UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 288

[2018/330]

Ní Raifeartaigh J.

Power J.

Collins J.

BETWEEN

MICHAEL KENNEDY

PLAINTIFF/RESPONDENT

AND

BRENDAN O'KELLY (OTHERWISE KNOWN AS BRENDAN KELLY)

DEFENDANT

AND

PATRICE MCGUINNESS

NOTICE PARTY/APPELLANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 22nd day of October, 2020

The nature of the case

1. The plaintiff is a receiver who in the substantive proceedings seeks a declaration that he was validly appointed in respect of certain property, together with associated reliefs, including a declaration that he is entitled to take possession of the property and an order restraining the defendant from attempting to frustrate his activities as receiver.

The property in question is a residential dwelling house and will be referred as "the property". The High Court granted him an interlocutory injunction, against which the notice party (but not the defendant) has brought this appeal. There must be a question as to whether the notice party has standing to maintain an appeal in such circumstances, but as the issue was not pressed by the plaintiff, I do not propose to deal with it.

2. The essence of the notice party's case is that she had a tenancy agreement with the defendant/mortgagor and that she is now entitled to the protections accruing to a tenant under the Residential Tenancies Act, 2004, notwithstanding that this agreement was reached in breach of a covenant in the mortgage prohibiting such a tenancy without the prior agreement of the mortgagee. She argues that the injunction should have been refused. A key question in this appeal is whether there is any relationship of landlord-tenant as between the plaintiff-receiver/ respondent and the notice party/appellant, in circumstances where the notice party/appellant clearly rebuffed the Receiver's repeated attempts to engage with her, having regard in particular to the decision in *Fennell v. N17 Electrics Limited* [2012] IEHC 228, [2012] 4 IR 634 and/or whether s.59 of the Act of 2004 applies. In order to properly examine the appellant's argument, it will be necessary to set out the correspondence between her and the Receiver at some length in this judgment.

The Background to the proceedings

3. On the 6th August 2004, by Deed of Mortgage to the defendant, the defendant granted INBS a charge over the property. The mortgage was registered in favour of INBS on 19 January 2005 at entry No. 4, Part 3 of Folio 112383F, Co. Dublin.

4. By a Facility letter dated 23rd March, 2005, Irish Nationwide Building Society ("INBS") granted certain refinancing facilities to the defendant. The required security

for the facility included a First Legal Charge over the property comprised in Land Registry Folio 112383F.

5. The mortgage was a first ranking charge registered on the property.

6. Clause 11(l) of the mortgage provided as follows:

> "The Mortgagor hereby further covenants with the Society as follows…
>
> (l) Not to assign or let or part with the possession of the Mortgaged Property, or any part thereof, *without the prior consent in writing of the Society* and further that the Mortgagor shall not exercise the statutory power of leasing or agreeing to lease or accepting or agreeing to accept a surrender of a lease or tenancy *without the prior consent in writing of the Society*…".

7. On 1st July, 2011, the High Court made a Transfer Order under the Credit Institutions Stabilisation Act, 2010 whereby all the assets and liabilities of INBS were transferred to Anglo Irish Bank Corporation Limited which in turn changed its name to Irish Bank Resolution Corporation Limited ("IBRC"), effective 14th October, 2011.

8. By Loan Sale Agreement dated 31st March, 2014, IBRC acting through its Special Liquidators agreed to sell the mortgage and related rights to MARS Capital Ireland Designated Activity Company (hereinafter "MARS"). The loan agreement was completed by Deed of Transfer made on 6th June, 2014.

9. Entry No. 5 on the Folio relating to the property dated the 26 June 2014 shows Mars Capital Ireland Limited as the owner of the charge.

10. On 17th August, 2015, MARS demanded repayment of the balance due on the mortgage account and detailed the arrears outstanding at that time. It called upon the defendant to pay all the monies due within seven days of that letter.

11. The defendant failed to make repayments and the plaintiff was appointed as Receiver by way of Deed of Appointment of Receiver dated 21st April, 2016. The plaintiff is a Director and Senior Partner with Sherry Fitzgerald Kennedy Lowe.

Correspondence between the plaintiff (Receiver) and the defendant (mortgagor) and notice party (tenant at the property)

12. The correspondence between the plaintiff and the defendant and notice party is relevant not only by way of background but for a resolution of the issues in this case and I therefore set it out in some detail.

13. By letter dated 25th April, 2016, solicitors for MARS (McDowell Purcell Solicitors) wrote to the defendant notifying him of the appointment of the Receiver and attaching a copy of the Deed of Appointment.

14. On 26th April, 2016, the next day, the plaintiff wrote to the occupier of the property, believing there to be a tenant in occupation. The Deed of Appointment was attached to the letter, and the letter was addressed to "The Occupiers" on Sherry Fitzgerald paper. It said:

> "Dear Tenants,
>
> I refer to the appointment of Michael Kennedy of this office as Receiver over the above assets by MARS Capital in accordance with the powers contained in the Mortgage Deed and Banking Law. [MARS] Capital are now your current landlord and the owners have been advised of this change of status.
>
> This is a legal appointment recognised by the law courts. In practice what this means is that we are appointed managing agents for the property on a 24 by 7 basis for all issues to do with the property including the rent.

> The owner has been advised that we are appointed to make all the necessary property decisions going forward.
>
> Please note that all rent payment will be directed to our office with immediate effect. See enclosed standing order form with bank details.
>
> In the event that the owner/landlord contacts you in regard to any issue to do with the property you are to direct them to myself at my office address above and we will liaise with them as required. I have attached for your information a copy of the Deed of Appointment.
>
> I would be grateful if you would phone me on [phone number given] as soon as you receive this letter and I will organise a trip out to the property to meet you personally and go through any questions you may have."

