APPROVED **[2021] IEHC 172**

THE HIGH COURT

2019 No. 232 SP

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

RICHARD FINBARR FITZGERALD

DEFENDANT

EILEEN DALY

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 March 2021

INTRODUCTION

1. These proceedings seek to recover the possession of land pursuant to a mortgage entered into between the plaintiff bank and the defendant. By reserved judgment delivered on 27 April 2020, *Allied Irish Bank plc v. FitzGerald* [2020] IEHC 197, this court held that the bank was entitled to an order for possession subject to a stay on execution. The parties (including the reputed lessee of the mortgaged property) were requested to correspond with each other with a view to agreeing the length of the stay. In default of agreement, the court was to rule on the matter.

2. In the event, a more fundamental disagreement arose between the parties. The reputed lessee, Ms. Eileen Daly, contends that she continues to enjoy a right to possession of the mortgaged property by virtue of the lease agreement entered into between her and the

defendant. This right of possession can, it is said, only be lawfully terminated in accordance with the Residential Tenancies Act 2004 (as amended). This, it is said, would necessitate the bank, *qua* landlord, serving a notice of termination with a notice period of not less than 244 days.

3. In response, the plaintiff bank submits that it is not bound by the Residential Tenancies Act 2004 in circumstances where the lease is said to be void against it for having been granted in breach of the terms of the mortgage.

NOMENCLATURE / SHORTHAND

4. For ease of exposition, the parties will be described in the balance of this judgment by reference to their relationships to each other. The plaintiff will be referred to as "***the Bank***"; the defendant as "***the Borrower***"; and the notice party as "***the Lessee***". The latter term is used in preference to the more cumbersome formulation "the reputed lessee". However, it should be emphasised that, in circumstances where the precise status of the lease *vis-à-vis* the Bank is very much in dispute, the use of the term "the Lessee" should not be understood as implying any finding on this issue.

5. The lease agreement said to have been entered into between the Borrower and the Lessee, for a term of 35 years commencing on 3 April 2002, will be referred to as "***the 2002 lease agreement***" where convenient.

PROCEDURAL HISTORY

6. The application for an order for possession had come on for hearing before me on 9 March 2020. There was no appearance on that occasion on behalf of the Borrower. It was explained to the court that the Borrower had been adjudicated bankrupt, and a letter

was exhibited from the Official Assignee indicating that he was not opposing the application.

7. Having heard detailed submissions from counsel for the Bank, I indicated that I would reserve judgment on the matter. The judgment was delivered, subsequent to the Easter vacation, on 27 April 2020 ("***the principal judgment***"). As appears from the principal judgment, one of the issues expressly addressed is the status of the lease said to have been entered into between the Borrower and the Lessee.

8. For the reasons explained in detail in the principal judgment, I concluded that the lease is void as against the Bank. This is because the Borrower did not have authority to enter into a lease of the mortgaged property without the written consent of the Bank. The statutory power, which the Borrower, as mortgagor, would otherwise have enjoyed under the Conveyancing and Law of Property Act 1881 ("***the Conveyancing Act 1881***") had been qualified as follows under the mortgage deed.

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

9. There was nothing in the papers before the court on 9 March 2020 to suggest that the Bank had consented to the lease. This remains the position some twelve months later. Despite her asserted intention to have the Borrower set out the factual position on affidavit, the Lessee has not adduced any evidence to support her contention that the Bank had consented to the lease. The onus of proof lies with the Lessee: see *Fennell v. N17 Electrics Ltd* [2012] IEHC 228; [2012] 4 I.R. 634 (citing *Taylor v. Ellis* [1960] 1 Ch. 368).

10. As appears from the principal judgment, I had also been satisfied that the proceedings had been properly served. I was, however, anxious to ensure that the Lessee, Ms. Eileen Daly, be served with a copy of the principal judgment and afforded an opportunity to

make submissions on the length of the proposed stay on execution. It will be recalled that April 2020 coincided with the beginning of the restrictions introduced in response to the coronavirus pandemic. Given the very real practical difficulties which those restrictions would present for the sourcing and securing of alternative residential accommodation, it seemed appropriate to grant a longer stay than the three month period typically allowed.

