

APPROVED

[2021] IEHC 105

THE HIGH COURT

2018 No. 4100P

BETWEEN

EVERYDAY FINANCE DAC

PLAINTIFF

AND

MARY BURNS  
GERALD BURNS

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 22 February 2021**

**INTRODUCTION**

1. This judgment is delivered in respect of an application to remit the within proceedings to the Circuit Court. The proceedings have been taken pursuant to section 74 of the Land and Conveyancing Law Reform Act 2009. The case, as pleaded, is that the first named defendant transferred certain lands to her son, the second named defendant, at a time when those lands were subject to a charge registered in favour of the plaintiff's predecessor in title. (Everyday Finance DAC was substituted as plaintiff by order dated 11 January 2021). The second named defendant has filed a full defence to this claim.
2. The application for remittal is made on behalf of the second named defendant. The motion came on for hearing before me on 8 February 2021.

NO REDACTION REQUIRED

### CONCURRENT JURISDICTION

3. There was some debate before me at the hearing as to whether the High Court and the Circuit Court enjoy concurrent jurisdiction in the proceedings. Counsel on behalf of the second named defendant had, initially, suggested that the lands should be regarded as being held as part of a “principal residence”; and that this might have the consequence that the Circuit Court enjoys exclusive jurisdiction. This appears to have been intended as a reference to the rules governing jurisdiction under section 101 of the Land and Conveyancing Law Reform Act 2009. This section indicates that the Circuit Court has exclusive jurisdiction in possession proceedings in respect of “housing loans” as defined.
4. Counsel, very sensibly, did not press this point. The argument is untenable for two reasons. First, there is no evidence before the court to indicate that the lands the subject-matter of the application are a principal residence. Rather, the second named defendant’s own solicitor describes the lands as comprising farmlands and outbuildings. (See paragraph 6 of Ms. Hayes’ affidavit of 6 November 2018). There is nothing in the papers before me to suggest that, in truth, the lands form part of a larger overall holding which should be regarded as constituting a principal residence. It also appears that the underlying loan is a commercial loan, and would not meet the definition of a “housing loan”. Further, the loan had been entered into prior to the commencement of the Land and Conveyancing Law Reform Act 2009.
5. Secondly, and in any event, the jurisdictional rules under section 101 do not govern an application to set aside a fraudulent conveyance. Section 101 is concerned instead with the allocation of jurisdiction in what might be described as mortgage suits, namely proceedings where it is sought to enforce a mortgage or charge by way of an order for possession or an order for sale. Section 101 does not govern jurisdiction under section 74. For the reasons explained by the Court of Appeal in its judgment in *Allied*

*Irish Bank v. Gannon* [2017] IECA 291; [2018] 2 I.R. 239, the High Court and the Circuit Court enjoy concurrent jurisdiction in cases under that section.

6. The parties appeared to agree, ultimately, that the jurisdiction in these proceedings is grounded in paragraph 21 of the Third Schedule of the Courts (Supplemental Provisions) Act 1961, and is subject to an exclusionary threshold of three million euro, i.e. the Circuit Court does not have jurisdiction (except by consent of all necessary parties) in cases where the market value of the lands exceeds that sum. The parties are also agreed that the exclusionary threshold is not exceeded in this case.
7. Counsel for the second named defendant submitted that section 53A of the Civil Liability and Courts Act 2004 (as inserted by the Courts Act 2016) has the consequence that, in cases where the market value of the relevant lands is below the three million euro threshold, then the Circuit Court has sole jurisdiction. With respect, the section merely creates a presumption, until the contrary is proved, that the market value of land does not exceed the monetary amount prescribed. It is merely an evidential presumption and does not govern the allocation of jurisdiction.
8. In summary, the proceedings in the present case are of a type in respect of which the High Court and the Circuit Court enjoy concurrent jurisdiction, given that all sides are agreed that the market value of the land does not exceed three million euro.

