Neutral Citation: [2014] IEHC 264

THE HIGH COURT

[2013 No. 273 SP]

BETWEEN

DEREK BYRNE

APPLICANT

AND

DESMOND KILLORAN

and

TOM O'BRIEN

RESPONDENTS

Judgment of Mr Justice Ryan delivered on the 14th January, 2014

The applicant is the lessee of a large guesthouse at Upper Leeson Street, Dublin. The lessor is the first respondent, Mr Killoran, who with his wife mortgaged the property which is comprised in three titles to AIB Finance Ltd. The second respondent, Mr O'Brien, is the receiver appointed by the bank on the 12th December 2012 under powers contained in the mortgages because of default in repayments. The demised premises comprises three lots with separate titles, each of which is held by the bank as mortgagee to secure large advances made to Mr Killoran.

Mrs Killoran is not a party to this application although she was a co-mortgagor of the property whose title is in dispute. The lease under which Mr Byrne holds the guesthouse premises and the lease and subsequent conveyance whereby Mr Killoran acquired it are all in the sole name of Mr Killoran, the first respondent. This case and judgment do not affect any interest that Mrs Killoran may have, although it does not appear that she has any interest in the property in respect of which the issue arises for decision.

Mr Killoran does not accept that the receiver is entitled to have the rent paid to him so Mr Byrne is faced with two claimants and has brought this summons by way of interpleader. Meanwhile, since the 1st January, 2013 he has been paying the rent into an escrow account.

Mr Killoran raises two issues to deny the receiver's entitlement to the rent being paid by Mr Byrne. First, he claims that there is a defect in the title of one of his mortgaged properties such that the bank did not acquire and does not hold his interest. Secondly, he says that the bank overcharged him interest on his loans which impaired his capacity to service them and contributed to his defaulting on repayments. For these reasons, he argues that the receiver's appointment is not valid.

Mr. Killoran purchased the property known as 1 Upper Leeson Street in 1984. It was at that time a derelict Georgian house which he renovated into a successful guesthouse. Dublin City Council held the freehold title to an adjoining plot. Mr. Killoran wanted to purchase the freehold but the Council was not amenable and granted him a long lease instead. This is where the title question originates.

The lease is dated 2nd December and made between 2002 between Dublin City Council and Mr. Killoran for a consideration of €507,895.23 whereby the lessee covenanted *inter alia* to extend his existing premises and construct a three storey house fronting Grand Parade (which became 1A Upper Leeson Street). The term of the lease was from 21st October, 2002 for 999 years, subject to a yearly rent of €127.00. Mr. Killoran claims that this lease was void.

On 20th December, 2002, Mr. Killoran and his wife executed a mortgage over his leasehold interest in 1A Upper Leeson Street in favour of AIB Finance Limited.

He avers that the security is limited to the specific property interest he held under the lease of 2nd December, 2002 that he submits is void. The City Council subsequently agreed to convey the freehold interest in the property at 1A Upper Leeson Street to Mr. Killoran for a payment of €1,269.74 and the conveyance was executed on 5th April, 2004.

Under s. 29 of the Landlord and Tenant (Ground Rent) (No.2) Act 1978, when a person's interest in land is mortgaged and the person then acquires the fee simple, the mortgage is deemed to attach to the fee simple. The bank would therefore have had a mortgage on the fee simple in No. 1A Upper Leeson Street. But Mr. Killoran says that did not happen in this case, because the interest he had under the 2002 lease was void at the time when he acquired the fee simple. Therefore, the bank was left holding no valid security.

I will turn in a moment to why the 2002 lease is allegedly void, but before doing that I want to show the logical path that Mr. Killoran follows.

1. He contends that the lease was void, of which more below.

2. The bank got its mortgage over that leasehold interest that is and was void; what was mortgaged was the precise property interest that was specified in the mortgage deed, namely, the lessee's interest in the void lease.

3. There was accordingly no specified valid leasehold interest that was subject to the mortgage when Mr. Killoran acquired his fee simple interest.

4. The bank's mortgage is worthless because it is of a void lease.

5. Mr. Killoran is the owner of the unencumbered fee simple of No. 1A Upper Leeson Street.

6. Although there are two other titles in Mr. Byrne's take from Mr. Killoran and they are subject to mortgages with the bank that are not affected by this title issue, it is impossible to delineate the precise boundaries of the titles or to apportion the rent because of interconnections and overlapping: the egg cannot be unscrambled.

