Neutral Citation: [2015] IEHC 128

THE HIGH COURT

[2014 No. 3097P]

BETWEEN

MICHAEL COTTER AND LUKE CHARLETON

PLAINTIFF

AND

LANDSCAPE HOUSE GOLF AND LEISURE LIMITED, TONY McMAHON, DERMOT McMAHON AND THERESA MESKELL

DEFENDANT

JUDGMENT of Mr. Justice David Keane delivered on the 25th February 2015

Introduction

1. The plaintiffs have issued the present proceedings as joint receivers ("the receivers") of the property and assets of a company known as Keelgrove Construction Limited ("Keelgrove"), a limited liability company having its registered office at Parkroe, Ardnacrusha, County Clare.

2. Keelgrove went into voluntary liquidation on the 1st November 2012. The receivers were appointed by deed of appointment executed by Allied Irish Banks plc ("the bank") and dated the 18th December 2012. The property concerned includes the lands and premises contained in Folio No. 2456 of the Register of freehold lands for County Clare to which a seven-day publican's licence is attached.

3. The reliefs sought in the plenary summons that issued on the 12th March 2014 include an order for possession of the property and various orders restraining the defendants from interfering with the receivership or trespassing upon the property, together with a claim for damages for trespass.

4. By notice of motion issued on the 20th March 2014, the receivers now seek substantially the same reliefs by way of interlocutory injunction, leaving aside only the damages claim. Specifically, the receivers apply for the following orders:-

> a) An Order directing the Defendants their servants or agents and any other person having notice of the Order of this Honourable Court to vacate [the property].
>
> b) An Order restraining the Defendants and each of them, their servants and agents, and all persons having notice of the Order of this Honourable Court from trespassing upon and/or entering upon [the property], and
>
> c) An Order restraining the Defendants and each of them, their servants and agents, and all persons having notice of the Order of this Honourable Court from interfering with the functions and office of the Plaintiffs as Receivers of [the property].

Background

3. The receivers' application is grounded on an affidavit of Michael Cotter, sworn on the 19th March 2014. In that affidavit, Mr. Cotter avers to the receivers' appointment, pursuant to a deed of appointment executed by the bank and dated the 18th December 2012, under the power to do so conferred on the bank by a Mortgage Debenture dated the 16th December 1999, made between the bank, as mortgagee, and Keelgrove, as mortgagor of specified mortgaged property, including the property now at issue.

4. Mr Cotter has exhibited a copy of the relevant folio covering the property, which comprises a substantial main residence (named Landscape House) with nine self-contained apartments around a courtyard to the rear, together with several other outbuildings and surrounding farmlands extending to approximately 60 acres. Mr Cotter further avers that one of the apartments has been converted into a public house, to which a public house licence is currently attached, although that licence did lapse for a period between the 30th September 2013 and the 6th May 2014. It appears to be common case that the current holder of the licence is the third named defendant Mr Dermot McMahon.

5. Mr Cotter has deposed that, pursuant to the terms of the mortgage, the property at issue formed part of the security provided by Keelgrove in exchange for various commercial loan facilities that Keelgrove received from the bank and upon which it subsequently defaulted. Mr Cotter exhibits a letter from the bank to Keelgrove, dated the 15th November 2012, demanding payment of the sums then due and owing on foot of the relevant facilities. Mr Cotter goes on to aver that, as of the 3rd March 2014, the amount due and owing on those facilities stood at €1,497,652.27, upon which sum interest continues to accrue.

The present application

6. The receivers have brought the present application on the basis of their understanding that each of the defendants claims some entitlement in respect of the property at issue and, in particular, that the first, third and fourth named defendants are in occupation of a portion of it pursuant to a lease purportedly granted to them by either Keelgrove or the second named defendant Mr Tony McMahon (who, it does not appear to be disputed, was a director of Keelgrove at the material time).

7. Mr Cotter avers that, since their appointment, the receivers have made enquiries and engaged in correspondence with certain parties who appear to have some involvement with the property. The relevant correspondence is exhibited to Mr Cotter's affidavit.

8. In particular, on the 18th January 2013, the receivers obtained from Ms Andrea O'Grady, a director of the first named defendant, Landscape House Golf and Leisure Limited ("Landscape"), a copy of a lease dated the 23rd August 2005 made between Keelgrove and

Landscape in respect of a significant part of the property described as "Landscape House Golf & Leisure Facility also known as Clonlara Golf Club" ("the 2005 lease").

