

THE HIGH COURT

2019 No. 115 SP

BETWEEN

PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

JOHN FOX

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 January 2020

INTRODUCTION

1. This judgment addresses a question of procedural law in the context of well charging proceedings. More specifically, the judgment addresses the allocation of jurisdiction as between the High Court and the Circuit Court.
2. The within proceedings have been instituted by way of Special Summons in accordance with Order 38 of the Rules of the Superior Courts. The proceedings seek to enforce a lien in respect of a debt for which, it is said, the Defendant is liable to the Plaintiff. The principal reliefs sought in the proceedings are, first, a well charging order, i.e. an order that the Defendant's interest in certain registered lands is well charged with the payment of all monies due and owing by the Defendant to the Plaintiff; and secondly, a declaration that there is due and owing to the Plaintiff a total sum of €145,918.80.
3. The Defendant has brought a motion seeking to have the proceedings remitted to the Circuit Court. This application is made on the basis that the market value of the lands falls within the threshold prescribed for proceedings of this type under the Third Schedule of the Courts (Supplemental Provisions) Act 1961 (as amended). It is said that the Circuit Court has jurisdiction in well charging proceedings, save those where the market value of the lands exceeds €3,000,000.
4. The Plaintiff, conversely, submits that the Circuit Court's jurisdiction is delimited by the monetary value of the *debt* underlying the well charging proceedings. It is submitted that if the debt exceeds €75,000, then the Circuit Court cannot entertain the well charging proceedings. In the present case, the debt is said to be in the order of €145,918.80, and thus—on the Plaintiff's argument—is beyond the Circuit Court's jurisdiction. This is so notwithstanding that the Plaintiff agrees that the *value of the lands* is well below the threshold of €3,000,000 prescribed under the Third Schedule of the Courts (Supplemental Provisions) Act 1961 (as amended).
5. The Plaintiff submits—in the alternative—that even if the Circuit Court does have jurisdiction to entertain the proceedings, the High Court should nevertheless exercise its *discretion* to refuse an order for remittal. The concerns raised by the Defendant should instead be addressed by way of a differential costs order.

LEGISLATIVE FRAMEWORK

6. It is necessary to consider two aspects of the legislative framework as follows. The first aspect concerns the Circuit Court's jurisdiction, and, in particular, the question of whether

that court's jurisdiction in well charging proceedings is confined to cases where the debt asserted is less than €75,000. The second aspect concerns the High Court's discretion to remit proceedings to the Circuit Court. These two aspects are examined under separate headings below.

(i) *Circuit Court's jurisdiction*

7. The Circuit Court's jurisdiction to entertain well charging proceedings derives from the Courts (Supplemental Provisions) Act 1961 (as amended). Section 22 provides that the Circuit Court shall, concurrently with the High Court, have all the jurisdiction of the High Court to hear and determine any proceedings of the kind mentioned in the Third Schedule to the Act.
8. The Third Schedule sets out the Circuit Court's jurisdiction in various types of cases in tabular form. Column (1) contains a unique reference number. Column (2) identifies the civil proceedings in respect of which concurrent jurisdiction is conferred on the Circuit Court. Column (3) sets out an exclusion of jurisdiction in certain cases. This is subject to the possibility of the parties consenting to jurisdiction pursuant to section 22(1). Column (4) identifies the judges of the Circuit Court by whom the jurisdiction is to be exercised.
9. The parties are agreed that the proceedings come within reference number 19 of the Third Schedule. Columns (2) and (3) of the relevant entry read as follows.

(2) *Civil proceedings in respect of which jurisdiction is conferred on the Circuit Court*

Proceedings for any of the following purposes—

- (a) the redemption of mortgages on land,
- (b) the raising of portions or other charges on land,
- (c) the sale and distribution of the proceeds of any land subject to any mortgage, lien or charge,
- (d) applications under sections 94, 97 (except where the property concerned is subject to a housing loan mortgage), 100 (except where the property concerned is subject to a housing loan mortgage) and 117 of the Land and Conveyancing Law Reform Act 2009.

(3) *Exclusion of jurisdiction (except by consent of necessary parties) in certain cases*

Where the market value of the land exceeds €3,000,000.

(ii). *High Court's discretion to remit*

10. The remittal of proceedings from the High Court to the Circuit Court is governed principally by two statutory provisions: (i) section 25 of the Courts of Justice Act 1924, and (ii) section 11(2) of the Courts of Justice Act 1936.
11. Section 25 of the Courts of Justice Act 1924 provides as follows.

