



**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 291

**Record No. 2016/234**

**Finlay Geoghegan J.  
Peart J.  
Hogan J.  
BETWEEN/**

**ALLIED IRISH BANKS PLC**

**RESPONDENT /**

**PLAINTIFF**

**- AND -**

**MARTINE GANNON AND RICHARD FAIR**

**APPELLANTS /**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 8th day of November 2017**

1. Does the Circuit Court have jurisdiction to entertain an application to declare void a voluntary conveyance on the ground that it amounted to a fraud on a creditor for the purposes of s. 74(3) of the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). This is the principal issue which arises on this appeal from a decision of the High Court (Binchy J.) dated 9th May 2016 not to remit these present proceedings to the Circuit Court.

2. In these proceedings the plaintiff Bank ("AIB") seeks an order pursuant to s. 74(3) of the 2009 Act declaring void a voluntary conveyance made on 13th April 2010 of certain property in Cork as between the first defendant, Ms. Gannon on the one hand and her husband, the second defendant, Mr. Fair on the other. The property in question is in fact the principal private dwelling of the couple who are married to each other. Prior to the conveyance the property was jointly owned by the couple, but the effect of the conveyance was to transfer Ms. Gannon's interest to her husband, so that Mr. Fair is now the full owner of the property.

3. AIB commenced these proceedings in the High Court in May 2015. The first defendant's solicitor wrote to AIB's solicitors on 11th April 2016 seeking consent to the remittal of these proceedings to the Circuit Court, but no such consent was apparently forthcoming. It is accepted that the rateable valuation of the property is less than the current maximum figure of €253.95 prescribed by the Third Schedule of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act").

4. On 18th April 2016 the solicitors for the second defendant issued a motion seeking an order pursuant to either Ord. 49, r.7 or s. 25 of the Courts of Justice Act 1924 transferring the proceedings to the Circuit Court in Cork. An affidavit grounding the motion was sworn by the second defendant's solicitor. She deposed to the fact that Mr. Fair was retired and the defence of these proceedings would impose a heavy burden on him. She further stated that the defence of the proceedings in the Circuit Court "would mitigate the costs of defending this action" on the part of her client. No replying affidavit was sworn on behalf of AIB.

5. The matter came before Binchy J. in the High Court in the course of a busy Monday list. Having heard a brief argument the judge ruled that AIB "probably had an election as to the jurisdiction in which to bring the proceedings". He refused the motion to remit the proceedings to the Circuit Court, ruling that in the event that AIB were successful, the defendants could seek that costs be paid on the Circuit Court scale on that basis that they had previously attempted to limit the costs by seeking to have the matter remitted to the Circuit Court and that this application had been resisted by the Bank.

6. The defendants have now appealed to this Court against that decision not to remit the proceedings.

**Does the Circuit Court have jurisdiction pursuant to s. 74 of the 2009 Act?**

7. Section 74 of the 2009 Act provides:

"(1) Subject to subsection (2), any voluntary disposition of land made with the intention of defrauding a subsequent purchaser of the land is voidable by that purchaser.

For the purposes of subsection (1), a voluntary disposition is not to be read as intended to defraud merely because a subsequent disposition of the same land was made for valuable consideration.

(2) Subject to subsection (4), any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced.

(3) Subsection (3) does not:

a) apply to any estate or interest in property conveyed for valuable consideration to any person in good faith not having, at the time of the conveyance, notice of the fraudulent intention, or

b) affect any other law relating to bankruptcy of an individual or corporate insolvency."

8. It will be seen that while s. 74 of the 2009 Act creates a new statutory cause of action, it is nonetheless one with deep roots in

our system of property law as the new section essentially re-states and re-enacts in modern form a jurisdiction to set aside conveyances previously contained in the Conveyancing Act 1634 and in the Voluntary Conveyances Act 1893. Both of these items of legislation were repealed by the 2009 Act.