15. I pause to describe the above letter as typical of a standard letter sent in such circumstances. There is nothing particularly remarkable or aggressive about it and it had all the indications of being genuine and official, being on Sherry Fitzgerald letter-headed paper and explaining the circumstances in which it was being written. It is also notable that it was envisaged that the only change envisaged at that point for the tenant-occupier was that the rent would be directed to the Receiver/plaintiff rather than the landlord/defendant. It is surprising, therefore, to note the tone of the response of the occupier/tenant (the notice party/appellant in these proceedings), which can be seen in the reply set out in the next paragraph.

16. By letter dated 5th May, 2016, the notice party, Patrice McGuinness, signing herself as tenant, wrote as follows:

> "Until we are in the receipt of a court order either requiring us to vacate the property and/or to pay rent to a third party entity unconnected with our tenancy, then we will not be discussing our tenancy with you.

> We will not change the nature of the tenancy agreement with Mr. Kelly on foot of a letter addressed to "The Residents".
>
> We trust that you will note in your records accordingly, please note also that we will hold you personally responsible for any other further disruption and/or loss suffered as a result of any inappropriate and unlawful threats".

I would characterise this as a letter which refused to engage in any manner whatsoever with the Receiver (unless directed to do so by a court order). The reference to holding the Receiver responsible for "any other further disruption and/or loss suffered as a result of any inappropriate and unlawful threats" is puzzling, to say the least.

17. By letter dated 11th May, 2016, the plaintiff responded to the occupier of the property in the following way:

> "I can confirm that we were appointed receivers over the above property on the 21st April 2016. This is a legal appointment recognised by the Law Courts…
>
> We are appointed over many properties and unless the borrower/landlord contacts our office, we are obliged to go directly to the property. At that stage we would be unaware as to whether the property is derelict … vacant… or occupied by tenants. We send a standard letter to the 'Residents' of the property to confirm that the property is vacant or not or if in fact there are tenants in place. If rented, we would not be aware of your details until the borrower or tenant contacts us to confirm same".

The letter went on to say that he was responsible for managing the property and enclosed a copy of the legal Deed of Appointment and the Residential Tenant Guide to Receivership which might help to answer some of the notice party's queries. Again, there is nothing remarkable or aggressive about that letter.

18. By letter dated 19th May, 2016, a Mrs. Tara McGuinness indicated that Patrice McGuinness was currently away and would be returning on 25th May, 2016, and would contact the plaintiff on her return. By letter dated 19th May, 2016, Patrice McGuiness wrote:

> "So that I can consider your correspondence further, please provide me with a copy of the mortgage dated 6th August 2004 which is referred to in your deed of appointment of receiver. This refers to a mortgage with Irish Nationwide Building Society and an order of the High Court dated the 1st July 2011 which we also require to see.
>
> While it seems a Court order was made transferring certain assets of the society to Anglo Irish, no such court order was made transferring assets to Mars Capital.
>
> Your letter also refers to Banking Law but I understand that you are not a Bank but you are in fact an unregulated vulture fund.
>
> Please also send on your own insurance details.
>
> Also please provide me with a copy of the PRTB details relevant to this property if you are, as you say you are, the registered Landlord."

19. It may be noted that the defendant also sought proof of the plaintiff's authority to act. The Receiver formed the view that he should instruct his solicitors, McDowell Purcell, to engage with the defendant and notice party. They did so by letter dated 14th June, 2016 to the notice party and by letter dated 15th June, 2016 to the defendant. They felt it more appropriate to furnish the documentation requested directly to the defendant who was the borrower in circumstances where he had made an identical request.

20. The letter of 14th June, 2016 to Patrice McGuiness stated as follows:

> "As you are aware our client is appointed pursuant to a deed of Charge made between Mr. O'Kelly (the registered owner of the Property) and Irish

> Nationwide Building Society. We are not in a position to furnish a copy of that deed to a third party, as requested in your most recent letter to our client.
>
> Notwithstanding, we enclose a copy of the folio which comprises the Property, which document is a matter of public record. You will note that MARS Capital Ireland Limited is the owner of the charge registered against the folio (see number 4 and 5, part 3) and therefore, entitled to appoint a Receiver pursuant to the powers contained in the deed of Charge".

The letter went on to request Ms. McGuinness to furnish a copy of any tenancy agreement in respect of which she was in occupation of the property.

21. McDowell Purcell received no response from either the notice party or the defendant and they wrote again, to the defendant, by letter dated 16th September, 2016. They indicated that the plaintiff had been appointed as receiver in accordance with the Deed of Appointment and had requested possession of the property and that they were instructed that the defendant was unwilling to provide possession to the Receiver. They also said that the property continues to be "illegally occupied" by either Patrice McGuinness or persons unknown to the Receiver. The letter then said:

> "A tenancy agreement or letting has not been put in place by the Receiver or MARS Ireland Limited ("MARS") and therefore, only the Receiver is entitled to be in possession or legally entitled to the property."

The letter went on to say that if they did not receive confirmation in writing by 28th September, 2016 that vacant possession would be provided, the Gardaí would be contacted and the Receiver would also consider an application to court for an injunction. It requested a response as a matter of urgency.

22. By letter dated 22nd September, 2016, the notice party replied to the Receiver's letter of 14 June in the following terms:

"Dear Sirs,

I refer to you letter dated 16 September 2016.

This property is the subject of a complaint to the PRTB [reference no. given] and we would suggest that your client goes through the appropriate channels and that they desist in threatening and harassing myself and my son."

23. In a remarkably similar-looking letter in terms of font and layout, the defendant wrote an undated letter to McDowell Purcell referring to their letter of 16th September, 2016, and asking for various documents and referring to legal proceedings "in being in the Circuit Court in respect of this property". It said – "we are unaware of any laws which allow you to appoint a Receiver during the currency of such legal proceedings".