25. When any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may, at any time before service of notice of trial therein, apply to the High Court that the action be remitted or transferred to the Circuit Court, and thereupon, in case the court shall consider that the action is fit to be prosecuted in the High Court, it may retain such action therein, or if it shall not consider the action fit to be prosecuted in the High Court it may remit or transfer such action to the Circuit Court or (where the action might have been commenced in the District Court) the District Court, to be prosecuted before the Judge assigned to such Circuit or (as the case may require) the Justice assigned to such District, as may appear to the High Court suitable and convenient, upon such terms, in either case and subject to such conditions, as to costs or otherwise as may appear to be just:

Provided that the High Court shall have jurisdiction to remit or transfer any action, whatever may be the amount of the claim formally made therein, if the court shall be of opinion that the action should not have been commenced in the High Court but in the Circuit Court or in the District Court if at all.

12. The legal test governing the High Court's discretion to remit proceedings has been modified somewhat by section 11(2) of the Courts of Justice Act 1936 as follows.

(2) Notwithstanding anything contained in section 25 of the Principal Act the following provisions shall have effect in relation to the remittal or transfer of actions under that section, that is to say:—

(a) an action shall not be remitted or transferred under the said section if the High Court is satisfied that, having regard to all the circumstances, and notwithstanding that such action could have been commenced in the Circuit Court, *it was reasonable that such action should have been commenced in the High Court*;^{*}

(b) an action for the recovery of a liquidated sum shall not be remitted or transferred under the said section unless the plaintiff consents thereto or the defendant either satisfies the High Court that he has a good defence to such action or some part thereof or discloses facts which, in the opinion of the High Court, are sufficient to entitle him to defend such action.

^{*}Emphasis (italics) added.

13. As appears, the High Court in deciding whether to remit proceedings to the Circuit Court must consider whether it was "reasonable" to have commenced the action in the High Court. The interpretation of section 11(2) of the 1936 Act has been considered recently by the Court of Appeal in *Allied Irish Banks plc v. Gannon* [2017] IECA 291. Hogan J. (delivering the unanimous judgment of the Court of Appeal) referred to the two leading authorities on the interpretation of the section, *Stokes v. Milford Co-Operative Creamery Ltd.* (1956) 90 I.L.T.R. 67, and *O'Shea v. Mallow Urban District Council* [1994] 2 I.R. 117. Hogan J. then summarised the factors which might be taken into account in deciding

whether it was “reasonable” to commence proceedings in the High Court as follows (at paragraph [24] of the judgment).

“[...] There may well be cases where for any number of reasons it was reasonable to commence the proceedings in the High Court in the sense contemplated by the sub-section. Thus, for example, the proceedings may be linked or otherwise bound up with existing High Court proceedings or where all the witnesses were based in Dublin where the alternative was a Circuit Court hearing at a rural venue or where the case raised an unusually important point of law suitable for adjudication by the High Court. Depending, of course, on the facts of the particular case, these examples might well amount to instances where the High Court might be satisfied within the meaning of s. 11(2)(a) of the 1936 Act that it was reasonable to commence the proceedings in that forum.”

14. An application for leave to appeal against the judgment of the Court of Appeal was subsequently refused by the Supreme Court: *Allied Irish Banks v. Gannon* [2018] IESCDET 95. Relevantly, the Supreme Court noted that the judgment of the Court of Appeal did not involve a departure from established principles.

“As to the second point raised by the applicant, the Court observes that the issue of the proper construction of section 25 of the 1924 Act and section 11(2)(a) of the 1936 Act was dealt with by applying the established principles as laid down in *O’Shea* and, earlier, in *Stokes*. The decision of the Court of Appeal does not effect a departure from, or create any confusion in respect of, the prevailing law in respect of the interpretation of these sections. No ambiguity arises from the construction given, nor is there any point in need of clarification. The Court is not satisfied that the proposed point reaches the constitutional threshold for leave to appeal.”

