



UNAPPROVED

THE COURT OF APPEAL

CIVIL

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 Mr Justice Maurice Collins delivered on the 22nd day of October,

2020

1. I have read the judgment of Ní Raifeartaigh J. and I agree with it and with the order that she proposes. I have some brief observations of my own on the appeal.
2. No challenge was made in this appeal to the line of authority of which the decision of the High Court in *Fennell v N17 Electrics Ltd (in liquidation)* [2012] IEHC 228, [2012] 4 IR 634 is perhaps the best known. There, Dunne J held that where the mortgagor of mortgaged property is required to obtain the consent of the mortgagee before creating a lease in respect of that property, any lease entered into without the mortgagee's consent will generally not be binding as against the mortgagee. For convenience, I will refer to this as the principle in *Fennell v N17 Electrics Ltd (in liquidation)* though, as is evident from the judgment of Dunne J, the jurisprudence goes back almost as far as the enactment of the Conveyancing Act in 1881.
3. Here, clause 11(1) of the mortgage contains an express covenant on the part of the mortgagor - the Defendant in these proceedings - not to let the mortgaged property "*without the prior consent in writing of [Irish Nationwide Building Society].*" It is not suggested that the Irish Nationwide Building Society or its successors in title ever gave their "*prior consent in writing*" to the letting of the mortgaged property to the Notice Party, Ms McGuinness, and it follows from *Fennell v N17 Electrics Ltd (in liquidation)* that any such letting is presumptively void as against MARS Capital Ireland Limited (MARS) – and against Mr Kennedy, the receiver appointed by MARS ("*the Receiver*") - whatever may be the position as between the Defendant and the Notice Party.
4. It is clear from *Fennell v N17 Electrics Ltd (in liquidation)* that there may be circumstances in which a mortgagee will be bound by a letting, notwithstanding the

fact that it was entered into in breach of a negative pledge clause such as that in clause 11(l) of the mortgage here. However, I agree entirely with Ní Raifeartaigh J's analysis of the evidence on this issue and the conclusion that she has reached. Indeed, in light of the terms of the Notice Party's correspondence with the Receiver, which is set out in detail by Ní Raifeartaigh J, and in light also of the fact that the Notice Party vehemently rejected the invitation to pay rent to the Receiver, it appears to me to border on the perverse to suggest that MARS (or the Receiver on its behalf) has somehow become bound to the letting of the mortgaged property to the Notice Party and/or is estopped from denying the validity of that letting (the terms of which, as Ní Raifeartaigh J observes, the Notice Party has elected not to disclose, a striking and singular feature of these proceedings in my view).

5. In truth, such an argument was not advanced to any significant extent on behalf of the Notice Party. Rather, the primary argument made on appeal was that the principle of law established by decisions such as *Fennell v N71 Electrics Ltd (in liquidation)* simply had no application to residential tenancies. That, it was said, followed from the provisions of section 59 of the Residential Tenancies Act 2004 (as amended) ("*the 2004 Act*"). Section 59 provides as follows:

"Subject to section 60, neither –

(a) any rule of law, nor

(b) provision of any enactment in force immediately before the commencement of this Part

which applies in relation to the termination of a tenancy (and, in

particular, requires a certain period of notice or a period of notice ending on a particular day to be given) shall apply in relation to the termination of a tenancy of a dwelling.”

6. Section 59 is found in Part 5 of the 2004 Act, the purpose of which is “*to specify the requirements for a valid termination by the landlord or tenant of a tenancy of a dwelling ..*” (section 57) and section 59 is clearly intended to exclude all pre-existing rules that apply to termination of a tenancy, particularly (though not limited to) those relating to the periods of notice required for a valid termination.
7. Counsel for the Notice Party argues that section 59 excludes the application of *Fennell v N11 Electrics Ltd (in liquidation)* and that, before MARS or the Receiver appointed by it could validly terminate the Notice Party’s tenancy in the mortgaged property, they are required to serve a valid notice of termination in the form provided for in Part 5 of the 2004 Act, on one of the grounds specified in section 34 of the Act.
8. It is neither necessary nor appropriate to express a definitive view on that argument in an appeal in an interlocutory injunction application. What this Court is required to be satisfied of, if it is to uphold the decision of the High Court (McDonald J), is that the Receiver has demonstrated that he has a “*strong case*” that is likely to succeed at trial that he is entitled to possession of the mortgaged property and entitled to deal with the property without reference to any purported tenancy between the Defendant and the Notice Party.

