THE HIGH COURT

[2022] IEHC 556

Record No. 2021/6816 P

BETWEEN

OSSORY ROAD ENTERPRISE PARK LIMITED

PLAINTIFF

AND

DECLAN ROGERS, TOM HARTY AND (BY ORDER) ROGERS RECYCLING LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 7th day of October, 2022.

Introduction and factual background

1. The proceedings were commenced by plenary summons against the first two defendants, the second being described by the plaintiff's director as an agent of the first defendant. However, the plaintiff has never served the second defendant with the proceedings and no application for interlocutory relief has been made against him.

2. By notice of motion returnable for 20 January 2022, the plaintiff sought various interlocutory reliefs against the first defendant, restraining him from *"interfering with or trespassing"* on the properties known as Units 1, 5A, 5B, 6, 7, 8, 8A, 9 and 10 of Ossory Industrial Estate, Ossory Road, Dublin 3 (collectively, "the Premises"), restraining him from collecting or attempting to collect rent from the occupiers of those Units, and restraining him from advertising for letting, letting or attempting to let those Units.

3. Unit 1 is divided into various sub-units known as Unit 1C, D, and so on, Unit 8A is part of Unit 8, and Unit 9A is part of Unit 9. There also appear to be shipping containers, used for storage, in respect of which the Company says it is the holder of a Lease. These are situate in the building of Unit 1 and also in the yard of Unit 1, though there is some uncertainty as to how many have been there in the past or are there at present.

4. The interlocutory application was allocated a hearing date on 6 April 2022. On 8 April 2022, I delivered an *ex tempore* judgment restraining the first defendant from collecting or attempting to collect rents from Units 5A, 5B, 6, 7, 8, 8A, 9, 9A and 10 and that the plaintiff should collect all rents from those Units and lodge them into its solicitors' client account, noting the plaintiff's solicitor's undertaking to provide a monthly account so that rent by way of sworn affidavit to be delivered to the first defendant's solicitor and to the Company.

5. Interlocutory relief was also sought in the notice of motion against persons having notice of such Order, and in particular, the respective occupants of the Units, from paying rent, or any sum in lieu of rent, to the first defendant but, this was not pursued. In any event, they were not named as defendants or served with the proceedings or the notice of motion so it is difficult to see how any order could have been made against them.

6. However, it also transpired at hearing that it was alleged that Rogers Recycling Limited ("the Company"), a limited liability company of which the first defendant and his wife are the directors and shareholders, was alleged by the first defendant to be in receipt of rents from the various sub-units and containers into which Unit 1 appears to be subdivided. I refer to the evidence of that Lease and of the bank's knowledge of it in more detail below.

7. While the plaintiff's position is that the tenants in the various Units are in fact tenants of the first defendant, and that the entire Lease is a fiction to obstruct the taking of possession

by the plaintiff, no order could be made against the Company unless it was joined and until it was heard.

8. Accordingly, by Order made 8 April 2022, the plaintiff was given liberty to issue a motion seeking to join the Company as a defendant to the proceedings and to seek interlocutory relief in the like terms as had been sought against the first defendant. The motion was to be returnable for 13 May 2022, and I made directions designed to ensure it could be heard on that date. On 13 May 2022, by consent, the Company was joined as co-defendant to the proceedings at the plaintiff moved for interlocutory relief against it. It should be noted that the original motion seeking relief against the first defendant had been adjourned insofar as Unit 1 was concerned, and so, the question of whether relief should be granted as against the first defendant personally in relation to Unit 1 also falls for determination.

9. The motion against the Company was subsequently heard over three days, listed on dates to suit the parties, and concluded on 28 July 2022. In light of the very detailed submissions made by counsel for the plaintiff and for the Company, and notwithstanding that it is an interlocutory application, I reserved judgment.

Issues arising

10. The plaintiff's essential position in these proceedings is that it has title to the Premises, having acquired them in a sale by private treaty from Everyday Finance DAC ("Everyday"), and is therefore entitled to the rents and profits thereof. The first defendant makes various complaints about the earlier holding of an online auction and the subsequent decision to sell to the plaintiff, but those issues are not material to this application, and it appears that the first defendant is litigating his complaints in other proceedings which do not appear to have been progressed. These issues were not the subject of any submissions in this application and I mention it only as background.

11. While the Company asserts that it is a tenant of the first defendant, who originally mortgaged the Premises to Allied Irish Banks plc ("the bank"), the plaintiff relies on the long established principles as authoritatively restated by this Court (Dunne J.) in *Fennell v. N17 Electrics Ltd. (in liquidation)* [2012] 4 I.R. 634, a judgment recently approved by the Court of Appeal in *Kennedy v. O'Kelly* [2020] IECA 288.

12. In response, the Company raises a number of arguments in order to resist interlocutory relief. First, it says that the title of the plaintiff was faulty when it issued the summons, as it had purportedly taken a conveyance of the Premises in fee simple when the mortgagee had in fact taken a mortgage by demise for 10,000 years.

13. Of course, the mortgage contains the usual provisions to the effect that the freehold reversion was held by the first defendant in trust for the bank (which is defined in the mortgage to include its successors and assigns) with a power to appoint a new trustee or trustees in place of the mortgagor. By virtue of the mortgage deed, the first defendant also irrevocably appointed the secretary of the bank as his attorney with authority to convey the fee simple reversion in his name.