24. By letter dated 21st October, 2016, McDowell Purcell wrote to the notice party referring to earlier correspondence and saying:

"It is entirely untrue and incorrect to allege that our client has "harassed" either you or your son and any assertion in that regard is wholly refuted and denied. We are instructed that our client has merely issued correspondence to you in an attempt to engage with you and to arrange a meeting to explain the position with the receivership.

We are advised that Susan Clarke of the Receiver's office called to the Property and met with you. She explained that it is necessary for you to forward a copy of your lease or tenancy agreement in respect of the Property to the Receiver's office. She also confirmed that a member of the Receiver's office would be happy to explain the receivership process and discuss the matter further. We are further advised that you indicated you would contact the Receiver's office to discuss the matter further however you have failed to do so.

As it stands the Receiver is appointed over the Property and you have not furnished any evidence of your right to occupy the Property.

The Receiver and his personnel remain willing to meet with you personally at any time convenient to yourself to discuss the matter. You might please confirm whether you are available to do so".

25. The letter went on to say that the Receiver had not received any notice of any complaint submitted to the PRTB and that they looked forward to hearing from her as a matter of urgency.

26. By letter dated 21st October, 2016, McDowell Purcell wrote to the defendant indicating that personnel had attempted to contact him by telephone and had left messages and that no return call had been received. The Receiver confirmed that he was willing to meet to discuss the receivership.

27. By letter dated 3rd November, 2016, the notice party replied to McDowell Purcell's letter of 21st October, 2016, saying:

"I refer to your letter dated 21 October 2016.

I notice that you continue to harass and threaten me and my family with inappropriate and illegal activity and I fully reserve my rights in this regard.

I do not accept your account of the events whereupon Susan Clarke called to my home.

You say that I am obliged to furnish you with information. Can you please advise me under what documentation or which legislative provision, I am under this obligation?

I look forward to receipt of this information, at which stage I will seek legal advice on this issue. Please desist from calling to my door as it is beyond inappropriate. We intend to bring your latest letter to the attention of the RTB."

28. There were further letters from McDowell Purcell in January 2017 to the notice party and the defendant. With regard to the notice party, they said that they had merely attempted to engage with her to arrange a meeting to explain the position with the receivership. They pointed out that they had repeatedly requested a copy of the tenancy or lease agreement evidencing her entitlement to occupy the property but that this had not been done. Again an offer was made to meet her for discussion.

29. By letter dated 7 February 2017, McDowell Purcell noted that there had been no response and that their client would attend at the property on the 16th February 2018 to take possession and that court proceedings would be taken if necessary.

30. By letter dated 15th February 2017, the notice party wrote to McDowell Purcell, saying as follows:

> "Dear Sirs,
>
> I refer to previous correspondence in this matter. As you are no doubt aware, your client is threatening to attend at my property and unlawfully terminate my tenancy. Please note that the matter is subject to an existing complaint to the RTB under reference number […].
>
> Section 58 of the Residential Tenancies Act 2004 provides that termination of tenancies must be by the means provided in that part of the Act. Your attempts to circumvent these procedures are unlawful and unconstitutional. Please be advised that on your client registering as landlord I will of course deal as I am required to do with my landlord.
>
> If your client does not register as landlord I can only assume that your client has no entitlement to do so.
>
> The continual visiting of my home by agents of your client is clearly calculated to cause my family members and I alarm and distress. As this is being done in

> attempting to collect a debt, this amounts to the commission of an offence under Section 11 of the Non-Fatal Offences Against the Person Act 1997 and I will take all appropriate steps to have charges brought if this conduct does not cease. Furthermore I reserve the right to complain to the professional bodies of persons engaging in unlawful conduct."

31. By letter dated 17th February, 2017, McDowell Purcell wrote to the notice party which stated that the Receiver attended the property at 10.00am the previous morning and was accompanied by the manager of his office; that he knocked at the door but there was no answer despite a car being parked outside; and that the plaintiff had left a note enclosing his business cards so that he could be contacted. The letter went on to comment:

> "Not only have you refused to furnish any evidence of your entitlement to occupy the Property, you have rejected all offers by our client to discuss the position with you."

The letter went on to point out that a copy of the Deed evidencing the appointment of the Receiver had been furnished and that the plaintiff strongly refuted the assertion that either he or his agent had harassed the notice party or her family in any way. It pointed out that the plaintiff and his agents had acted with the utmost probity and courtesy in all their efforts to engage with them. It then indicated that as she refused to engage with the plaintiff they would proceed with an application to court. The letter also said that it was an extremely serious matter and that she should contact her legal advisors as regards the implications and any orders that might be made against her.

The proceedings

32. The plaintiff commenced proceedings by plenary summons on 1st June, 2017. In the general endorsement of claim, the plaintiff claimed the following reliefs:

1) A declaration that the plaintiff had been validly appointed receiver over the property on foot of a Deed of Mortgage in Charge between the defendant and Irish Nationwide Building Society dated 6th August, 2004;
2) A declaration that the plaintiff is entitled to exercise the powers of a receiver in respect of the property in accordance with the terms of the mortgage;
3) A declaration that the plaintiff is entitled to take possession of, collect and get in the property over which he has been appointed receiver;
4) An order restraining the defendant from interfering with and/or attempting to frustrate the activities of the plaintiff as receiver of the property;
5) An order restraining the defendant from preventing the plaintiff taking possession of, or getting in, or collecting the property;
6) An order restraining the defendant from remaining on or continuing in occupation of the property, and restraining him from refusing access to the property to the plaintiff;
7) An order restraining the defendant from trespassing on the property;
8) An order restraining the defendant from dealing with the property in any manner howsoever, otherwise than as agreed with the plaintiff;
9) Damages for trespass;
10) Interest pursuant to the Courts Act, 1981;
11) Further and other orders on the costs of the proceedings.