11. A copy of the principal judgment was duly served on the Lessee. In response, the Lessee swore an affidavit explaining that she had not been served with the pleadings prior to the hearing on 9 March 2020, and requesting an opportunity to be heard on the question of the validity of the lease.

12. It appears from the affidavits filed by Ms. Daly that—contrary to the Bank's understanding—the Lessee has not been in occupation of the mortgaged property for a number of years. It seems that the dwelling has, at various points, been occupied by persons described as sub-tenants of the Lessee. Most recently, the mortgaged property is said to be subject to a caretaker agreement. This has not, however, been confirmed on affidavit.

13. At all events, rather than become embroiled in technical arguments as to whether the proceedings had been properly served on every person in actual possession, or in receipt of the rents and profits, of the mortgaged property, as required by the Rules of the Superior Courts, I indicated that the Lessee would be afforded an opportunity to make written and oral submissions on the question of whether she could rely on the lease as against the Bank. This was done in circumstances where no order had yet been drawn up pursuant to the principal judgment, and the proceedings were not yet finalised. It would be open to this court, having heard submissions from the Lessee, to revisit the principal judgment and to reach different findings if appropriate.

14. Directions were given to ensure that the Lessee, Ms. Daly, received a full set of pleadings and a copy of the transcript of the hearing on 9 March 2020. Thereafter, the hearing of the Lessee's application to revisit the principal judgment had been adjourned on a number of occasions to facilitate Ms. Daly who, at that time, had been representing herself.

15. A solicitor came on record for the Lessee on 25 February 2021 and instructed counsel to request a further adjournment. I acceded to this request. The matter ultimately came on for hearing before me on 15 March 2021, at which stage Ms. Daly was represented by solicitor and counsel. Both sides had filed very helpful written legal submissions, which were read by the court in advance, and these submissions were elaborated upon at the hearing. I reserved judgment to today's date.

SUBMISSIONS OF THE PARTIES

(i). Lessee

16. The argument made on behalf of the Lessee may be summarised as follows. It is submitted that the Lessee enjoys security of tenure as a tenant under Part 4 of the Residential Tenancies Act 2004 ("***the RTA 2004***" where convenient). A residential tenancy may only be terminated in accordance with Part 5 of that Act.

17. Counsel places particular emphasis on the wording of section 59 of the RTA 2004 as follows.

> "59.—Subject to section 60, neither—
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> (a) any rule of law, nor
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> (b) provision of any enactment in force immediately before the commencement of this Part,
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> 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."

18. (Section 60 addresses the contingency where a tenancy agreement requires a *greater period* of notice to be given by a notice of termination than that required by Part 5).

19. Counsel submits that section 59 of the RTA 2004 precludes reliance on "any rule of law" or "any enactment" to avoid the requirements of Part 5. It is said to follow that the provisions of section 18 of the Conveyancing Act 1881 cannot be relied upon to terminate a residential tenancy. It is further submitted that the case law relating to negative pledge clauses in leases of *commercial* premises has no application in the context of a residential tenancy. It is sought to distinguish the judgment in *Fennell v. N17 Electrics Ltd* and subsequent case law on this basis.

20. More generally, the judgment of the High Court (Baker J.) in *Hennessy v Private Residential Tenancy Board* [2016] IEHC 174 is cited as authority for the proposition that security of tenure for a tenant is of the first importance, and that the residential tenancies legislation must be construed to give effect to this where there is any ambiguity. The judgment of the ECtHR in *McCann v. United Kingdom* (2008) 47 EHRR 913 is also cited as emphasising the requirement for proportionality in any decision involving the loss of an individual's home.

21. Applying the above analysis to the facts of the present case, it is said that the 2002 lease agreement may only be lawfully terminated by the Bank notifying the Lessee of its intention to enter into a contract for the sale of the property (in accordance with section 34 of the RTA 2004), and serving a notice of termination with the requisite notice period.