7. Mr. Killoran is *prima facie* as lessor entitled to get the rent and it is for the receiver to displace his claim by clear evidence of a better title, which he cannot do because of the void leasehold interest.

8. Mr Killoran must get all the rent because apportionment is impossible.

This argument depends first on the 2002 lease being void and second on Mr. Killoran's logic being correct in law and not being displaced by some other principle.

Counsel for the receiver, Mr Whelan, submitted that the point made by the landlord does not arise in circumstances in which he shortly afterwards acquired the fee simple in the land. He says that it is inconsistent of Mr Killoran to denigrate the inferior title that gave rise to his acquisition of the superior interest. I will first look at the landlord's argument.

Mr. Killoran proposes that the 2002lease was void under s. 2(1) of the 1978 Landlord and Tenant (Ground Rents) Act which provides as follows:-

> "2(1) Subject to subsection (2), a lease of land made after the passing of this Act shall be void if the lessee would, apart from this section, have the right under section 3 of the Act of 1967 to enlarge his interest into a fee simple and the permanent buildings are constructed for use wholly or principally as a dwelling."

Section 1 provides that "*dwelling*" does not include a separate and self contained flat in premises divided into two or more such flats The building was constructed wholly for use as a commercial guesthouse. Does that mean it was constructed for use as a dwelling? Mr Lyons, Counsel for the landlord, cited two authorities in argument. In *Re Ross and Leicester Corporation* [1932] KBD 459, it was held that a "common lodging-house" was a "dwelling-house" within the meaning of the [English] Housing Act, 1930. In *Kerry County Council v Kerins* [1996] 3 IR 493, the question was whether holiday chalets were premises used as a dwelling within another statutory provision. Hamilton CJ said:

> Now there is no doubt whatsoever on any assessment of the situation that these chalets are dwellings, are used as dwellings and can only be used as dwellings. It is quite true that the rated occupier does not occupy them as a dwelling for himself and his family; he used them for the commercial purposes of letting them out to other people who would reside in them for short periods during vacation and use them as their dwelling for those particular periods but the actual fact is that these chalets can only be described as dwellings and the definition does not require that the dwelling be used by the rated occupier, does not require that it cannot be used for commercial use in the sense of being let out for dwellings during the holiday period and I am satisfied that these chalets come within that definition of a domestic hereditament and having come to that conclusion, the only thing I can do in this case is answer the question posed by the learned trial judge in the affirmative.

Mr Whelan, for the receiver, cited *Sfar v. Louth County Council* [2007] I.E.H.C. 344, a judgment of Murphy Jon the word "dwelling" in s. 16 of the Control of Dogs Act, 1986, in which the court reviewed legal dictionaries and cases in which the meaning was considered, arguing that a dwelling should be construed as a "house where people live" and that a guesthouse or hotel cannot properly be considered a "dwelling" for the purposes of the Act in circumstances where its occupants do not live in the premises.

The House of Lords in *Uratemp Ventures Limited v. Collins* [2002] 1 A.C. 301, held that a dwelling describes a place where someone dwells, lives or resides and "...connotes a place where one lives, regarding and treating it as home....." Lord Steyn, at p. 307 said that

> "....dwelling-house has for centuries been a word of wide import. It is often used interchangeably with lodgings. It conveys the idea of a place where somebody lives....In ordinary parlance, a bed-sitting room where somebody habitually stays is therefore capable of being described as a dwelling- house ...."

It was submitted that 1A Upper Leeson Street was not constructed as a "dwelling" within the meaning of the Act of 1978 - it was constructed for commercial purposes to provide additional accommodation for the guesthouse and is used for that purpose. Therefore occupants of the guesthouse do not "dwell" there as they do not habitually reside there. As 1A Upper Leeson Street was not constructed for use wholly or principally as a dwelling, s. 2 of the Act of 1978 did not apply to it. Therefore, the 2002 lease is not caught by the provisions of s. 2 and was not void on the 5th April, 2004 when Mr Killoran acquired the freehold title.

Mr. Whelan submits that the two conditions set out in the subsection must be fulfilled for the lease to be void and that Mr. Killoran has not demonstrated how those conditions apply here. Although it is correst to say that Mr Killoran did not show how he satisfied the first requirement, I am prepared to assume that Mr. Killoran was entitled to buy out the fee simple under s. 3 of the 1976 Act because the 2002 demise was a building lease. The question therefore is whether the permanent building was constructed for use wholly or principally as a dwelling.

