THE HIGH COURT

2019 No. 232 SP

BETWEEN

ALLIED IRISH BANKS, PLC

PLAINTIFF

AND

RICHARD FINBARR FITZGERALD

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 April 2020

INTRODUCTION

1. These proceedings seek to recover the possession of land pursuant to a mortgage entered into between the plaintiff bank and the defendant. The title to the relevant lands is unregistered. Consequently, the application is made pursuant to Order 54 of the Rules of the Superior Courts 1986. (The mortgage predates the enactment of the Conveyancing and Land Law Reform Act 2009).
2. One of the issues to be addressed in this judgment is the status of a lease entered into between the defendant and a third party. In particular, it is necessary to consider whether this lease is valid as against the plaintiff bank.

FACTUAL BACKGROUND

3. The plaintiff bank seeks an order for possession in respect of premises known as Flat No. 9, Baruva House, 57 Pembroke Road, Dublin 4 ("***the Premises***"). The defendant granted a mortgage over the Premises in favour of the plaintiff bank on 1 June 1995. The

indenture of mortgage has been exhibited as part of the grounding affidavit of Orlaith Tierney. The mortgage is stated to secure all moneys for which the defendant may be in any way liable to the plaintiff bank, either as principal or surety. The indenture of mortgage had been registered in the Registry of Deeds on 1 August 1995.

4. The following provisions of the mortgage are relevant to the issue which has arisen in respect of the lease of the Premises.

> "IT IS HEREBY AGREED AND DECLARED that the provisions of the Conveyancing Act 1881, as amended by the Conveyancing Act 1911 shall in their application to this security be modified as follows:–
>
> (1) The power of sale conferred upon mortgagees by the Conveyancing Act 1881 shall apply to this present security without the restrictions therein contained as to the giving notice or otherwise and for the purpose of any sale under such power the moneys hereby secured shall be deemed to have become due immediately after the execution of these presents although no demand of payment shall have been made.
>
> (2) The Mortgagor shall not be entitled without the consent in writing of the Bank to exercise the powers vested in him by section 18 of the said Conveyancing Act of 1881 so long as any moneys shall remain unpaid on this present security.
>
> […]"

5. The plaintiff bank now seeks to enforce the mortgage in circumstances where it is said that there is a debt outstanding to it under the terms of loan facilities accepted by the defendant on 13 September 2015. The terms of the loan facilities are set out in a letter of 28 August 2015. The transaction is a complicated one, and involved the restructuring of existing debt owed to the plaintiff bank by the defendant. As part of the restructuring, it was intended that the defendant would dispose of certain lands including, relevantly, the Premises. It seems that if the proceeds of sale met certain "asset disposal targets" and certain other conditions were met, then the outstanding balance would be written off.

6. The facility letter of 28 August 2015 provided for five individual loan facilities. These proceedings are concerned with the fourth and fifth of these.

7. The obligations of the defendant in terms of the repayment of these two facilities are dealt with as follows.

Facility 4: Loan Account (Demand Facility) – A Note

> "All amounts due in respect of this Facility are repayable by you on demand by the Bank at any time at its absolute discretion. However, without prejudice to the Bank's right to exercise this right of demand, you shall repay this Facility in the following manner:
>
> You will pay the interest accrued on this Facility for a period of 18 month(s) from the date of your first drawdown/deemed drawdown under this Facility on a quarterly basis in arrears in each March, June, September and December that it falls due, which the Bank will debit to your account number […] and you hereby authorise the Bank to debit the interest in this manner.
>
> AND
>
> You agree that during the Relevant Period of this Facility (defined below), at the earliest opportunity, but in any event on or before the expiry of the period(s) set out against the Property (defined below), you will make repayments against the amounts due under this Facility from the sales proceeds of the Property."

8. There are then detailed provisions explaining what is to happen in respect of any surplus sale proceeds. The "Relevant Property" is defined as Apartment 9, No. 57 Pembroke Road, Ballsbridge, Dublin 4, i.e. the Premises the subject-matter of these proceedings.