#### **HIGH COURT'S DISCRETION TO REMIT**

9. 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.
10. 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.

11. 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*;<sup>\*</sup>
  - (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.

<sup>\*</sup>Emphasis (italics) added.

12. 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 v. Gannon* (cited earlier). 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 paragraphs 26 and 27 of the reported 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.

Can, however, the same be said in the present case? There is nothing in the pleadings to suggest that the present proceedings are anything more than a routine application under s. 74 of the 2009 Act seeking to have an inter-spousal transfer of a share in a family home set aside. Quite apart from the fact that no affidavit has been filed by AIB addressing any of these points, there has been no suggestion that there is anything unusual or special about these proceedings. Everything instead points to the fact that this is a case which is entirely Cork-based and which ought really to be heard by the Circuit Court in that venue. Utilising the wording of s. 25 of the 1924 Act it can therefore be said that the present proceedings are not really fit to be prosecuted in the High Court and that it was not reasonable within the meaning of s. 11(2)(a) of the 1936 Act that they should have commenced in that court. Adopting the language of Dixon J. in *Stokes v. Milford Co-operative Creamery Ltd.* (1956) 90 I.L.T.R. 67 it may be said that there are no specific circumstances by reason of which the action ought to have been brought in the High Court.”

13. 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.”

14. The application of the principles in *Allied Irish Banks v. Gannon* to the facts of the present case is discussed under the next heading.

## **DISCUSSION AND DECISION**

15. For the reasons which follow, I am satisfied that an order for remittal should be made. First, the case as pleaded does not give rise to any novel issue of law or present complex facts such as might benefit from a hearing before, and a written judgment of, the High Court. (cf. *Promontoria (Oyster) DAC v. Fox* [2020] IEHC 12). Without in any way trespassing upon the merits of the parties’ respective positions, it can fairly be observed that the case, as pleaded, is not legally or factually complex. The allegation—and at this stage it is still only an allegation—is that lands subject to a charge were transferred with the intention of defrauding a creditor, and, in particular, with a view to preventing enforcement action being taken against the first named defendant’s interest in the lands. There is nothing unusual or special about these proceedings, and there are no specific circumstances by reason of which the action ought to have been brought in the High Court.
16. Secondly, not only are the relevant lands located within the jurisdiction of Cork Circuit Court, the principal witnesses all appear to be resident there also. There is a practical benefit, therefore, in having the case heard in Cork. This is especially so in the current climate where non-essential travel is restricted as part of the public health measures

introduced in response to the coronavirus pandemic. There is no necessity for all of the parties to have to travel to Dublin to the High Court to have the case determined there in circumstances where it can be adequately dealt with locally.

17. In reaching this conclusion, I have not lost sight of the fact that the plaintiff has agreed, in principle, that the costs should be confined to costs at the Circuit Court scale. This removes one of the objections to having the proceedings heard before the High Court. Costs are not, however, the only consideration. As noted above, there are practical and logistical reasons as to why the case should be heard in Cork.
18. Finally, whereas there was some suggestion that these proceedings should remain in the High Court in circumstances where a second set of proceedings might yet be instituted against the defendant(s), the fact of the matter is that no such proceedings have been instituted.

#### **CONCLUSION AND FORM OF ORDER**

19. For the reasons set out herein, an order will be made remitting the proceedings to the Circuit Court in Cork.
20. As to costs, Order 99, rule 2(3) provides that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been “entirely successful” is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order. One of the factors to which regard may be had in the exercise of this discretion is the conduct of the litigation.

21. The starting position, therefore, is that the second defendant having succeeded, notwithstanding the opposition of the plaintiff, in obtaining an order for remittal, would ordinarily be entitled to his costs. If the plaintiff wishes to contend for a different form of costs order, then written legal submissions are to be filed within fourteen days of the date of this judgment. The second named defendant will have fourteen days thereafter to reply.

Approved  
Gareth S. Mans