9. Furthermore, on the 17th July 2013, the second named defendant Mr Tony McMahon furnished to the receivers a purported lease dated the 1st February 2011, made between himself as "owner" and the fourth named defendant, Ms Theresa Meskell, as "farmer", in respect of certain agricultural lands that, it seems to be acknowledged, also form part of the property at issue. It is unnecessary to consider the averment by Mr Tony McMahon that this lease should be read, contrary to the plain and ordinary meaning of the words actually used to describe the parties to it, as a lease between Keelgrove and Ms Meskell, rather than as one between Mr Tony McMahon and Ms Meskell, because the defendants have confirmed, both on affidavit and at the hearing of the present application, that they do not seek to place any reliance upon it.

The test to be applied

10. The test that I propose to apply on this application is the one identified by Lynch J. in *ICC Bank plc v. Richard Verling, Niamh Landy and Wine Dimensions Limited* [1995] 1 I.L.R.M. 123, and applied by Birmingham J. in *Ferris v. Meagher and Echoforde Limited* [2013] IEHC 380, namely whether the receivers have made out a strong prima facie case. The basis for the application of a more rigorous test than that required under the *Campus Oil* principles is that the relief now sought takes the form of a mandatory injunction, which, if granted, is capable of effectively determining the dispute between the parties.

11. In this context, for the sake of completeness I should add that I reject the argument, reiterated several times on affidavit by Mr Tony McMahon on behalf of the defendants, that an application for interlocutory relief equivalent to the substantive relief sought in the underlying proceedings should be refused outright as an abuse of process rather than considered on its merits by reference to the test that I have just described. No authority for the former proposition was identified on behalf of the defendants in the course of the application before me, nor am I aware of any such authority.

The arguments

12. Section 18 of the Conveyancing and Law of Property Act 1881 confers a power on a mortgagor to make certain leases of land effective against every encumbrancer, including a mortgagee. However, s. 18(3) of that Act states:

> "This section applies only if and so 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."

13. Mr. Cotter has exhibited a copy of the mortgage debenture between Keelgrove and the bank. At Clause 8, Keelgrove covenanted with the bank in the following terms:

> "(f) Not without the prior consent in writing of the Bank to exercise any of the statutory powers of leasing and accepting surrenders of leases conferred on mortgagors by the Conveyancing and Law of Property Act 1881;
>
> (g) Not without the prior consent in writing of the Bank to part with possession of the legally mortgaged property or the equitably charged property or any part thereof nor confer upon any person, firm, company or body whatsoever any licence, right, or interest in or to occupy it or any part thereof."

14. It is not in dispute that Keelgrove did not obtain the bank's prior consent in writing to the creation of the 2005 lease.

15. The defendants' first argument, articulated and reiterated in various affidavits sworn by Mr Tony McMahon is that the specific loan secured by the mortgage debenture had been discharged by the time of the creation of the 2005 lease, such that the mortgage debenture was no longer then in effect and Keelgrove was not therefore required to obtain the prior written consent of the bank before entering into that lease.

16. However, it is clear from the express terms of the mortgage debenture that the continuing security that it creates over the mortgaged property relates to "the payment or discharge of all Principal Monies [thereby] covenanted to be paid or discharged." In Clause 1, dealing with interpretation, the term "Principal Monies" is defined to mean "all monies now owing *or which from time to time may become due and owing or payable by [Keelgrove] to the Bank…"* (emphasis supplied). Accordingly, it is clear that the instrument concerned unambiguously creates a security of the "all monies" type and not simply one in respect of the particular sum of money the subject of the specific loan agreement that gave rise to its creation. In a subsequent affidavit, Mr Cotter acknowledges that the original loan account was discharged in 2004, but goes on to aver that additional facilities then remained outstanding from Keelgrove to the bank and to exhibit documentation evidencing that continuing indebtedness at the material time. The defendants did not press this argument at the hearing of the application, in my view quite correctly.

17. The defendants' second argument was strongly urged by Counsel on their behalf, Mr O'Mahony S.C. It is that the receivers and, by extension, the bank have acquiesced in or recognised the 2005 lease and cannot now repudiate it.

