THE HIGH COURT

DUBLIN CIRCUIT COUNTY OF DUBLIN

[2017 No. 188 CA]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

RICHARD FARRINGTON AND AUDREY FARRINGTON

DEFENDANTS

JUDGMENT of Mr. Justice Coffey delivered on the 14th day of May, 2018

1. This is an appeal against an order of the President of the Circuit Court made on 19 June 2017 wherein he refused the defendants' application on the trial of a preliminary issue for an order striking out, dismissing or staying the proceedings in respect of the six issues set out in an issue paper before the court.

2. The issues set out in the issue paper are as follows:

> 1. "Whether the proceedings herein should be struck out or dismissed as being oppressive or an abuse of process.
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> 2. Whether the proceedings herein should be struck out or dismissed as breaching the rule in Henderson and Henderson.
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> 3. Whether the proceedings herein should be struck out or dismissed as being a case of issue estoppel.
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> 4. Whether the proceedings herein should be struck out or dismissed as being a case of cause of action estoppel.
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> 5. Whether the proceedings herein should be stayed until the costs in the High Court case between the parties (being proceedings entitled, The High Court, Record Number 2011, No. 3477S, Between, Bank of Ireland Mortgage Bank, Plaintiff and Richard Farrington and Audrey Farrington, Defendants) are first paid or discharged.
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> 6. Whether the proceedings herein should be struck out or dismissed or stayed on public policy or other equitable grounds."

Factual Summary

3. The plaintiff in this action seeks possession from the defendants of their family home, the property known as No. 78 Heytesbury Lane, Ballsbridge, Dublin 4 ("the property"). The property was purchased by the defendants on 16 November 2006 for the sum of €2,600,000. The plaintiff advanced two loans to the defendants to assist with the purchase of the property, a loan of €1,000,000 for a term of twenty years and a loan of €1,000,000 for a term of five years, being €2,000,000 in the aggregate.

4. The money so advanced by the plaintiff to the defendants was secured by a mortgage dated 16 November 2006 over the property. The mortgage was in the plaintiff's standard form and included the following terms:

> "3.01 The Mortgagor as beneficial owner hereby grants and conveys onto the Mortgagee ALL THAT AND THOSE so much of the Mortgage Property (save any parts of the ownership whereof is registered in the Land Registry) as is a freehold tenure TO HOLD the same unto the Mortgagee in fee simple subject to the proviso of redemption hereinafter contained.
>
> 3.02 The Mortgagor as beneficial owner hereby demises unto the Mortgagee ALL THAT AND THOSE so much of the Mortgaged Property (save any parts the leasehold ownership whereof is registered in the Land Registry) as is of leasehold tenure TO HOLD the same unto the Mortgagee for all the residue or respective residues of the term or respective terms of years of the Mortgagor's tenure less the last three days of such term or respective terms subject to the proviso for redemption hereinafter contained.
>
> 6.01 At any time after the execution of this Mortgage the Mortgagee may without any further consent from or notice to the Mortgagor or any other person enter into possession of the Mortgaged Property or any part thereof or into receipt of the rents and profits of the Mortgaged Property or any part thereof.
>
> 6.02 The Mortgagee shall have the statutory powers conferred on mortgagees by the Conveyancing Acts as varied and extended by this Mortgage including the power to appoint a receiver and particular subject to the following variations and extensions that is the say…
>
> 6.05 The powers conferred on the Mortgagee by this Mortgage are an addition to all the powers and remedies conferred on or vested in the Mortgagee by statute, common law or otherwise. "
>
> Definition B(4)
>
> The "Conveyancing Acts" means the Conveyancing Acts, 1881 to 1911 and the Registration of Title Act, 1964 and "Act of 1881" means the Conveyancing Acts, 1881."
>
> Section Headed "C Interpretation" at page 5
>
> (4) Reference to any enactment includes reference to any statutory modification thereof whether by way of amendment addition deletion or repeal and re-enactment with or without amendment and whether such be occasioned by Act of the

> Oireachtas, Ministerial order or regulation or by regulation or directive or other enactment of any organ of the European Union."

5. It is common case that the defendants defaulted in repaying the monies due and owing to the plaintiff under the terms of the loan agreements, that the monies due and owing are substantial and that they are secured by way of mortgage on the property by virtue of the Mortgage dated 16 November 2006.

2010 Proceedings for Possession

6. On 20 December 2010 the plaintiff issued a Civil Bill for Possession of the property in proceedings entitled "Bank of Ireland Mortgage Bank, Plaintiff, Richard Farrington and Audrey Farrington Defendants, the Circuit Court, the County of the City of Dublin, Record No. 1287 8/2010".