14. However, as the purchase deeds each simply purported to convey the fee simple, despite the fact that neither the plaintiff's attorney nor any new trustee appointed by the bank had joined in the conveyance to convey the freehold reversion, it was said that the conveyance was ineffective to transfer any interest to the plaintiff. While this argument was also made by counsel for the first defendant at the hearing of the original application for interlocutory relief, and I rejected it in the *ex tempore* ruling of 8 April 2022, it was made in a more detailed fashion by counsel for the Company. For example, it was argued that the all estates clause in s.76 of the Land and Conveyancing Reform At, 2009 ("the 2009 Act") had no effect and that the Deed of Rectification executed on 15 June 2022 was not retrospective,

such that the plaintiff had no title to sue on the date proceedings were issued and that this defect could not be cured thereafter.

15. Before considering those issues, I think it is useful to recall that this is an application for interlocutory relief only. It should be noted that the notice of motion seeks interlocutory relief restraining entry by the Company or its agents, but this was not pursued, and only orders described cumulatively as a *"rent preservation order"* were pursued. I think counsel for the plaintiff is correct in submitting that the relief sought is prohibitory in nature as the substance of the Order is to prevent the Company, its servants or agents from collecting rent, and therefore he only has to demonstrate a fair question to be tried.

16. He further submits that the unsatisfactory nature of the evidence tendered by the Company (and indeed the first defendant, whose affidavits were relied upon by the Company also) and the apparent financial weakness of the defendant demonstrated that the balance of convenience favoured the grant of the relief. In a nutshell, if the relief is granted, the rents received from the occupiers will be held by the plaintiff's solicitor pending determination of the action, whereas if the relief is refused, those monies may well be dissipated and the plaintiff will be at an irreparable loss in respect of its entitlement to the rents and profits of the Premises for the period pending trial.

17. In my view, the plaintiff is correct in its submissions on the balance of convenience. The plaintiff is a special purpose vehicle, incorporated for the purposes of owning the property, but its financial history and standing are really irrelevant if any rents are held by its solicitors pending trial, and if those solicitors are willing to account for the monies in the manner described.

18. By contrast, the Company, which was originally incorporated to carry on a recycling business at the Premises, now engages solely in the collection of rent from the Premises. However, it gave no evidence of its financial standing and the limited bank statements

exhibited showed balances as of 31 December 2019 of only €2,075. By March 2022, having fluctuated upwards, the balance was just over €1,000. It seems highly unlikely that the Company would be in a position to pay damages to the plaintiff and the uncertainty as to how and to whom rents have been paid in the past makes it highly unlikely that the Company would be in a position to account to the plaintiff for the rents paid, if required to do so in the future. Indeed the application is brought because of doubts as to the first defendant's compliance with an interim order made by Allen J. to the effect that the parties should pay over any rents collected in respect of the Premises to their respective solicitors.

19. In addition, the Company has not deposed to having any employees, to the effect on the livelihoods of its directors and shareholders, or even to having any cashflow problems if the relief is sought. There is also, to put it at its mildest, some doubts arising from the affidavits as to the maintenance by the Company of adequate books and records. It appears that at least some of the rent to which it now claims to be entitled is paid in cash, and at least some of that cash has in the past been lodged to the first defendant's account - an event which it is claimed is an error.

20. Without making any finding on that particular point, there is certainly some doubt as to whether the monies will be available for payment to the plaintiff if it succeeds at trial, whereas the court can have confidence that the plaintiff's solicitors will retain monies in their account so that it is readily available for the Company if it succeeds in showing that it has a valid Lease over Unit 1.

21. The balance of convenience therefore clearly favours the grant of relief and the question is whether the plaintiff has demonstrated a fair question to be tried as to whether it is entitled to succeed at trial. As is probably obvious from the introduction above, there are two broad issues to be considered: whether the Company is entitled to possession (and, in consequence, to the receipt of any rents from sub-tenants, such as the occupiers of the Units

or the containers) and secondly, whether the plaintiff has shown that it has title to the Premises. At this stage, the plaintiff only has to show a fair question to be tried that it has title to the Premises and a fair question to be tried as to whether the purported Lease from the first defendant to the Company is invalid as against the plaintiff. The consequence of the plaintiff having title and of the Lease not being binding on it would be that the plaintiff could be entitled to the rents and profits derived from the Premises.

Whether the Plaintiff has title to the Premises

22. The plaintiff claims it is the successor-in-title of the bank, having purchased the Premises from the bank's successor, Everyday. The Premises are unregistered at present so the plaintiff's title rests on a series of Indentures of Conveyance made on 6 December 2021, between Everyday and the plaintiff ("the 2021 Conveyances"), each of which recites an agreement between the parties for the sale of the Premises in fee simple. Separate Deeds of Conveyance were executed in respect of each Unit.

23. The arguments of the Company based on the alleged lack of title of the plaintiff fall to be considered by reference to two broad issues:

(1) Whether the *"all estates clause"* in s. 76 of the 2009 Act applies so as to assign the residue of the 10,000 year term created by the mortgage, in which case the plaintiff would have an interest in possession, which would clearly entitle it to receive rents payable from any occupants who wished to enter into a landlord and tenant relationship with it.