18. Mr Tony McMahon's first affidavit contains the following Delphic averment:

> "[T]he defendants herein are in possession of certain portions of the lands under Leases and/or Letting Agreements which were entered into with the knowledge and consent of the lending institution AIB Bank plc…."

19. On behalf of the bank, Mr Conal Regan, a manager in its Financial Solutions Group had already averred that at no stage did the bank consent (whether in writing or otherwise) to the purported letting of the security property by Keelgrove to any party; and that, more particularly, at no stage did the bank consent (whether in writing or otherwise) to the 2005 lease between Keelgrove and Landscape.

20. In advancing their argument on this issue, the defendants rely on the decision of Birmingham J in *Ferris v. Meagher and Echoforde Limited* [2013] IEHC 380 and on certain of the jurisprudence considered therein. In particular, the defendants place reliance on paragraph 12 of that judgment in which Birmingham J. compared the facts at issue in the case before him with those considered by Lynch J. in the case of *ICC Bank plc v. Richard Verling, Niamh Landy and Wine Dimensions Limited* [1995] 1 I.L.R.M. 123. Birmingham J. noted the specific comment made by Lynch J. in the course of his judgment that the plaintiff in that case "had never acquiesced in or recognised the lease by any positive conduct such as by demanding or accepting rent thereunder in place of [the mortgagor]." As I understand it, it is the defendants' contention in this case that the receivers have acquiesced in or recognised the 2005 lease by just such positive conduct whether by demanding or accepting rent under the 2005 lease in place of Keelgrove or by otherwise seeking to rely upon that lease.

21. In *Fennell v. N17 Electrics Limited (In liquidation)* [2012] IEHC, Dunne J. surveyed the relevant authorities in great detail, before making the following helpful observations:

> "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 a 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."

22. The phrase in internal quotation marks in the passage just quoted is drawn from the decision of Cross J. in *Taylor v. Ellis* [1960] 1 Ch. 368. The relevant portion of that judgment states as follows:

> "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."

23. In *Taylor v. Ellis*, Cross J. in turn had considered the older Irish case of In *re O'Rourke's Estate* [1889] 23 LR Ir. 497 in which it is interesting to note that Monroe J. felt able to preface the following statement by expressing the view that, even then, the applicable law was "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 (44 & 45 Vict. C. 51, s. 18) 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 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 serves 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 a contract of tenancy: *Wyse v. Myers* 4 Ir. C.L.R. 101; *Underhay v. Read* 20 Q.B. Div. 209; *Evans v. Elliot* 9 A. & E. 342; *Corbett v. Plowden* 25 Ch. Div. 678."

24. By reference to the legal principles just described, the defendants rely upon various aspects of the correspondence engaged in by the receivers with various parties as establishing the bank's acquiescence in, or recognition of, the 2005 lease in place of Keelgrove. Accordingly, it is necessary to consider that correspondence.

25. The first relevant letter is one written by Mr Cotter on the 20th December 2012, two days after his appointment as receiver, at a time when, as he has averred, the receivers were making enquiries and engaging in correspondence with various parties who appeared to have some involvement with the property. The letter is addressed to "The Tenant, Landscape House, Clonlara, County Clare". It identifies the plaintiffs as the receivers over the property of Keelgrove, including the licensed premises at Landscape House. It requests that the recipient provide full details of his or her occupation of that property. It then continues as follows:

> "In the meantime, please note that [Keelgrove] does not have authority to give you directions in respect of payment of rent in respect of the Property or any other directions in respect of your occupation of the Property. Therefore, all rents, including any arrears of rent presently subsisting, together with all future sums due, should now be discharged to the account of the Joint Receiver and Manager, details of which will be provided."

26. It is common case that no rent has ever been paid to the receivers by Landscape or by any other person in occupation of the property, whether pursuant to the 2005 lease or otherwise.