7. On 13 December 2011 the Circuit Court granted an order for possession in respect of the property. The defendants appealed this order of the Circuit Court by notice of appeal dated 15 December 2011.

8. Prior to this, on 1 December 2009 the Land and Conveyancing Law Reform Act 2009 ("the Act of 2009") came into force. The Act of 2009, *inter alia*, repealed ss. 15 to 24 of the Conveyancing and Law of Property Act 1881 ("the Act of 1881"). The sections of the Act of 1881 so repealed were those which set out the statutory powers of sale of a mortgagee and the statutory powers of a mortgagee to appoint a receiver. The Act of 2009 also abolished the previous power that a mortgagee had to seek foreclosure.

9. When the appeal came on for hearing before the High Court, the defendants contended that there was no express power of sale reserved to the plaintiff in the mortgage deed other than the statutory powers conferred on mortgagees by the "Conveyancing Acts" and which statutory powers were defined in the deed as being subject to "amendment addition deletion or appeal". The defendants argued that the plaintiff no longer had a power of sale in circumstances where the statutory powers referred to in the deed had been repealed by the Act of 2009. The defendants further argued that the plaintiff's power to seek possession of the property was not a right in itself and was no more than a power in aid of the statutory powers of sale and foreclosure, both of which had been repealed. Accordingly, it was contended that the plaintiff could not seek to enforce a right to seek possession. In so contending, the defendants relied on the legislative loophole identified by Dunne J. in *Start Mortgages Limited & Ors. v. Gunn & Ors*. [2001] IEHC 275.

10. On 25 July 2013 the High Court (Charleton J.) stated a case to the Supreme Court pursuant to s. 38 of the Courts of Justice Act 1936 as follows:

> "Whether, by virtue of the passing of the Land and Conveyancing Law Reform Act 2009, the power of sale and/or power to seek possession which the Plaintiff previously enjoyed under the mortgage have been removed from the Plaintiff OR whether the power of sale and/or power to seek possession of the Property which the Plaintiff so enjoyed have survived and remain enforceable in accordance with the provisions of the mortgage as governed by the law prevailing at the time when the mortgage deeds were executed."

11. A day prior to this, on 24 July 2013, the Land and Conveyancing Law Reform Act 2013 ("the 2013 Act") was enacted to provide relief to lenders whose security was affected by the repeal of certain statutory powers by the Act of 2009 and to close the loophole identified in *Start Mortgages Limited*. The Act of 2013, *inter alia*, provided for the continued application of the repealed provisions of the Conveyancing Acts 1881 to 1911 to all mortgages created prior to 1 December 2009.

12. On 29 July 2014, and prior to any determination by the Supreme Court of the case stated to it by the High Court on the 25 July 2013, the plaintiff purported to discontinue the proceedings by issuing a notice of discontinuance in the High Court, dated 29 July 2014. On 30 July 2014, the plaintiffs' lawyers, in the presence of the defendants' solicitor, informed Charleton J. that the proceedings were being discontinued and that the case stated was being withdrawn. It was not in dispute that, at the hearing of this appeal, Senior Counsel for the plaintiff informed the court that the plaintiff intended to bring further proceedings pursuant to the Act of 2013. By consent, the court made an order striking out the proceedings with an order for costs in favour of the plaintiff. Whether through inadvertence or otherwise, no order was made to vacate the order for possession made by the Circuit Court on 13 December 2011 which remains extant. To compound matters, this case was fully argued, both in the Circuit Court and on appeal before this Court, without any acknowledgment or indeed recognition of this fact or any consideration as to the impediment that the existence of the order might create. Having identified the potential difficulty that arose, this Court of its own motion re-entered the matter for further hearing solely in relation to this issue. At that hearing, the parties accepted this Court's view that neither the purported notice of discontinuance dated 29 July 2014 nor the order of Charleton J. of 30 July 2014 had the effect of setting aside the judgment of the Circuit Court given on 13 December 2011. I will return to these matters in due course having first addressed the arguments that were actually advanced at the hearing of this appeal.

2011 Proceedings for Debt

13. On 17 August 2011 the plaintiff issued a summary summons seeking judgment in the sum of €1,987,213.36 as against the defendants in proceedings entitled "Bank of Ireland Mortgage Bank, plaintiff and Richard Farrington and Audrey Farrington, defendants, High Court record no. 2011/3477S".

