Neutral Citation: [2014] IEHC 266

THE HIGH COURT

Record Number: 2013 No. 14099P

Between:

Aidan Murphy

Plaintiff

And

Hilary Hooton

Defendant

Judgment of Mr Justice Michael Peart delivered on the 22nd day of May 2014:

1. The defendant is in occupation of a premises ("the property") which comprises part of the security for certain loans advanced by Irish Nationwide Building Society to her husband and son ("the borrowers") under a Deed of Mortgage dated 25th June 2001.

2. The loans and the mortgage were acquired by National Asset Loan Management ("NALM") a NAMA Group entity under the terms of the National Asset Management Agency Act 2009 ("the Act of 2009")

3. The plaintiff is the statutory receiver appointed by NAMA on the 8th July 2013 pursuant to section 147 of the Act of 2009 over these premises and others charged under the said mortgage as security for the loans, the borrowers having committed acts of default.

4. Upon his appointment, the receiver requested a Mr McDonald of Crowe Howarth to attend at the property and secure possession of same, as well as the other premises the subject of the said mortgage. Those other premises are not the subject of the present application for an injunction to restrain trespass and to deliver up possession.

5. When Mr McDonald called to the property on the 8th July 2013 in order to take possession and secure same he discovered that the plaintiff was the only person there, and he found also that the property has been divided up into a number of 'bedsits' which are used as overnight temporary accommodation for the homeless, in respect of which the defendant is in receipt of monies from Dublin City Council.

6. The defendant informed Mr McDonald at that time that she was running a business from the premises but that she did not have a lease or other written tenancy agreement from the borrowers. In the circumstances, Mr McDonald changed the locks to the premises but gave a key to the defendant as a matter of courtesy.

7. Later the same day the receiver wrote to the defendant asking her to set out the basis of any claim by which she maintained an entitlement to be in occupation of the property. No reply was received to that letter or to another letter written to her on the 17th July 2013 requesting a timeline for the delivery up of possession. That remained the position until after the present proceedings and Notice of Motion were issued. It is only in her replying affidavit to the present application for injunctive relief – in effect seeking a mandatory order for possession – that the receiver has learnt that the defendant seeks to substantiate her claim to be entitled to be in possession by asserting the existence of an oral tenancy with the owners which first arose in 2008, and given the passage of time since 2008 that she is entitled to a continuation of that tenancy on the basis of a "business equity".

8. I should however note that the borrowers' solicitors (the same solicitors as now act for the defendant) did write to Mr Ben Donoghue of Irish Bank Resolution Corporation by letter dated 8th April 2013 in which, inter alia, he stated:

> *"I have discussed the position of Hilary Hooton separately with her. It is my opinion that Hilary has long term rights in the above premises by virtue of her 'business equity' or otherwise. I do not wish to represent Hilary to clarify her rights to her as she needs independent legal advice on the matter and I understand she is to seek such advice over the next few days but she requested me to inform you of her intentions in this regard.*
>
> *It was pointed out by Hilary that her business at South Circular Road provides the vast bulk of the payments being made to IBRC."*

IBRC replied to that letter by stating, inter alia:

> *"We have never been provided with evidence that Hilary Hooton holds any interest in the property …… and accordingly how she can have acquired long term rights to this property is something that is inconceivable. Your clients will fully appreciate, as per the terms of the security granted in favour of Irish Nationwide Building Society (at the time) that they are not entitled to let the secured property. The consent of this Bank was not provided to any such lease under the terns of the security granted in favour of Irish Nationwide Building Society which they are obliged to as it was known at the time the security was provided."*

9. The receiver maintains the position that Irish Nationwide Building Society had no notice of any such tenancy, and that its written consent was neither sought nor given in respect of any such tenancy, and in that regard has referred to Clause 11(L) of the mortgage deed which contains the usual covenant against assignment or sub-letting by the borrowers other than with the bank's prior written consent:

> *"Not to assign or let or part with the possession of the mortgaged property or any part thereof, without the prior consent in writing of the Society and further that the mortgagor shall not exercise the statutory power of leasing or agreeing to lease or accepting or agreeing to accept a surrender of a lease or tenancy without the prior consent in writing of the Society ……".*

10. The defendant swore a replying affidavit on the 20th March 2014 for the purpose of resisting the plaintiff's application for an injunction requiring her to give up possession and to restrain her alleged trespass of the property. In it she says that she is the occupier of the property, and that she has been carrying on a business in the premises since February 2008 when she took over the business from her husband. She describes the business as being one which provides emergency accommodation for the homeless funded by Dublin City Council. She says that Dublin City Council regards her as the owner of the business and that her husband has had no involvement in the business since February 2008, and that all payments made by Dublin City Council are to her, whereas prior to February 2008 they were made to her husband.

