

THE HIGH COURT

2016 No. 241 CA

Between:

JOSEPH CLEARY

Plaintiff

– and –

MARY CLEARY

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 20th July, 2017.

I. Overview

1. This is an appeal against a decision of the Circuit Court, on the basis of want of jurisdiction, not to grant judgment in default of defence in ejectment proceedings relating to a particular residence in Ballyfermot, County Dublin (the 'Ballyfermot Property'). The court has previously granted the order sought and explains its reasons for doing so below.

II. Factual Background

2. The plaintiff and the defendant are siblings. In or around 1999, Mr Cleary and his parents gave Ms Cleary permission to reside at the Ballyfermot Property. In or around 2002, Ms Cleary moved out of the Ballyfermot Property and into social housing and then, again with the permission of Mr Cleary and his parents, returned to the Ballyfermot Property. At this time, Mr Cleary and his parents were the registered owners of the Ballyfermot Property. In 2010 and 2013 respectively, Mr Cleary's father and mother, unfortunately, passed away. In January, 2011 and again in March, 2014, Mr Cleary demanded possession of the Ballyfermot Property from his sister but, at the date of hearing of the within application in May, 2017, she remained residing in the Ballyfermot Property. In May, 2014, Ms Cleary entered an appearance in the within proceedings. Since that time, Mr Cleary has engaged in protracted attempts to obtain a defence from Ms Cleary. At last, in January, 2016, his solicitor wrote to Ms Cleary and advised that unless a defence was received within 14 days, Mr Cleary would issue a motion seeking judgment in default of defence. No defence has ever in fact been received. At end-January 2016, a motion for judgment in default of defence was issued. That came on for hearing before the Circuit Court at end-October 2016. The learned Circuit Court judge accepted that Mr Cleary's papers were in order but considered herself coerced as a matter of law into declining the order sought because, she held, the Circuit Court did not have jurisdiction to act in the matter. An appeal against that decision was entered and came on for hearing before this Court in May, 2017. Despite being duly served, Ms Cleary did not appear at the hearing of the appeal, nor did anyone appear on her behalf.

III. Essence of Appeal

3. In the within appeal, which is a full re-hearing *de novo*, the High Court is possessed of the jurisdiction of the Circuit Court. Counsel for Mr Cleary was therefore required to advance one or more bases on which this Court, acting in its jurisdictionally constrained capacity, could hold, contrary to the finding of the learned Circuit Court judge in October, 2016, that it does have jurisdiction to make the order sought in the within proceedings. Counsel for Mr Cleary advanced three alternative bases on which the court could find itself possessed of the requisite jurisdiction to grant the order sought. The court finds that each of the three bases contended for offers a sound legal basis on which the court could as of the date of hearing make, and it made on that date, the order sought by Mr Cleary. Each of these three bases is considered hereafter.

IV. Basis #1:**Section 45 of the Civil Liability and Courts Act 2004***i. Civil Liability and Courts Act 2004.*

4. Section 45 of the Civil Liability and Courts Act 2004, as commenced by the Civil Liability and Courts Act 2004 (Commencement) Order 2017 (S.I. No. 2 of 2017) provides as follows:

"(1) Section 2 of the Courts (Supplemental Provisions) Act 1961 is amended by the insertion, in subsection (1), of the following definition:

"'market value' means, in relation to land, the price that would have been obtained in respect of the unencumbered fee simple were the land to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land."

(2) The Third Schedule to the Courts (Supplemental Provisions) Act 1961 is amended, in column (3), by the substitution of –

(a) 'market value' for 'rateable valuation' in each place that it occurs, and

(b) '€3,000,000' for '€200' (inserted by section 2(1)(d) of the Act of 1981) in each place that it occurs."

5. The effect of these ostensibly technical amendments is quite significant in the context of the within application. Unfortunately, it is necessary to go back to early-Victorian legislation and work forwards to the contemporary statutory framework to explain why this so.

ii. Civil Bill Courts (Ireland) Act 1851.