14. Following the entry of an Appearance on behalf of the defendants by their solicitor, the plaintiff issued a notice of motion dated the 9 December 2011 seeking the recovery of the said sum. The notice of motion was grounded upon two affidavits supporting the application and opposed by a replying affidavit sworn by the first named defendant. The motion appeared before the Master of the High Court on four occasions and was eventually struck out by consent on 10 July 2012 with an order providing for the defendants' costs. For the purposes of these proceedings, an affidavit was sworn on behalf of the plaintiff wherein it was averred that, as a result of the first named defendant's challenge to the plaintiff's calculation of the sum claimed, the plaintiff carried out a review of the defendants' two accounts and discovered that there had in fact been a miscalculation so that an incorrect interest rate had been applied. It is asserted by the plaintiff that it was on that basis that the proceedings were struck out on consent. There is a dispute between the parties as to whether the costs of those proceedings have been paid. The plaintiff asserts that a global sum was agreed in respect of the costs of the 2010 and 2011 proceedings which were paid in full. The defendants' solicitor disagrees and says that he has yet to tax his costs in respect of the second matter but agrees that he has been paid in full for the 2010 proceedings.

The Instant Proceedings

15. On 15 July 2015 the plaintiff issued a Civil Bill for Possession of the property to which the defendants entered an Appearance through their solicitor on 4 February 2016. On 13 June 2016 the first named defendant swore an affidavit in which he raised the preliminary issues set out in the issue paper.

Objection

16. The defendants' objection to the current proceedings both in the Circuit Court and on appeal to this Court is on the basis that the plaintiff now seeks to re-litigate precisely the same cause of action that it choose not to pursue to final judgment or settlement but rather withdrew on 29 July 2014. The defendants submit that the tactical withdrawing of litigation in order to repeatedly sue the defendants in respect of the same cause is fundamentally unfair, oppressive and an abusive of process. Specifically, it is argued, that the defendants are being subjected to "unjust harassment" of a kind to which they are entitled to protection under the rule in *Henderson v. Henderson*.

17. The plaintiff opposes the application relying primarily on the terms and effect of O. 26, r. 1 of the Rules of the Superior Courts 1986 and the decision of the Supreme Court in *Allied Irish Bank plc v. Darcy* [2016] IR 588, where the Supreme Court refused an identical application on facts, which it is argued are very similar to the facts in the instant case.

The rule in *Henderson v. Henderson*

18. This is not a case in which the defendants' objection relies on *res judicata* in its strict sense which is best understood as applying to or consisting of cause of action estoppel and issue estoppel. This is because in such a case there must at the very least be a judgment in respect of a cause of action or issue which is final, conclusive and made on the merits even though it be the subject of an appeal. As stated by Lord Shaw in *Bradshaw v. M'Mullan* [1920] 2 IR 412, p. 424:-

> "[T]he overruling consideration with regard to *res judicata* is that there should have been a judiciun. That is to say, that the merits of the identical dispute between the identical parties, on the identical subject-matter, and on the same media, should have been settled by judgment. The judicial mind should have been applied to it. This is the principle, familiar and fundamental."

19. As there was no judicial determination of their appeal, the defendants fall back on the rule in *Henderson v. Henderson* which was stated in the following terms by Wigram V. C. in *Henderson v. Henderson* (1843) 3 HARE 100, p. 115:-

> "[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of a subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

20. The courts will apply a more exacting scrutiny under *Henderson v. Henderson* where the complaint is that the plaintiff has not merely failed to bring forward an aspect of his claim but rather has brought proceedings in respect of his claim and thereafter withdrawn them. Thus in *Mount Kennett Investment Company and Others v. O'Meara and Others* [2011] 3 IR 547, Clarke J. (as he then was) stated:-

> "The fact that (a) case had been brought and abandoned would be a significant consideration against the court exercising any discretion it might have had to allow it to be re-heard. In those circumstances, it would seem to me that a case brought and abandoned would face an even greater struggle then a case not brought in the first place."

21. Although it is described as a rule which might suggest that it ought to be applied mechanically and without discretion, the case law recognises that there is a critical distinction to be drawn between *res judicata* and the rule in *Henderson v. Henderson* in the way in which their requirements are applied. In *Moffitt v. Agricultural Credit Corporation plc*. [2007] IEHC 245, Clarke J. (as he then was) stated:-

> "3.8. If a matter is *res judicata* then, in the absence of a defence to the application of the doctrine such as fraud, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.
>
> 3.9. On the other hand, where reliance is placed on the rule in *Henderson v. Henderson* to the effect that it would be an abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court will adopt a more broad based approach."