Application for an interlocutory injunction

33. By notice of motion dated 10th July, 2017, the plaintiff sought an interlocutory injunction, grounded upon an affidavit of the plaintiff, Michael Kennedy sworn on the 29th May 2017, in which he set out the background, including the above correspondence, and gave an undertaking as to damages.

34. The defendant swore an affidavit on the 25th July 2017. He said that he had parted with possession of the premises to his tenant, the notice party Ms. McGuinness, that it was a tenancy within s.3(1) of the Residential Tenancies Act 2004, that she had a "fixed term tenancy the term of which will continue until the 1st day of February 2021", and that she was entitled to the statutory protections associated with such a tenancy. He exhibited an email from the Private Residential Tenancies Board showing that the landlord had registered a tenancy "which commenced on the 1st February 2016" and related to the notice party and the property. This email on its face states: "This confirmation email does not constitute proof of the tenancy or the terms thereof but is merely a confirmation that the tenancy has been registered on foot of the registration particulars provided". The defendant did not exhibit any tenancy agreement. He asserted that clause 11 of the Facility Letter of 23rd March entitled him to let the premises. It provides: "The Society is to be satisfied at all times with any present and future tenants in the Property and any other Properties the subject of the Security and with their respective leases".

35. The defendant also said that Circuit Court proceedings had been instituted against him on foot of the debt, in which judgment was given against him and which was under appeal. He asserted that the plaintiff's failure to disclose this breached the obligation to put all relevant matters before the court; that the delay in the circuit Court proceedings militated against the granting of interlocutory relief; and that an issue arose as to the "capacity" of the plaintiff to make a demand for possession in circumstances where judgment for the debt had previously issued.

36. He raised further issues concerning the validity of the appointment of the plaintiff as Receiver, with which this judgment is not concerned.

37. The notice party, Ms. McGuinness, swore an affidavit on 9th October, 2017. She averred that her tenancy was registered with the Residential Tenancies Board and exhibited an acknowledgement of registration dated 5th May, 2016. Notably, she did not exhibit any letting agreement. She said that the plaintiff purported to be her landlord or otherwise entitled to possession of the property but that he had not registered as a landlord nor had the entity which appointed him. She referred to demands from persons appointed on behalf of the plaintiff and threats that the Gardaí would be contacted if she did not cooperate. She said that these procedures were "entirely inconsistent with the legislation and in any case violate the constitutional protections afforded to the dwelling". She said that:

> "I have at all times been prepared to cooperate with the Plaintiff provided that he demonstrated that he was in fact my landlord. He has not done so but has resorted to bluster and threats".

She suggested that he was not coming to court with clean hands and that the court should not exercise its discretion in his favour.

38. Two affidavits were sworn by Joseph Carter, an employee of MARS Capital Finance Ireland DAC. Among other things, he indicated that a notice of discontinuance was served in the Circuit Court proceedings on 20th March 2017. He also pointed out that the email from the PRTB referred to a tenancy which commenced on 1 February 2016 which was a date *after* the loan had been called in. He said that the tenancy was concluded without informing MARS and was registered with the PRTB after the appointment of the plaintiff as Receiver. He observed that neither INBS nor MARS had received any rental income from the tenancy, despite the large debt. He invited the notice party to clarify if the purported tenancy was new and had been registered with

the RTB for the first time in April 2016 together with full particulars of the purported tenancy.

39. The defendant swore an additional affidavit on 13th November, 2017. He challenged Mr. Carter's averment that the tenancy had commenced after the final letter of demand and said that "in fact Ms. McGuinness was in occupation of the premises as tenant since January 2015". He exhibited a letting agreement albeit one which had been redacted with regard to the amount of rent and the deposit. The letting agreement exhibited in this affidavit is dated 1st February, 2015 and describes the term as being a one-year term. He also exhibited utility bills from 2015 which he said showed that she was living in the house prior to the demand letter having been served.

40. I pause to note that it is a remarkable feature of this case that no letting agreement for the period *from* January 2016 was ever exhibited either before the High Court or on appeal. When questioned by the Court during the course of oral submissions about this, counsel on behalf of Ms. McGuinness was unclear as to whether such a letting agreement even existed, in itself a rather unusual state of affairs, given the content of the affidavits as described above.

The High Court decision

41. The matter came on for hearing on 12th July, 2018 and was adjourned to the following day upon which date the High Court (McDonald J.) delivered an *ex tempore* judgement. The Court has been provided with the DAR transcript of this judgment.

42. McDonald J. commenced by saying that this was in substance an application for mandatory relief and it was therefore well settled that the plaintiff must satisfy the Court not merely that he has a fair question to be tried but that he has a strong case: *Shepherd Homes Ltd v. Sandham* [1971] Ch 340, *Maha Lingham v. Health Service Executive* [2005] IESC 89, and *Lopes v. Minster for Justice* [2014] 2 IR 301. He said

that the first question to be considered was therefore whether the plaintiff had satisfied him that he had a strong case to make.

43. He then went on to refer to a number of matters which were not in dispute. These related essentially to the granting of the mortgage; the terms of the loan letter; the terms of the mortgage; the transfer of the mortgage to Anglo Irish Bank/IBRC on 1st July, 2011; judgment being obtained by IBRC on 15th July, 2013 in an amount of €437,451.52; the loan sale agreement by IBRC to MARS; the securitisation scheme whereby MARS entered a Deed of Charge in favour of City-Core; the letting agreement on 1st February, 2015 between the defendant and the notice party which was subsequently registered with the Residential Tenancies Board; the demand letter of 17th August, 2015 by MARS and the appointment of the Receiver. McDonald J. noted that there was no doubt that the Receiver had, among other powers, "the power to enter upon and take possession of, collect and get in the mortgage property" and take proceedings in the name of the mortgagee or otherwise as he may deem fit, which was a provision of what the judge noted was a legal agreement between the defendant signed up to at the time he sought finance from INBS. McDonald J. then referred to the correspondence commencing with the letter of 26th April, 2016 and the various letters which ensued (as described above). He turned then to the arguments made in the case.

