APPROVED **[2023] IEHC 309**

THE HIGH COURT

2022 No. 194 SP

BETWEEN

JAMES ANDERSON
PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFFS

AND

DAVID FITZGERALD
HELEN FITZGERALD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 June 2023

INTRODUCTION

1. The within proceedings seek to recover possession of lands pursuant to a charge registered under Section 62 of the Registration of Title Act 1964. This judgment is delivered in respect of an application to adjourn the proceedings pending an adjudication by the Residential Tenancies Board. The application to adjourn is moved by the second defendant. The second defendant submits that she has the

benefit of a tenancy under Part 4 of the Residential Tenancies Act 2004 and that the tenancy can only be lawfully terminated by the service of a valid notice of termination. No such notice has been served. The second defendant has made a referral to the Residential Tenancies Board and submits that the within proceedings should be adjourned pending an adjudication on that referral.

2. The adjournment application presents the following issue of principle: whether jurisdiction to determine the validity of the supposed tenancy lies with the High Court or with the Residential Tenancies Board ("*RTB*"). The resolution of this issue requires consideration of the nature of the RTB's statutory jurisdiction under Part 6 of the Residential Tenancies Act 2004.

PROCEDURAL HISTORY

3. The within proceedings were instituted by way of special summons on 27 October 2022. The principal relief sought in the proceedings is that the defendants deliver up possession of certain lands to the plaintiffs.

4. The second plaintiff is the registered owner of a charge in respect of the lands under Folio 32609 F, County Clare ("*the mortgaged property*"). The entry on the folio recording the second plaintiff's ownership of the charge is dated 12 September 2019. The charge had originally been in favour of ACC Bank plc. The charge had been created prior to 1 December 2009, and, accordingly, these proceedings benefit from the saver under the Land and Conveyancing Law Reform Act 2013.

5. The first plaintiff asserts that he has been appointed as a receiver over the mortgaged property by the second plaintiff in the exercise of its powers under the deed of mortgage and charge.

6. The first and second defendants are brother and sister. The first defendant is the registered owner of the mortgaged property. It is alleged that the first defendant created a tenancy over the mortgaged property in favour of his sister, i.e. the second defendant, on 1 December 2015. A copy of what purports to be a tenancy agreement has been exhibited. The supposed tenancy is stated to be for a period of seven years. The supposed tenancy has not been registered with the Residential Tenancies Board.

7. The second defendant avers that she did not pay any rent for the first fourteen months of the term of the supposed tenancy, but that thereafter she had paid rent directly to her brother for a period of approximately four or five years. The second defendant further avers that on or about 30 November 2021 she had been provided with a bank account number of "*a company called Newgrange and directed to pay the rent to that company in place of*" the first defendant. The identity of the person giving these directions has not been disclosed in the grounding affidavit. The second defendant avers that she has paid "*rent*" into this bank account since that date. The second defendant has exhibited her personal bank statements showing monthly payments of €600 from 2 December 2021 onwards. The narrative on these bank statements describes the payment as "**MOBI RENT*". It is not apparent whether the same narrative appears on the payee's bank account. It is asserted on behalf of the second defendant that the making of these monthly payments has given rise to a tenancy as between her and "*Newgrange*".

8. The plaintiffs refute this interpretation of events. It is submitted on their behalf that the deed of mortgage and charge contains a covenant against the creation of any leases without the prior written consent of the lender, i.e. a so-called

"*negative pledge clause*". It is further submitted that the bank account to which monies have been remitted by the second defendant is an account that is held and maintained by Pepper Finance Corporation (Ireland) DAC and not any other entity. The account is denoted by the name "*PFCI Newgrange EUR Collections*". The narrative of payments made to this bank account includes a reference to the first defendant's loan account. A statement in respect of the first defendant's loan account has been exhibited and this shows that the monthly payments of €600 have been credited against the outstanding debt. Accordingly, it is submitted that such payments have been applied in reduction of the debt outstanding under the loan account and are not properly characterised as a form of rent. It is denied, therefore, that any tenancy can have arisen, whether by way of a tenancy by estoppel or otherwise.

APPLICATION TO ADJOURN

9. The second defendant issued a motion on 24 February 2023 seeking to adjourn the within proceedings pending an adjudication by the Residential Tenancies Board. An application for a mediation had been submitted to the RTB on behalf of the second defendant in January 2023. Thereafter, the second defendant successfully sought to change the application to one for an adjudication (rather than a mediation).

