82 JKL Street, Edenderry, Co. Offaly, as some security for the monies the plaintiff had advanced to Mr. G.K. This lease was signed on 12th December, 2008.
8. The plaintiff states and I accept that he intended to establish a business in the premises and commenced works thereon in April 2009 when he was approached by his bank manager, Mr. Gillen who indicated to the plaintiff that he was unhappy with his presence on the premises which he advised was subject to a mortgage in favour of the bank and the plaintiff advised that he had a lease with Mr. G.K. and was entitled to be there. Mr. Gillen was sympathetic to the plaintiff and I accept that Mr. Gillen indicated that he would try to resolve the matters to the plaintiff's satisfaction. The plaintiff then withdrew himself and his workers from the premises and apparently did not execute any further works on it. The plaintiff was made aware that the monies he had withdrawn had been lodged to Mr. G.K.'s rental accounts in the bank.
9. Subsequently, a further meeting was held but then Mr. Gillen was transferred from the branch and nothing further occurred in relation to the property to the plaintiff's satisfaction. Mr. Gillen has subsequently, I have been advised died.
10. Mr. G.K. was judged a bankrupt in July 2009 with, I am advised, debts of approximately €15.5m. The property, the subject of Mr. G.K.'s mortgage to the plaintiff, was transferred by the official assignee back to AIB and in December 2010, the assets was acquired by NAMA for whom the second and third named defendants act as receivers.
11. In the substantive proceedings, the plaintiff claims against the first named defendant damages for breach of duty of care in failing to properly advise or look after the plaintiff and against the second and third named defendants for various breaches of statutory duties.
12. It is not the function of this Court to make any adjudication as to the substantive case being made by the plaintiff against the defendants and the court makes no findings in that regard.
13. It is clear from the evidence before me that the plaintiff has done nothing in any way that could be described as legally wrong, acted in good faith and it seems was grossly deceived by Mr. G.K.
14. The plaintiff claims that under the lease of the property in Edenderry (agreed to in autumn 2008 but finally entered into and completed on 12th December, 2008) that he is entitled to possession of that property and the defendants are attempting to sell or dispose of same with vacant possession and seeks to injunct the defendants.

15. The first named defendant claims, inter alia, that no injunctive relief is or can be sought by way of an injunction against the bank as they are not in possession of the property and have no part in the sale or disposing of the property and whatever about the plaintiff's claims against the bank in the substantive matter that no injunctive relief could or can be granted against them.

16. Both sets of defendants go on to say that the plaintiff is not entitled as against any of the defendants under the supposed lease entered into with Mr. G.K. on 12th December, 2008, as the property was subject to a prior mortgage entered into by Mr. G.K. with AIB that the said mortgage of 14th September, 2007 was subject, *inter alia*, to a covenant by Mr. G.K.:-

"7.01(e) Not to convey, transfer, assign, demise, let or part with the possession of the mortgage property or any part thereof or any interest therein without the prior consent in writing of the bank and further and without prejudice to the generality of the foregoing not to exercise the statutory powers of leasing or agreeing to lease or accepting or agreeing to accept the surrender of a lease contained in section 18 of the Act of 1881 without the prior consenting of the bank."

17. The defendant placed reliance on clause 9.04 i.e.:-

"No failure to exercise and no delay in exercising, on the part of the Bank of a right or power or privilege hereunder shall operate as a waiver thereof...etc."

18. Reliance is further placed by the defendants on the decision of Dunne J. of 11th May, 2012, in *Fennell v. N17 Electrics Limited* in a case with not dissimilar facts she analysed the authorities and stated at para. 30:-

"...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."

19. The plaintiff has furnished a number of submissions, much of which deal with the substantive case the plaintiff is bringing against the defendants, but in effect makes the case that the AIB bank manager, Mr. Gillen promised to "sort out" matters on two occasions that as a result of his promises, the plaintiff left the premises it is further claimed that the bank apparently lodged the proceeds of the plaintiff's monies being bank drafts into Mr. G.K.'s rental accounts (and I accept for the purposes of this decision only that that was done) and that the bank allowed or did not object to Mr. G.K. leasing other properties subject to prior mortgages that in effect they are estopped from now insisting on their rights under the mortgage.

20. I am conscious of the plight of the plaintiff but I must reject those submissions. I believe that the creation of the lease by Mr. G.K. in favour of the plaintiff had no effect as against these defendants as there was no consent in writing or indeed otherwise by the bank and in the absence of the said consent following the *N17* decision (above) and also on general principles, I cannot find that the plaintiff has made out any entitlement to the lease and therefore must fail on the first of the *Campus Oil* principles. I do not find that the friendly suggestion by Mr. Gillen that he would try to "sort out" the matter amounted to any estoppel agreement or acknowledgement of title on behalf of the bank or anyone else. The plaintiff did, in fact, withdraw from the premise after Mr. Gillen's visit but the physical absence of the plaintiff or his workers from the premises is not in any way relevant to the plaintiff's case in this injunction. I also hold that the fact of the bank lodging the plaintiff's monies by way of bank drafts at the direction of Mr. G.K. into any specific rental or tenancy account did not amount to an estoppel on the part of the bank. I further hold that the bank is not estopped by any other agreement it may have entered into by way of accepting or allowing any tenancies being created in any other properties which Mr. G.K. had mortgaged with the bank without written consent. I do not know whether the bank did so allow Mr. G.K.'s properties which had been mortgaged with them under similar terms to be let to third parties but the plaintiff contends that they did. Even if this were so, I do not believe that this is a ground that creates any entitlement to the plaintiff.

21. Should I be wrong on the above matters, I also hold that given that the defendants are AIB and receivers appointed by NAMA (in effect NAMA itself) that damages would clearly be an adequate remedy for the plaintiff. The plaintiff's substantive case is one of damages for alleged negligence and/or breaches of duty and if the plaintiff is successful and persuades a court notwithstanding my views that they were entitled to the benefits of the lease with Mr. G.K. and/or succeed in persuading the court (about which I have not decided) that the defendants or any of them were in any breach of any of the duties that they owed to the plaintiff then it is clear in my view that the defendants would meet a claim for damages. Accordingly, the plaintiff in this application also fails under the second of the *Campus Oil* case tests.

22. Accordingly, despite my sympathy for the plaintiff, I must dismiss this application.