22. In *A.A. v. The Medical Council and The Attorney General* [2003] 4 I.R. 302 Hardiman J. referred to the rule in *Henderson v. Henderson* and stated, at p.317:-

> "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities. This point has a particular resonance in terms of article 6 of the European Convention on Human Rights and Fundamental Freedoms 1950."

23. In the same judgment, Hardiman J., at p.316, approved the following dictum of Lord Bingham in *Johnston v. Gore Wood & Co*. [2002] A.C. 1 where he stated, at p.31:-

> "[T]here will rarely be a finding of abuse unless the later the proceeding involves what the courts regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in a later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

24. In the more recent decision of *O'Driscoll and Others v. McDonald and Others* (Unreported, High Court, Barton J., 11 February 2015) Barton J., after a comprehensive and careful review of the authorities in relation to *Henderson v. Henderson*, stated:-

> "72. [The rule in *Henderson v. Henderson*] must not be applied in a way or manner which would have the effect of depriving or fettering the court in the exercise of its inherent jurisdiction to make an order on an application where the rule is invoked, as it has been here, and that that is particularly so where special circumstances exist and which, having

due regard to those, the application of the rule in a rigid or mechanical manner would in the result be unjust."

Order 26, rule 1 of the Superior Courts

25. Order 26, r. 1 of the Rules of the Superior Courts 1986 provides an exception to the rule in *Henderson v. Henderson* insofar as it expressly provides that the discountenance or withdrawal of an action, pursuant to its provisions, as the case may be "shall not be a defence to any consequent action".

26. The rule provides as follows:-

> "The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing in the Form No. 20 in Appendix C, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed. The plaintiff may, however, at any time prior to the setting down of any cause for trial wholly discontinue his action, with or without costs to be paid by any party, upon producing to the proper officer a consent in writing signed by all parties or by their solicitors and such costs (if any) shall be taxed. Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the Court, but the Court may before, or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave."

27. Commenting on the rule in *O'Driscoll v. McDonald infra*, Barton J. stated:-

> "60. The discontinuance of an action in accordance with O. 26. of the Rules of the Superior Courts will not give raise to an estoppel nor is a bar to fresh proceedings created by the dismissal of an action for want of prosecution or because it was premature."

28. In *Allied Irish Bank plc v. Darcy* infra., Charleton J. observed that:-

> "10. The text of [O. 26. r. 1 of the Rules of the Superior Courts 1986] clearly provides for discontinuance of proceedings without leave of the court. It also makes plain that, in the ordinary way, any such action will not amount to the setting up of an event against the party discontinuing whereby it may be said that any principles of *res judicata* applies."

29. He went on to further state:-

> "17. The Rules of the Superior Courts contemplate that litigation may have to be brought to an end and, in that regard, Order 26, Rule 1 provides a complete code for the proper and just control of that circumstance..."

30. Charleton J. made it clear, however, that O. 26. r. 1 did not displace the inherent jurisdiction of the courts to prohibit the reissuing of discontinued litigation where it is brought for an "improper purpose" or otherwise constitutes an abuse of process.

Allied Irish Bank plc v. Darcy

31. In that case the defendants, who were property developers, borrowed significant sums from the plaintiff for a property venture which were secured by legal charges on the relevant properties. The borrowings were not repaid, however, and the bank obtained judgment in default of appearance against the defendants for the debt which it sought to execute by way of seeking an order for possession of the properties. It obtained a summary judgment from the High Court for possession of the relevant properties which was successfully appealed by the defendants to the Supreme Court which set aside the judgment for possession and remitted the entire matter for plenary hearing to the High Court. Whilst the High Court proceedings were still pending, the plaintiff issued new proceedings which expressly on their face relied on the provisions of the Land and Conveyancing Law Reform Act 2013. Subsequent to the issuing of those proceedings, the bank served a notice of discontinuance in respect of the initial proceedings. On these facts, the defendants moved to stay the second set of proceedings as an abuse of process.

32. In the High Court, Gilligan J. refused the application and exercised his discretion to find that the proceedings were valid notwithstanding the fact that they were issued before a notice of discontinuance was served. He took the view that the error that occurred was simply "an error of form and not an error of any substance" because to hold otherwise would oblige the plaintiff to issue a third set of proceedings to which the defendants would have no defence by reason of the Land and Conveyancing Law Reform Act 2013.

33. On appeal to the Supreme Court, Charleton J. stated:-

> "11. The real issue is whether there had been an abuse of the process of the courts by the discontinuance of the first special summons proceedings and the substitution of a new special summons, lacking the ostensible defect of the first, with an overlap of both sets of proceedings for the period from 28th January to 9th April 2014. The answer must be in the negative."