27. Nevertheless, the defendants contend that the letter just described and, in particular, the passage just quoted amount to acquiescence in, or recognition of, the 2005 lease by the receivers on behalf of the bank, in that they amount to a demand for rent under that lease, or the service of a notice on Landscape to pay the rent under that lease to the receivers (on behalf of the bank) in place of Keelgrove, from which notice Landscape did not dissent, thus leading to the creation of a new lease between Landscape and the bank under the principles of law already set out above. I cannot accept that argument. It will be remembered that the receivers did not have sight of a copy of the 2005 lease until they were provided with one by Ms Andrea O'Grady, a director of Landscape, on the 18th January 2013, more than four weeks after they wrote that letter. Accordingly, to accept that the receivers and, by extension, the bank were acquiescing in, or recognising, the 2005 lease by sending that letter requires the Court to accept the untenable proposition that, by so doing, the receivers had resolved on behalf of the bank to recognise and acquiesce in an unknown lease, with an unknown party, for an unknown term, at an unknown rent, subject to unknown terms and conditions. Alternatively, it requires the Court to accept the equally unattractive proposition that, in sending that letter in effect blind, the receivers were, unbeknownst to themselves, binding the bank into a new lease with Landscape on the same terms as the lease between Keelgrove and Landscape (to which the receivers and the bank were strangers), even in the absence of any assent whatsoever on the part of Landscape (whether through the payment of rent or otherwise).

28. I am satisfied that, on the contrary, the only sensible and reasonable interpretation of the contents of that letter is the one provided on affidavit by Mr Cotter when he avers, in response to the defendants' argument on this issue, that the purpose of the said letter - and of a subsequent letter sent to Mr Dermot McMahon in similar terms, wrongly dated the 18th January 2012 (rather than the 18th January 2013) - was to ascertain the basis upon which the property was occupied and to ensure that any monies due in respect of the occupation of the property were not paid in error to the directors of Keelgrove. The receivers further point out that the request to Mr Dermot McMahon to discharge all rents due to the receivers, rather than Keelgrove, could not amount to the recognition by the bank of the 2005 lease between Keelgrove and Landmark, since, on the evidence before the Court, Mr Dermot McMahon is neither a director of the latter company nor otherwise authorised to act on its behalf in connection with that lease.

29. In support of a similar argument, the defendants also seek to rely on a subsequent and, unfortunately, rather confused part of the receivers' correspondence that I must, therefore, now turn to consider.

30. By email on the 6th February 2013, Mr Cotter wrote in his capacity as receiver to one Richard McMahon in reference to the licensed premises at Landscape House. In that letter, he expressed his understanding that, under the terms of the 2005 lease between Keelgrove and Landscape, an annual rent of €38,902 was payable. Mr Cotter went on to state that it was his intention to dispose of the property and that he was therefore seeking possession of the licensed premises forthwith.

31. Mr Richard McMahon responded by e-mail shortly afterwards on the same date stating that, once the receivers had an interested party ready to buy the property, "we will give ye immediate vacant possession." Mr Richard McMahon went on to say that, until then, "it is in all our interests to maintain the lease that is in place." Mr Tony McMahon has averred, in the context of the present application, that Mr Richard McMahon was not in a position to make any such representation on behalf of Landscape because, although he was a director of Keelgrove, he was not a director of Landscape at the material time.

32. In any event, this email elicited a further letter from Mr Cotter to Mr Richard McMahon, dated the 13th February 2013, noting the latter's agreement to vacate the property the subject of the 2005 lease once the joint receivers had secured the sale of it. Mr Cotter enclosed a letter for the review and signature of Andrea O'Grady and David Kerr (the two directors of Landscape at the material time). That letter comprised a proposed agreement between Keelgrove (acting through its receivers), as landlord, and Landscape, as tenant, by way of amendment to the 2005 lease, whereby the landlord would agree not to charge the rent payable under the 2005 lease, in consideration for a right to terminate the said lease on one month's notice; confirmation that satisfactory insurance was in place for the licensed premises; and confirmation that the licenced premises was fire safety compliant.

33. It is common case that the said agreement was never signed, or otherwise entered into, by, or on behalf of, Landscape.

34. On the 6th September 2013, the receivers' solicitors wrote to Landscape incorrectly noting that an agreement had been reached in relation to (the non-payment of) rent and further noting that it was a term of the underlying lease that a Tax Clearance Certificate be obtained in respect of the licensed premises each year in order that the excise licence in respect of the premises could be renewed. The letter concluded by noting that the licence was due to expire on the 30th September 2013, and by requesting both provision of an up to date Tax Clearance Certificate and confirmation that an application had been made to renew the licence. On behalf of the receivers, Mr Cotter has averred that this letter was sent, as its terms suggest, by reference to the receivers' misconception that the proposed agreement had been entered into.

35. It is common case that no response was received to that letter, nor to a reminder letter dated the 4th November 2013.