44. The first argument made before him was that once judgment had been obtained there could be no basis for any subsequent demand and that it was necessary for there to be a demand before a receiver could be appointed. No authorities had been cited in support of this proposition. McDonald J. rejected this argument saying that he could see no reason in principle why a judgment creditor could be prevented from making a demand, especially when the judgment debt is unpaid, and where demand is necessary

in order to crystallise the appointment of a receiver. While he made no final determination on the issue because this was at interlocutory stage, he went on to say:

> "…it certainly seems to me to be an argument which would require to be supported by authority, if it could be said to be an argument that would in any way displace what I think is a strong prima facie evidence before the Court that the receiver has been validly appointed following… the making of a demand".

McDonald J. also referred to the decision of Cregan J. in *Flynn v. NALM* [2014] IEHC 408 that a demand is not invalidated in any way where the amount demanded is greater than the amount actually due. Accordingly, on the basis of the arguments he had heard and the evidence before him, the receiver had a strong case to make on this point and it met the test set out in *Maha Lingham.*

45. The next argument related to the failure to register IBRC as transferee from INBS as owner of the charge but this argument had been acknowledged as falling away in light of s.40 of the Credit Institution (Stabilization) Act, 2010.

46. The next issue was in relation to the securitisation and the fact that at the date of the appointment of the receiver, the plaintiff had transferred its interest under the mortgage to City-Core. McDonald J. looked at the terms of the mortgage and he scrutinised Clause 16.1(a) and said that while on first reading counsel's argument might appear to be supported, the language was in fact qualified and the argument was not sustainable. I do not propose to examine this in any further detail because the argument was not pursued on appeal.

47. He then turned to the issue concerning the potential application of the Residential Tenancies Act, 2004. He said that he accepted that the Act applied as between the defendant and the notice party, but noted that the real question was whether the receiver had advanced a strong argument (that being the test on the interlocutory application)

that the legislation did not apply to him. He referred again to clause 11 of the mortgage, the covenant against the creation of leases without the prior consent in writing of the mortgagee, and referred to the judgment of (Dunne J.) in *Fennell & Anor v. N17 Electrics Ltd* [2012] 4 IR 634. He said the first thing to consider was the letter of 26th April in the present case and whether this constituted a letter which bound MARS to the terms on the tenancy agreement. He said that he could not ignore the fact that although this letter had been sent on 26th April, 2016, there was an "immediate rebuff" from the notice party and that when there was further correspondence between the solicitors for the Receiver and the defendant and notice party, "that rebuff was never resiled from". This was so, notwithstanding that various documents dealing with the entitlement of MARS to appoint a receiver were provided to both the defendant and the tenant. He said that in those circumstances, the Receiver had a strong argument to make that there was no acceptance of a lease in the present case. He said that it was difficult to see how it could even be plausibly suggested that there was an acceptance of the lease in light of the correspondence that ensued from the tenant and the defendant in response to the correspondence from the Receiver, although the ultimate determination of this argument would be a matter for the trial judge. He said the position would be entirely different if the tenant had responded positively to that letter in which case the tenant's rights would have been secured in relation to the property but, "sadly, from her perspective, that is not the route which she took".

48. The next argument made was concerned paragraph 11 of the Facility Letter. McDonald J. said that while any lease entered into in relation to residential property is one that will be governed by the Residential Tenancies Act 2004 (as amended) *("the 2004 Act*"), the observations of Dunne J. in the *N17 Electrics* case governed the situation; the mere fact that a mortgagee knows of the intention to create a lease does

not displace the rule that the lease is not binding in the absence of prior written consent. He pointed out that the terms of the tenancy were not put forward by the notice party or the defendant. The tenancy was created in February 2015, two years after judgment had been obtained against the defendant. It was clear from the provisions of Clause 11 that the Society had to be satisfied at all times with any present and future tenants in the property. No information had been given to MARS, and a lender who had just recovered judgment against a mortgagor landlord would wish to have very detailed information in relation to a tenant in circumstances where no payments had been made to the mortgagee; in particular they would need to be satisfied that the tenant was in a position to pay and would want to ensure that any rental payments would be paid into a bank account to be applied in discharge of the judgment debt. The *N17 Electrics* case could not support the suggestion that merely because back in 2005 the bank may have envisaged there would be a lease put in place, this meant that the bank was bound by a tenancy agreement that was put into place without any prior notice to it, without giving it any opportunity to consider to quality of the tenant or the quality of the rent, and it would be difficult to see how in those circumstances the bank would be bound. Without making any final determination on the issue, the Receiver had a strong argument to make that he was not bound by the tenancy and therefore an equally strong argument that the 2004 Act did not apply. He said:

> "it would be an extraordinary thing that someone could be bound by the provisions of 2004 Act in respect of a tenancy to which they never consented. That seems to me to be a contradiction in terms".

49. In addition, he said that although s.34 of the Act of 2004 concerns the manner of termination of a tenancy by a landlord, - a strong case could be made by the Receiver

that he was not bound by the tenancy and therefore was not in the position of a landlord under the Act, again because of what had been said in the *N17 Electrics* case.

50. The judge then referred to the decision of Costello J. in the *Havbell* case *(Havbell DAC v. Dias* [2018] IEHC 175) to the effect that it was not necessary to go further than the above because the tenant would, as a result of the above circumstances be trespassers, i.e. that it was not necessary to consider adequacy of damages and balance of convenience. However, he said he would adopt the safer approach of considering these issues nonetheless.

