

THE HIGH COURT

[2012 No. 12700P]

BETWEEN

PAUL COLLINS

PLAINTIFF

AND

JOAN CUMMINS & FRANCIS (FRANNY) MOORE

DEFENDANTS

AND

[2014 No. 5559P]

BETWEEN

NEIL HUGHES, JOAN CUMMINS, FRANCIS (FRANNY) MOORE

PLAINTIFFS

AND

PAUL COLLINS

DEFENDANT

JUDGMENT of Ms. Justice Murphy delivered the 10th day of June, 2015

1. There are three motions before this Court relating to the above entitled proceedings. They are as follows:

1. In the first entitled proceedings between Paul Collins and John Cummins and Francis (Franny) Moore, the receiver of the defendants' property seeks to set aside orders of the High Court made by Ryan and Cross JJ. made in default of appearance on 3rd February, 2014 and 3rd April, 2014 respectively granting relief to the plaintiff in damages and declaratory relief as a tenant of the defendants;
2. An application by the plaintiff, in the same proceedings, to set aside a purported appearance entered by the receiver in the name of the defendants on 28th June, 2014;
3. In the last set of proceedings, the 2014 proceedings, the receiver seeks an interlocutory order restraining the defendant to those proceedings, being the plaintiff in the earlier proceedings, from entering on to or otherwise interfering with the mortgaged property.

The Court, for the purposes of the present case, is required only to determine the first of these motions.

Factual Background

2. Joan Cummins and Francis Moore are the registered owners of property comprised in Folio 31819F of the Register of Freeholders, Co. Wexford more commonly known as Blackhall House Stud, Bannow, Co. Wexford. The property was mortgaged by deed of mortgage dated 30th July, 2007 and the charge in favour of IIB Bank plc now KBC Bank was registered on the folio on 30th August, 2007.

3. By clause 7.19 of the mortgage deed the mortgagors agreed not to lease without first obtaining the written consent of the Bank; not to give any licence or tenancy affecting any part of the secured assets; not to exercise the powers of leasing or agreeing to lease or of accepting or agreeing to accept surrenders conferred upon a mortgagor by statute or otherwise and not to enter into or permit any parting with possession or sharing agreement whatsoever in respect of the secured assets.

4. In apparent breach of that clause, on 1st October, 2011, Joan Cummins entered a residential tenancy agreement with Paul Collins, the plaintiff in the first set of proceedings and the defendant in the second set of proceedings. The agreement is expressed to be for twenty four months at a rent of €10,000 per annum with the full rent of €20,000 stated to be paid in advance. In the first schedule to the tenancy agreement the following is noted under special conditions:

- "1. Note regarding tenancy period and possibility of extension or purchase at date when 24 months has been completed.*
- Tenant may exercise an option to purchase the property subject to agreement of terms i.e. price etc. with landlord.*
- Option of extra 12 months must be agreed 2 months prior to 24 months being complete. Agreement must be agreed at that time between all parties involved."*

At clause 4 of the tenancy agreement the landlord covenanted at 4.3 that all necessary consents had been obtained to let the property.

5. The evidence before the Court suggests, and the Court makes no finding thereon, that at the time of execution of the lease the demised property was not in habitable condition and the landlord had undertaken to render it habitable. The evidence suggests that

the work was in fact carried out by the tenant, Paul Collins, and in consideration therefore the lease period of two years was deemed not to commence until mid December, 2011.