(2) Whether the Deed of Rectification executed on 15 June 2022 could be relied upon by the plaintiff in these proceedings, given that it post-dated the issue of the summons.

I propose to deal with both issues in turn.

Whether section 76 of the 2009 Act applies

24. The first issue concerns s. 76 the 2009 Act, which replaced s. 63 of the 1881 Act, the purpose of which was to remove the need for lengthy *"all estates clauses"* from nineteenth century conveyances. Section 76 provides that, subject to the terms of the conveyance itself, a conveyance passes all the claim, demand, estate, interest, right and title which the grantor has or has power to convey in, to or on the land conveyed.

25. For the Company to resist interlocutory relief on this basis, it has to show that the conveyance is so clearly defective such that the plaintiff has not raised even a fair question to be tried. I do not think it can do that.

26. Before considering the title issues raised by the Companies, it is helpful to recall the title enjoyed by the bank and which passed to Everyday. Under the mortgage, the bank held the premises for the term of 10,000 years and the first defendant was a bare legal trustee of the legal estate in the fee simple reversion.

27. The 2021 Conveyances purported to convey the fee simple directly to the plaintiff but failed to explicitly assign the residue of the term of years created by the mortgage. In addition, the first defendant's attorney did not join in the conveyance to convey the reversion in fee simple held by the first defendant as bare legal trustee in favour of, in the first instance, the bank and, secondly, Everyday.

28. By Deed of Rectification made 15 June 2022, each of the 2021 Conveyances was rectified so as to convey the fee simple reversion, assign the residue of the term of years, and merge the leasehold in the freehold such that the plaintiff now holds it in fee simple in possession.

29. No issue has been taken by the Company as to the manner in which the first defendant's attorney joined in or executed the Deed of Rectification and the only issue raised is whether it can have retrospective effect.

30. The first issue arising is the effect of the 2021 Conveyances. If they were effective to assign a sufficient interest to the plaintiff to institute the proceedings, then the remaining issues do not arise.

31. However, there is persuasive authority that s. 63 of the 1881 Act operated to convey a leasehold interest where there is a conveyance in fee simple, but the grantor only holds a leasehold interest: see *Thelluson v. Liddard* [1900] 2 Ch. 635, 641, where a leasehold interest which had merged at common law but not in equity was held to pass under a conveyance which purported to convey the fee simple.

32. That authority therefore appears to support the proposition that s. 76 of the 2009 Act applied to the 2021 Conveyances so as to, in effect, ensure that they operated so as to assign the residue of the 10,000 year term of the mortgage by demise. Of course, this is only an interlocutory judgment, so it is not necessary to decide that, but the plaintiff has, at the very least, established a fair question to be tried as to whether the 2021 Conveyances were effectual to assign the leasehold term created by the mortgage. Indeed, had the plaintiff been required to satisfy the *Maha Lingham* test required for mandatory interlocutory relief, I think that threshold would also have been met.

33. In addition, though it was not raised at hearing, it must be recalled that the bank (and therefore Everyday) enjoyed the beneficial interest in the fee simple reversion and, in any event, the first defendant's estate or interest being confined to a bare legal estate in that reversion. I think is, at the very least, strongly arguable that s. 76 operated to vest that beneficial interest in the plaintiff also.

34. The Company cited *Cedar Holdings Ltd v. Green* [1981] Ch. 129 but that case is entirely distinguishable in my view, as it held that a beneficial interest in the proceeds of sale of land held on a statutory trust for sale was not an interest in that land for the purposes of s. 63 of the Law of Property Act 1925 which had replaced s. 63 of the 1881 Act in England and Wales and is in substantially the same terms as s. 76 of the 2009 Act. In this case, there can be no doubt that the interest in a term of years created by a mortgage by demise is an estate or interest in land within the meaning of s. 76 of the 2009 Act, such that the section is applicable.

35. The Company also argued that *Thellusson v. Liddard* had no application, as the conveyance at issue in that case did not require rectification, but I simply do not see how that follows. The whole point of s. 76 is to pass title to an estate held which the conveyance does not expressly deal with. In consequence, in many cases, it avoids the need for rectification which would otherwise be required. The fact that the parties may decide, out of an abundance of caution (nearly always the correct approach in conveyancing, where certainty is paramount) to execute a deed of rectification anyway, is beside the point.

36. The plaintiff has therefore established its title to the extent required to seek the interlocutory orders sought even without relying on the Deed of Rectification. This means that it is not necessary to decide whether the fact that the defect was not cured until after institution of proceedings is fatal to the plaintiff's case, as the Company submitted, nor is it necessary to consider whether the Deed of Rectification operated prospectively only and the related argument of the plaintiff that the Deed of Rectification pre-dated the joinder of the Company to the proceedings, so that it does not operate retrospectively so far as the Company is concerned. This does not preclude those arguments being made at trial, where, if a contrary finding is made on s 76, they may need to be determined.

37. The plaintiff has therefore met the necessary threshold for this application by demonstrating a fair question to be tried that it held, at the date of institution of proceedings, the residue of the 10,000 year term created by the mortgage together with the beneficial interest in the fee simple in reversion.