6. Enacted on 1st August, 1851, the Act of 1851 provides as follows, at s.79, of which the side-note reads "Ejectment on Title":

"LXXIX....[T]he several Assistant Barristers and the Recorder of the County of the City of Dublin and the several

Recorders herein mentioned, shall and they are hereby authorized and empowered to hear and determine within their respective Jurisdictions all Disputes and Differences respecting the Possession of any Lands, Tenements, or Hereditaments held under any Grant, Lease or other Instrument for any Term or Interest the Duration or Extent whereof when originally granted or created did not or shall not exceed Three Lives, without any Provision for the Renewal thereof, or a Term of Sixty-One Years determinable on Three Lives, or Three Lives with a concurrent Term of Years not exceeding Sixty-One Years, or a Term of Sixty-One Years absolute, and the yearly Rent reserved or payable in respect whereof under such Grant, Lease or other Instrument shall not exceed Twenty Pounds, and in respect of which no Fine exceeding Twenty Pounds shall appear on the Face of such Grant, Lease or other Instrument to have been paid on the granting or Execution of such Grant, Lease, or other Instrument, or held under a Parole Demise for a Term not exceeding Three Years at a Rent not exceeding Twenty Pounds, whether any Fine was paid upon the Creation of the same or not, or held for any Term or Tenancy from Year to Year at a Rent not exceeding such Amount as aforesaid; and every Person claiming such Possession may proceed by Civil Bill in the Court for the Division of the County or Riding wherein such Lands, Tenements or Hereditaments or any Part thereof shall be situate, for Recovery of such Possession."

7. Section 79 remains in force. As can be seen, the jurisdiction it gave was relatively limited in respect of the interest, the annual rent and the nature of the title. As a result of s.53 of the County Officers and Courts (Ireland) Act 1877, considered later below, the words "twenty pounds" wherever they appear in s.79 of the Act of 1851 have been replaced by the words "thirty pounds".

iii. Civil Bill Courts (Ireland) Act 1874.

8. Before turning to the Act of 1877, the court pauses to consider the expanded jurisdiction conferred, in the late-Victorian age, on what were then the Civil Bill Courts of Ireland, by s.1 of the Civil Bill Courts (Ireland) Act 1874, which provides as follows:

"The chairmen of every county in Ireland shall have jurisdiction to try by civil bill actions for the recovery of any debt or demand not exceeding forty pounds alleged to be due as the balance of a partnership account, whether the balance shall have been ascertained or not previous to the issuing of the civil bill; and such chairmen shall, in addition to any jurisdiction in respect of lands and hereditaments which they already possess, also have jurisdiction to try by civil bill actions in which the title to any corporeal or incorporeal hereditament shall come in question, when the value of the land in dispute, or in respect of which an easement or license is claimed, or on, through, over, or under which such easement or license is claimed, shall not exceed twenty pounds by the year as valued under the Acts relating to the valuation of rateable property in Ireland; but the decision of the chairmen in any action in which the title to any corporeal or incorporeal hereditament shall be in question shall not be evidence of title between the parties or their privies in any other action relating to any other corporeal or incorporeal hereditament, although the same may depend in the whole or in part on the same title: Provided, however, that this section shall not extend to any action in which title to any fishery or right of fishing shall come into question."

9. Section 1 of the Act of 1874 remains in force: it was expressly retained through its being listed in Schedule 1, Part 4 of the Statute Law Revision Act 2007. And we can tell, by reference to Mr Thomas Harrison's learned text *The Law and Practice Relating to Ejectments* (Dublin, 1903), that by the early-Edwardian period it was settled law that the Civil Bill Courts had jurisdiction in any action for ejectment where the title to corporeal or incorporeal hereditaments of any tenure was in question and the annual value of which, thanks to the Act of 1877 (considered below) did not exceed £30. The action was brought by way of 'Civil Bill Ejectment on the Title' with a claim being made for possession of the lands described in the civil bill.

iv. County Officers and Courts (Ireland) Act 1877.