6. On the 6th April, 2012 Joan Cummins wrote to Paul Collins purporting to terminate the tenancy agreement on the grounds that the tenant had carried out unauthorised works which devalued the property and requesting that he vacate the property before 9th May, 2012. Ms. Cummins copied this letter to Mr. Cullen's then solicitors. Again the evidence suggests that there was some interaction between the landlord and the tenant's then solicitors because on 23rd April, 2012 the landlord sent a further letter to the tenant's solicitors stating

*"I write to inform you that I have received communication from KBC Bank with notice that they DO NOT and WILL NOT give their consent to the tenancy agreement signed on 1/10/2011. This decision I believe is based on the fact that the tenant **denied access** to the Owner, Mr. Franny Moore and other third party persons on 6th April 2012. They are also aware of unauthorised works to the property whereby it breaches planning laws and the removal of trees and boundary ditches and general works done without permission which has devalued the property.*

I have also been notified that they are appointing a Receiver to the property known as Blackhall House Stud and that the Receiver will take possession of the property on the morning of 10th May 2012. All items found on the property that day will be deemed to be part of the property. No access or permission will be given to persons to remove any items from the property thereafter.

I hereby give you notice that Paul Collins and any other persons, must vacate the property and bring all their belongings with them before 9th May 2012. The property must be left in a satisfactory condition and that no damage should be done to the property during their removal. I ask you and your client for cooperation in this matter

Yours faithfully

Joan Cummins"

7. A week later, on 1st May, 2012 a dispute application was lodged on behalf of the tenant Paul Collins with the Private Residential Tenancy Board relating to breach of the fixed term lease, breach of landlord obligations, and invalid notice of termination.

8. The evidence before the Court suggests that matters were quite fraught at this stage with the landlord writing to the tenants' solicitor complaining inter alia that the tenant had barricaded himself into the property.

9. On 11th May, 2012 the first named plaintiff in the second set of proceedings was appointed receiver over the mortgaged property by KBC Bank pursuant to the powers contained in clause 9 of the mortgage deed.

10. Initial relations between the tenant and the receiver appear to have been cordial in that there was email contact in May 2012 with personnel from the receiver's office apprising them of the sale of furniture and other items by the mortgagors. There was an amount of correspondence between May and September from the tenants then solicitors concerning the receivership and the validity of the tenancy agreement. In September 2012, the tenant's then solicitors notified the receiver's solicitors that the tenancy dispute was before the Private Residential Tenancy Board. The tenant's solicitors further informed the receiver's solicitors that the PRTB had been notified of the receiver's involvement in the dispute and confirmed that they would liaise with the receiver in respect of the matter being adjudicated. The letter also provided the receiver's solicitors with the PTRB reference number. The tenancy dispute was listed for hearing on 30th October, 2012 and the solicitor on behalf of the receiver attended at the hearing. It was advanced at the hearing on behalf of the receiver that the lease was null and void having regard to the provisions of the mortgage deed and in particular paragraph 7.19 which precluded the landlord from leasing the dwelling without first obtaining consent of the Bank. The receiver's representative argued that the lease was null and void and of no legal effect on the basis that the landlord had not obtained the consent of the Bank in relation to the lease. According to the PRTB adjudication report, a discussion took place regarding the provisions of the Residential Tenancies Act 2004 and the implications of the view being expressed by the receiver for the conduct of legal relationships between landlords and tenants. The representative of the receiver acknowledged that such a view could create difficulties but stated that the requirement for consent was a fundamental term of the relationship between mortgagor and mortgagee and that without the appropriate consents there can be no lawful tenancy agreement. The matter was founded on the law of contract and the provisions of conveyancing legislation. The PRTB adjudicator found as follows:

"(i) [He] did not accept the proposition put forward by the receiver that the failure of the landlord to obtain the consent of the Bank to the tenancy agreement was such a fundamental term of the mortgage as to render the tenancy agreement null and void and of no legal effect, and

(ii) [He] formed the opinion that the tenancy agreement between the applicant tenant and the respondent landlord as a valid tenancy for the purposes of the Act. Section 58(2) provides that the termination of a tenancy must be effected by means of a notice of termination that complies with the provisions of section 2 which sets out the requirements for a valid notice of termination."

He went on to find that the notice of termination served by the landlord on 6th April, 2012 did not comply with the requirements of section 62 of the 2004 Act and accordingly that the notice was invalid.

11. On the day following this hearing the receiver wrote to the tenant Paul Collins by letter dated 31st October. The letter, headed "lease denied", is an important letter in the context of these proceedings and the Court proposes to set it out in full.