51. Concerning the adequacy of damages, it was clear the damages would not adequately compensate the plaintiff but if the Receiver were ultimately proved correct, his ability to recover damages was effectively nil because the defendant has been unable to pay the judgment debt and there was no basis to think he would be able to pay damages in the event that an injunction was refused.

52. He said that the balance of convenience lay strongly in favour of the grant of an injunction. The tenant could have accepted the appointment of the Receiver and paid rent to him, in which case she would not have been disturbed in her possession - but she did not do so. This was a factor which weighed heavily in the balance against any suggestion that her position should be taken into account in any strong way in weighing the different factors.

53. McDonald J. also considered a submission that there had been delay on the part of the Receiver but was not persuaded by this having regard to the correspondence already referred to. The other matter was the existence of the Circuit Court proceedings. He said it was quite clear that the Circuit Court proceedings did not go “terribly far” and there was no evidence that the defendant was lulled into any sense that the only way in which proceedings would be pursued would be by means of that Circuit Court

action. He did not consider that there had been any inequitable conduct in this regard which would prevent an injunction being granted.

54. He therefore granted the interlocutory injunction but placed a stay of three months on the order on condition that the tenant pay rent to the Receiver during that period, without in any way making her a tenant of the Receiver.

55. Subsequently, this Court refused a further stay, with the result that, as of the hearing of the appeal, the notice party had vacated the property, a factor which would be relevant to the balance of convenience, should it arise. There was no suggestion that she had been unable to find alternative accommodation.

The appeal

56. A notice of expedited appeal was filed on behalf of the notice party on 2nd August, 2018. No appeal was filed on behalf of the defendant.

Grounds of appeal

57. The grounds of appeal were set out are as follows:

1) The trial judge erred in fact and in law in holding or taking the view that there was no sufficiently arguable case to the contrary, or that the plaintiff had made out a strong case to the effect that there was no difference in principle between a lease unapproved by the mortgagee of commercial property and a lease unapproved by the mortgagee of residential property, the tenancy of which was comprehended by the Residential Tenancies Act 2004 (as amended).
2) The trial judge erred in fact and in law in holding or taking the view that there was no sufficiently arguable case to the contrary, or that the plaintiff had made out a strong case to the effect that the notice party had repudiated a tenancy, offered by the plaintiff's agent, and therefore the tenancy never came into effect and was void *ab initio*.

3) The trial judge erred in fact and in law in holding or taking the view that there was no sufficiently arguable case to the contrary, or that the plaintiff had made out a strong case to the effect that a tenancy protected by the Residential Tenancies Act 2004 (as amended) could be terminated or lose its protection by virtue of the appointment of a Receiver or the assumption of possession by a mortgagee who had not consented to the tenancy in writing
4) The trial judge erred in fact and in law in holding, by implication, that section 59 of the Residential Tenancies Act 2004 (as amended) did not cause a divergence between the position of residential tenancies comprehended by the Residential Tenancies Act 2004 and commercial tenancies.
5) The trial judge erred in fact and in law in holding or taking the view that it was not sufficiently arguable otherwise, or that the plaintiff had made out a strong case to the effect that a declaration by the plaintiff that it was the notice party's landlord and demanding the payment of rent did not cause the plaintiff to become the landlord of the notice party as defined by section 4 of the Residential Tenancies Act 2004 (as amended).
6) The trial judge erred in fact and in law in holding or taking the view that it was not sufficiently arguable otherwise, or that the plaintiff had made out a strong case to the effect that the Court had jurisdiction in the matter concerning the notice party despite the provisions of section 182 of the Residential Tenancies Act 2004 (as amended).
7) The appellant/notice party will seek such intermediate reliefs as may be required in the Court of Appeal including an extension of the stay allowed by the trial judge.

The submissions on behalf of the notice party/appellant

58. Mr. Dixon BL, on behalf of the notice party, seeks to rely upon *McCann v. United Kingdom* application no. 19009/04; s.2 of the Human Rights Act 2003; *Donegan v. Dublin City Council* [2012] 2 ILRM 233 in connection with the rights of tenants. He relies on *Hennessy v. PRTB* [2016] IEHC 174, where the High Court (Baker J.) had said that the Residential Tenancies Act 2004 established the entire rights and obligations of the landlord and tenant of residential premises and that the common law requirements had no application to the contents and form of a notice to quit. She said that it was clear that the intent of the Act was to provide a degree of security of tenure to a tenant of residential premises, which was apparent in particular from the provisions of Parts 4 and 5 and from the long title to the Act. Counsel submitted that the decision in *Hennessy* showed that the security of tenure of the tenant "overrides all other rights in the property" and that the tenancy must be terminated by means of the methods set out in that Act. The intention of the Oireachtas was that a tenant would be free from the insecurity of a tenancy being terminated "in an arbitrary manner arising out of contractual provisions of which the tenant was unaware and which provisions could not be discovered by the tenant prior to entering into the tenancy".

59. Reliance is also placed upon *Collins v. Cummins* [2015] IEHC 354 and counsel submits that the trial judge's treatment of it in his judgment was erroneous.

60. Counsel submits that the Receiver was seeking to "have his cake and eat it" insofar as he was avoiding the responsibilities of a landlord by not registering and yet seeking to obtain rent. It was submitted that the judge was wrong in concluding from the correspondence that the rent should have been paid over to protect the tenant's position and he submits that this is not the correct interpretation of the *N17 Electrics* case.

The submissions on behalf of the plaintiff

61. The plaintiff submits that the protection contained in the provisions of the Residential Tenancy Act, 2005 is restricted to the tenancy as between the defendant and the notice party, and submits that because there was no tenancy between the plaintiff and the notice party, the Act did not apply as between them. He submits that the plaintiff was not bound by the lease as between the defendant and the notice party in the absence of consent, by reason of Clause 11(l) of the mortgage.