10. The Acts of 1851 and 1874 were amended by ss. 53 and 54 of the County Officers and Courts (Ireland) Act 1877. Section 53 had the effect of upping all references to "twenty pounds" in the earlier Acts to "thirty pounds", with a corresponding increase in jurisdiction. Section 54 provided as regards the Act of 1874 that the words "action in which the title to any corporeal or incorporeal hereditaments shall come in question" when employed therein "shall include and may be applied to any action of ejectment upon the title", adding that "for the purposes of the said Act the annual value of any lands in question shall be estimated and may be established as provided by this Act".

v. Courts of Justice Act 1924.

11. In the early post-Independence phase of our national history, the jurisdiction of the Civil Bill Courts was transferred to the former Circuit Court by s.51 of the Courts of Justice Act 1924. Section 48 of that Act provided a general limit on the jurisdiction of the Circuit Court in civil cases, being limited, in cases involving title to the land, to cases where the Poor Law Valuation of the property in question did not exceed £60.

vi. Courts (Supplemental Provisions) Act 1961.

12. Almost half a century into Independence, ss.48 and 51 of the Courts of Justice Act 1924 were repealed by s.3 and schedule 1 of the Act of 1961, which Act transferred the jurisdiction of the former Circuit Court to the present Circuit Court. Section 22(5)(a) of the Act of 1961 provides that "There shall also be vested in the Circuit Court all jurisdiction which, by virtue of any enactment which is applied by section 48 of this Act, was, immediately before the operative date, vested in or capable of being exercised by the existing Circuit Court." And s.48(1)(a) of the Act of 1961 provides that "Subject to paragraph (b) of this subsection, this section applies to the following enactments: (i) any enactment contained in the Courts of Justice Acts, 1924 to 1961". Thus, to borrow from the judgment of Hogan J. in last year's decision of the Court of Appeal in *Permanent TSB plc v. David Langan* [2016] IECA 229, para. 23, "It is...clear that by virtue of this statutory chain of title [that] the jurisdiction conferred by the 1877 Act – which remains in force on the Civil Bill Courts (and as later subsumed into the County Court) continues to be enjoyed by the present Circuit Court." The court is conscious that the decision of the Court of Appeal in *Langan* has been appealed to the Supreme Court. However, it remains binding in its entirety on the court at this time, and insofar as the just-quoted observation is concerned, the court would respectfully note that Hogan J.'s observation is, in any event, demonstrably correct.

13. Section 22(1)(a)–(c) of the Courts (Supplemental Provisions) Act 1961 identifies the current jurisdiction of the Circuit Court in the following terms:

"(a) Subject to paragraphs (b) and (c) of this subsection, 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 column (2) of the Third Schedule to this act at any reference number.

(b) Unless the necessary parties to the proceedings in a cause sign, either before or at any time during the hearing, the form of consent prescribed by rules of court, the Circuit Court shall not, by virtue of paragraph (a) of this subsection, have jurisdiction to hear and determine any cause of the kind mentioned in column (2) of the Third Schedule to this Act

at a particular reference number in the case mentioned in column (3) of the said Schedule at that reference number.

(c) *The Circuit Court shall not, by virtue of paragraph (a) of this subsection, have jurisdiction to hear and determine any matter of the kind mentioned in column (2) of the Third Schedule to this Act at a particular reference number in the case mentioned in column (3) of the said Schedule at that reference number.*"

14. The Third Schedule to the Act of 1961 lists at reference eight "An action in which the title to land comes into question, other than an action of ejectment", subject to the quantitative restriction "[w]here the rateable value of the land exceeds £60". The Third Schedule then lists at reference 9, again subject to instances "[w]here the rateable valuation of the land exceeds £60", "An action for ejectment other than – (a) an action under section 82 of the Civil Bill Courts (Ireland) Act 1851, or under section 78 to 80 of the Landlord and Tenant Law Amendment Act 1860 (hereinafter in this Schedule referred to as the Act of 1860), or (b) an action of the kind specified in column (2) of this Schedule at reference number 10."

vii. Courts Acts 1971 and 1981.