"31st October, 2012

Lease Denied

Certain Assets of Franny Moore and Joan Cummins

(Receiver Appointed)

Dear Mr. Collins

I write to set out my position with regard to the occupation by you of Blackhall House Stud, Bannow, Co. Wexford ("the

Property"). You have claimed to be entitled to occupy the property pursuant to a Lease or Letting Agreement. The existence of a Lease or Letting Agreement is expressly denied by me and by KBC Bank Ireland plc ("the Bank"), the Mortgagee of the property.

Background

As you are aware, I was appointed Receiver over the property by the Bank by Deed of Appointment dated 11th May, 2012.

My role as Receiver is to realise the Bank's security and I act as agent of the borrowers, Mr. Franny Moore & Ms. Joan Cummins ("the Borrowers") for the purpose of the realisation. Furthermore, as Receiver, there is a statutory obligation on me to achieve best price for the property.

Legal Position

Certain documents have been passed to me from you and from your solicitors, Compton Aylmer, during the period since my appointment as a Receiver. For the avoidance of doubt, **I do not accept that the document purported to be a lease has any legal standing.** It is clear that the Borrowers did not obtain bank consent to the purported lease, notwithstanding the fact that they signed to say "All necessary consents have been obtained to let the property".

Having consulted with my solicitor and barrister on this case, I am advised that an action by the Bank and the Receiver to have the purported lease declared void would most likely be successful. Papers have been drafted to bring the necessary High Court proceedings to have the purported lease declared void. If my action were to be successful, possession of the Property would be granted to me.

Purported Investment

The position with regard to the monies which you say you have invested in the Property is unfortunate. There is no legal obligation on me to acknowledge your purported investment in the Property. This is so by reason of the fact that I do not accept that the purported lease has any legal standing. Even if the purported lease had a legal standing, the decision to make what you allege is an investment in the Property lay with you. It was a matter for you to decide and was subject to risk, notwithstanding the existence of what you believe was an option to purchase which was to exist at the expiry of the purported lease. Clearly, you may not have been in a position to purchase the Property. In such circumstances, it would be reasonable for you to return the Property to the owner / landlord in its present condition.

PRTB

I note that you have lodged an action with the Private Residential Tenancies Board ("PRTB") to declare the notice to quit served on you by the Borrowers prior to my appointment, as invalid. I further note that this action was heard by the PRTB yesterday.

Practical Position

Despite the legal position of this case, as set out above, and despite my advice that the purported lease would be void on a High Court application, I am prepared to adopt the following position in the hope of reaching an amicable solution.

I am willing to allow you and your family occupy the Property as Licensees until close of business on 16th December 2013. This is subject to the following four conditions which must be satisfied:

- Vacant possession must be granted to me on 16th December 2013, after which date neither you nor your family will be permitted to occupy the Property or enter on the Property;
- The Property must be returned to me in its present condition;
- No further works are carried out by you to the Property, without my prior consent. This would include repairs, improvement or indeed any other works; and
- My selling agents and I will be given unimpeded access to the Property from 16th September 2013, for the purpose of marketing and selling the Property.

The time period being offered is in my opinion, very reasonable, given that this is a period in excess of the term set out in the purported lease of 2 years.

This offer is being made without any admission whatsoever, that the purported letting agreement dated 1st October 2011 is valid or that it is binding in any way on either myself or on the Bank. As I have made clear in the course of this letter, the existence of a valid lease or letting agreement is expressly denied and I do not accept that you have any entitlement to occupy the property as a Tenant."