36. Mr Cotter avers that, in the meantime, efforts to obtain a buyer for the security property had continued and that, on the 27th September 2013, the auctioneers retained for that purpose informed the receivers that a buyer had been identified and that a price had been agreed. Accordingly, on the 4th December 2013, the receivers' solicitors again wrote to Landscape enclosing a Notice of Termination in respect of the "Lease dated the 23rd August 2005 between [Keelgrove] and [Landscape] ("the Lease") as amended by Side Letter dated the 13th February 2013 in respect of [the property]" and purporting, under that amended lease agreement, to exercise a right to terminate the lease of the property on one month's notice with effect from the 3rd January 2014.

37. The defendants have not vacated the property.

38. At the hearing of the present application and in various averments made by Mr Tony McMahon on their behalf, the defendants have put forward the argument that the train of correspondence just described amounts to an acquiescence in, acknowledgment of, or consent to the terms of the 2005 lease on the part of the receivers and, by extension, the bank. I do not accept that argument. It seems perfectly clear to me that the receivers offered to enter into an amended version of the 2005 lease with Landscape and, indeed, that for some considerable period of time were under the misconception that they had done so, even going so far as to later purport to serve a notice of termination of that amended lease agreement. But those actions simply cannot amount to acquiescence in, or recognition of, any binding effect of the original 2005 lease by the receivers should Landscape fail to accept the receivers' offer to enter into a modified version of it. Or to put matters a different way, any suggestion that, in offering to enter into a modified version of the 2005 lease between Keelgrove and Landmark, the receivers and the bank were in some way acknowledging that, failing such agreement, they were to be bound instead by the terms of the original unmodified 2005 lease (in place of Keelgrove) is an obvious *non sequitur*.

39. Accordingly, I am satisfied that the defendants have failed to make out an arguable defence in this respect also. In the circumstances, it is unnecessary to consider the receivers' additional argument that their actions could not, in any event, have bound the bank to recognise, or acquiesce in, the 2005 lease since, under the terms of the relevant mortgage debenture (and, more generally, under common law), a receiver acts as agent of the mortgagor and not of the mortgagee, albeit subject to a fiduciary duty to each of the relevant parties.

40. On behalf of the defendants, Mr O'Mahony S.C. raised one further argument in support of the contention that, on a proper application of the relevant law, the 2005 lease should be held binding on the bank. It was submitted that, in both *Fennell v. N17 Electrics Ltd and Ferris v. Meagher and Echoforde Ltd*, the Court had expressed some reservation or misgiving about the form or authenticity of the lease at issue in each case, whereas – it was submitted – in this case the lease lacks none of the elements of a genuine arms length commercial agreement. As ingenious as that argument is, I do not think that it can avail the defendants, since I do not understand the essential principles of law identified in either case to be in any way dependent for their application upon the existence of any reservation or doubt concerning the validity of the lease concerned in any particular case.

41. In all of the circumstances, it is my conclusion that the receivers have made out a strong *prima facie* case for the relief that they seek.

42. I therefore proceed to consider the extent to which damages are an adequate remedy for the receivers if an injunction is wrongly withheld or for the defendants if the injunctions sought are wrongly granted. I am satisfied that, in the former instance, there is a significant risk that the bank, which is seeking to enforce its security, will lose the benefit of the purchaser who has now been found for the security property, if it has not done so already. There is no evidence before the Court concerning the defendants' ability or willingness to pay damages in that event. On the other hand, the receivers, through their Counsel, Mr. Cahill B.L., have indicated their willingness to provide the necessary undertaking to compensate the defendants for any damage or loss sustained by them should the injunction sought ultimately prove to have been wrongly granted.

43. I am further satisfied that the balance of convenience favours the grant of the injunctions sought in circumstances where no rent

has ever been paid to the receivers on foot of the lease contended for and where the continuing occupation of the security property is obstructing the sale of that property and frustrating the receivership.

44. Finally, I reject the argument that the injunctions now sought should be refused on the grounds of the receivers' delay in bringing the relevant application. In circumstances where the defendants, or some of them, have remained in occupation of the security property and where no rent has been paid during the currency of the receivership, any delay in seeking the relief at issue can only have operated to the defendants' benefit, rather than their detriment.

46. I will, therefore, receive the relevant undertaking as to damages from the receivers and, thereafter, make orders in terms of paragraphs 1 to 3 (inclusive) of the receivers' notice of motion.