15. The £60 rateable valuation referred to in the immediately preceding paragraph was raised to £100 by s.2(1)(d) of the Courts Act 1971 and to £200 by s.2(1)(d) of the Courts Act 1981.

viii. Back to the Act of 2004.

16. The court has touched upon the detail of the recently commenced s.45 of the Act of 2004 previously above. Its significance can now properly be appreciated. Section 45(2) amends the Third Schedule to the Act of 1961 by substituting the concept of "market value" for that of "rateable valuation" and substituting the sum of €3m for each instance of €200 that appears in the Third Schedule by virtue of the Act of 1981. The effect of these changes is that the Circuit Court now has jurisdiction in actions for ejectment whenever the market value does not exceed €3m.

17. The question that immediately arises at this juncture is whether the court can apply s.45 in the context of proceedings which were commenced prior to the commencement of that provision. The court, in this regard, recalls the reasoning of Baker J. in *Meagher and anor v. Woods and anor* [2015] IEHC 464. That was a case in which the Circuit Court had made an order for possession of four separately rated premises in County Monaghan. When the proceedings were instituted the combined rateable valuation of all four premises was reduced because a fire had occurred in one of the buildings which, as a consequence, had a nil rateable valuation. But, by the time of the final order, the premises had a combined rateable valuation that was greater than the jurisdictional limit. A key issue that fell to Baker J. to resolve was the point in time at which the jurisdiction of the Circuit Court fall to be determined. In this regard, she observed as follows, at paras 55–56 of her judgment:

"55....I reject the contention of the plaintiffs that as jurisdiction is established to have existed at the date of the institution of the proceedings, the Circuit Court continued to enjoy that jurisdiction until the making of the final order.

56. The answer to that question is found in the terms of the Act of 1961 itself, which provides that the jurisdiction of the Circuit Court to hear and determine proceedings is limited by the monetary and valuation limits provided in the Act. The fact that the Oireachtas provided that the jurisdiction was one to determine the proceedings reflects in my view an obligation that the jurisdiction be in existence at the date the relevant order is made, in other words the date of the determination of the dispute by the proceedings."

18. Baker J. applied the foregoing logic to conclude that the Circuit Court did not continue to have jurisdiction in the matter before her when, in the course of proceedings, the rateable value went beyond the jurisdictional threshold. *Meagher*, of course, was a case in which the facts had changed but the law had not; this is a case in which the law has changed but the facts have not, save insofar as the market value of property constantly fluctuates. *Meagher* was also a case in which the Circuit Court had jurisdiction and lost it; this is a case in which, at least by reference to s.45 of the Act of 2004, the Circuit Court did not have jurisdiction and this Court (clothed in the jurisdiction of the Circuit Court) is claimed to have gained it. Regardless of these differences, it seems to the court that Baker J.'s logic nonetheless holds true and that it is compelled, by virtue of that logic, as quoted above, to gauge whether, by reference to the law as it applied as of the date of its determining Mr Cleary's application, it had the jurisdiction to make the order sought of it on that date. That is not the retrospective application of legislation, but rather the application of contemporary legislation to determine a contemporary issue as to jurisdiction at the moment in time when, per *Meagher*, jurisdiction falls to be determined.

19. The court has clear evidence before it in the form of an affidavit sworn by Mr Cleary on 17th February, 2017, and admitted at the hearing of the within application pursuant to O.61, r.8 of the Rules of the Superior Courts 1986, as amended, which points to the market value of the Ballyfermot Property as being about €140k and almost certainly not in excess of €175k, being the rounded-up price for which a brochure on www.daft.ie, a popular property website, indicates a nearby property, in better condition, to have been sold at end-January 2017. If one believes the pundits, real property prices in the Dublin area appear generally to be on the rise again but clearly not to the extent that the market value of the Ballyfermot Property could conceivably have risen since January to a value in excess of €3m.