9. In this context, I consider that the Receiver has indeed established a “*strong case*” that he is entitled to take possession of, and deal with, the mortgaged property on behalf of MARS (because any letting of the property was in breach of clause 11(1) of the mortgage) and that such entitlement is unaffected by the provisions of Part 5 of the 2004 Act.

10. The argument that Part 5 constrains the receiver rests on the contention that the receiver (and/or MARS) on the one hand and the Notice Party on the other are in a relationship of landlord and tenant. But it follows from *Fennell v N17 Electrics Ltd (in liquidation)* that, as a matter of general principle, a letting entered into by a mortgagor and a third party in breach of a negative pledge clause in the mortgage does not give rise to any relationship of landlord and tenant between the third party and the mortgagee. That being so, it does not seem to me that the principle in *Fennell v N17 Electrics Ltd (in liquidation)* is properly characterised as a rule of law “*which applies in relation to the termination of a tenancy*” any more than section 18 of the Conveyancing Act 1881 can properly be characterised as a provision of an enactment having such application. *Fennell* is not concerned with the *termination* of any tenancy by the mortgagee; rather it is concerned with the distinct issue of whether a tenancy entered into by a mortgagor, in breach of a negative pledge clause, affects the rights of the mortgagee, and in particular its rights of recourse to the mortgaged property as security: see *Fennell*, at paragraph 47. Put another way, the effect of the principle in *Fennell* is to preclude the *creation* of a tenancy relationship

between mortgagee and third party, rather than providing for the subsequent *termination* of such relationship.

11. The argument that, in enacting Part 5 of the 2004, the Oireachtas intended to abrogate the principle in *Fennell v N17 Electrics Ltd (in liquidation)* appears to me to be inherently implausible. Had the Oireachtas intended to change the law in this area, one would expect that it would do so in clear terms: see, by way of illustration, *Minister for Industry & Commerce v Hales* [1967] IR 50. That is not to suggest that the principle *Fennell v N17 Electrics Ltd (in liquidation)* is beyond legislative reform. Clearly it is open to the Oireachtas to legislate in this area and it has in fact done so in the Land and Conveyancing Law Reform Act 2009.

12. That Act repealed (*inter alia*) many of the extant provisions of the Conveyancing Act 1881, including section 18, and makes new provision for the leasing powers of mortgagors in Part 10, Chapter 4. While section 112(1) of the Act requires the consent in writing of the mortgagee to any lease of mortgaged land, it also provides that such consent shall not be unreasonably withheld. Furthermore, section 112(2) provides that a lease made without such consent is voidable (rather than void) by a mortgagee *if* it establishes actual knowledge of the mortgage on the part of the lessee *and* that the granting of the lease had prejudiced the mortgagee. Section 113, which appears to be entirely new, provides that a section 112 lease must reserve the best rent that can reasonably be obtained and otherwise be granted on the best terms that can reasonably be

obtained, in default of which any lease will be void. It would appear to follow that a lease entered into by a mortgagor will bind the mortgagee, even in the absence of the mortgagee's consent, provided that the lease complies with section 113, unless the mortgagee establishes that the lessee had actual knowledge of the mortgage and also establishes prejudice arising from the lease. However, the section 112 power to lease applies only to mortgages created after the commencement of Part 9 (which commenced on 1 December 2009) and thus had no application here, where the mortgage dates from August 2004.

13. In any event, it appears to me that the argument that Part 5 of the 2004 Act applies in the circumstances here, and that it operates to constrain the Receiver from exercising the powers conferred by the mortgage to take possession of and sell the mortgaged property, is founded on a misunderstanding of the principle in *Fennell v N11 Electrics Ltd (in liquidation)*.
14. For these reasons, and the further reasons set out in the judgment of Ní Raifeartaigh J., I agree that this appeal should be dismissed and the order made by McDonald J in the High Court should be affirmed.