10. The nature of the dispute in respect of which an adjudication is sought is summarised as follows in the application form lodged with the RTB:

> "Original tenancy entered into on 01/12/2015 with my brother David Fitzgerald. On 30/11/21 I was told that Newgrange were taking over and I was to pay rent to their bank account which I did. Without even serving a notice on me to terminate the lease even though I am a tenant and entitled to continuing tenancy, Pepper who are the agents of

> Newgrange brought court proceedings against me to seek possession, ignoring my lease. I am seeking to continue my lease for another 6 years and deny that either Pepper or Newgrange are entitled to evict me or to take possession. I understand from a letter received by my brother that his loan was sold to Otterham in December […]"

11. The identity of the supposed landlord is not readily apparent from the application form: reference is made variously to "*Pepper*", "*Newgrange*" and "*Otterham*". In this regard, the RTB raised a query by emails dated 3 April and 11 April 2023. The RTB official described the language used in the application form as "*ambiguous*" and sought confirmation of the identity of the landlord.

12. The RTB appears to have taken the view that this query was not responded to within the 30 day period specified, and, accordingly, the RTB closed its case in relation to the matter: see letter dated 9 May 2023 from the RTB to the second defendant's solicitors. The letter closing the case indicated, however, that the case would be reopened if the requested documentation was provided within 30 days.

13. It is suggested in the affidavit filed on behalf of the second defendant on 16 June 2023 that the additional information sought had been provided to the RTB within the 30 days allowed under the letter of 9 May 2023. As of the date of this judgment, however, there is no evidence of any formal confirmation from the RTB to the effect that it has reopened its case file in respect of the request for adjudication. For the purpose of this judgment only, I am prepared to assume, without deciding, that the application for adjudication has been reactivated.

14. The motion to adjourn these proceedings was heard on 12 June 2023 and judgment was reserved for one week, i.e. to today's date. In circumstances where the correspondence with the RTB, which had been exhibited on behalf of the second defendant, was incomplete, the second defendant was given liberty,

at the conclusion of the hearing, to file a further affidavit by 16 June 2023 exhibiting the following three items: (i) a copy of the application for an adjudication (as opposed to a mediation); (ii) a complete set of the correspondence with the RTB; and (iii) any further communication received in the interim from the RTB confirming that the case file had been reopened. It was explained to the parties that the oral hearing on the motion had concluded and that no further submissions would be entertained.

15. An affidavit was duly filed on 16 June 2023. As to item (i), it has been confirmed that a *second* application was not submitted as such; rather, the RTB was requested to treat the original application for a mediation as an application for an adjudication instead. As to item (ii), a fuller set of the correspondence with the RTB has now been exhibited. As to item (iii), no such confirmation has yet been received.

16. The affidavit goes further, however, and exhibits an incomplete set of email correspondence between the first defendant's financial advisor and the first plaintiff's office during the period October 2021 to November 2021. This correspondence is in relation to a (then) proposal by the first defendant to redeem the loan owing to the second plaintiff by selling certain properties. There is reference in the correspondence to "*the tenant*" and to the payment of "*rent*". This correspondence, it is alleged, confirms that a tenancy agreement had been entered into with the second defendant by the receiver.

17. With respect, it is impermissible for the second defendant to attempt to adduce this further evidence now in circumstances where the hearing of the motion had concluded on 12 June 2023 and judgment had been reserved. The court had, very unusually, given liberty to file an affidavit *post-hearing* to address a number

of apparent omissions from the exhibits. This concession was intended to allow the second defendant to put her existing exhibits into proper order. The three items to be addressed in the affidavit were clearly identified by the court.

18. The additional material actually adduced goes well beyond what was allowed by the court. If and insofar as the second defendant wished to rely on this material, she should have exhibited same as part of her grounding affidavit at the time she issued the motion to adjourn. The same solicitor acts for both defendants so the email correspondence from 2021 should have been available to her before now. No proper context has been provided for the additional material: the email correspondence appears to be incomplete; mention is made to various telephone conversations and virtual meetings, but no narrative is provided as to what was discussed during the course of same; and there is no explanation provided as to why the proposal to redeem the loan was not ultimately pursued. It would be unfair to the plaintiffs to allow this material in now in relation to the motion in circumstances where the hearing has concluded, and they never had an opportunity to respond to same.

19. If and insofar as the second defendant wishes to rely on this material at the substantive hearing of these proceedings in due course, she may apply for liberty to file a proper affidavit, subject always to the plaintiffs being afforded an opportunity to reply.