12. Thus, the receiver's position remained that the lease was invalid. The receiver did not, however, either appeal the PRTB adjudication to the Tenancy Tribunal nor did he bring an appeal to the High Court on a point of law pursuant to s. 123(3) of the Residential Tenancies Act, 2004. The tenant, for his part, did not accept the terms of the open letter of offer and continued on in occupation of the demised premises. On 14th December, 2012 the tenant, Paul Collins, issued a plenary summons. The original summons is dated 10th December, 2012 and the general endorsement of claim carries the date of 10th December, 2012. There is also a stamp from the Finance Directorate dated 10th December, 2012. On the face of the summons, the original defendants were Joan Cummins, Francis (Franny) Moore and Neil Hughes the receiver of the mortgaged property. The summons shows that Neil Hughes has been scored out of the proceedings which are stated to have been amended on 13th December, 2012. The date of issue of 10th December removed and 14th December inserted in its place. It appears from the document that the original intention was to sue the receiver as well as the original landlords but that the plaintiff changed his mind between 10th and 14th December and issued the summons solely against Joan Cummins and Francis Moore.

13. The general indorsement of claim seeks multiple reliefs including the right to possess the land for a period of two years of peaceful

enjoyment uninterrupted and the right to exercise the clause of the lease that gives him the right to buy or extend the said lease at expiration. On 21st December, 2012 the plaintiff Paul Collins registered the proceedings as a *lis pendens* against the folio in the land registry in Co. Wexford.

14. On the evidence before the Court, the next major event which occurred was the service by the receiver Neil Hughes on 25th November, 2013 of a notice to quit. It is not clear on the evidence before the Court when the receiver abandoned his previous position, as set out in his letter of 31st October, 2012, that the lease was null and void and adopted and endorsed the position that it was a valid lease within the meaning of the Residential Tenancies Act 2004. The letter of 25th November, 2013, which flatly contradicts the letter of 31st October, 2012, is as follows:

"Certain Assets of Franny Moore and Joan Cummins

(Receiver Appointed)

Notice of Termination of Tenancy of Residential Premises at Blackhall House Stud, Bannow, Co. Wexford ("the Premises").

Dear Mr. Collins,

I note that you are a tenant of the Premises under a Residential Letting Agreement dated 1st October 2011 between Joan Cummins and you (which I hereafter call the "Tenancy Agreement") which tenancy commenced on 15th December 2011.

Please note that I have been appointed by KBC Bank Ireland plc as the Receiver to the interest of Joan Cummins in the Tenancy Agreement by virtue of Deed of Appointment of Receiver dated 11th May 2012.

Please note that the Tenancy Agreement of the Premises will terminate on the 28th day of January 2014. You, the tenant, have the whole 24 hours of the 28th January 2014 to vacate possession.

The reason for the service of this Notice of Termination of tenancy is that it is intended that I, acting as agent and attorney for Joan Cummins and Francis Moore, intend within 3 months after the termination of the Tenancy Agreement, to enter into a enforceable agreement for the transfer to another, for full consideration, of the whole of the relevant interest in the Premises.

Please note that any issue as to the validity of this notice or a right to serve same must be referred to the Private Residential Tenancy Board under Part 6 of the Residential Tenancies Act 2004 within 28 days of the date of receipt of it.

This notice is served on 25th day of November 2013."

The Court has evidence that this notice of termination was served by email by ordinary post, by registered post and by depositing a copy of same in the letter box outside the tenant's front door. A photograph of that action has been exhibited in the affidavit of Jacinta Kelly, the member of the receiver's staff who deposes as to service. As such, the receiver having accepted the validity of the lease and thus occupying the position of landlord, should have been served with notice of the proceedings. However, the tenant has averred that he never received this notice of termination. The registered letter came back uncalled for and the tenant has averred that the email account to which the notice was emailed is no longer active. He also makes the very serious allegation that the affidavit of Jacinta Kelly wherein she has deposed to depositing the notice in the letterbox of the tenant is false.