38. Nevertheless, the arguments raised about the plaintiff's title means that *Keating v. Jervis Shopping Centre Ltd.* [1997] 1 I.R. 512 (as recently reaffirmed by the Supreme Court in *McDonagh v. Clare County Council* [2022] IESC 2, para. 104) and subsequent caselaw cannot be applied. *Keating* is to the effect that where title is clear, the balance of convenience need not be considered. By contrast, it is necessary in this case to consider the balance of convenience. However, as stated at the outset, the balance of convenience in this case favours the grant of the relief.

Whether the Lease granted to the Company is binding on the plaintiff

i. The general legal position: whether the Company can show compliance with the negative pledge clause

39. The Company claims that it holds a 21-year Lease, executed on 30 January 2014. It is a less than reassuring feature of this Lease that there is considerable uncertainty about the amount of the rent reserved. This very uncertainty is important, not only because agreement as to the rent to be paid is generally regarded as an essential term of an agreement to create a lease, without which there will be no concluded agreement to create a lease or tenancy and evidence of which is required in order to enforce such an agreement, but it is a circumstance which I think is also very important in applying the principles in *N17 Electrics*.

40. *N17 Electrics* concerned a somewhat similar situation of a company connected to a borrower who was asserting a lease against a receiver appointed by a chargee of lands, and

where there was some uncertainty about the rent to be paid (though this issue of fact was apparently resolved in favour of a finding that the sum of €30,000 was the annual rather than the monthly rent and that the lease was therefore at a rent which was well below market rent). In the course of her judgment, Dunne J. reviewed authorities dating back almost to the enactment of the 1881 Act. Section 18 of the 1881 Act was a significant innovation because it varied the common law position (which is to the effect that a lease granted by a mortgagor will not bind a mortgagee) and introduced a right for a mortgagor to create a lease of mortgaged lands which would bind the mortgagee, subject to compliance with the requirements of the section. These include, it should be noted, a requirement in subs. (6) that the rent should be the best reasonably available for the lands, and given the uncertainty about the amount of the rent reserved in the Lease, there must be considerable doubt as to whether the Company could ever have relied on the power created by s. 18 in support of its assertion that the Lease granted to it was valid, had that question arisen.

41. However, as s. 18 only applies insofar as not otherwise provided by the mortgage deed, the issue at hand is the more usual one, considered also in *N17 Electrics*, which is whether the lease was properly granted by the first defendant in compliance with the mortgage covenants. Mortgages almost invariably include a negative pledge clause to the effect that no lease shall be valid unless the mortgagee gives its prior written consent and these have been held as *"providing otherwise"* so as to exclude the power conferred on mortgagors by section 18: see *ICC v. Verling* [1995] 1 ILRM 123. That was the case here, as clause 7.01 (e) of the mortgage deed provides:

> *"Not to convey transfer assign demise or let or part with the possession of the mortgaged property or any part thereof or any interest therein without the prior written consent in writing of the Bank and further and without prejudice to the generality of the foregoing not to exercise the statutory powers of leasing or agreeing*

to lease or accepting or agreeing to accept a surrender of a lease contained in Section 18 of the [1881 Act] without the prior consent in writing of the Bank."

42. The *ratio* of *N17 Electrics* is contained in para. 30 where, after referring to some of the older authorities, Dunne J. stated:

"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."

43. In applying *N17 Electrics*, it is important to recall that it restates the principles emerging from older authorities. Indeed, not only did Dunne J. explicitly base her decision on those older authorities, but she reiterated at the conclusion of her judgment that they have stood the test of time because their logic is unassailable. This she identified as follows (at para. 47):

"[N]o 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."

44. It is important, in my view, to recollect the factual situation considered in *N17 Electrics*. The primary dispute there was whether the bank had consented to the lease. The evidence was that the borrower believed he had dropped off a copy of the lease to the bank's representative and that the bank knew that the company was in possession. There was, however, a dispute as to whether the bank knew of the lease.

45. Similarly, in this case, the Company places reliance on the fact that the bank advised the first defendant to put a lease in place, and that the special conditions in the contract of sale to the plaintiff notified the plaintiff of the existence of the Lease. In fact, the contract records that the Premises are to be sold in fee simple subject to, and with the benefit of, the tenancies set out in the schedule and special condition 24.1 provides that the plaintiff has been notified of certain occupational tenancies as set out in the schedule. That schedule names the Company as the tenant in occupation of Unit 1, Unit 1A, IB, IC and IF, while naming other tenants as occupants of ID and 1E. Special Condition 24.1 expresses doubt about the basis on which the Company is in occupation of part of Unit 1 and the schedule advises that it is unknown whether a Lease is in place.