22. The stance of the Lessee on the question of whether the Bank should be regarded as the "landlord" under the 2002 lease agreement has evolved somewhat. It had been explained in the written legal submissions that the Lessee is <u>not</u> saying that the relationship of landlord and tenant subsists between her and the Bank, but rather that her tenancy cannot be ended by the order for possession.

23. However, in the course of oral submission, counsel drew attention to the definition of "landlord" under section 5 of the RTA 2004 as follows.

> " 'landlord' means the person for the time being entitled to receive (otherwise than as agent for another person) the rent paid in respect of a dwelling by the tenant thereof and, where the context so admits, includes a person who has ceased to be so entitled by reason of the termination of the tenancy;"

24. It is said that the Bank, as mortgagee, would be entitled to receive any rent payable under the 2002 lease agreement, and thus meets the definition of "landlord".

25. It is also said that, notwithstanding that she does not reside in the mortgaged property, the Lessee is nevertheless in "occupation" of the mortgaged property for the purposes of the definition of a Part 4 tenancy under the RTA 2004.

(ii). Bank

26. Counsel on behalf of the Bank made extensive reference to the judgments of the Court of Appeal in *Kennedy v. O'Kelly* [2020] IECA 288. There, an argument in almost identical terms to that advanced in the present case had been made. Counsel, very properly, acknowledged that the judgments had been delivered in the context of an application for an interlocutory injunction. It had not been necessary, therefore, for the Court of Appeal to reach a concluded view on the implications, if any, of the RTA 2004 for the rights of a tenant in occupation of mortgaged property under an unauthorised lease. The Court of Appeal nevertheless found that the receiver had met the "strong case" threshold for saying that his right to possession under the terms of a mortgage were unaffected by the provisions of the RTA 2004.

27. The position is put as follows by Collins J. in his concurring judgment (at paragraphs 10 and 11).

> "The argument that Part 5 [of the Residential Tenancies Act 2004] 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.
>
> The argument that, in enacting Part 5 of [the Residential Tenancies Act 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 & Commence v Hales* [1967] IR 50. That is not to suggest that the principle [in] *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."

28. While acknowledging that Collins J. had prefaced these observations by saying that it was neither necessary nor appropriate to express a definitive view on the argument in an appeal in an interlocutory injunction application, counsel respectfully adopts the analysis. In particular, counsel relies on the distinction between the creation of, and the termination of, a tenancy in support of his argument that the 2002 lease agreement does not give rise to any relationship of landlord and tenant as between the Bank and the Lessee *inter se*.

29. It is further submitted that were the 2002 lease agreement to be enforceable as against the Bank, the security would become meaningless because the Bank would have no

recourse to the mortgaged property for the 35 year term of the lease. This is said to be contrary to the principles identified in *N17 Electrics Ltd* (in particular, at paragraph 47).

30. More generally, counsel submitted that there is nothing in the case law to suggest that the principles derived from *N17 Electrics Ltd* are confined to cases involving commercial (as opposed to residential) premises. It is also observed that the Lessee does not actually reside at the mortgaged property.

31. Finally, insofar as the Lessee's allegation that the Bank had consented to the lease is concerned, it is observed that notwithstanding repeated requests and the lapse of a period of almost twelve months since the date of the principal judgment, the Lessee continues to fail to produce evidence of any such written consent.

DISCUSSION

32. The legal position in respect of leases entered into in breach of pre- December 2009 mortgages is correctly summarised as follows by M. O'Connell in (2018) 23(4) *Conveyancing and Property Law Journal* 82.

> "Although void as against the mortgagee, a lease entered into without mortgagee consent will create binding obligations on the parties to it, namely the mortgagor/lessor and the lessee. This is a form of tenancy by estoppel, because, although the lease may be void, at law, the courts will not countenance a party to a deed resiling from his own deed by virtue of a third party's right to avoid the deed. Moreover, if the mortgagor were to satisfy the mortgage and redeem his title, the estoppel would be fed and the lessee would thereafter hold a lawful tenancy in the property. The concept of a tenancy by estoppel serves a very important purpose in everyday life: although only a handful of cases make their way to the courts, the reality on the ground is that leases are granted every day of the week by property owners whose title is still subject to mortgages, without reference to the mortgagee. If such a landlord could assert the invalidity of his own lease by reference to his mortgagee's right to avoid it, then he would be entitled to deprive his lessees of their lease and indeed their statutory rights (e.g. of renewal) by reference of his own default."
>
> *Footnotes omitted.