34. Charleton J. stated:-

> "14. [A] court must examine the individual circumstances of a particular case (a process which necessitates an understanding of a case's history and the course of proceedings up to that point) before it can properly exercise its jurisdiction to strike out proceedings as an abuse of the legal system."

35. Having noted that the plaintiff was owed a "substantial amount of money" by the defendants, Charleton J. stated that:-

> "15. [A]ny consideration as to whether there has been an abuse of the process of the court by the bank should start with the premise that creditors are entitled to enforce their debts."

36. Following an examination of the circumstances in which the bank had discontinued the first set of proceedings, Charleton J. noted

that they had been discontinued in circumstances where they suffered a "technical defect" which necessitated their recommencement. He said that this was a very different situation to one where such discontinuance should be "condemned". He concluded by saying, at para.18, that the "courts would be abjuring their responsibility to grant wronged parties an appropriate legal remedy if they were to force litigants to unnecessarily continue litigation that is flawed only in terms of procedural correctness." He stated that in such a situation a "just response" was the awarding of costs to the parties who were required to seek advice and respond to the relevant litigation.

Decision

37. It seems to me that the facts of the instant case are materially similar to the facts in *Darcy*. Whilst the plaintiff does not have a judgment for the relevant debt, it is common case that the defendants owe a substantial sum of money to the plaintiff which is secured by way of mortgage on the property by virtue of the mortgage deed. Accordingly, the "real issue" is whether the purported discontinuance of the first set of proceedings and the bringing of a second set of proceedings was for "an improper purpose". It seems to me that the plaintiff's purpose in withdrawing and reissuing its proceedings in this case was identical to that of the bank in Darcy.

38. There are, however, two differences between the instant case and the Darcy case:-

> (1) unlike the notice that was served in *Darcy*, the notice of discontinuance served in these proceedings was of no legal effect under O. 26, r. 1 of the Rules of the Superior Courts by reason of the fact that it was issued after the matter had proceeded to judgment and, therefore, at a stage in the litigation when there is simply no procedural mechanism for the discontinuance of proceedings by the mere service of such a notice;
>
> (2) unlike the *Darcy* case, and whether through inadvertence or otherwise, the underlying judgment has not been vacated and remains in being.

39. The Rules of the Superior Courts do not provide for a mechanism whereby a notice of discontinuance can be served by a party to litigation that is under appeal. A notice of discontinuance served by a respondent after judgment and whilst an appeal is pending, as in this case, at best evinces an intention to take no further part in the appeal over which the appellant has carriage. It cannot of itself and without anything more set aside the judgment that is the subject of the appeal or extinguish the proceedings leading to that judgment or deprive the appellant of his or her entitlement to proceed with the appeal in order to have the judgment of the lower court set aside whether it be on its merits or otherwise.

40. The notice of discontinuance dated 29 July 2014 was not issued in accordance with the provisions of O. 26, r. 1 of the Rules of the Superior Courts. It follows that the withdrawal of the proceedings on 30 July 2014 is not entitled to the automatic protection that arises under O. 26, r. 1 of Rules of the Superior Courts whereby the discontinuance or withdrawal of an action "pursuant to its provisions" shall not afford to the other person or party a defence to any consequent action. I am nonetheless of the view that the rule in *Henderson v. Henderson* does not apply to this case and that the "real issue" is one of abuse of process that is identical to that which arose in the Darcy case. Applying the law as stated therein by the Supreme Court, I am of the view that the withdrawal and reissue of the relevant proceedings was not for an improper purpose but solely for the purpose of availing of the Land and Conveyancing Law Reform Act 2013 which the Oireachtas enacted to ensure that secured creditors are entitled to enforce their debts.

41. The failure of the plaintiff to vacate the judgment of the Circuit Court given on 13 December 2011 prior to the commencement of these proceedings does, however, preclude the plaintiff from succeeding before this Court on the preliminary issue. As a matter of law, the plaintiff already has an order for possession and the matter is, therefore, *res judicata*, albeit for a reason that was never argued or even considered by the defendants either in the Circuit Court or on this appeal.

42. As the parties have at all material times acted in good faith on the mistaken assumption that the 2010 proceedings had been entirely set at nought, it seems to me that the justice of the case requires that I allow the defendants' appeal and make an order staying these proceedings but only until such time as the plaintiff has vacated the order of the Circuit Court made on 13 December 2011.