46. At para. 24 of his affidavit of 9 February 2022, the first defendant averred that the Company *"leased a large number of the units and it is the party that collects the rents at the property."* The precise units are not identified, and no Lease was exhibited. The Lease was

not specifically identified and exhibited until the first defendant swore his third affidavit on 24 February 2022. It was stamped on 13 July 2017, on the basis that the rent was €24,000 per annum. It purports to demise Unit 1, together with the yard and offices attached thereto and all ancillary buildings, for a term of 21 years from 1 July 2012. Curiously, while the typed lease reserves an annual rent of €24,000, there is a handwritten note altering the rent from €300 per week from January 2014. This would reflect an annual rent of €15,600. The Company relies on an email from the bank dated 1 December 2014 which attaches a Schedule of Commercial Tenants and Leases, in which the Company is listed as having a 21 year lease from 14 Jan 2014 at an annual rent of €14,400. It seems from the email from the Bank that they had previously received that schedule from the first defendant in May 2014 and were requesting an update as to what tenancies had been created in the various Units in the Premises. The email is also keen to impress on the first defendant that all rents received (including on buy-to-let properties which are not relevant to these proceedings) had to be lodged in a particular AIB account in order to pay down the first defendant's loans.

47. The most that could be drawn from that email at this stage is that the bank was enquiring of the first defendant as to the various tenancies in his various properties and were reliant on him for information. The information he gave was not very carefully put together as he seems to have confused the date of execution of the Lease with the date of commencement and, more importantly, he also seems to have misstated the rent.

48. On affidavit, the first defendant says that the Company *"pays €1,200 in rent"* which I take to mean per month, but of course that would have to be per lunar month as opposed to per calendar month if the reference to €300 per week is correct. There is therefore significant uncertainty about the amount of rent reserved.

49. The Company relies, perhaps most strongly, on its assertion that the bank was estopped from denying the validity of the Lease as against it, on an email of 6 March 2014, in

which the first defendant's wife, presumably in her capacity as director of the Company, forwarded a copy of the executed Lease to Mr. Philip Foley, the Head of Commercial Lending of the bank, who the first defendant says make it clear to *"us"* (it is not clear who, other than the first defendant is referred to here but I assume it is his wife) that they should put a lease in place to protect the interest of the Company. This email states:

> *"Dear Philip,*
>
> *Declan asked me to forward you a copy of the Lease between himself and Rogers Recycling Ltd. for your approval.*
>
> *Regards,*
>
> *Brid."*

50. However, no response to this email has been exhibited. It is fairly clear from the email that the Company's directors knew that bank approval was required, but there is no evidence of any such approval being forthcoming. Presumably if written consent was furnished, whether by email or in any other format, the Company would be able to produce it. The first defendant says in his fourth affidavit that he believes the bank has on file *"confirmation of the consent with the deeds but I have not been furnished with this confirmation despite making a request to them to furnish me with a copy of the consent".* The first defendant does not give the basis for that belief nor does he indicate how he made that request though presumably it was in written form, given the significance of such a request, but it has not been exhibited.

51. The first defendant also states on affidavit:

> *"I say that Allied Irish Bank plc were fully aware that I was leasing Unit 1 to [the Company] and I recently spoke with [the former Head of Commercial Lending] and he confirmed this fact to me."*

52. Apart from the hearsay nature of this averment, it in any event does not contain any evidence that the bank was anything more than aware of the existence of the Lease, as opposed to giving formal written consent to it so as to satisfy the negative pledge clause and become bound by it themselves.

53. The affidavit sworn by the first defendant on behalf of the Company, for the purposes of defending the application against it, is to substantially the same effect. This says that the executed Lease was sent to AIB in early 2014. That is already apparent from the email sent by the first defendant's wife which is set out above. It is said by the first defendant that he altered the text of the draft lease sent to him by his solicitor as it overstated the rent, that it was altered prior to execution and that AIB was sent the Lease as executed. However, an attendance from the solicitors then acting for the defendants points out that their solicitor instructed his colleague to stamp the Lease at the annual rent of €24,000, as he had not initialled the change and the first defendant *"put that in himself"*. This casts doubt on the assertion that the alteration was made prior to execution as, if it had been, the solicitor witnessing the execution of the Lease would most likely have initialled it to indicate that it was part of the document to be executed. The solicitor has in fact confirmed this by an email dated 9 May 2022, and although this is hearsay, such statement is generally admissible at this stage of the proceedings. This in turn means that it is quite possible that the Lease was executed on the basis that the rent would be €24,000 per annum and therefore it is less than clear that the copy-executed Lease sent to AIB reflected the lower rent now asserted by the defendants as having been agreed.

54. In any event, it is not clear how *prior* consent could be obtained after the Lease was executed and there must be considerable doubt as to whether AIB were advised prior to the Lease being executed, that the rent would be considerably less than that stated in the draft Lease.

55. There is also an email of 6 December 2013 from the solicitors acting on behalf of the first defendant, and seemingly also the Company, which apparently sends the first defendant a draft lease (the email doesn't specify that the attachment is a draft but as, on the defendants' case, the Lease was not executed until January 2014, it must have been in draft form), and requests the first defendant to get the consent to the Lease on behalf of the bank. This email envisages that the Lease will not be executed until after that consent is forthcoming. However, the later email from the first defendant's wife to Mr. Foley shows that the Lease was executed prior to seeking consent on 6 March 2014.

56. The Company also stresses the fact that Mr. Foley supported the applications of the Company for Waste Management Permits in 2011 and 2013, by providing, on behalf of the bank, some limited financial guarantees required for the issue of those permits.