15. I address the application of these principles to the facts of the present case at paragraph 27 below.

THE PROCEEDINGS TO DATE

16. This judgment is confined to ruling upon the Defendant’s application to remit the proceedings to the Circuit Court. It is neither necessary nor appropriate to make any finding in relation to the underlying merits of the proceedings. However, as appears from the discussion under the previous heading, one of the factors to be considered on an application to remit is whether a case raises “an unusually important point of law” suitable for adjudication by the High Court. In order to address this factor, it is necessary, to a very limited extent, to identify the legal issues which potentially arise in the proceedings. I reiterate that this task is being undertaken solely for the purpose of informing the exercise of this court’s discretion to remit. No finding is being made in relation to the underlying merits of the proceedings.
17. The ownership of the lands the subject matter of these proceedings has been registered under the Registration of Title Act 1964. Put colloquially, the lands are “registered lands”.

The Defendant is registered as full owner of the lands. The Plaintiff seeks a well charging order in respect of a lien which has been registered as a burden pursuant to section 73(3) of the Registration of Deeds and Title Act 2006. It appears from the folio that the lien had originally been granted in favour of Ulster Bank Ireland Ltd. ("*Ulster Bank*"). The Plaintiff, Promontoria DAC, asserts that it has succeeded to Ulster Bank's interest. The former's interest in the lien is "noted" on the folio. The legal consequence of these events is a matter to be determined at the substantive hearing of the proceedings.

18. For the purposes of the application to remit, it is relevant to note that the lien in favour of Ulster Bank had been registered *prior* to the execution of the two loan facilities which are said to give rise to the alleged debt. More specifically, it appears from the folio that the lien was originally registered as a burden on 19 March 2009. The two loan facilities are said to have been entered into by the Defendant on 23 June 2010. The Defendant attaches significance to these dates, and seeks to link same to certain legislative milestones under the Registration of Deeds and Title Act 2006 ("*the 2006 Act*"). In brief, one of the effects of the 2006 Act had been to bring to an end the issuing of land certificates.
19. The consequences of this change for the practice of creating equitable mortgages by way of the deposit of a land certificate has recently been considered in detail by the Supreme Court in *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49 ("*Hannon*"). The Supreme Court held that the effect of the 2006 Act was not only to preclude the creation of new equitable mortgages (otherwise, liens) by way of the deposit of a land certificate, but also to extinguish any such liens with effect from the end of 2009. (See, in particular, paragraph [7.24] of the judgment). The holders of such liens were afforded a period of three years within which to protect their interests by the registration of the lien as a burden on the title pursuant to section 73(3) of the 2006 Act, as follows.

(3). The following provisions have effect during the period referred to in subsection (2):

- (a) the Authority shall cause adequate notice to be published of the coming into operation of subsection (2) and of its implications for persons to whom land certificates or certificates of charge have been issued and for any others who may be affected, *including persons holding a lien on registered land or a registered charge through deposit or possession of those certificates*;^{*}
- (b) a holder of such a lien may apply to the Authority for registration of the lien in such manner as the Authority may determine;
- (c) the application shall be on notice by the applicant to the registered owner of the land or charge and be accompanied by the certificate concerned;
- (d) the lien is deemed for the purposes of section 69 of the 1964 Act to be a burden which may be registered as affecting registered land;
- (e) the Authority shall register the lien without charging any fee or duty for doing so.

^{*}Emphasis (italics) added.

20. It appears from the affidavit sworn in the proceedings by the Defendant, Mr John Fox, that he intends to advance an argument to the effect that the security sought to be relied upon by the Plaintiff in some way falls foul of these legislative amendments. See, in particular, paragraph 5 of the affidavit as follows.

“5. I say that I wholly dispute the validity of the security relied on, being apparently a statutory lien registered under s. 90 of the Registration of Title Act. Although more appropriately a matter for legal submissions, I dispute that this is valid security in respect of an agreement entered and funds advanced after the registration of the lien. The lien is a statutory mechanism to protect pre-existing mortgages by equitable deposit within three years of the commencement of the Registration of Deeds and Title Act 2006 and cannot be used in the manner alleged by the Plaintiff to create fresh security as is claimed.”

21. The Plaintiff has joined issue with this characterisation of the security in a subsequent affidavit filed in response to the Defendant’s affidavit.

22. Whereas this judgment has nothing to say in relation to the merits of the case, it appears to me that the proceedings have at least the *potential* to require the determination of legal issues the significance of which may transcend the facts of the individual case. I will return to this point at paragraph 27 below when discussing the discretion to remit proceedings.