20. It appears to the court for the reasons stated that Basis #1 offers and offered a sound legal basis on which to grant Mr Cleary the order made on the date of hearing.

V. Basis #2:

Section 82 of the Civil Bill Courts (Ireland) Act 1851

21. Returning again to the early-Victorian period, the Civil Bill Courts enjoyed a jurisdiction under s.82 of the Act of 1851 in respect of the ejectment of permissive occupants, holding without demise and without rent, whose permissive occupation was proven and who had refused to comply with demand for possession. As can be seen from the court's introductory remarks as to the background of this case, Ms Cleary comes within the category of permissive occupant: she was originally permitted as an act of kindness between siblings to stay in the Ballyfermot Property, there was no demise arising and she does not pay rent. She is also a person who has refused to comply with repeated demands for possession.

22. Section 82 of the Act of 1851 provides as follows:

"LXXXII. And whereas Owners of Land in Ireland are often Sufferers by Caretakers, Servants, Herdsmen and other Persons holding over the Possession of Lands and Premises which they do not hold under any Lease or Parole Demise, but

strictly at Will or by Sufferance, or merely by Permission: Be it enacted, That if any Person who shall have been heretofore, or shall hereafter be, by the Owner of any Land, Tenements or Hereditaments, or by his Agent, Receiver, or Bailiff, put or let into occupation or possession thereof by Permission, or as Servant or Caretaker, or as Tenant strictly at Will or by Sufferance, shall refuse or omit to quit and deliver up Possession of the said Premises, on Demand made by the Owner thereof, or his known Agent or Bailiff, it shall and may be lawful for such Owner, his Heirs, Executors, Administrators or Assigns, (after such Demand and Refusal or Omission to deliver up the same) to proceed by way of Civil Bill Ejectment Process for the Recovery of the Possession thereof against such Person or Persons so in occupation or possession, or any Person or Persons being or claiming to be in occupation or possession by, through or under such Person or Persons; and it shall and may be lawful for the respective Assistant Barrister, Chairman, or Recorder to hear and determine such Civil Bill in the same or like Manner as he is hereby empowered in Cases of Ejectment against over-holding Tenants, and to make a Decree or Dismiss thereon: Provided always that nothing in this Provision contained shall be deemed to affect or prejudice any Right or Remedy which any such Owner of Land, his Heirs, Executors, Administrators, or Assign, might have used or exercised in such Case for taking or obtaining the actual Possession of such Premises, if this Act had not been passed."

23. The entitlement under s.82 of the Act of 1851 is in addition to any entitlement under s.1 of the Act of 1874. Section 82 has not been repealed. By s.17 of the Courts of Justice Act 1928, the District Court was given concurrent jurisdiction in relation to an action for ejectment under s.82 of the Act of 1851; however, the jurisdiction conferred on the Circuit Court was not removed from the Circuit Court. Lest there be any doubt in this regard, the point is expressly confirmed by the Fourth Schedule to the Act of 1961 which lists s.82 of the Act of 1851 at reference 17, thereby including it in the jurisdiction of the Circuit Court. Interestingly, no quantitative limitation on jurisdiction is imposed by the Act of 1961. Nor does such a limitation appear to have existed. So, for example, while Harrison mentions the need to establish Circuit Court jurisdiction in a civil bill ejectment brought under s.1 of the Act of 1874, he does not mention any need to bring a claim under s.82 of the Act of 1851 within any quantitative jurisdictional limit. Moreover, in Form 2D of the Circuit Court Rules 'Ejectment civil bill – title jurisdiction or permissive occupant', there is no requirement to include a statement as to rateable valuation where the application is brought in respect of a permissive occupant.