57. I think it is reasonably clear from the documentation exhibited that the bank knew of the existence of the Company from at least 2010 and were aware that it was in occupation of Unit 1 or at least part of it, and that it was operating a recycling business from that portion of the Premises. It also seems that the bank wanted to be informed of the Lease when it was put in place but there is significant doubt as to whether it saw the manuscript endorsement reducing the rent. More pertinently, while the solicitor acting for the first defendant and the Company spoke in terms of getting the bank's consent to a draft lease, there is nothing to say it was ever given and it also seems that the alteration was made to the Lease after the draft was sent. Finally, there is nothing from the bank to say that it regarded itself as involved in a process of granting a prior written consent within the terms of the negative pledge clause, such that the Lease would ultimately become binding on it and potentially prevent it from realising its security over the Premises, as opposed to informing itself that the mortgagor was conducting himself in a way likely to produce sufficient income to continue the mortgage payments.

58. In my view, the evidence is not materially different from that in *N17 Electrics* with the only possible difference here being that the Bank seems to have known of the Lease (albeit that there is a dispute as to whether it knew of the reduced rent, which would really make its knowledge of the Lease as originally drafted irrelevant anyway). There is, therefore at least a fair question to be tried on the issue of whether the Lease is invalid as against the plaintiff. Indeed, again, had I found that the necessary threshold to be met by the plaintiff was that in *Maha Lingham*, I would have found that the plaintiff had established a strong case that it would succeed at trial in showing that the Lease was invalid for lack of prior written consent by the Bank to the grant of the Lease.

59. In *N17 Electrics*, Dunne J. approved this passage from the judgment of Monroe J. in *In re O'Rourke's Estate* (1889) 23 L.R. Ir. 497, 500-501:

> *"I take it that the law on this subject is free from all manner of doubt. A lease made by a mortgagor, subsequent to the mortgage, and not coming within the provisions of [the 1881 Act] ... is absolutely void as against the mortgagee. He can treat the tenant as a trespasser, and evict him without notice. It is open, however, to the mortgagee and the tenant by agreement, express or implied, to create a new tenancy; and the question which always arises is the mere question of fact, whether such an agreement has been made in the particular case. If the mortgagee enters into the receipt of the rents and continues to take them from the tenants, this is almost conclusive evidence of an agreement between the mortgagee and the tenant for a new tenancy from year to year on the terms of the old tenancy; or, if the mortgagee serve notice on the tenant, requiring him to pay his rents direct to the mortgagee, and the tenant do not dissent, these are facts from which a jury may, and probably ought, to infer the existence of such a contract of tenancy ...* ." [Emphasis added.]

60. I highlight that passage because it seems to state that the mortgagee may become bound by the lease or tenancy if it agrees to enter into a landlord and tenant relationship - the demand and receipt of rent being, as always in these matters, one of the most important indicia of such an agreement. But the key fact is whether there has been agreement by the mortgagee to be so bound: if it does, then a relationship of landlord and tenant directly between the mortgagee and the tenant is created. Mere knowledge that the mortgagor has entered into a relationship himself is insufficient.

61. However, nothing like that is asserted in this case. Knowing that there is a relationship of landlord and tenant between mortgagor and his tenant is not the same as agreeing to enter into such a relationship directly with the tenant, and there is nothing in the various lengthy affidavits filed to demonstrate that the bank did anything other than let the first defendant enter into his own arrangements with the Company and keep itself informed of what these were, or at least attempt to do so. As explained later on in the same passage by Monroe J.:

> *"The mortgagor, while in possession, and bound to keep down the interest on his mortgage, is at liberty to manage the lands as he pleases. It is not for the mortgagee to interfere with that management unless he choose to go into possession. He treats the tenancy as one binding on the mortgagor, but in no way binding upon himself if he find it afterwards for his interest to repudiate it."*

62. Consistent with that view, the lease was held in *In re O'Rourke's Estate* to be void as against the mortgagee even though he had seen the tenancy in the list of rentals, knew the tenant was in occupation, knew the tenant was paying rent, and probably assumed that the rent was being used to repay the loan secured by the mortgage. It was found to be clearly insufficient, as a matter of law, that the mortgagee did not disavow the tenancy created by the mortgagor, and this followed from the necessity at common law of showing that the mortgagee had agreed to the creation of a new tenancy between the tenant and the mortgagee.

63. If a tenant, such as the Company in this case, cannot show an agreement by the mortgagee to itself enter into a lease or tenancy, for which mere knowledge is plainly insufficient, there are other ways in which a mortgagee can be bound.

64. The first, if of course it is not excluded, is by creation of a lease in accordance with s. 18, but to do that, as was argued in *N17 Electrics*, the lease has to comply with the requirements of s. 18, including subs. (6), by reserving the best price reasonably obtainable. Here, on the evidence, it is difficult to see how the Company could be said to have proved this so clearly at this stage that it could be said there is no fair question to be tried and that the Lease is plainly binding on the plaintiff. The very fact that there is uncertainty about how much the rent costs must mean that this did not occur, so it is difficult to see how the mortgagor enjoyed the power to enter into this Lease.

