

THE HIGH COURT

[2013 No. 8090 P]

BETWEEN:-

JAMES JACOB AND CHRISTOPHER JACOB

PLAINTIFFS

AND

GEORGE WALSH, SAM WALSH AND THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANTS

JUDGEMENT of Ms. Justice Murphy delivered on the 10th day of October, 2015

1. Before the Court are two applications. The first is the plaintiff's application for judgment in default of defence. This motion was issued against the third named defendant solely. It is grounded on the affidavit of Ethna Ryan solicitor, who simply deposes as to the third defendant's failure to file its defence. The plaintiffs' underlying claim is for a declaration that they are entitled to a vendor's lien and/or charge over certain registered properties which were transferred to the first and second named defendants pursuant to a contract of sale but in respect of which the purchase price remains unpaid. The plaintiffs seek a further declaration that the said liens/charges take priority over the registered charge of the third defendant. In response, the third named defendant in these proceedings issued a counter motion seeking an order striking out the plaintiffs' claim under Order 19, Rule 28 of the Rules of the Superior Court or in the alternative under the inherent jurisdiction of the court.

Background

2. The plaintiffs are farmers and reside at Monawilling, Oulart, Gorey, Co Wexford and 7 St Johns Terrace, Enniscorthy, Co Wexford respectively. The first named defendant is a gentleman and resides at Ballyvadden, Kimuckridge, Gorey, Co. Wexford. The second named defendant is a gentleman and resides at 2 Westbuw Wood, Enniscorthy, Co. Wexford. The third named defendant is a bank and has its registered office at Century House, Mayor Street Lower, IFSC, Dublin 1.

3. By contract dated in or about 2007, the first named plaintiff agreed to sell and the first and second named defendants agreed to buy, the lands now registered in Folio 55053F County Wexford ("the first property") for the sum of €750,000. By further contract dated in or about 2007 the second named plaintiff agreed to sell and the first and second named defendants agreed to buy the lands now registered in Folio 5682 County Wexford ("the second property") for the sum of €750,000. In the Replies to Objections and Requisitions on Title provided in respect of both the first and second properties, the first and second named plaintiffs confirmed to the first and second named defendants that vacant possession would be handed over on closing.

4. By transfer dated in or about 2007 the first property was transferred to the first and second named defendants without the full purchase price of €750,000 having been discharged. According to the plaintiffs' statement of claim a balance of €690,000 remains outstanding. The contract for sale records a balance of €675,000 and specifies a closing date of 18th October, 2007. By transfer dated in or about 2007 the second property was also transferred to the first and second named defendants with a balance of €690,000 remaining outstanding, according to the contract for sale and the plaintiff's statement of claim.

5. The third named defendant, Bank of Ireland, advanced funds of €1 million to the first and second named defendants, to conclude the purchase of the first and second properties. According to the affidavit of the third named defendant's solicitor, the Bank was provided with certain documentation in the context of its agreement to provide finance to the first and second named defendants and for the purpose of taking security for such finance, including contracts for sale in respect of both the first and second properties. The Bank's agreement to provide such funds, which were provided jointly to the first and second named defendants, was based on a certificate of title provided by Traynor & Co. Solicitors on the 21st February 2008. A deed of mortgage and charge were executed by the first and second named defendants on 28th February, 2008 and registered as a first legal charge against both folios in the Land Registry. The folios do not disclose any residual or remaining interest in the lands on the part of the former owners, whether in the form of a registered burden or otherwise.

6. According to the affidavit of the plaintiffs, Messrs. Christopher and James Jacob, Mr. Joseph Traynor acted as solicitor for both the plaintiffs as vendors and the first and second named defendants as purchasers. The plaintiffs state that Mr. Traynor would have been aware that the first and second named defendants had drawn down funds from the third named defendant and that these funds were not passed on to the plaintiffs. The plaintiffs state that Mr. Traynor has since been struck off the roll of solicitors and the plaintiffs have commenced proceedings against him.

7. The plaintiffs accept that the signatures appearing on the contracts of sale and other relevant documents are theirs respectively. However, they state that they were not clear as to the nature of their dealings with the first and second named defendants and were unaware that the first and second properties would be formally transferred into any other name. The plaintiffs state that had they been so aware they would not have executed such documents and further note that the family home of Mr. Christopher Jacobs is located on one of the properties and that he would never have agreed to its sale.