62. The plaintiff submits that had the trial judge held that the Receiver was bound by the tenancy, then the Act of 2004 would have applied with the ensuing consequences set out in *Hennessey v. PRTB* [2016] IEHC 174, regardless of the lack of registration by the plaintiff as receiver. However, where the notice party had consistently maintained that her tenancy was with the defendant, that he was the registered landlord, and she had immediately rebuffed the Receiver's offer of tenancy of 26th April, 2016), a position from which she had never resiled, the Act of 2004 does not apply as between her and the Receiver. As a result, it is submitted that the cases of *Hennessey v. PRTB* [2016] IEHC 174 and *Collins v. Cummins* [2015] IEHC 354 (as relied on by the notice party) have no application.

63. The plaintiff submits that in circumstances where the trial judge found that the loan offer was a commercial loan agreement (despite it relating to a residential property), to accede to the notice party's submissions would be to place a mortgagee and its receiver in the extraordinary circumstance of being bound to a tenancy – having previously secured summary judgment against the defendant – in which it did not participate; to which it did not consent; and of which it was unaware.

64. Regarding the notice party's submission that the trial judge erred in his application of the balance of convenience test in ordering the notice party to vacate the

property pending the trial, the plaintiff submits that in fact the trial judge did not need to continue on to apply this test at all, in circumstances where he found that the plaintiff had demonstrated that he had a strong case; at that point, the notice party had become a trespasser. The balance of convenience test, it is submitted, was applied simply to ensure that the best interests of the defendant and the notice party were fully and fairly explored.

65. The plaintiff submits, in the alternative, that the notice party lacks the legal standing to maintain this appeal in circumstances where she has since vacated the property (in accordance with the order of Irvine J. dated 19th October, 2018); has not instituted proceedings seeking damages or otherwise for the wrongful interference in her occupation of the property by the plaintiff as receiver; nor has she brought any proceedings against the defendant.

Decision

66. In the first instance, I am satisfied that the trial judge correctly directed his mind to the appropriate test and authorities concerning this type of application, namely that the plaintiff had to satisfy the court that had had a strong case because the application was one for a mandatory injunction.

67. Secondly, I am also satisfied trial judge was correct when he took the view that it was a commercial lending and was described as a commercial mortgage offer, even though the property itself was a residential property, and that the defendant was not acting as a consumer when he signed it. The mere fact that a residential property is the subject of a mortgage does not thereby convert it into a private consumer loan.

68. Thirdly, the key question on this appeal is whether or not the appellant is correct when she contends that there is a landlord-tenant relationship between her and the plaintiff/respondent (the Receiver). If this proposition is incorrect, this would be fatal

to her remaining arguments, which are all built upon this foundation. Accordingly, the key question is whether, applying what was said in *N17 Electrics,* this proposition is correct. In my view, there is, at the very least, a strong argument that the notice party/appellant is incorrect and the plaintiff/respondent is correct on this point, the same conclusion reached by the trial judge.

69. In *N17 Electrics Ltd*, the respondent (N17 Electrics) purported to enter into a business lease agreement in respect of four properties which had previously been mortgaged by their owner to the second applicant (ACC Bank). The mortgage deeds contained covenants prohibiting the mortgagor from leasing the properties without the prior written consent of the mortgagee. The mortgagor defaulted on his obligations and the first applicant (Mr. Fennell) was appointed as receiver of the properties. The respondent was subsequently wound up by order of the High Court and in the course of the winding up, the applicants sought a declaration that the business lease agreement was not binding upon them (and therefore did not constitute an asset of the respondent). They argued that the lease agreement had been created without their prior consent and was therefore unenforceable. The respondent argued that the applicants were estopped from impugning the validity of the lease because of their conduct. The High Court (Dunne J.) held that where the mortgagor of mortgaged property was required to obtain the consent of the mortgagee before creating any lease in respect of that property, a lease created without such consent would not generally be binding as against the mortgagee, but that there were circumstances in which the mortgagee might be bound by such a lease, such as where he had required the tenant to pay rent directly to him. She said that mere awareness on the part of a mortgagee that a tenant was present at a mortgaged property in contravention of a mortgage would not be sufficient to create a relationship between the tenant and the mortgagee. She also said that the application by

a mortgagor of rental income, received on foot of a lease which contravened a mortgage, to repay his obligations to a mortgagee would not be sufficient to create a relationship between the tenant and the mortgagee. (see para 30 of judgment).

70. My interpretation of that judgment is that the court must examine the facts in every case to see whether there is something more than mere awareness of the presence of a tenant on the premises or the application of rent to repay the obligations of the mortgagee, which might displace the general position that a lease created without such consent would not usually be binding as against the mortgagee. In the present case, if the letter of 26th April 2016 from the plaintiff to the notice party had been met with an acceptance by her of the plaintiff as the new landlord, or something to that effect, this might well have constituted a circumstance which would have required a departure from the general position and warranted the court treating a new landlord-tenant relationship as having been created. However, on the contrary, despite the Receiver having repeatedly sought to engage with the notice party in a manner which was both clear and professional, she, for her part, rebuffed him firmly and repeatedly and insisted that the only person she would deal with as landlord was the defendant. If she had engaged with the plaintiff, the position might well now be different; but the submission she now makes that she has a relationship of landlord-tenant with the Receiver, against the backdrop of the position she adopted and maintained throughout her correspondence with the plaintiff, is a very weak one and I have no doubt that the plaintiff/respondent has a strong case to make in this regard. I am therefore of the view that the trial judge was correct in reaching the conclusion that the plaintiff/respondent had a strong case in this regard.