It is obvious that everything depends on the statutory context. As the speeches in the House of Lords said explicitly and the judgment of Murphy J endorsed, the word is not of special legal meaning and it has to be understood in the setting in which the legislature has placed it. One cannot say that because it means one thing in England in 1932 or something else in Ireland in 1986, it must have meant the same in the 1978 Act. It is not a matter of lexicography but of interpreting the meaning in the statutory context.

It seems to me that the statutory regime on ground rents and acquisition of fee simple and the eventual abolition of such rents are indicative of a policy of protection of the interests of owners of private dwellings. Now I have added the word private to dwellings, but I think that it is implicit. My reading therefore of the provision in s. 2(1) is that it does not make sense to consider a commercial guesthouse to be a dwelling within this meaning. If one took the other interpretation, it would follow that every hotel is covered by the subsection and I do not think that was intended. My view is that the three storey extension to the guesthouse that was built in accordance with the terms of the 2002lease was not wholly or principally constructed as a dwelling. I think that my interpretation is consistent with that of the Supreme Court and of Murphy J and of the House of Lords in the cases that were cited. If that view is correct, that is the end of Mr. Killoran's first point.

The next matter is to look at the situation on the assumption that Mr. Killoran is correct in his contention about the building lease and

the purpose of the construction so that it is captured by the subsection and that means that the lease is void. What is his position in those circumstances?

The receiver submits that the validity of the prior lease relied upon by Mr Killoran is moot. Following Mr Killoran's acquisition of the fee simple interest in lA Upper Leeson Street, the Bank's mortgage of the leasehold interest in that property automatically attached to the fee simple interest without the need of any action on the part of the Bank. The Bank therefore retained its entitlement to appoint a receiver in relation to the properties, notwithstanding the fact that the mortgage was taken out over the leasehold interest. The fact that his previous title might have been voidable prior to its merger with the freehold in April 2004 cannot allow him to avoid the consequences of a mortgage which has, for close to ten years, attached to the fee simple interest.

There is also a more fundamental question, whether it is open to a mortgagor who has furnished his title as security and it has been accepted as such to declare it to be invalid. In this case the circumstances are extreme. Instead of having security over the fee simple interest that the mortgagor acquired a year and a half after the lease, and which he was able to buy because he had complied with the building covenant in the lease, the lender on this theory is holding a worthless piece of paper. And the borrower who gave his title over the property to secure his loan is free of the obligation, in possession of the unencumbered fee simple. This was the case all along but nobody knew about it. The discovery was made 11 years after the execution of the lease that the landlord is now disowning.

Subsection (4) of section 2 of the 1978 Act is relevant here:

> (4) A person who has given consideration for a lease that is void under subsection (1) shall have the right to acquire the fee simple in the land and any intermediate interests therein as if he were a person to whom section 3 of the Act of 1967 applies at the expense, as to both purchase money and costs, of the person who purported to grant the lease.

This provision means that a lease rendered void under s.2(1) is not devoid of any effect. The lessee possesses rights in the demised premises that are acquired by reason of the execution of the lease. In this case, Mr Killoran retained an interest in the land pursuant to his status as lessee. A lessee under such a void lease has a right to acquire the fee simple. Voidness must be construed as nevertheless leaving the party with a valuable interest that can be converted into a fee simple. Therefore, Mr Killoran had an interest in the land, which he mortgaged to the bank. That may be considered to be the leasehold under the 2002 indenture or the residual interest by statute. In either case, acquiring the fee simple as he did grafted that interest on to the existing one. The essential point is that there was a subsisting interest, nothwithstanding the application of s.2(1) to the lease, if the lease was captured.

It is true of course that Mr. Killoran went to the bank and mortgaged his property with an interest that he considered valid and for which he had paid a great deal of money. Is it legally legitimate or permissible for Mr. Killoran to renege on his presentation to the bank? He represented to the lender that he had this title and as far as he was concerned it was a valid title just as it was for the lender who took it as security for the money advanced to Mr Killoran.

Then Mr. Killoran acquired the fee simple in April2004. To his knowledge, his property was mortgaged to the bank and that understanding remained until Mr. Killoran got the idea that the 2002 lease might be void. That seems to have come about as a result of a passing comment in a letter from the Property Registration Authority which went on to observe that the matter was moot because Mr. Killoran had acquired the fee simple in 2004. Mr. Killoran or an adviser was inspired by the Authority's comment to explore a little further and to see if there was some advantage that could be gained from the situation. That led to the ingenious chain of reasoning that I enumerated above.