11. The defendant then proceeds to describe the basis on which the business transferred to her. In that regard she states:

> *"6. The terms on which I took over the business from my husband was [sic] that I would take a monthly tenancy of the premises from my husband and son, Derek, the owners, in consideration of a rent of €3250 per month, this rent to be paid by way of discharge of the mortgage payments payable by them to the Irish Nationwide Building Society (now IBRC – in special liquidation).*
>
> *7. In accordance with the above, and by agreement with IBRC I have paid this rent directly into my husband's account with IBRC.*
>
> *8. On a number of occasions I requested a written tenancy agreement but same was not forthcoming; however a monthly tenancy has arisen in any event by oral agreement.*
>
> *9. I say and believe that no steps have been taken to determine this monthly tenancy and that in the event that such steps are taken I would be entitled to claim a new tenancy under Part II of the Landlord and Tenant (Amendment) Act 1080 insofar as I have been in occupation and carrying on a business from the premises for upwards of five years last past so as to give me business equity under Section 13(1)(a) of the 1980 Act, the premises being a tenement within the meaning of Section 5 of that Act."*

12 In paragraph 10 of her replying affidavit she elaborates somewhat on the alleged knowledge of and acquiescence by IRBS in relation to her continuing to run this business from the property, to which she referred in paragraph 7 of her affidavit. In that regard she states that although no formal letter of consent from IBRC ever issued in respect of her tenancy, IBRC were fully aware of her tenancy and her control of the business from 2008, and she refers in particular to a meeting which took place between her and a Brian Mortimer of Irish Nationwide Building Society at 9.30am on 20th March 2009 at the office of INBS and at which her own accountant, Michael O'Reilly also attended. She says that at this meeting her own position and the disengagement of her husband from the business were discussed.

13. The plaintiff has not sworn any affidavit to dispute what the defendant has stated in paragraph 10 of her affidavit in relation to INBS being made aware at that meeting that she was continuing to run the business at the property. IBRC and through it, the plaintiff receiver must be deemed to have knowledge of those facts, even if they did not gain actual knowledge thereof until reading it in her replying affidavit. The question will be what significance, if any, those facts have in the defendant's resistance to the present application for an interlocutory injunction to remove her from the property and effectively close down her business.

14. As far as the law is concerned, there is not much dispute between the parties. All agree that the mortgage in this case predates the commencement of the Land and Conveyancing Law Reform Act, 2009, and that it does not therefore have any application to the facts of this case. All parties agree also that save in some limited circumstances, a tenancy between the owner/borrower and a tenant without the prior consent in writing of the mortgagee, will in the face of a clause such as Clause 11(L) of the present mortgage be void as against the mortgagee, even though it will give the tenant rights as against the landlord. The question arising now on the present application is whether the facts of the present case can be considered to come within the very limited circumstances referred to in the case-law where, despite a clause such as Clause 11(L), and despite no prior written consent to the tenancy or lease, it is arguable that the mortgagee is bound by the tenancy.

15. In making her case in this regard, Ruth Cannon BL for the defendant has referred to the judgment of Dunne J. in *Fennell & ACC Bank v. N17 Electronics Ltd (in liquidation)* [2102] IEHC 228. In that case and in the face of a similar clause to Clause 11(L) the mortgagor company created a lease with the defendant tenant ("N17") without prior mortgagee consent. The mortgagor company went into liquidation, a receiver was appointed and, through him, the mortgagee sought possession of the premises. The business lease agreement in question was very short and was described by Dunne J. as being "*to say the least an unusual form of document to be relied on as amounting to a binding commercial lease*". In the present case there is of course no written lease or tenancy agreement whatsoever. However, there was no doubt about the fact that no prior consent to the lease had been obtained, even though it appeared from an affidavit of the borrower, and apparently accepted by the bank in the case, that it was aware that the N17 company was in occupation of the premises. There was evidence that a copy of the business lease agreement signed was on the bank's file. But it had not given its written consent either prior or subsequently. In the end, having considered closely all the facts and circumstances of the case as disclosed on the affidavits before her, Dunne J. concluded that despite some criticism of the bank having been "*lax in its approach to the question as to whether appropriate formal leasing arrangements were in place as between … the borrower and the company*" she was satisfied that on the evidence that no prior consent, written or otherwise was furnished by the bank.

16. She went on to deal with the question of whether the bank could be held to be estopped from denying the validity of the business lease given its knowledge of the occupation of the premises by the N17 company, and the fact that as averred by the borrower he had entered into the business lease agreement with the company precisely because the bank itself had asked that the .occupation relationship be formalised, and he at all times over a period of ten years had understood that the bank knew all about it and consented to it. Nevertheless, Dunne J. concluded that she "*could not 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*."