33. A lease which has been granted without the consent of a mortgagee, where required, enjoys a hybrid status. As between the mortgagor/landlord and the tenant, the lease operates by estoppel. The mortgagor/landlord is precluded from denying the lease. However, as between the mortgagor/landlord and the mortgagee, the lease is void. This has the legal consequence that there is no relationship of landlord-and-tenant as between the mortgagee and the tenant. The tenant cannot rely on the existence of a lease to resist complying with an order for possession in favour of the mortgagee.

34. This principle is well established in the modern line of case law, commencing with *Fennell v. N17 Electrics Ltd* [2012] IEHC 228; [2012] 4 I.R. 634. This case law has already been discussed in detail in the principal judgment in the present proceedings and that discussion need not be duplicated here.

35. The question which now arises for determination is how a lease with such a hybrid status falls to be treated under the Residential Tenancies Act 2004. As between the mortgagor/landlord and tenant, the position is clear-cut. The mortgagor/landlord cannot assert the absence of consent from the mortgagee so as to avoid his statutory obligations under the RTA 2004. The mortgagor/landlord cannot rely on his own default, i.e. the failure to obtain the requisite consent from the mortgagee, so as to deny his tenant their statutory rights.

36. The position as between the mortgagee and the tenant is more complex. It might be tempting to say that the tenant should not be prejudiced by the failure of the mortgagor/landlord to obtain the requisite consent, and to insist therefore that the tenant should be allowed the same notice period applicable to a termination by the mortgagor/landlord. Such an approach would, however, fail to observe the well-established limits on a mortgagor's capacity to create a lease binding on the mortgagee. The mortgagee is not bound by a lease which has been granted in breach of the mortgage.

37. There is no inconsistency between this principle and the provisions of Part 5 of the Residential Tenancies Act 2004. Part 5 regulates the *termination* by notice of a tenancy. Section 59 expressly identifies the purpose of Part 5 as being to specify the requirements for a valid termination by the landlord (or tenant) of a tenancy of a dwelling. That is a very different concept from that involved in the granting of an order for possession to a mortgagee against whom the tenancy is void because of the failure to obtain consent. The tenancy is not enforceable against the mortgagee, still less is the mortgagee to be regarded as being in the position of landlord. It is unnecessary for a mortgagee to terminate a lease in circumstances where they are simply not bound by the lease at all.

38. In this regard, I respectfully adopt the analysis of the distinction between the creation of, and the termination of, a lease as set out by Collins J. in *Kennedy v. O'Kelly* [2020] IECA 288 (at paragraphs 10 and 11). In so doing, I am conscious that that analysis had not been intended to be definitive, having been made in the context of an application for an interlocutory injunction. However, having had the benefit of full argument on the issue in the present proceedings, I am satisfied that that analysis is correct.

39. I turn next to address the argument that a mortgagee fulfils the statutory definition of a "landlord" under section 5 of the RTA 2004. It will be recalled that the term "landlord" is defined as meaning the person for the time being entitled to receive (otherwise than as agent for another person) the rent paid in respect of a dwelling by the tenant. For the reasons which follow, I have concluded that this argument is incorrect.

40. A mortgagee is not privy to a tenancy agreement which has been entered into between the mortgagor and a third party without the mortgagee's consent. There is no contractual relationship between the mortgagee and the third party. The mortgagee has no right to call for the rent. This remains the legal position unless and until the mortgagee chooses

to ratify the tenancy agreement or otherwise acts in a manner which indicates that the mortgagee intends to enter into a relationship of landlord-and-tenant.

41. The law in this regard is well settled. The position is put as follows in *In re O'Rourke's Estate* (1889) 23 L.R. Ir. 497 (at page 500), in a passage cited with approval in *N17 Electrics Ltd*.