9. So far as the issue of jurisdiction is concerned, s. 74 of the 2009 Act, admittedly, does not in terms positively confer jurisdiction on the Circuit Court and, indeed, the section is silent on the question of which Court can exercise this jurisdiction. The Circuit Court is, of course, a court of local and limited jurisdiction for the purposes of Article 34.3.4 of the Constitution, so that its jurisdiction must be prescribed by law. As this Court stated in *Permanent TSB v. Langan* [2016] IECA 229:

"Article 34.3.4 of the Constitution provides that: "The Courts of First Instance should also include Courts of local and limited jurisdiction with a right of appeal as determined by law". As the Circuit Court is, accordingly, a court of local and limited jurisdiction for the purpose of Article 34.3.4, it is necessary to consider the nature of that jurisdiction. One consequence of this constitutional provision is that the Circuit Court enjoys no inherent jurisdiction, as the limitations of the jurisdiction of the court must be as specified by law. This is in contrast to the position with regard to the High Court which, by virtue of Article 34.3.1 of the Constitution, enjoys a full original jurisdiction in respect of all justiciable matters."

10. Section 74 of the 2009 Act must, however, be read in conjunction with s. 3 of that Act. Section 3 provides that, "unless the context otherwise provides" the term court is defined as meaning:

"(a) the High Court, or

(b) the Circuit Court when exercising the jurisdiction conferred on it by the Third Schedule to the Courts (Supplemental Provisions) Act 1961."

11. Section 22 and the Third Schedule to the 1961 Act confers jurisdiction in civil cases on the Circuit Court (concurrently with the High Court) in a variety of miscellaneous circumstances, each of which in turn are subject to certain exceptions and qualifications. (The various exceptions and qualifications are not relevant to the issue under appeal). Two such specific provisions of the Third Schedule are relevant here.

12. Ref. No. 8 confers jurisdiction on the Circuit Court in respect of an action "in which the title to land comes into question, other than ejectment." I find it hard to say that the present proceedings do not concern title to land, because their very object is to have an otherwise ostensibly valid conveyance set aside and declared void. In the present case AIB contends, in effect, that Ms. Gannon should continue to be regarded as having title to one share of the family home and that the voluntary conveyance which purported to transfer that share to her husband should be set aside.

13. Ref. 21 confers jurisdiction on the Circuit Court in respect of proceedings "for the rectification or setting aside or cancellation of deeds or other written instruments." Again, it is clear that the Circuit Court is given jurisdiction in s. 74 proceedings because the object of such proceedings is to have a particular deed (namely, the voluntary conveyance) set aside by having it declared void.

14. It follows, therefore, that the Circuit Court has been given jurisdiction in s. 74 proceedings by reason of the operation of s. 3 of the 2009 Act and s.22 and Refs. 8 and 21 of the Third Schedule of the 1961 Act, unless, where, in the words of s. 3 of the 2009 Act, this construction would be contrary to the context of the section.

15. The fact that s. 74 is silent on the question of jurisdiction means that it stands in contrast to other provisions of the 2009 Act. Thus, for example, the Circuit Court is expressly given jurisdiction (subject to certain exceptions) in possession suits: see s. 97 and First Schedule of the 2009 Act. But, contrary to the submission of Mr. Murphy on behalf of AIB, I do not think that one can necessarily draw some kind of *expressio unius*-style inference by reason of this apparent omission in s. 74 itself. Given that the Circuit Court would traditionally have had jurisdiction in the vast majority of possession suits given that the rateable valuation of most private residence would have fallen well within the €253.95 rateable valuation limit, it is not perhaps surprising that the Oireachtas would have expressly addressed this jurisdictional question in cases of that nature. By contrast, the s. 74 jurisdiction is capable of being utilised in respect of a range of properties quite remote from that of the traditional family home. One could, for example, envisage circumstances in which a large industrial premises with a rateable valuation well in excess of the Circuit Court limit was transferred from one company to another in circumstances where a creditor might wish to have the conveyance set aside pursuant to s. 74(3) of the 2009 Act. In these circumstances, it may be expected that the High Court would have jurisdiction in that type of case.

16. In my view, therefore, the effect of s. 3 of the 2009 Act is, when taken to together with the Third Schedule to the 1961 Act, to confer jurisdiction and this construction would not be contrary to the context of s. 74 itself. This construction is not contrary to the context of s. 74 itself. Accordingly, I consider that the High Court judge was correct on this issue.

#### **Whether the proceedings should be transferred to the Circuit Court**

17. It is next necessary to consider whether the proceedings should be transferred to the Circuit Court. It is only fair to acknowledge that in this respect this Court has had the benefit of a fuller argument than was the case in the High Court.

18. Section 25 of the Court of Justice Act 1924 ("the 1924 Act") provides:

"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."