15. While he maintains he did not receive this notice of termination, coincidentally within days of its alleged service, the tenant reactivated the plenary proceedings which had lain dormant since their issuance in December 2012. On the 6th December, 2013 he swore an affidavit for the purpose of having service of the plenary summons deemed good and an order to that effect was made by Peart J. on the 9th December, 2013. On the 23rd December, 2013 the plaintiff filed a notice of motion seeking judgment in default of appearance against Joan Cummins and Francis Moore. That motion for judgment in default of appearance was grounded on an affidavit which was filed in the High Court on 8th January, 2014. The Court notes that there is no reference in the grounding affidavit to the fact that the defendants had mortgaged the property and that a receiver had been appointed on foot of that mortgage. The motion came on before Ryan J. on 3rd February, 2014 when judgment for the liquidated sum of €72,864.78 was ordered in default of appearance together with the costs of the motion when taxed and ascertained. The court further ordered that the balance of the statement of claim, being €50,864.78, be adjourned for assessment before a judge without a jury. Liberty was given to the plaintiff to amend his statement of claim.

16. The statement of claim was amended on 13th February, 2014 by the inclusion of a claim for specific performance of the contract of tenancy and of the option to buy or extend the lease contained in section 6 of the inventory and special conditions in that contract. Notice of trial was issued on the 13th February, 2014 and the matter came on as an assessment on 3rd April, 2014 before Cross J.. Having read the plenary summons, the pleadings and documents adduced in evidence, the order of the court dated 3rd February, 2014 and the oral evidence of the plaintiff, the court declared:

"1. That the plaintiff is entitled to two years peaceful enjoyment of the property the subject matter of the within proceedings from 3rd April, 2014 and;

2. That any rent owed by the plaintiff on the aforesaid property be set off against the sum of €72,864.78 due to the plaintiff from the first and second named defendants pursuant to the aforesaid judgment and order dated 3rd February, 2014."

The order was perfected on the same date.

17. The foregoing are the underlying circumstances in which the receiver seeks to set aside the orders of the High Court made on 3rd February, 2014 giving judgment in the sum of €72,864.78 and on 3rd April, 2014 declaring the plaintiff's entitlement to two years quiet enjoyment of the demised premises.

The Law

18. Order 13 of the Rules of the Superior Courts provides for judgment in default of appearance. Having set out the various means by which judgment in default of appearance may be obtained, Ord. 13 r. 11 provides:-

"Where final judgment is entered pursuant to any of the proceeding rules of this order, it shall be lawful for the court to set aside or vary such judgment upon such terms as may be just."

19. Rule 11 confers a wide discretion and does not specify the grounds upon which the discretion may be exercised. However, the authorities disclose two clear categories of case in which judgment in default of appearance may be set aside, namely:-

(i) Where judgment was granted irregularly or ;

(ii) Where judgement was obtained regularly but the defendant has a good defence to the proceedings.

20. The significance of the distinction is stated by Clarke J in *O'Tuama v. Casey* [2008] IEHC 49 :

"Thus, where judgment is obtained irregularly, the court will normally set aside the judgment without enquiring into the merits of the proposed defence. The logic of this decision is that the judgment should not have been obtained in the first place and a plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion. On the other hand, where judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment so as to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward."

As noted by Delaney and McGrath, Civil Procedure in the Superior Courts 3rd Ed.,(Dublin, 2012) at paragraph 436:

"...the main difference between the two categories is that in the case of an irregular judgement, an affidavit of merits is not required but in the case of a regular judgment, it is essential. In addition the court is unlikely to impose terms for the setting aside of an irregular judgment, but may well do so, depending on the circumstances, where it sets aside a regular judgement."

21. The first issue for the Court to determine therefore is whether or not the judgments obtained by the plaintiff were obtained irregularly. Should the Court conclude that the judgments were obtained regularly, the Court must then go on to consider whether or not the receiver has a defence on the merits such as would entitle him to an order setting aside the default judgments.