71. The notice party seeks to rely on *Collins v. Cummins* [2015] IEHC 354 and criticises the trial judge's treatment of it in his *ex tempore* judgment. Referring to certain

authorities cited to him, the trial judge said: " *In one of them, the decision of Ms Justice Murphy, the decision in Collins v. Cummins, it's clear that an adjudicator within the Private Residential Tenancies Board had concluded that there was an argument to make that a mortgagee was bound. But, with respect, I am not bound by a decision of such an adjudicator. There's no indication in the judgment of Ms Justice Murphy that she agreed with the view taken by the adjudicator. She does draw attention to the fact that it was never challenged subsequently by the mortgagee, and therefore, it seems to me, that value of that determination is very low, with all due respect to the adjudicator concerned*." The case of *Collins v Cummins* consisted of an application by a receiver to set aside orders obtained in default of appearance. Despite a mortgage deed providing that the mortgagors agreed not to lease the property without written consent of the lending bank, the mortgagors entered into a residential tenancy agreement with a tenant. A dispute arose between the landlord and tenant and an application was lodged on behalf of the tenant with the PRTB. The Receiver, having been appointed in the meantime, was represented at the hearing before the Board and submitted that the lease was null and void in circumstances where the consent of the bank had not been obtained for the lease. A discussion took place concerning the relevance, if any, of the Act of 2004 and the PRTB adjudicator did not accept the view of the Receiver that the failure of the landlord to obtain the consent of the bank to the tenancy agreement rendered it null and void, but rather considered that it was a valid tenancy (as between the mortgagor and the tenant) for the purposes of the Act. After the hearing, the Receiver initially continued to maintain that the lease was null and void, but subsequently served a notice to quit which apparently abandoned this position (see High court judgment at para 14 recording this change of position). The tenant denied having received the notice to quit, but reactivated dormant plenary proceedings, did not serve the Receiver, and

obtained judgment in default of appearance against the mortgagors. The grounding affidavit of the tenant did not refer to the existence of the Receiver at all. The decision of the High Court was concerned with whether the judgments were regularly obtained and in turn, whether or not the Receiver was entitled to be served with the plaintiff's proceedings.

72. I would make the following three points about *Collins v. Cummins*: (i) the High Court judgment merely records the adjudicator's opinion about the application of the 2004 Act without expressing its own view as to the correctness of that opinion; (ii) the High Court judge was correct to take the view in the present case that he was not bound by the view of the PRTB adjudicator; and (iii) by the time the matter came to the High Court in the *Collins* case, the receiver was no longer arguing that the tenancy was not valid, having abandoned its earlier position on that issue; therefore the point was not argued before the court. It is in that particular context that the Court said, at para 25 of its judgment that '*…by endorsing the validity of the tenancy agreement the relationship between the plaintiff and the receiver was, as of the 25th November 2013 [being the date of service of the notice to quit by the receiver], one of landlord and tenant*", before concluding that the receiver was therefore entitled to have been served with the proceedings and that the judgments had been irregularly obtained. In my view, the case is not a helpful authority for the appellant's position.

73. Given the strength of the argument that there is no landlord-tenant relationship between the plaintiff and notice party (as distinct from the defendant and notice party), it follows that authorities such as *McCann v. United Kingdom* application no. 19009/04; *Donegan v. Dublin City Council* [2012] 2 ILRM 233 and *Hennessy v. PRTB* [2016] IEHC 174 are very unlikely to have any application to the situation at all. I would

observe in passing that the factual position of the tenants in the *McCann* case was utterly different to that of the notice party in the present case; she had a choice, they did not.

74. A submission of the notice party which was strongly urged upon the Court was that section 59 of the Act of 2004 required that MARS or the Receiver had to serve a valid notice of termination in accordance with Part 5 of the Act, and that the Act excluded the application of *Fennell v N71 Electrics Ltd (in liquidation).* It seems to me that this is to put the 'cart before the horse', as it were, and that the appropriate sequence is to inquire as to whether there is a valid tenancy (whether a residential tenancy or other form of tenancy), in the first instance; and only if that question is answered in the affirmative does the Act come into play. The point is dealt with in further detail in the judgment of Collins J. and I wish to express my agreement with his analysis.

75. In the circumstances, I would agree with the view taken by the trial judge that it was, strictly speaking, unnecessary to proceed further to consider the balance of convenience, given that the appellant's position was likely to be that of a trespasser; but again, and for completeness, I would endorse the conclusions he reached as to the balance of convenience as described above. Further, as already noted, the notice party has in fact vacated the premises and there has been no suggestion that she was unable to find alternative accommodation.

76. By way of final comment, I would observe that it is most peculiar that despite the notice party's insistence throughout her correspondence, and in these proceedings, that she had a tenancy with the landlord before and after the appointment of the plaintiff as receiver, the documentation in support of such letting arrangements was incomplete, and what was provided was redacted in certain essentials, including the amount of rent paid, a not insignificant matter in view of the fact that no rental income has ever been paid over to by the mortgagor. Further, the timing and format of some of the

correspondence from the notice party and the defendant, not to mention the tone of her correspondence from the outset, which I would characterise as hostile, aggressive and legalistic, must raise a suspicion that both the notice party and defendant were engaged in a concerted effort to prevent the Receiver from obtaining possession of the premises. Be that as it may, the contention that a new relationship of landlord-tenant was created as between her and the Receiver on behalf of the mortgagee (who had never consented to the lease) in circumstances where she herself blocked the taking of any steps to establish such a relationship is, to say the least of it, weak, and the trial judge was correct in his conclusion that the Receiver had made out a strong case against her.

77. Accordingly, I would dismiss the appeal and uphold the conclusion of the trial judge in this regard.

Power J. I have read and considered the judgment of Ní Raifeartaigh J. and the concurring judgment of Collins J. and I agree with the reasoning and conclusions reached therein.