8. However, the third named defendant's solicitor, Mr. O'Dowd, in his affidavit on its behalf, avers that the second named plaintiff, Mr. James Jacob, had actual knowledge of the Bank's charge over the lands, because on or about November 2009 consent was sought by Mr. Traynor, solicitor, from the third named defendant to register a right of way over the transferred lands in favour of one of the plaintiffs, to gain access to a dwelling house which was not part of the lands included in the sale. While the affidavit of Mr. O'Dowd refers to the second named plaintiff, Mr. Christopher Jacob, the solicitor's correspondence appears to refer to the first named plaintiff, Mr. James Jacob. In this regard, Mr. O'Dowd exhibits a letter dated 24th November, 2009 from Traynor & Company Solicitors, who it would appear in this context were acting for the first and second named defendants. The letter read as follows:

"We refer to the above matter and wish to advise that it has only come to light that the transfer from James Jacob to Sam & George Walsh should have been subject to a Right of Way in favour of the Vendor, James Walsh (sic) from the

points A to B (as shown on the enclosed map herewith) in order for Mr. Jacob to gain access to the dwellinghouse from the public road.

We would therefore be obliged in you might confirm that it is in order for use to lodge a Grant of Right of Way in the Land Registry and associate same with your application."

Consent was furnished by the third named defendant in this regard, through its solicitors, on 8th April, 2010.

9. Mr. O'Dowd further avers that subsequently, with actual knowledge of the third named defendant's interest in the property, the plaintiffs failed to inform the third named defendant of their alleged vendor's lien or to attempt to register such on the folios of the respective properties, in the Land Registry.

10. The plaintiffs say that at all times following the transfers they remained in occupation of the respective properties which formed the subject matter of the first and second contracts. They state that no vacant possession of any sort was handed over to the first and second named defendants on closing and that they continued in occupation of the lands following the closing date and at all times thereafter in the same way in which they had been in occupation prior to that date. The first and second named defendants defaulted on their repayment obligations under the mortgage agreement with the third named defendant. In February 2013, the third named defendant appointed Mr. David Walsh as receiver over the properties in reliance upon its claimed first ranking security. The receiver's investigation of the situation on the ground revealed that the plaintiffs were in fact in occupation of the relevant lands. The plaintiffs confirm that they were in occupation at the date of the receiver's inspection of the lands and subsequent to his appointment, using the land as a farm for tillage purposes for the growing of corn, turnips and other crops. The plaintiffs aver that the first and second named defendants were aware of their continued use and occupation of the lands and never sought to take possession of the lands from the plaintiffs or interfere with their continued and uninterrupted use of same.

11. On 9th April, 2013, the third named defendant's solicitors, acting on behalf of the receiver, wrote to the plaintiffs seeking possession of the properties. On 5th June, 2013, the plaintiffs' solicitors responded by letter and contended that the plaintiffs had received only a nominal sum in respect of the transactions entered into with the first and second named defendants and that the plaintiffs therefore held a vendors lien which was an overriding interest over and above the third named defendant's mortgage and charge. On 3rd July, 2013 the third named defendant's solicitors responded seeking detailed information as to the basis for the plaintiffs' claim. Details were not supplied but on 31st July, 2013, the plaintiffs issued a plenary summons seeking declarations that they held such a lien/charge over the first and second properties and that such liens/charges took priority over the third named defendant's registered charge. The plaintiffs' statement of claim contends that an amount of €690,000 is outstanding in respect of the first property with a further €690,000 outstanding in respect of the second property. The plaintiffs further claim that since they remained in occupation of the land on and at all times prior to and following the date of the execution and registration of the third named defendant's charge then their lien/charge takes priority over the registered charge of the third named defendant, pursuant to s. 72(1)(j) of the Registration of Title Act, 1964. The plaintiffs contend that pursuant to s. 72(1)(j), it was incumbent on the Bank when taking its mortgage or charge, to inquire as to the basis upon which the plaintiffs remained in occupation of the first and second properties and, having failed to do so, the security taken by the Bank by way of its charge must be subject to their entitlements as the persons in actual occupation.