> "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 Conveyancing and Law of Property Act, 1881 … 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 tenants do not dissent, these are facts from which a jury may, and probably ought, to infer the existence of such a contract of tenancy …".

42. Applying these principles to the facts of the present case, I am satisfied that no relationship of landlord-and-tenant exists between the Bank and the Lessee. The Bank is not entitled to receive the rent payable under the 2002 lease agreement. Insofar as the Bank is concerned, the Lessee has no right to possession of the mortgaged property. The Bank is entitled to treat the Lessee as a trespasser. The provisions of Part 5 of the Residential Tenancy Act 2004 are inapplicable in such a scenario. The Bank's interest in the mortgaged property is unaffected by the unauthorised lease between the Borrower and the Lessee. It is not necessary for the Bank to *terminate* the tenancy: it is simply not bound by it.

43. This result may seem harsh, and, indeed, as explained under the next heading below, the legislation has since been amended to afford better protection to certain tenants. These

legislative amendments do not apply retrospectively to mortgages entered into prior to 1 December 2009.

44. In most instances, however, the unavailability of the statutory protections under the Residential Tenancies Act 2004 will have little practical consequence. This is because a court making an order for possession has a discretion to place a stay on the execution of the order, and the length of the stay will often coincide with the notice period which would have been allowed under the RTA 2004, were the legislation applicable.

45. To elaborate: if one assumes for the sake of argument that a mortgagee were bound by Part 5 of the Residential Tenancies Act 2004, the mortgagee would normally be entitled to serve notice of termination pursuant to section 34 on the basis that it intends to exercise its power of sale. The relevant notice period would be calculated by reference to the duration of the tenancy. In most cases, the notice period would not be much longer than the stay—generally between three to six months—typically allowed by courts in possession cases.

46. As it happens, the circumstances of the present case are highly unusual in that the 2002 lease agreement is for a lengthy fixed term (35 years, commencing on 3 April 2002). Had the lease been for any longer period, it would have been expressly excluded from the RTA 2004, see section 3(3).

47. The fact that the lease is for a fixed term well in excess of the maximum statutory fixed term (six years) appears to have the effect that the statutory right to terminate where it is intended to sell the property does not apply (see section 58(3) of the RTA 2004). If this is correct, then neither the Borrower (*qua* mortgagor/landlord), nor, on the Lessee's case, the Bank (*qua* mortgagee) would have a statutory right to terminate the lease. The Bank would be precluded from exercising its security for the balance of the 35 year term. The Bank would also not receive any income from the mortgaged property. Whereas a rent

of €800 per month is reserved under the lease, it is to be "paid" by set-off against a sum of €800,000 said to be owing by the Borrower to the Lessee. No cash payment is involved. The Bank would therefore be powerless to enforce its security until April 2037 and would receive no payment in the interim. Such a scenario would be contrary to the principles identified in *N17 Electrics Ltd* (in particular, at paragraph 47).

48. Of course, for the reasons set out earlier, I have concluded that a mortgagee is not subject to the provisions of the Residential Tenancies Act 2004 where the tenancy has been created in breach of the mortgage. The discussion in the preceding paragraph is thus hypothetical.

49. Even if this conclusion is incorrect, there is a separate and distinct reason for finding that the Lessee is not entitled to rely on the RTA 2004. It is this. To avail of the statutory protections afforded to a "Part 4 tenancy" (as defined under sections 28 and 29 of the RTA 2004), a person must have been in occupation of a dwelling, under a tenancy, for a continuous period of 6 months. There is no suggestion—still less any evidence—that the Lessee has resided in the mortgaged property within the last number of years. Rather, it seems that the dwelling has been occupied by third parties, described variously as sub-tenants or caretakers by counsel in submission. There is no evidence before the court to indicate that the Lessee fulfils the occupation requirement.

LAND AND CONVEYANCING LAW REFORM ACT 2009

50. For completeness, it should be noted that the position of a tenant holding under an unauthorised lease granted by a mortgagor/landlord has been improved as a result of amendments introduced under the Land and Conveyancing Law Reform Act 2009 ("***the 2009 Act***"). (These amendments do not apply in the case of mortgages created prior to 1 December 2009).