Facility 5: Loan Account (Demand Facility) – C Note

> "All amounts due in respect of this Facility are repayable by you on demand by the Bank at any time at its absolute discretion. However, without prejudice to the Bank's right to exercise this right of demand, during the period of 60 months from the Effective Date of this Facility (the "Relevant Period"), you will repay this Facility in the following manner:
>
> Subject to the "Incentive Arrangement" sub-clause below no repayments of principal will be payable on this Facility (unless the provisions of the paragraphs headed "Out of Course Repayment" below apply" **SAVE THAT** Surplus Sale Proceeds and/or Excess (as defined in the Repayment clause of Facility 1 (Loan Account (Demand Facility) – A Note), Facility 2 (Loan

> Account (Demand Facility) – A Note), Facility 3 (Loan Account (Demand Facility) – A Note) and Facility 4 (Loan Account (Demand Facility) – A Note) above) may be applied by the Bank from time to time to reduce the balance outstanding on this Facility."

9. It is averred in the grounding affidavit that the defendant failed to sell the Premises within the period of eighteen months as required by the terms of the fourth facility.

10. The grounding affidavit also exhibits letters of demand dated 28 November 2017 (in respect of the fourth facility), and a letter dated 26 April 2018 (in respect of both the fourth and fifth facility). A letter from the plaintiff bank's solicitors, A.C. Forde & Co., dated 8 October 2018 calling upon the defendant to deliver up vacant possession of the Premises has also been exhibited.

LEASE

11. It appears that a lease has been entered into between the defendant and a third party, Ms Eileen Daly. A copy of a document entitled "Memorandum of Agreement" entered into between the defendant and Ms Daly has been exhibited on behalf of the plaintiff bank. This document is dated 3 April 2002. The second schedule of this agreement indicates that the term of the lease is to be 35 years, commencing on 3 April 2002. The rent payable is €800 per month, which is to be paid by set-off of a sum of €800,000 said to be due by the landlord to the tenant, i.e. due by the defendant to Ms Daly.

BANKRUPTCY

12. The defendant was declared a bankrupt on 27 January 2020. An affidavit has been sworn by Mr Ciaran Sheridan, who is a legal executive in the firm of solicitors acting on behalf of the plaintiff bank, which exhibits the relevant correspondence between the solicitors and the Official Assignee.

13. The Official Assignee's position is set out as follows in an email dated 7 February 2020.

> "Re: Apartment 9 Baruva House, 57 Pembroke Rd, Dublin 4
>
> Where a creditor is seeking a Court order for possession, the Official Assignee's (OA) position is that he can confirm that he offers no objection to the application and will of course abide by any order made on the basis that no cost order is sought against the OA.
>
> The OA will not attend nor be represented at any possession hearing.
>
> The OA would appreciate it if his position outlined in this email could be provided to the Court confirming his position."

SERVICE

14. No notice of appearance has been entered by the defendant to these proceedings. The defendant did not attend and was not represented at the hearing on 9 March 2020.

15. The proceedings had been served on the defendant personally by a summons server on 16 September 2019. The summons server has sworn an affidavit of service, and has confirmed that she endorsed the date and month of service on the Special Summons within three days from the date of service. The summons server confirmed that she was acquainted with the appearance of the defendant.

16. The proceedings were served on the occupant of the premises, on 15 October 2019, by a (different) summons server. The summons server has sworn an affidavit of service, and has confirmed that he endorsed the date and month of service on the Special Summons within three days from the date of service. A supplemental affidavit has been sworn by the summons server confirming that, to the best of his knowledge information and belief, he did not believe that there was any person in occupation or possession of the lands apart from those who had been served.

DISCUSSION

APPLICATION TO RECOVER POSSESSION OF THE PREMISES

17. The application to recover possession of the Premises is made on foot of the indenture of mortgage entered into between the plaintiff bank and the defendant on 1 June 1995. The terms of the mortgage indicate that it applied to present and future advances.

18. The plaintiff bank has exhibited the facility letter of 28 August 2015 in respect of which it says moneys are outstanding to it. The terms of the loan facilities were agreed to in writing by the defendant on 13 September 2015. The grounding affidavit has explained that the Premises have not been sold, as the defendant had been required to do under the terms of the fourth facility. Statements of account have been exhibited which indicate that the balance outstanding in respect of the fourth and fifth facilities are as follows: €85,329.42 and €4,203,807.38.

19. I am satisfied that the plaintiff bank is entitled to an order for possession. The uncontested evidence before the court indicates that the principal moneys secured on the mortgage are due for payment. As appears from the extract of the facility letter of 28 August 2015 set out earlier, the loans are repayable by the defendant on demand by the plaintiff bank at any time at its absolute discretion. An alternative timeline for the repayment was then set out "without prejudice" to the bank's right to exercise its right of demand.