Legal Submissions

12. The plaintiffs say that a vendor's lien/charge over the respective properties exists pending the payment of the outstanding sums due under the relevant contracts. It is the plaintiff's position that, by reason of the fact of their actual occupation of the respective properties at the date of execution/registration of the third named defendants mortgage and charge, the plaintiff's charge takes priority over the charge of the third defendant, pursuant to section 72(1)(j) of the Registration of Title Act 1964.

13. The third named defendant seeks an order pursuant to Order 19, Rule 28 of the Rules of the Superior Courts striking out or dismissing the plaintiffs' claims on the basis that the pleadings disclosed no reasonable cause of action as against the defendant and/or are frivolous and vexatious. In the alternative, the third named defendant seeks an order pursuant to the inherent jurisdiction of the Court striking out the claim on the basis that (i) the claim is clearly unsustainable; (ii) the claim is bound to fail; (iii) the claim is frivolous and/or vexatious; and, (iv) in the all the circumstances, the claim constitutes an abuse of process.

Judgment in Default of Defence

14. The Court is not satisfied, on the basis of the evidence before it, that the plaintiff has discharged its initial burden of proving, on the balance of probabilities, that a vendor's lien for unpaid purchase monies or any other charge, exists in favour of the plaintiffs in respect of either the first or second property. The Court notes in particular the plaintiffs' position as set out in paragraph 8 of their replying affidavit to the third defendant's motion:

"Secondly, we are not clear as to the nature of the dealings with the first named defendant and the second named defendant. We say and believe that we were unaware that the properties would be formally transferred into any other name. We were unaware that the third named defendant would register a charge against the properties. Although we accept that the signatures appearing on the relevant documents are our signatures, we say and believe that we were not aware of the content and effect of those documents when signing same and in particular that they amounted to a sale of the property. We say and believe that had we been advised that the lands would be formally transferred into any other name we would not have executed such documentation. It should be noted that Christopher Jacob's family home is included in the lands the subject of one of the transfers and [he] would never have agreed to the sale of this family home".

The plaintiffs in this regard, have failed to explain the contradictory position which flows from their assertions that a vendors lien exists on foot of unpaid purchase monies alongside assertions that they would never have sold such properties in the first place. The plaintiffs on the basis of the above paragraph, would appear to be raising the issue of *non est factum* however they have failed to explain the circumstances in which the relevant documents were signed and have further failed to explain the basis upon which they accepted and received the sum of €60,000 in respect of the first property, and €60,000 in respect of the second property, from the first and second named defendants.

15. The plaintiffs have further failed to offer adequate explanation for the inconsistencies which arise from the communications from Traynor & Company solicitors with the third named defendant, in or about November 2009. Indeed, the replying affidavit of Mr. Christopher Jacob, does not specifically deal with such communications at all and merely re-iterates the position laid down in the original affidavit:

"I say that neither I nor the first named plaintiff were aware that our lands had been given as security to the third

named defendant. I say that I only became aware of the claim of the third named defendant when a man purporting to be the agent of the third named defendant attended at my property to demand vacant possession of same. I say that my family home is on the lands claimed by the third named defendant and I would not have agreed to any charge being placed on these lands”.

16. Therefore, on the basis of the available evidence the Court is not persuaded, on the balance of probabilities, that any such charge in fact exists such as would entitle the plaintiff to succeed in a motion for judgment in default of defence. Therefore, the Court must now go on to consider the third named defendant’s motion to strike out the proceedings.

Jurisdiction to Strike Out

17. It is acknowledged by all parties that the threshold for the striking out of proceedings is a high one. In respect of the interplay between the rules based jurisdiction and the court’s inherent jurisdiction, the third named defendant points to the Supreme Court judgment of *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21, in which Clarke J. stated as follows:

“It is important to emphasise that the inherent jurisdiction of the Court should not be used as a substitute for, or a means of getting round, legitimate provisions of procedural law. That constitutionally established courts have an inherent jurisdiction cannot be disputed. That the way in which the ordinary jurisdiction of those courts is to be exercised is by means of established procedural law including the rules of the relevant court is also clear. The purpose of any asserted inherent jurisdiction must, therefore necessarily, involve a situation where the Court enjoys that inherent jurisdiction to supplement procedural law in cases not adequately covered, by procedural law itself. An inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law for to do so would set procedural law at naught...”