17. Part of Dunne J's journey to her conclusion involved a detailed consideration of the judgment of Farwell J. in *Iron Trades Employers Assurance association Ltd v. Union Land and House Investors Ltd* [1937] Ch. 313 which is certainly authority for the accepted proposition that while a lease, given without prior consent where that is required, is valid as between the borrower and the tenant, it is null and void as regards the mortgagee who was therefore entitled to regard the tenant as a trespasser and could seek to have him evicted and recover possession.

18. She also considered the judgment of Monroe J. in *In Re O'Rourke's Estate* [1889] 23 LR Ir. 497, and approved same. That was a case where a lease was made without a required prior consent, but nevertheless the mortgagor paid the rents received to the

mortgagee, who thereupon raises no objection. That is close to the situation in the present case because the amount of 'rent' that the defendant agreed she would pay to the bank by way of repayments of his mortgage repayments was actually paid into the loan account, even though there was never any written tenancy agreement or lease specifying this sum to be 'rent'. However, in *Re O'Rourke's Estate*, as noted by Dunne J. it was held that any such tacit acquiescence does not suffice to create a new tenancy as against the mortgagee. Munroe J. stated at p. 500:

> *"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 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 in May, and probably ought, to infer the existence of such a contract of tenancy." [emphasis added]*

19. Ms. Cannon seeks to rely upon the window of exception possibly available to the defendant herein in circumstances where she has been paying a sum into her husband's loan account each month, that being a sum agreed with him, and which she is now calling a rent. However, John McCarroll BL for the plaintiff submits that this payment could not be sufficient "to create a new tenancy" and he refers to the words "*if the mortgagee enters into the receipt of the rents and continues to take them from the tenants ……"* and submits that there is no question on the facts of the present case to support a conclusion that INBS or IBRC ever entered into the receipt of rent as such, and that it is simply a fact that the defendant unilaterally paid a sum which she had agreed with her husband into his bank account against his obligations to the bank, and that the bank had no active part in these arrangements in so far as they were made between her and her husband.

20. I note also in this regard that at paragraph 30 of her judgment, Dunne J., in concluding that no estoppel could arise on the facts of that case, stated:

> *"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 to, 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 mortgage or which is being used to pay the obligations of the mortgage or to the mortgagee, is not of itself sufficient to create a relationship between the mortgagor's tenant and the mortgagee."*

21. Dunne J. was satisfied that on the facts of that case "no commercial reality would justify departing from those well-established authorities". She went on at paragraph 47:

> *"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."*

22. It is hard to avoid the same conclusion in the present case, particularly in circumstances where there was not even a written agreement between the defendant and her husband and son, which might at least have stood some chance of containing terms which the bank might have given its approval to had it seen them. Here there is nothing except some sort of verbal arrangement whereby she agreed with her husband that each month she would pay the sum of €3250 against their obligations to the bank. Yes – the bank may have known that this is what was to happen after February 2008, if the defendant's averment is accepted that at on the 29th March 2009 (more than 12 months later) she told the bank about this at the meeting she had spoken about in her replying affidavit. But that information cannot be taken as an acquiescence such that it amounts to prior written consent or indeed any consent prior or subsequent so that Clause 11(L) is satisfied. Equally, I am not satisfied that on the authorities it is open to regard that knowledge on the part of the bank as acting as an estoppel against the bank so that it may not deny the entitlement of the defendant to remain in possession. In my view there was no reasonable, proper and transparent engagement between the borrowers and the bank, or indeed between the defendant and the bank in relation to any potential tenancy arising, and in order to comply with the borrowers' obligations under Clause 11(L). If the Court was to consider that the actions of the defendant in compliance with her agreement with her husband should serve to deprive the bank of the protection to its security intended to be given by the existence of Clause 11(L), albeit that she has informed the bank in February 2008 that she would be continuing the business in her own name from the property and made payments in the said sum on a monthly basis, it would be to countenance a situation where on the barest of evidence of these arrangements, a bank would be denied the very protection that clauses of this kind are designed to give lenders. In my view the evidence of acquiescence or even consent must be clear. It must be clear also exactly what the terms to which they are deemed to have accepted are. The effect of Clause 11(L) and clauses like it cannot be negated by stealth or accident. Where it is sought to imply by its conduct that the lender has acquiesced or given up its entitlement to the protection of such a clause, the facts must be clear so that an intention to do so is clearly made out, in circumstances where the need for a prior written consent is so clearly spelled out. The onus is on the defendant to establish these matters clearly. In my view the evidence in the present case falls so far short of the mark that I cannot conceive, on the evidence available and the state of the law, of any prospect of a successful defence to the plaintiff's claim for possession. In these circumstances I must come to the conclusion that the plaintiff has made out a very strong arguable case for any higher threshold of arguability that is required of him in seeking in effect a mandatory order requiring the defendant to vacate the premises.

