

**THE HIGH COURT****RECORD NO. 2014/4313P****BETWEEN/****NATIONAL ASSET LOAN MANAGEMENT LIMITED, GEORGE MALONEY AND STEPHEN SCOTT****PLAINTIFFS****- AND -****SOUTHLODGE INNS LIMITED AND JAMES O'SHEA****DEFENDANTS****Judgement delivered this 29th day of January, 2015 by Mr. Justice Michael White**

1. The Plaintiffs issued a Notice of Motion on the 8th May, 2014 seeking orders compelling the first Defendant to deliver up vacant possession of the licensed premises known as Clonskeagh House, Clonskeagh, Dublin 14 and an injunction restraining it from trespassing or continuing to trespass on the property. The motion was at hearing on 24th October and 14th November, 2014 and judgement was reserved.

2. James O'Shea the second Defendant obtained loan approval on the 29th September, 2006 for a commercial mortgage with Irish Nationwide Building Society. He signed a first legal mortgage on the 20th December, 2006. Clonskeagh House Limited the company who held a lease of the licensed premises entered into a separate commercial mortgage with a floating charge. The loan was for €1,500,000.

3. The second Defendant granted a Lease on the 8th December, 1993 to Clonskeagh House Limited for a period of 35 years from the 1st December, 1993 at the annual rent of €37,500 which had increased subsequently by rents reviews to €120,000 per annum. The loan, the subject matter of the mortgage with the Irish Nationwide Building Society was transferred to the National Asset Management Agency on the 10th December, 2010. Difficulties arose over the repayment of the loan.

4. The first Defendant was incorporated on the 18th February 2011, the directors being Seamus O'Shea and Breda O'Shea. Seamus O'Shea is the son of James O'Shea and Breda O'Shea is the spouse of James O'Shea.

5. The second Defendant granted a lease to the first Defendant for a period of two years from June 2011 NAMA did not consent to this Lease.

6. A second Lease was granted on the 8th January, 2014 from the second Defendant to the first Defendant for a term of two years from the 21st July, 2013 at a yearly rent of €25,000 to be paid by monthly instalments..

7. There was considerable correspondence between Kenny, Boyd & Co., Solicitors for the second Defendant and Beauchamps Solicitors for the Plaintiffs.

8. NAMA engaged the services of a firm Capita to manage the loan on its behalf.

9. Capita wrote to the second Defendant on the 12th February, 2014 advising him that the level of cooperation from him was not acceptable and that certain consequences may flow from his continued uncooperative engagement. A further letter was sent from Capita on the 25th February, 2014. On the 8th April, 2014 the first Plaintiff wrote to the second Defendant outlining its dissatisfaction with the performance of the loan and the lack of cooperation. The first Plaintiff writing on behalf of NAMA stated that NAMA has grave concerns regarding the following

1. The loans are in default and have been for a substantial period of time.
2. The failure to reveal to NAMA the true position in relation to the renewal of the liquor license which has led to a breakdown of trust between NAMA and James O'Shea.
3. The failure to provide security in favour of NALM over the liquor license which was held in the name of Southlodge Inns Limited or consenting to the liquor license being transferred to James O'Shea.
4. The failure to provide clarity and supporting information in respect of the Car Park license arrears with Dublin City Council and veranda lease.
5. The failure to provide an up to date sworn Statement of Affairs in the NAMA format and a residual debt proposal for consideration by NAMA's relevant decision making authorities.

10. By separate letter of the 8th April, 2014 the first Plaintiff demanded repayment of the loan and interest thereon. At close of business on the 31st March, 2014 the sum of €2,117,801.77 was due. A similar letter was sent to Clonskeagh House Limited.

11. By letter of the 9th April, 2014 Solicitors for the first Defendant wrote to the first Plaintiff stating that any attempt to interfere with the rights of the first Defendant would be strenuously contested and that no attempt should be made to enter the property.

12. By Deed of Appointment of the 10th April, 2014 the second and third Plaintiffs were appointed as Statutory Receivers over the property. On the 17th April, 2014 the second and third Plaintiffs called to the licensed premises Clonskeagh House in order to take possession of same but the first Defendant refused to deliver up possession. The second and third Plaintiffs again attended at the property on the 30th April, 2014 and again the first Defendant refused to deliver up possession.

13. In two Affidavits sworn on the 21st May and 27th May, 2014 Seamus O'Shea the director of the first named Defendant outlined the position of the first Defendant.

14. Mr. Seamus O'Shea in his affidavit of the 21st May, 2014 stated at paragraph 5

"5. I say and believe that the Plaintiffs are not entitled to rely on any documentation which purports to dissent, firstly to the creation of the lease between the second named Defendant and the first named Defendant and secondly to the transfer of the seven day liquor license between Clonskeagh House Limited and the first named Defendant on the basis that any said dissent is fundamentally inconsistent and entirely at odds with the position taken in actuality by the Lender in regard to the aforesaid creation and transfer."

15. At paragraph 6 of his affidavit of the 21st May, 2014 Mr. O'Shea stated

"I say and believe that the Lender clearly and unambiguously acknowledged the existence of the said creation and transfer of the Lease and license respectively. Furthermore it is wholly reasonable to infer from correspondence between the Lender and the second named Defendant that the former furnished documentation with a view to recognising and substantiated the validity of both the aforesaid Lease creation and license transfer".