Regular or Irregular

22. It appears to the Court that the question of whether or not these judgments were regularly obtained turns on the question of whether or not the receiver was entitled to be served with or be given notice of the plaintiff's proceedings. On behalf of the plaintiff it is contended that the receiver was well aware of his claims against the mortgagors/defendants from the correspondence sent by his then solicitors at the time of the appointment of the receiver. Furthermore, he states that a registration of a *lis pendens* on the folio in December 2012 was adequate notice of the fact of his claim. Counsel for the receiver contends that the plaintiff was at all times aware of his appointment as receiver; that he was aware that the receiver's interests would be affected by the outcome of proceedings maintained against the mortgagors/defendants; that the receiver had been notified by the plaintiff's previous solicitors and had been legally represented at the hearing before the PRTB in relation to the tenancy and on that basis he was entitled to notice. In supplemental submissions made by the receiver he advanced additional grounds upon which he was entitled to be served with the proceedings. Having initially denied the validity of the tenancy both at the PRTB hearing and afterwards in his letter of 31st October, 2012 set out above, the receiver, not having appealed the adjudication of the PRTB nor having appealed on a point of law to the High Court, decided to treat the tenancy agreement as valid. This is evidenced by the notice of termination served on 25th November, 2013 also set out above. By this action, the receiver stepped into the shoes of the defendants, Joan Cummins and Francis Moore and became the landlord. As such, he enjoyed all of the powers of Joan Cummins and Francis Moore in respect of the tenancy agreement, including the power to terminate the tenancy in their names. This he purported to do in accordance with the Residential Tenancy Act 2004.

23. In the Court's view the service of this notice to quit changed everything. It signalled an acceptance by the receiver of the validity of the tenancy and thereby pursuant to the powers conferred on him by clause 9 of the mortgage deed he became the appropriate person to defend the proceedings.

24. It follows that the receiver, as agent of the mortgagors and as the person entitled to possession of the property and as the person who has validated the plaintiff's tenancy agreement and as the person who has terminated the tenancy agreement, is the proper defendant to any proceedings concerning the lease.

25. The Court has evidence that the notice of intention to terminate the tenancy was served on the plaintiff. The evidence is that it was served by email, ordinary post, registered post (which was returned uncollected) and by placing a copy of the notice in the letterbox attached to the plaintiff's property. The plaintiff states that he didn't receive it. Even if that were so, it does not alter the fact that by endorsing the validity of the tenancy agreement the relationship between the plaintiff and the receiver was, as of the 25th November, 2013 one of landlord and tenant. As landlord, the receiver was entitled, not merely to notice of the proceedings but to be served as a party to those proceedings. The Court has no doubt that had the notice of termination of 25th November, 2013 been opened to the High Court when it deemed service good on the 9th December, 2013 or when it gave judgment for a liquidated sum on 3rd February, 2014 or when it gave a declaration as to the plaintiff's rights on the 3rd April, 2014, judgment would not have been entered for the plaintiff without proof of service on the receiver. The Court again notes that in the original proceedings issued by the plaintiff on the 10th December, 2012 the receiver was named as a defendant to the proceedings but his name was subsequently deleted there from. In the particular circumstances of this case, where at the time judgments were obtained the de facto landlord was not a party to the proceedings, the judgments of the court were irregularly obtained. The Court therefore proposes to set aside the order deeming service good made on 9th December, 2013; the order giving judgment in the sum of €72,864.78 along with the costs of the motion when taxed and ascertained, made 3rd February 2013; and the order made on 4th April, 2014 granting the plaintiff a declaration as to his entitlements as tenant.

26. The Court therefore observes, in relation to the second application, that is the application of the plaintiff in the original proceedings to set aside a purported appearance entered by the receiver in the name of the defendants on 28th June, 2014. While such application is in effect rendered moot by the Court's decision to set aside the orders in question, the Court notes that entering an appearance, where a judgment has already been obtained, is not provided for by the Rules of the Superior Courts. Such a memorandum of appearance is a nullity unless preceded by leave of the Court. On the evidence, no such leave was sought or obtained in this case.

27. On the basis of the foregoing the Court proposes to set aside the three orders referred to at paragraph 25 herein. If the plaintiff wishes to pursue his claim outside the ambit of the Landlord and Tenant process (and the Court expresses no view on his entitlement

to do so) he will have to take such steps as are necessary to serve the proceedings on the receiver and thereafter matters will take their course in the normal way.