65. Of course, my view on s. 18(6) is *obiter*, as there was a negative pledge clause. The evidence referred to above was relied upon to show that the bank might be estopped in some way, but no prior written consent was produced. The whole point, of course, of providing that the consent should be written is to avoid uncertainty as to whether or not the bank had consented and therefore to avoid disputes as to whether consent had been given. If the consent has to be in writing, then the written record of that consent can be produced. Therefore, even if the plaintiff had to show a strong case likely to succeed at trial, I would find that the plaintiff had met that threshold on the issue of whether the lease was presumptively invalid against it.

66. Counsel for the Company correctly points out that, even though the negative pledge clause provides for *prior* written consent, the mortgagee could become bound by agreeing later, and on this issue, I was referred to para. 2.175 of Woodfall on Landlord and Tenant, (2022), which cites *Webb v. Austin* (1844) 7 Man. & G. 701. As is obvious from the fact that the cited authority is pre-1881, that reflects the common law position which is that a

purported lease by a mortgagor operates by way of estoppel only, that is, an estoppel in favour of the tenant, because the mortgagor has no power at common law, acting without the agreement of the mortgagor, to grant a lease. However, if the mortgagee subsequently agrees to execute the deed necessary for a valid lease, that estoppel will be *"fed"*, and the lease will be valid at common law. That case is cited in a discussion of joint leases by mortgagor and mortgagee and, while the precise deed to be executed by the mortgagee is not identified in the report, it appears simply to be authority for the view that the mortgagee can, subsequent to the grant of a lease which does not bind the mortgagee, subsequently make good the title to make it valid at common law. The authors of Woodfall seem to assume that this would be a deed whereby the mortgagee would be joint lessor with the mortgagor.

67. This case, therefore, does not assist the Company as there is absolutely no evidence of any later agreement by the bank to become joint lessor with the first defendant. Its only relevance to the proceedings, in my view, is to reiterate that the Lease is invalid but enforceable as an estoppel by the Company against the first defendant (but not the bank or its successor in title, the plaintiff).

68. Finally, there is the possibility that an estoppel arises against the mortgagee which was also considered in *N17 Electrics*. While legally distinct from the issues of whether a mortgagee agreed to enter into a tenancy directly with the tenant and whether the mortgagee had given prior written consent to the lease or tenancy, the facts and circumstances material to the consideration of a submission that a mortgagee is estopped from disputing the validity of the tenancy are, of course, the same as those considered for the purposes of determining those separate legal issues.

69. Dunne J. was of the view that mere knowledge that a tenant was in occupation and that the rent was being used by the mortgagor to make repayments on the loan was insufficient to create an estoppel. The argument was made that there was evidence that the

bank was encouraging the mortgagor to put a formal lease in place. However, it was held that it was unlikely that the bank would ever have consented to the lease as purportedly granted. Various reasons for this are set out in the judgment (at para. 47), including the fact that the lease could hardly be said to be on commercial terms as it referred to a number of separate properties, reserved a rent which seems to have been well below market rates, and failed to provide for any of the usual covenants that one would find in a commercial lease.

70. The Company relies heavily on the statement of Ó Raifeartaigh J. at para. 70 of *Kennedy v. O'Kelly*:

> *"My interpretation of [N17 Electrics] 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…."*

71. The Company stressed the opening sentence of that passage but, in my view, has overlooked the significance of the remainder of it. What is required in order to demonstrate that the mortgagee will be bound is, generally, evidence of an agreement by the mortgagee to enter into a landlord and tenant relationship.

72. Absent an agreement by the bank to enter into a landlord and tenant relationship, the Company has to bring itself within the concept of estoppel more generally (as opposed to tenancy by estoppel). Counsel relied on *Tennant v. Reidy* [2022] IECA 137 which is a recent

example of a discussion of the principle of proprietary estoppel which can operate to prevent a property owner from insisting on his or her strict legal rights where, to adopt the summary by the Court of Appeal of the judgment of Edwards J., in *An Cumann Peile Boitheimeach Teoranta v. Albion Properties Ltd.* [2008] IEHC 447, there must be *"detriment ... expectation or belief ... encouragement ... [and] ... no bar to the equity"* with approval. However, no submission as to how these features could be said to be present in this case was made. In any event, I think it could hardly be said that there is no fair question to be tried on the issue of whether the plaintiff is bound by an estoppel said to arise against its predecessor-in-title, the bank. The existence of such an estoppel could hardly be said to clearly arise at this stage. The complex issues involved in assessing a claim in estoppel will fall for determination at full hearing and cannot be resolved here.

73. The plaintiff has therefore raised a fair question to be tried, and indeed a strong case likely to succeed at trial, that the Lease is not binding on it.

ii. Whether the Lease is a "fiction"

74. The primary argument of the plaintiff was, in fact, that the entire Lease was a fiction, that the Company was not in occupation at all, and that the sub-tenants were sub-tenants of the first defendant.

75. There is also significant doubt as to whether the Company was in continuous occupation under the Lease or whether it ceased trading and ceased occupation of Unit 1. A receiver appointed by the bank appears to have been appointed in 2017 and appears subsequently to have entered into possession of at least part of the premises.