23. I am mindful in making the above remarks that this is not the hearing of the substantive action. It is an application on foot of a Notice of Motion for certain interlocutory reliefs, the effect of which will be to order that the defendant give up possession of the property. I do not now decide the ultimate merits of the plaintiff's claim or the defence which might be mounted at that hearing. Ms. Cannon urges the Court not to make such an interlocutory order as in reality it will put an end to the case and will put an end also to the business which is being run out of the property. She submits that the defendant has an arguable defence to the plaintiff's claim. I have expressed a view of that contention, but I do of course accept that it can be a provisional view only and not one which would in any way bind any judge who would ultimately hear the substantive case should it get to trial. But I must reach such a provisional view at this stage in order to determine the plaintiff's motion.

24. In my view the plaintiff has established a very strong case indeed, and one which in all probability should succeed. Mr McCarroll has submitted that the principles in *Patel and others v. W.H.Smith (Eziot) Ltd* [1987] 853 should apply. In that case it was held by the Court of Appeal that a landowner whose title was not disputed was primer fussier entitled to an injunction to restrain trespass on as land, even if the trespass did not harm him, although that could be exceptional circumstances which would make the granting of an injunction inappropriate; and also that on an interlocutory application such an injunction should, in the absence of such exceptional circumstances, be granted unless the defendant satisfied the court that there was an arguable case that he had a right to do that which the plaintiff alleged to constitute a trespass; and that only of the defendant could show such an arguable case should court going on to consider the balance of convenience, the preservation of the status quo and the adequacy of damages as a remedy. In the present case the bank has a title which entitles them to recover possession. For practical purposes, they are in the position of the owner of the premises. Under Patel principles, they should be entitled to an injunction to restrain the defendants trespass, unless the defendant can show an arguable defence which goes beyond mere assertion. I have already expressed my conclusion that the case being put up by the defendant that the bank have acknowledged, acquiesced or otherwise by implication given its consent to the tenancy said by the defendant to have been created, is not an arguable defence on the facts and the state of the law. I have concluded that the defendant has no prospect of success on this point at trial.

25. Ms. Cannon on the other hand submits that this court should simply apply the Patel principles, but rather should approach the question of whether or not an injunction should be granted at this stage of the proceedings by means of the well-known Campus Oil principles. She submits that the plaintiff seeks to avoid Campus Oil approach because there could be no question but that the balance of convenience between now and the trial of this action must favour leaving the defendant in situ until such time as the proceedings are finally determined against her. Mr McCarroll does not accept that submission, and inter alia, points to the lack of any reality in the defendant saying that if unsuccessful in her defence she will be able to compensate the defendant in damages for their loss should she lose the case. Ms. Cannon submits that while the plaintiff may be in a position to establish the necessary fair issue to be tried in order to over come the first hurdle under Campus Oil, it could not be the case that damages would be an adequate remedy for this defendant in the event that the injunction ought not to have been granted, since in reality the injunction would destroy the defendant's business and she would not in reality be able to revive it in the event that the Court determined that she should not have been evicted from the premises. In such circumstances it is submitted by her that the balance of convenience lies in favour of refusing the interlocutory injunction.

26. Even though Campus Oil was itself an application for a mandatory interlocutory injunction, it seems to be the case that in such applications, following the judgment of Fennelly J. in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137 – certainly in employment law cases – that a higher test of arguability is required to be established by a plaintiff who seeks a mandatory interlocutory injunction, and that such a plaintiff must show a strong arguable case - a case that is likely to succeed at trial. This is in my view what the plaintiff in this case has established. In my view also, applying Campus Oil principles, damages would not be an adequate remedy for the plaintiff. The defendant is not a mark for such damages, and it cannot be said even that the property itself when sold by the receiver would yield sufficient to cover damages also. I gather there is a sum in the order of €2 million owing on the mortgage itself at this stage. The balance of convenience favours the bank in my view, since at the end of the day, in the unlikelihood event that the defendant succeeds and the plaintiff is required to make good on its undertaking as to damages, it will be able to do so, even if the calculation of the defendant's losses becomes a difficult task. It will not be an impossible task.

27. It seems to me that whether I adopt the Patel principles or those in Campus Oil the result in the present case will be the same. In fact, I prefer to operate under Patel.

28. In these circumstances I will make an order in terms of paragraphs 1, 2, 3 and 4 of the Notice of Motion – but in so far as the Notice of Motion refers to the delivery "forthwith" of possession, keys etc., I will postpone the perfection of any order for a week or so, so that consideration can be given to a short but reasonable period being allowed under the order to enable possession to be given up in an orderly fashion having regard to the nature of the business presently being carried on in the property.