20. The legal effect of a similarly worded clause has been explained as follows by Clarke J. (as he then was) in *ACC Bank plc v. Kelly* [2011] IEHC 7, at paragraph [7.2].

> "The loan was expressed to be payable on demand. [The second defendant] indicated in evidence, and both of the [defendants] argued, that they were unaware that the loan was a demand facility. The loan is, however, clear in its terms. It says that it is repayable on demand and that the terms concerning payment of interest only for a period and interest and principal over an extended period are stated to be what is to happen in the absence of a demand. This is not exceptionally technical language. The ordinary meaning of the term

> demand in English is that a person insists on something happening. The ordinary meaning of a loan being repayable on demand is that a person who gives the loan is entitled to demand repayment. The terminology used in describing the other repayment terms is again clear. Those terms only applied where there is no demand. It is by no means unusual for commercial property lending facilities to be payable on demand."

21. This formulation has very recently been approved by the Court of Appeal in *Allied Irish Banks plc v. McKeown* [2019] IECA 296.

22. Returning to the facts of the present case, the principal moneys were payable on demand at the absolute discretion of the bank, and, in any event, were to have been paid by certain dates specified in the facility letter. Those dates have passed without repayment being made. Moreover, the defendant failed to dispose of the Premises as required.

23. Formal demand for payment of the principal moneys has been made by the plaintiff bank and has not been satisfied. The mortgage provides that the plaintiff bank may exercise the statutory power of sale under the Conveyancing Act 1881 without the restrictions therein contained; and for the purpose of any sale under such power the secured moneys shall be deemed to have become due immediately after the execution of the mortgage.

24. The power of sale would be ineffective without vacant possession of the Premises.

STATUS OF THE LEASE

25. As explained earlier, the defendant appears to have granted a lease of the Premises to a third party, Ms Eileen Daly. The term of the lease is 35 years, commencing on 3 April 2002.

26. Section 18(1) of the Conveyancing Act 1881 had provided that a mortgagor of land, while in possession, shall have power to make from time to time any such lease of the mortgaged land. The parties to a mortgage were, however, allowed to contract out of this provision. See section 18(13) as follows.

> (13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and 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.

27. The mortgage of 1 June 1995 expressly addresses the provisions of section 18 of the Conveyancing Act 1881 as follows. (A fuller extract from the mortgage has been set out at paragraph 4 above).

> "(2) The Mortgagor shall not be entitled without the consent in writing of the Bank to exercise the powers vested in him by section 18 of the said Conveyancing Act of 1881 so long as any moneys shall remain unpaid on this present security."

28. For the sake of completeness, it should be noted that section 18 of the Conveyancing Act 1881 has since been repealed by the Land and Conveyancing Law Reform Act 2009. (Section 112 of that Act now provides that a mortgagor of land, while in possession, may lease the land with the consent in writing of the mortgagee, which consent shall not be unreasonably withheld). This repeal does not, however, affect the interpretation of the mortgage of 1 June 1995. The mortgage falls to be interpreted by reference to the legal position obtaining when the mortgage had been entered into. As of that date, the combined effect of (i) the provisions of section 18 of the Conveyancing Act 1881, and (ii) the clause of the mortgage cited above, was that the parties had expressed the intention that the statutory power to lease was to be qualified by the introduction of a requirement for the written consent of the plaintiff bank as mortgagee. The contractual intention cannot be changed *ex post facto* by reference to the repeal of section 18 of the Conveyancing Act 1881, some fourteen years after the mortgage had been executed.

29. The legal position would, of course, have been different had section 112 of the Land and Conveyancing Law Reform Act 2009 purported to have *retrospective* effect. There are many examples of legislative amendments which are expressly applied to *existing* contracts. See, for instance, section 66 of the Landlord and Tenant (Amendment) Act

1980. This is not, however, the approach which had been adopted by section 112 of the Land and Conveyancing Law Reform Act 2009.