19. Broadly similar provisions are contained in Ord. 49, r. 7 reflecting the High Court's jurisdiction to remit or transfer a case to the Circuit Court or (as the case may be) the District Court.

20. Section 11(2)(a) of the Courts of Justice Act 1936 ("the 1936 Act") provides:

"Notwithstanding anything contained in s. 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...."

21. It is clear that s. 25 of the Courts of Justice Act 1924 ("the 1924 Act") reflected a legislative policy of what might be termed a form of legal decentralisation, so that litigants are thereby encouraged and facilitated in commencing their proceedings at the lowest level of the legal system appropriate to those proceedings. This policy finds expression in other contemporary legislative provisions, such as s. 17 of the Courts Act 1981 (as inserted by s. 14 of the Courts Act 1991) which imposes a cap on legal costs recovery in certain circumstances where the action might well have been commenced in either the District Court or the Circuit Court: see, e.g., *Savickis v. Governor of Castlereagh Prison (No.2)* [2016] IECA 372. Indeed, it may be said that Article 34.3.4 of the Constitution itself also reflects this policy because it amounts "to a recognition of the fact that the High Court is not expected to be a suitable forum for hearing and determining at first instance all justiciable matters": see *Tormey v. Ireland* [1985] I.R. 289, 295, per Henchy J.

22. Section 11(2)(a) of the 1936 Act admittedly tempers the earlier provisions by providing that an action shall not be transferred if the High Court is satisfied that "having regard to all the circumstances" it was reasonable that such proceedings were commenced in that court. In *Stokes v. Milford Co-Operative Creamery Ltd.* (1956) 90 I.L.T.R. 67 Dixon J. stated that the sub-section meant that where there were some specific circumstances by reason of which the action should have been brought in the High Court, it should not be remitted: see Delany, *The Courts Acts* (Dublin, 2000) at 120.

23. The construction of this latter provision was more recently considered by Morris J. in *O'Shea v. Mallow Urban District Council* [1994] 2 I.R. 117, 119-120 where he stated:

"Counsel submits that on the correct interpretation and construction of this subsection, it would follow that the court may only transfer and remit an action in circumstances where it was not reasonable that the action should have been commenced in the High Court and, he argues, that it would follow that any order remitting an action to the Circuit Court must contain an express finding that it was not reasonable to commence the action in the High Court and he argues that it would follow that in these circumstances no award in excess of the Circuit Court jurisdiction can be made.

In my view, this construction of the subsection is incorrect.

The provisions of s. 11(2)(a) of the Courts of Justice Act 1936, were enacted so as to provide for the circumstance where an action involves issues which are capable of being resolved in the Circuit Court and fall within the jurisdiction of that Court but, for valid reason, should properly be dealt with in the High Court. The subsection removes from the High Court the obligation to transfer an action simply because the subject matter of the action falls within the Circuit Court jurisdiction. The subsection provided for a circumstance where, notwithstanding the fact that the subject matter of the action falls within the jurisdiction of the Circuit Court, it is nevertheless reasonable and proper to retain the action in the High Court. If such circumstances exist then the High Court has the power to retain the action and not transmit it to the Circuit Court. It does not logically follow that, simply because the court makes an order transmitting the action for hearing to the Circuit, it was unreasonable to commence the proceedings in the High Court."

24. I entirely agree with this analysis and, indeed, with the approach which had earlier been taken by Dixon J. in *Stokes*. 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.

25. 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(1)(a) of the 1936 Act that they should have commenced in that Court. Adopting the language of Dixon J. in *Stokes* 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.

## Conclusions

26. In summary, therefore, I am of the view that:

27. First, the Circuit Court has jurisdiction in certain cases arising under s. 74 of the 2009 Act by reason of the provisions of s. 3 of that Act and s.22 and Refs. 8 and 21 of the Third Schedule of the 1961 Act. The property in question in these proceedings comes within the limits specified therein.

28. Second, as this present case is one with no special features, it cannot be said that this is a case in respect of which the High Court could have been satisfied that it was reasonable for the Bank to have commenced proceedings in the High Court within the meaning of s. 11(1)(a) of the 1936 Act.

29. I would accordingly allow the appeal and direct that the present proceedings should be remitted from the High Court to the Circuit Court in accordance with s. 25 of the 1924 Act.