RELEVANT CASE LAW

20. The leading judgment on the status of a tenancy which has been created in breach of a negative pledge clause is that of the Court of Appeal in *AIB plc v. Fitzgerald*

[2022] IECA 286. The position in respect of a pre- 2009 mortgage/charge is summarised as follows at paragraph 44 of the judgment:

> "(1) The general principle is that a lease which has been granted to a third party without the consent of a mortgagee, where required, enjoys a hybrid status. As between the mortgagor and the third party, the mortgagor cannot rely upon his own default and is precluded from denying the lease. However, as between the mortgagor and the third party, the lease is void. There is no relationship of landlord-and-tenant as between the mortgagee and the third party and the latter cannot rely on the existence of a lease between himself and the mortgagor to resist complying with an order for possession in favour of the mortgagee.
>
> (2) The decision in *N17 Electrics Ltd* concerns the question of whether or not a tenancy *exists* as between the mortgagor and tenant. It focuses in particular on the state of knowledge and/or actions of the mortgagor in the context of assessing whether the mortgagor may subsequently have 'opted in' to the tenancy despite the absence of written consent in accordance with the mortgage at the time of the creation of the lease. However, the decision does not concern the separate and distinct issue of the *termination* of a tenancy.
>
> (3) The requirements as to notice of termination in the 2004 Act apply where a tenancy is in existence. Logically, they do not apply where there is no tenancy between the parties. In circumstance where no tenancy exists as between a mortgagor and a third party by reason of principle (1) above, the provisions of the 2004 Act do not apply even if the third party's agreement with the borrower/mortgagor would be classified as a residential tenancy. To suggest that the mortgagor is required to give notice in accordance with the 2004 Act is to reverse the correct sequence of questions: (i) Is there a tenancy? (ii) If so, what notice of termination must be given if it is a residential tenancy under the 2004 Act? It is only if the first question is answered in the affirmative that one proceeds to the second question. In the present context, *N17 Electrics Ltd* and the authorities referred to therein answer the first question in the negative and therefore the provisions of the 2004 Act simply do not apply. The appellant did not acquire any interest in 2002 which can be asserted as against the Bank, whether as tenant in common or otherwise."

DISCUSSION AND DECISION

21. The second defendant seeks to resist the claim for an order for possession on the basis, first, that she has the benefit of a tenancy pursuant to Part 4 of the Residential Tenancies Act 2004, and, secondly, that the tenancy has not been validly terminated. It will be necessary, therefore, for some tribunal—to use a neutral term—to determine whether there is a valid tenancy in existence. This will require, *inter alia*, consideration of the implications of the negative pledge clause contained in the deed of mortgage and charge, and of whether the payments made to Pepper Finance Corporation (Ireland) DAC can be said to have given rise to a tenancy by estoppel.

22. The adjournment application thus presents the following issue of principle: whether jurisdiction to determine the validity of the supposed tenancy lies with the High Court or with the Residential Tenancies Board. The resolution of this issue requires consideration of the nature of the RTB's statutory jurisdiction.

23. The RTB's jurisdiction over disputes is conferred by Part 6 of the Residential Tenancies Act 2004. This jurisdiction is, in certain circumstances, an exclusive jurisdiction, i.e. it operates to oust parallel proceedings before the courts. This is provided for under Section 182 of the Act as follows:

> "(1) On and from the commencement of Part 6, proceedings may not be instituted in any court in respect of a dispute that may be referred to the Board for resolution under that Part unless one or more of the following reliefs is being claimed in the proceedings—
>
> (a) damages of an amount of more than €20,000,
>
> (b) recovery of arrears of rent or other charges, or both, due under a tenancy of an amount, or an aggregate amount, of more than €60,000 or such lesser amount as would be applicable in

> the circumstances concerned by virtue of section 115(3)(b) or (c)(ii).
>
> (2) In this section 'dispute' has the same meaning as it has in Part 6."

24. It is apparent from the provisions of Part 6 of the Residential Tenancies Act 2004 that the RTB's jurisdiction is confined to disputes in relation to tenancies or terminated tenancies. It is a condition precedent to the RTB's jurisdiction that there either be a tenancy in existence or that there had been a tenancy and a dispute arises as to whether it has been validly terminated. This is evident from the wording of Section 76(1) of the Act which describes the right to refer disputes as follows:

> "Either or both of the parties to an existing or terminated tenancy of a dwelling may, individually or jointly, as appropriate, refer to the Board for resolution any matter relating to the tenancy in respect of which there is a dispute between them."

25. Section 76(3) of the Act provides as follows:

> "The landlord may refer to the Board for resolution any matter relating to a dwelling in respect of which there is a dispute between the landlord and another, not being the tenant but through whom the other person claims any right or entitlement."