51. Section 112(2) of the 2009 Act provides as follows.

> "(2) A lease made without such consent is voidable by a mortgagee who establishes that—
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> (a) the lessee had actual knowledge of the mortgage at the time of the granting of the lease, and
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> (b) the granting had prejudiced the mortgagee."

52. The implication of these provisions is that a mortgagee will be bound by a lease entered into without consent *unless* they can establish actual knowledge on the part of the lessee.

53. It should be noted, however, that a lease will be void if granted other than for the best rent which can reasonably be obtained. See section 113 of the 2009 Act.

EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

54. Counsel on behalf of the Lessee has called in aid the ECHR Act 2003 in support of his argument that the Residential Tenancies Act 2004 should be interpreted as applying to a mortgagee even in the case of a lease entered into in breach of a negative pledge clause. It is submitted that there is "good authority" for differentiating between residential tenants and commercial tenants.

55. With respect, reliance on the interpretative obligation under section 2 of the ECHR Act 2003 does not advance the Lessee's case. On its ordinary and natural meaning, Part 5 of the Residential Tenancy Act 2004 only applies to the *termination* of a tenancy by a landlord or tenant. It has no application to a mortgagee where the tenancy has been entered into in breach of a negative pledge clause under the mortgage.

56. There is nothing in the case law of the ECtHR which mandates a different interpretation. Rather, the jurisprudence recognises that cases involving mortgages and tenants cannot be considered solely by reference to Article 8 (respect for one's home), but must also be

considered by reference to property rights of lending institutions as protected under Article 1 of the First Protocol.

57. The ECtHR has distinguished the judgment in *McCann v. United Kingdom* (cited earlier) in mortgage repossession cases on the basis that the applicants there were living in State-owned or socially-owned accommodation and an important aspect of finding a violation in that case had been the fact that there was no other *private interest* at stake. The position has been put as follows in *F.J.M. v. United Kingdom*, Application No. 76202/16 (at paragraph 42 of the decision).

> "[…] there are many instances in which the domestic courts are called upon to strike a fair balance between the Convention rights of two individuals. What sets claims for possession by private sector owners against residential occupiers apart is that the two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected (see paragraph 16 above). If the domestic courts could override the balance struck by the legislation in such a case, the Convention would be directly enforceable between private citizens so as to alter the contractual rights and obligations that they had freely entered into."

58. Moreover, there is nothing in the evidence in the present proceedings to suggest that any right of the Lessee under Article 8 of the ECHR has been engaged. As explained at paragraph 48 above, the Lessee does not reside in the mortgaged property and it does not represent her "home".

CONCLUSION AND PROPOSED ORDER

59. For the reasons set out in both this judgment and the principal judgment, I have concluded that the lease entered into between Richard Finbarr FitzGerald and Eileen Daly is void as against Allied Irish Bank. This is because the mortgage deed was subject to a negative pledge clause, and there is no evidence before the court that the Bank either consented to, or acquiesced in, the grant of the lease. The onus of proof in this regard lies with

Ms. Daly as the reputed lessee: see *Fennell v. N17 Electrics Ltd* [2012] IEHC 228; [2012] 4 I.R. 634 (citing *Taylor v. Ellis* [1960] 1 Ch. 368).

60. The Bank is entitled to an order for possession, and is not required to serve notice of termination pursuant to the Residential Tenancies Act 2004.

61. Given the fact that almost a year has elapsed since the delivery of the principal judgment, and given that the only person in occupation of the mortgaged property is seemingly there under a caretaker agreement, my *provisional* view is that it is unnecessary to place any further stay on the order for possession. I will, of course, hear submissions from the parties in respect of the question of a stay and on the issue of costs before making any final orders. The case is to be listed before me on 26 March 2021 for argument on these issues.

Appearances

Roland Rowen for the plaintiff bank instructed by A.C. Forde & Co. Solicitors
Tim Dixon for the notice party instructed by Herbert Kilcline Solicitor