30. Accordingly, I have concluded that the mortgage is not affected by the repeal of the Conveyancing Act 1881. A similar conclusion in respect of the implications of the repeal of the 1881 Act for an existing mortgage had been reached by the High Court (Laffoy J.) in *Kavanagh v. Lynch and St Angela's Student Residences Ltd* [2011] IEHC 348 ("***Kavanagh***"), albeit in the context of the statutory power of a mortgagor to appoint a receiver. The judgment in *Kavanagh* has since been applied in the specific context of the leasing powers under the Conveyancing Act 1881 by the High Court (Birmingham J.) in *Ferris v. Meagher* [2013] IEHC 380.

31. Returning now to the specific question which arises in the present case, namely whether the lease between the defendant and Ms Daly is void as against the plaintiff bank, the leading authority is the judgment of the High Court (Dunne J.) in *Fennell v. N17 Electrics Ltd* [2012] IEHC 228; [2012] 4 I.R. 634 ("***N17 Electrics Ltd***").

32. Dunne J., having conducted a careful review of the authorities, summarised the consequences of section 18 of the Conveyancing Act 1881, as follows (at paragraph 30 of her judgment).

> "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 Act of 1881. 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."

33. Towards the end of her judgment (at paragraph 47), Dunne J. referenced the rationale underlying the requirement for the consent of the mortgagee, namely that any potential impediment to the realisation of the security must be approved of by the lender.

> "There might be an argument to be made that modern commercial realities are somewhat different to the facts and circumstances outlined in those authorities which are of some vintage. However, the answer to that argument may be simply that those principles have stood the test of time because the logic of the principles is unassailable; the one thing I am sure of is that on the facts of this case no commercial reality would justify departing from those well established authorities. It is essential from a lender's point of view that the secured property is available as security in the event of default by the borrower. It is therefore important to ensure from the lender's point of view that any impediment to the realisation of its security by reason of a lease binding on the mortgagee should be one in respect of which the mortgagee had furnished its consent. That is the importance and the function of the negative pledge clause contained in the various mortgages/charges. From the bank's point of view in this case, there was no commercial reality apparent in the business lease agreement. It is inconceivable that the bank would ever have consented to a lease in the terms of the business lease agreement had it been asked to do so. Its conduct in granting loans from time to time without appropriate leases having been put in place does not alter the position."

34. The principles in *N17 Electrics Ltd* have been applied consistently in the subsequent case law, including the judgments in *Ferris v. Meagher* [2013] IEHC 380; *Stafford v. McCourt* [2017] IEHC 726; *Havbell DAC v Dias* [2018] IEHC 175; and *Fennell v. Corrigan* [2020] IEHC 79, [15].

35. Applying these principles to the facts of the present case, there is nothing in the papers before the court to suggest that the plaintiff bank had consented to the lease. The judgment in *N17 Electrics Ltd* indicates that the onus of proving that a mortgagee had consented to a lease which contravened a mortgage lies with the party seeking to rely upon the terms of the lease. This onus has not been discharged. The lease is, therefore, void as against the plaintiff bank.

CONCLUSION AND PROPOSED FORM OF ORDER

36. For the reasons set out herein, the plaintiff bank is entitled to an order for possession in respect of the property the subject of the mortgage of 1 June 1995, namely Apartment 9 Baruva House, 57 Pembroke Road, Dublin 4. An order will be made, therefore, in the terms of paragraph 1 of the special endorsement of claim in the Special Summons.

37. The solicitors acting on behalf of the plaintiff bank are directed to have a copy of this judgment sent by ordinary prepaid post to the premises, marked for the attention of the occupant, within seven days of today's date. If the plaintiff bank is aware of an email address for Ms Daly, then a copy of the judgment is in addition to be sent by email.

38. Subject to any submissions to the contrary which the parties wish to make, it is proposed to impose a stay of **six months** on the order. This is to allow Ms Eileen Daly, the lessee under the lease, a period of time within which to obtain alternative accommodation. The proposed period of six months is longer than the usual three-month stay allowed in these types of cases, and this is intended to reflect the practical difficulties presented by the coronavirus pandemic. It also reflects the fact that Ms Daly has been residing in the premises for almost two decades.

39. It is proposed to make no order as to costs in circumstances where the defendant is now a bankrupt, and no opposition was offered to the proceedings by the Official Assignee.

40. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising

> will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

41. The parties are requested to correspond with each other on the question of the appropriate costs order and the length of a stay. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office within fourteen days of today's date, and a copy of same emailed to the Registrar assigned to this case.

Appearances

Roland Rowen for the plaintiff bank instructed by A.C. Forde & Co. Solicitors
No appearance by the defendant