Another point is that in circumstances such as they are here, the validity of a long-standing transaction is to be presumed and voidness has to be proved. I think that where a borrower presents title deeds as good security, the onus is on the person asserting the invalidity of the transaction to prove that. Therefore, I do not think it is simply a matter of asserting the idea and seeing what happens and purporting to act on the basis of it. So, there is a clear onus in my view not on the receiver or on the bank but on Mr. Killoran to establish the invalidity of his own lease as of 2002 and he has failed to do so.

I accept the submissions made on behalf of the receiver by Mr. Whelan on the validity of the bank's security. First, the guesthouse building cannot be considered to have been constructed wholly or principally as a dwelling. Secondly, assuming that the lease of 2002 was rendered void by s.2(1) as Mr Killoran submits, he nevertheless retained an interest which the fee simple subsumed in 2004. Thirdly, I do not think it is open to Mr. Killoran to renege on his presentation of a valid lease to the bank as security and deny his own title, so to speak, retrospectively at a remove of some eleven years.

In relation to the overcharging by the Bank, Mr. Killoran maintains that this occurred over a period of some four and a half years and negatively affected his loans. His financial expert, Mr. Richard Coburn, calculated the overcharging at over €400,000. Mr. Coburn says that in March, 2011 AIB acknowledged that overcharging had occurred and estimated the figure at €334,245.77, excluding compound interest, for the period between September 2006 to March 2011. In Mr. Coburn's opinion, compound interest and overdraft interest surcharges should not have been applied. Mr. Killoran's position is that if he had not been overcharged to this extent, it is likely that the default would not have occurred and there would have been no basis for the present circumstances to have arisen.

The receiver argues that Mr Killoran has raised no proper legal basis of objection to his appointment. Regarding the calculation of interest on loans and the overcharging allegation, that is a matter between Mr Killoran and the Bank. The reason for the default may or may not be relevant in an application seeking repayment of the loans but it has no relevance to the receiver's appointment. In circumstances where the loans remained unpaid, the power of the Bank to appoint a receiver under Clause 6(c) of the mortgages became exercisable from 2nd October, 2012. That contractual term incorporated the powers of a mortgagee in the Conveyancing Act 1881 but free from the restrictions imposed by section 20 of that Act. Although the 1881 Act was repealed by the Land and Conveyancing Law Reform Act 2009 with effect from 1 December, 2009 this court has held that where a mortgage expressly incorporated the provisions of the repealed Act dealing with the appointment of receivers, the mortgagee can continue to rely upon the provisions of the 1881 Act. See *Kavanagh v. Lynch* [2011] I.E.H.C. 348 Laffoy J. said that "the ascertainment of the rights and liabilities of the parties to the security document is a matter of construction of the document....." In *McEnery v. Sheahan* [2012] I.E.H.C. 331, Feeney J. held that the mortgagee's statutory right to appoint a receiver was acquired under the Act of 1881 at the time of the execution of the mortgage and survived the repeal. It follows that Clause 6(c) of the 2002 mortgage entitles the Bank to appoint a receiver under the Act of 1881, notwithstanding its repeal by the Act of 2009 to enter into possession of the rents and profits of the mortgaged property. Since each of the mortgages contains Clause 6(c), no question of apportionment or boundary determination arises. If there was default of any repayment, the Bank had the right, without further notice, to exercise all powers conferred on it by law or by any mortgage or security created by the borrowers in the Bank's favour. Therefore the action taken by the Bank in appointing a receiver on 2nd October, 2012, is provided for in the mortgage documents. The plaintiff should not be entitled to rely on an issue going to the calculation of interest on the monies he owes to prevent the Bank from exercising the

security rights which it holds under the mortgage deeds.

It is further submitted that the overcharging allegations put forward by Mr Killoran as an explanation for his default are irrelevant given the overcharging amounted to less than 2% of his total liabilities. As at 7th December, 2012, Mr. Killoran owed the Bank approximately €16 million, in light of which the complaint of overcharging interest may appear to be an unconvincing reason for the default but I do not think that is a question for the court on this application.

I think that the complaint of overcharging that Mr Killoran has with the bank going back over some years does not affect the validity of the appointment of the receiver, nor does it impair his powers. The reasons for the default are irrelevant to the question of the Bank's entitlement to exercise this power. Therefore this issue raised by Mr Killoran discloses no basis upon which he might be entitled to receive the rents associated with the properties. In each of the mortgages relied upon, clause 6(c) refers to the provision of the Conveyancing Act 1881.

I propose therefore to direct the applicant to pay the rent under his lease to the receiver, the second respondent, and to order the transfer of the funds in the escrow account into his name.