26. Both of these provisions presuppose the existence of a valid tenancy (albeit that the tenancy may since have terminated). The RTB has jurisdiction to determine a "*dispute*" between a landlord and a tenant, including a dispute in relation to the termination of their tenancy. The RTB does not have jurisdiction to determine conclusively the question of jurisdictional fact as to whether a valid tenancy ever existed.

27. It is a principle of administrative law that an inferior tribunal, such as the Residential Tenancies Board, does not have jurisdiction to determine its own

jurisdiction. To elaborate: the RTB has been entrusted, under the Residential Tenancies Act 2004, with the determination of disputes in relation to tenancies and expired tenancies. The nature of the disputes which the RTB can determine is indicated by the non-exhaustive list at Section 78 of the Act. These disputes include, *inter alia*, disputes in respect of the rent payable and disputes in respect of the validity of the termination of the tenancy.

28. There is nothing in the Act which suggests that the RTB has exclusive jurisdiction to decide whether or not a valid tenancy ever existed. Rather, the legislation treats the existence of a tenancy as a condition precedent to the RTB's jurisdiction. Put shortly, the existence of a tenancy is a condition precedent or a jurisdictional fact.

29. In circumstances where there is a dispute between the parties to a referral as to whether a tenancy ever existed, the RTB may, for pragmatic reasons, be prepared to form a view—to use a neutral term—in relation to the existence or otherwise of a tenancy. If the RTB is of the view that no tenancy ever existed, then it should decline jurisdiction in accordance with the procedure prescribed under Section 84 of the Act. If, conversely, the RTB is of the view that a tenancy does or did exist, then it may be prepared to embark upon the adjudication.

30. Crucially, however, the RTB's view in this regard cannot be final and conclusive. If the RTB were mistakenly to assume jurisdiction in a case where the factual circumstances did not give rise to a tenancy, this would represent an error of law on its part. For example, the relevant premises may have been occupied pursuant to a caretaker's agreement rather than a tenancy. The same logic applies where a supposed tenancy is invalid because it has been created in breach of a negative pledge clause in a deed of mortgage and charge. The RTB

cannot, by its own error, expand upon its own jurisdiction; rather, its competence is confined to the statutory jurisdiction conferred upon it by the legislature.

31. It follows from the principle that the Residential Tenancies Board does not have *exclusive jurisdiction* to determine whether, in a particular set of circumstances, a residential tenancy exists, that the High Court's full original jurisdiction to determine such issues is not ousted. The provisions of Section 182 of the Residential Tenancies Act 2004 are not, therefore, engaged.

32. As observed by the Court of Appeal in *AIB plc v. Fitzgerald* [2022] IECA 286, the question of whether or not there is a valid tenancy must be determined first, prior to any question arising as to whether there has been compliance with the requirements of the Residential Tenancies Act 2004. The resolution of this issue requires consideration of matters well outside the expertise of the Residential Tenancies Board. For example, on the particular facts of the present case, it requires consideration of issues such as the effect of the negative pledge clause. It will also require consideration of the concept of a tenancy by estoppel. Moreover, the resolution of such a dispute will typically involve the rights of third parties: the dispute will usually be whether a tenancy, which has been agreed between the supposed landlord and tenant, is valid as against a charge holder.

33. In summary, the High Court retains jurisdiction to determine whether the second defendant can assert a tenancy which is binding against either of the plaintiffs. The High Court does not have to cede jurisdiction in this regard to the Residential Tenancies Board.

CONCLUSION AND PROPOSED FORM OF ORDER

34. For the reasons set out herein, the jurisdiction to determine the issues raised by the second defendant lies with the High Court and not with the Residential Tenancies Board. Accordingly, the application to adjourn the proceedings pending the adjudication of the dispute referred to the Residential Tenancies Board is refused. The parties should bring this judgment to the attention of the RTB.

35. As to the costs of the motion, my *provisional* view is that the plaintiffs, having been entirely successful in resisting the application to adjourn, are entitled to recover the costs of the motion as against the second defendant. If the second defendant wishes to contend for a different form of costs order than that proposed, she will have an opportunity to do so when this case is next listed for directions.

36. Given that the adjournment application has been refused, the proceedings should now be readied for hearing. I will hear further from counsel as to what procedural steps remain outstanding.

Appearances

Paul Brady for the plaintiffs instructed by OSM Partners LLP
Ronnie Hudson for the defendants instructed by Maxwell Mooney & Company

Approved Garrett Simons