24. Mr Cleary's civil bill in the within proceedings contains the information appropriate to ground relief either as an ejectment civil bill on title, or as an ejectment civil bill on title for a permissive occupant. 'Double jobbing' by a civil bill is permitted under the Circuit Court Rules. Thus Order 5 of the Circuit Court Rules ("*Commencement of proceedings*") states, at rule 1, that "*Civil proceedings in the Court shall, unless otherwise provided by Statute or by these Rules, be instituted by the issue of a Civil Bill, which shall be in the appropriate form in accordance with the Schedule of Forms to these Rules...or such modification thereof as may be suitable and shall state such facts as may be necessary to show the jurisdiction of the Court.*"

25. It appears to the court for the reasons stated that Basis #2 offers and offered a sound legal basis on which to grant Mr Cleary the order made on the date of hearing.

VI. Basis #3:

Section 67 of the Valuation Act 2001

26. Pursuant to s.31 of the Act of 1877, whenever it is necessary to ascertain the value of any lands for the purposes of proceedings before the Circuit Court, in circumstances where there is no valuation of lands, it is permissible to estimate the value of the lands according to the principles of valuation prescribed by the Valuation Acts, and to establish that estimate by any legal evidence. In this regard, on 3rd May, 2016, Mr Cleary obtained a certificate of rateable valuation which had issued under s.67 of the Valuation Act 2001. The certificate appears not properly to have been before the Circuit Court at its hearing last October. It appears as an attachment to an affidavit which has been admitted before this Court pursuant to O.61, r.8 of the Rules of the Superior Courts 1986, as amended. That affidavit, sworn by an officer of the Commissioner of Valuation, and the accompanying attachment indicate the rateable valuation of the Ballyfermot Property to be €57.50.

27. A so-called 's.67 certificate' had a walk-on appearance in each of the two conflicting decisions that issued from the High Court in recent years concerning the jurisdiction of the Circuit Court, and which fell to be resolved by the Court of Appeal in *Permanent TSB v. Langan* [2016] IECA 229, which last decision, as mentioned above, remains binding on the court, notwithstanding any appeal being brought in respect of same to the Supreme Court. Thus in *Bank of Ireland Mortgage Bank v. Hanley* [2015] IEHC 738 such a certificate was sought to be relied upon but was held inadmissible by Noonan J., with the case being decided in any event on a very different ground. (The difficulty as to admissibility identified in the case has since been cured by s.3 of the Courts Act 2016). In *Bank of Ireland Mortgage Bank v. Finnegan* [2015] IEHC 304, the bank sought to rely on a letter from the Valuation Office which indicated that the property in issue was not yet valued for rating purposes but that the rateable value of certain proposed buildings would not exceed €252.95. Evidence from a member of the Valuations Office was given at hearing to the effect that the letter aforesaid was not a s.67 certificate. The criticism made by Murphy J. in that case, at 18, of the reliance which it was sought to place on an "*ad hoc non-statutory process which is devoid of legal effect*" was, the court understands, a criticism of the provisional assessment letter, not a criticism of certificates that issue under s.67. In *Langan*, the bank had not obtained a s.67 certificate and the issuance of certificates under that provision were not mentioned in that case.

28. There has been no decision of the Superior Courts which has said that it is not possible to rely on a s.67 certificate to establish rateable valuation; and what lawful statute gives, it does not in any event fall to the courts to take away. Here, there is a s.67 certificate, it indicates the rateable value of the Ballyfermot Property to be €57.50, a valuation which places the within application comfortably within the applicable jurisdictional limit of the Circuit Court.

29. It appears to the court for the reasons stated that Basis #3 offers and offered a sound legal basis on which to grant Mr Cleary the order made on the date of hearing.

VII. Conclusion

30. Sometimes it seems in life as if no good deed goes unpunished: Mr Cleary sought to assist his sister and has ended up having to bring ejectment proceedings to which no defence has ever been entered. For the reasons identified above, and on each and all of the bases considered above, the court was satisfied to grant the judgment in default of defence which issued on the date of hearing of the within application.