76. However, it is asserted that, in January 2020, the Company invested in shipping containers and commenced *"the storage business"* which seems to mean sub-letting the containers. From para. 13 of his fourth affidavit, it appears that the Company only did this

"after the receiver had abandoned the units", which suggests that the receiver in fact re-entered the entirety of the Premises, and the Company simply stepped into the vacuum in early 2020. The plaintiff claims that the fact that the Company was struck-off the register in 2018 is deemed to be a forfeiture, but I think this is most likely a misinterpretation of clause 7 of the Lease, which entitles the first defendant to re-enter on the happening of certain events which do not in fact appear to include a strike-off. In any event, there would have to be evidence of such re-entry. Again, this will have to be explored at full hearing, but it is certainly not at all clear at this stage that the Lease was determined on the basis of clause 7.

77. The sum allegedly invested by the Company is not identified, there is no corroborating documentation, and perhaps most importantly, there is no explanation as to why the Company proceeded to do this when its directors were well aware that a Receiver had been appointed (and, it seems, had entered into possession of at least part – if not all – of the Premises) and that exercise of the power of sale was a possibility.

78. It is accepted by the first defendant that at least one of the alleged sub-tenants of the Company paid rent directly to the Receiver. It is asserted that this was just convenient, because the Company had to make payments to the Receiver anyway. That may be so but, at the interlocutory stage, it must equally be borne in mind that direct payments of this kind were made to the receiver, who presumably received them as agent of the first defendant so as to pay them over to the bank. This is consistent with a landlord and tenant relationship between the sub-tenant and the first defendant, rather than the Company.

79. It also seems to be acknowledged by the first defendant that the Company did not pay rent to him, as he refers to the rent from the sub-tenancies being used by the Company to invest in the containers, which suggests that the Company has not in fact been paying rent to him in his personal capacity. Indeed, in her reply to the email of 1 December 2014 from AIB, the first defendant's wife appears to represent to AIB that Unit 1E was let directly by the first

defendant and not by the Company. This is consistent with the fact that it appears that the occupier of Unit 1E paid rent to the receiver during the receivership. However, it is inconsistent with the Company holding a Lease over Unit 1.

80. The plaintiff also asserts that other alleged sub-tenants in fact pay rent directly to the first defendant and the first defendant has acknowledged that rent was paid by the sub-tenants directly to him rather than to the Company, in that he accepts that the sub-tenants were already in occupation and paying rent to him when the Lease was granted to the Company.

81. The plaintiff also relies on the fact that the Company has covenanted, at clause 5.30 of the Lease, not to sublet Unit 1 other than as a single unit while the first defendant says that he, as landlord, consented to the subletting of Unit 1 to various subtenants. The plaintiff says this is further evidence that the Company was not in occupation of Unit 1 as lessee of the first defendant. I would comment in passing that the possibility of subsequent variation of the terms of the Lease by the parties to it is, of course, another factor justifying the common law position that a mortgagee is not bound by a lease granted by the mortgagor. It is also inconsistent with the alleged prior consent of the bank to the arrangements between the first defendant and the Company, given that they appear to have been altered subsequently on an informal basis.

82. In light of all of the above, the primary basis on which the plaintiff says the entire Lease is a fiction, designed to prevent it from occupying its own property. These matters will all have to be examined more fully at substantive hearing, but I think the facts as averred by the first defendant, on their face, demonstrate a fair question to be tried as to whether the Company has been, at all material times, in occupation of the Premises on foot of the Lease.

Conclusion on arguments as to whether the Lease is binding on the plaintiff

83. I think the plaintiff has raised, at the very least, a fair question to be tried on the issues surrounding the validity of the Lease purportedly granted to the Company. There is a fair issue to be tried as to whether the Company has been in occupation at all for the last few years and as to whether the sub-tenants are, in reality, sub-tenants of the first defendant. There is also a fair question to be tried as to whether the bank gave its prior written consent to the grant of the Lease, as opposed to simply knowing it was granted in 2014. It was not asserted that the bank had entered into a direct landlord and tenant relationship with the Company and the basis on which the essential elements of estoppel could be found to exist was never clearly articulated by the Company.

Conclusion for the application for interlocutory relief

84. The corollary of the Lease being invalid would be that the plaintiff is entitled to the rents and profits of the premises, including the monies paid by the sub-tenants. As owner in fee simple (or of a term of years vested in possession), the plaintiff would be entitled to enter into tenancy agreements with sitting tenants, which is what it sought to do after the sale to it closed. However, the evidence is that, insofar as the plaintiff has attempted to do this, the first defendant, acting either on his own behalf or in his capacity as director of the Company, has disputed its entitlement to do so and sought to prevent it from entering into such agreements and from collecting rent. Had the first defendant not so acted, I think it is probable that, by this time, the plaintiff would have entered into direct leases or tenancies with those tenants.

85. If the plaintiff shows at trial that it has title and if it is found that the Lease is invalid, then the plaintiff will have been deprived of the opportunity of receiving those rents from 7 December 2021 to date of trial and, therefore, those sums will quite possibly represent a loss to the plaintiff.

86. As already stated, the balance of convenience favours the collection of rent by the plaintiff and its retention by the plaintiff's solicitors pending trial. I will hear the parties on the precise order to be made, as well as on the appropriate directions to be made at this stage so as to ensure that the proceedings come to trial as soon as is reasonably possible.