DISCUSSION

23. The parties are agreed that the land the subject-matter of these proceedings does not comprise a principal residence and, accordingly, the proceedings are not subject to the specific jurisdictional rules applicable to a “housing loan mortgage” under the Land and Conveyancing Law Reform Act 2009. Rather, the nature and extent of the Circuit Court’s jurisdiction falls to be determined by reference to the Third Schedule of the Courts (Supplemental Provisions) Act 1961 (as amended).

24. The parties are also agreed that the proceedings come within reference number 19 of the Third Schedule. The only exclusion of jurisdiction prescribed under column (3) is as follows.

“Where the market value of the land exceeds €3,000,000.”

25. There is no exclusion prescribed by reference to the value of the underlying debt. This is to be contrasted, for example, with reference number 1 which prescribes an exclusion of jurisdiction where the amount of the claim exceeds €75,000 in the case of an action founded on contract.

26. I am satisfied, therefore, that the Circuit Court’s jurisdiction in well charging proceedings is not subject to any quantitative limitation by reference to the value of the underlying debt. The fact, therefore, that a declaration is sought in respect of a sum in the order of €145,000 does not preclude the Circuit Court from having jurisdiction concurrently with the High Court in circumstances where the value of the lands falls below the threshold of

€3,000,000. Put shortly, these proceedings are of a type which could properly have been brought before the Circuit Court.

27. It is, therefore, in principle open to the High Court to remit these proceedings to the Circuit Court. The making of an order for remittal is not mandatory, rather the High Court has a discretion to do so. The criteria by which this discretion is to be exercised have been explained recently by the Court of Appeal in *Allied Irish Banks plc v. Gannon* [2017] IECA 291 (discussed at paragraphs 13 and 14 above). One of the factors to be considered on an application to remit is whether a case raises “an unusually important point of law” suitable for adjudication by the High Court.
28. Applying these criteria to the facts of the present case, I have decided to refuse an order for remittal. The exercise of my discretion is informed primarily by the nature of the defence which the Defendant seeks to make to the proceedings.
29. For the reasons set out at paragraphs 18 to 22 above, I am satisfied that these proceedings have at least the *potential* to require the determination of legal issues, the significance of which may transcend the facts of the individual case. In particular, the precise implications of the very recent judgment of the Supreme Court in *Hannon* may have to be teased out further.
30. It seems to me that these potentially difficult legal issues would benefit from a hearing before the High Court at first instance. The High Court can then prepare a reserved judgment, which judgment would be amenable to an appeal to the Court of Appeal.
31. The concerns raised by the Defendant in respect of the additional costs which a hearing before the High Court would entail, as compared to a hearing before the Circuit Court, can be addressed by the making of an appropriate costs order. I elaborate upon this at paragraph 35 below.
32. Finally, for the sake of completeness, I should record that I do not accept the argument advanced on behalf of the Plaintiff that the proceedings represent “an action for the recovery of a liquidated sum” such as to trigger sub-section 11(2)(b) of the Courts of Justice Act 1936 (set out at paragraph 12 above). This sub-section, it will be recalled, requires consideration of whether a defendant has a good defence. The principal relief sought in these proceedings is a well charging order. The declarations are ancillary to that relief. These reliefs are distinct from the type of relief available in summary summons proceedings. Only the latter can properly be characterised as an action for the recovery of a liquidated sum.
33. Lest I am incorrect in this finding, however, I should also record that I am, in any event, satisfied that the Defendant has put forward a *potential* defence to the well charging order by reference to the chronology of the lien and the facility letters. If and insofar as sub-section 11(2)(b) of the Courts of Justice Act 1936 applies to the proceedings, the requirement to demonstrate a good defence has been met.

CONCLUSION AND FORM OF ORDER

34. The Defendant's application to have the proceedings remitted to the Circuit Court is refused. I will hear counsel as to what further steps, if any, are required to ready the proceedings for hearing, and will then fix a date for the hearing of the application for a well charging order.
35. In the event that the application were to be successful—and I have obviously formed no view on this—this judgment will be taken into account in determining what costs order if any, should be made. In the event that a costs order were to be made in favour of the Plaintiff, it will be subject to a direction that the Office of the Legal Costs Adjudicator assess such costs on the Circuit Court scale. The Defendant would, of course, be entitled to make an application for a differential costs order pursuant to section 17 of the Courts Act 1981 (as amended).

Appearances

Eoghan Casey, BL for the Plaintiff instructed by O'Brien Lynam Solicitors

Dermot Sheehan, BL for the Defendant instructed by Larkin Tynan Nohilly