16. At paragraph 8 he stated

"I say and believe that the manner in which the Lender specifically and unequivocally instructed that all rental income received on foot of a lease Agreement between the second named Defendant and first named Defendant be mandated to the Lender can only be seen as a clear and unambiguous acceptance of the validity of the Lease from the Lender's perspective".

17. The other averments in this affidavit relate to the first Defendant's ability to discharge its responsibilities under the lease and further liabilities in particular to Dublin City Council for rates.

18. In a further affidavit sworn on the 4th July, 2014 Seamus O'Shea stated that

"Since the beginning of 2012 he had on behalf of Southlodge Inns Limited been present at all meetings between the second Defendant and the Vendor and that, at all material times he was the party effectively dealing with the proceedings".

19. In a further affidavit sworn on the 15th July, 2014 he stated that the first Defendant had been paying a weekly sum of €200 by way of direct debit to NAMA since at least September 2013. He accepted that this rental had been refunded by NAMA to the company's bank accounts since the appointment of the second and named Plaintiffs.

20. Paragraph 17A of the Indenture of Mortgage of the 20th December, 2006 made between the second Defendant and the Irish Nationwide Building Society states

"The Statutory powers of leasing and accepting surrenders of leases shall not be exercised by the Borrower without the prior consent in writing of the Society and the Borrower shall not create or purport to create any lease or tenancy or accept any surrender thereof, otherwise than under the said powers without the prior consent in writing of the society".

21. No prior consent in writing or orally was granted for either lease by NAMA.

22. The law establishing the right of a mortgagee to gain possession of property, where there has been a Lease granted without the consent of the mortgagee is well settled.

23. In *Maloney V O'Shea and Another* [2013 IE page 3354] Laffoy J cited the decision of Dunne J in a case *In the Matter of N17 Electrics Limited (in liquidation) and In the Matter of the Companies Acts 1963 – 2009 Kenneth Fennel and ACC Bank PLC V N17 Electrics Limited (in liquidation)* [2012 IE HC228] unreported High Court decision Dunne J 11th May, 2012.

At paragraph 30 and 31 Laffoy J stated

30. Counsel for the plaintiff also referred the Court to academic commentary on the law in relation to the creation of leases by mortgagors and judicial decisions in which the status of a lease made by a mortgagor without the necessary consent of the mortgagee was considered at the hearing of the substantive issues, the most recent being the decision of the High Court (Dunne J.) in *Fennell v. N 17 Electrics Limited* [2012] IEHC 228. The following passage from the judgment of Dunne J. (at para. 30) in that case outlines what is to be derived from the authorities.

"A number of useful observations can be made from the authorities referred to above. 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 the 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."

In summary, what the academic commentary and the authorities indicate is that a lease created by a mortgagor without the consent in writing of the mortgagee, where the requirement of such consent is expressly stipulated for in the mortgage deed, is void as against the mortgagee and the mortgagee is not bound by it.

31. Adopting the approach adopted by Lynch J. in *ICC Bank Plc v. Verling*, it is appropriate to conclude, but without in any way purporting to decide the issue in any final manner, that the plaintiff has made out "a strong *prima facie* case" that the Lease in favour of the Company is void as against the Bank and as against the plaintiff as receiver appointed by the Bank, because Mr. O'Shea did not

obtain the consent in writing of the Bank to the creation of the Lease.

24. The Court is satisfied that the first Plaintiff and Capita acting as an agent on behalf of the first Plaintiff and NAMA engaged with the second Defendant in discharge of the statutory responsibilities of NAMA. It was appropriate that cooperation was sought from the second Defendant to deal with the outstanding debt, the sale of the property, the transfer of the liquor license and the difficulties about the license for the car park attached to the licensed premises. This Court does not regard that form of engagement as acting as any form of estoppel in the particular circumstances of this case.

25. NAMA Limited was within its rights to appoint the second and third Plaintiffs as Receivers. In law the rights of the first Defendant as beneficiary of the lease of the 8th January, 2014 cannot supercede the rights of the mortgagee, where there has been no consent to that lease.

26. The correspondence on behalf of NAMA Limited, the first Plaintiff and Capita always stated that no consent had been forthcoming for both leases.

27. In considering the Plaintiffs' application for an injunction the Court has to consider

(1). The merits of the Plaintiffs' claim for mandatory injunction.

(2). If damages would be an adequate remedy.

(3). If necessary the balance of convenience.

28. Neither of the Defendants could compensate the Plaintiffs by way of damages if eventually the proceedings went to hearing and the Plaintiffs were successful in their action. If the Defendants were successful in defending the action and any counterclaim the first Plaintiff would be in a position to discharge any damages and costs.

29. The merits of the case favour the Plaintiffs.

30. NAMA Limited has not acted precipitously and has attempted to engage with the second Defendant over a substantial period of time. Due to the amount of debt and the expected sale price of the licensed premises the second Defendant is not in a position to discharge the amounts due.

31. The balance of convenience favours the Plaintiffs.

32. The Plaintiffs are entitled to the reliefs sought in the Motion.