*...An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in *Barry v Buckley*, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked”*

18. In this regard, the third named defendant submits that on the facts as pleaded by the plaintiffs their claim against the Bank cannot succeed and therefore falls to be dismissed on the basis explained by Clarke J in *Lopes*. For the purposes of their application the third defendant did not dispute the existence of the plaintiff’s liens for unpaid purchase money but maintained that as a matter of law any such lien ranked behind the third defendant’s charge in priority. The third named defendants submit that the only basis upon which the plaintiffs advance a claim to have priority over the Bank’s security is on the basis that they were not obliged to disclose on the Land Registry Folios that they continued to assert an interest in the land as unpaid vendors. The plaintiffs rely on s. 72 of the Registration of Title Act 1964 in support of such assertion.

19. However the third named defendant argues, for the reasons set out below, that if a party asserts a lien over lands as an unpaid vendor, this must be registered under s. 69(1)(f) of the 1964 Act to be effective in terms of gaining priority over subsequently registered charges. No such burden was registered against the folios in this case and accordingly, the Bank’s position is that its charge must take clear of the asserted lien. The third named defendants rely on the decision of Laffoy J. in *Tynan v. County Registrar for Kilkenny and Start Mortgages Limited* [2011] IEHC 250 in this regard. The Bank further states that even if it is possible that the right is within s.72(1)(j), this cannot avail the plaintiff if because the section contains the following qualification:

“...save where, upon enquiry made of such person, the rights are not disclosed;”

The defendants claim that an enquiry was made of the plaintiffs through a solicitor and that nothing was disclosed.

20. The plaintiffs contend however that the test for striking out has not been met. In addition to the caselaw set out by the defendant, they draw the Court’s attention to *DK v. King* [1994] 1 IR 166 in which it was emphasised that striking out can only be permitted where the text of the plaintiff’s summons or statement of claim discloses no reasonable cause of action or that the action is frivolous or vexatious. In the same case it was emphasised that although a claim will be struck out where on admitted facts or undisputed evidence, it is clearly unsustainable or bound to fail, this is a difficult test to satisfy as it will be necessary for the defendant to establish that the plaintiffs claim is entirely devoid of merit and has not just little, but no chance of success. The plaintiffs thus contend that in the circumstances the Bank has failed to satisfy the very high burden in relation to striking out.

Registration of Title Act 1964

21. In support of its application to strike out, the third named defendant relies on the fact that, under s. 69(1)(f) of the 1964 Act, a “lien on the land for unpaid purchase money” is a minor interest capable of being protected by the Land Registry. The third named defendant’s argument is that any vendors’ liens held by the plaintiffs, not having been so registered, cannot in any circumstances take priority over the Bank’s registered mortgage.

22. It is undisputed that the plaintiffs did not register their alleged vendors’ liens in the Land Registry prior to registration of the mortgage. The plaintiffs however base their claim to priority on s. 72(1)(j) of the 1964 Act, which reads as follows:

“[A]ll registered land shall be subject to such of the following burdens as for the time being affect the land, whether those burdens are or are not registered, namely... the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed.”

23. The plaintiffs therefore claim that given their occupation at the time of the creation of the mortgage, its registration and thereafter, their vendors’ liens are overriding interests for the purposes of s. 72(1)(j) and, pursuant to that section, take priority over the mortgage, even if unregistered at the date thereof. In other words, the plaintiffs claim that they remained in occupation of the lands at all times, that it was incumbent on the third named defendant Bank to inquire as to the basis upon which they remained in occupation of the relevant properties when taking its mortgage or charge over the properties, and that, having failed to do so, the security, if any, taken by the Bank over the lands by way of its charge must be subject to the entitlements of the plaintiffs as the persons in actual occupation.

24. The third named defendant Bank argues that since a vendor’s lien is an interest capable of registration under s. 69 it cannot be a

right of persons in actual occupation under s. 72(1)(j). The Bank submits that under s. 69 of the 1964 Act there is a list of burdens which "may be registered as affecting registered land". It further notes that in *Tynan v. County Registrar for Kilkenny & Start Mortgages Limited* [2011] IEHC 250, the High Court noted that a contended for right as against registered land can only be governed by one or other of s. 69 or s. 72, that is to say it is either a right which may be registered as affecting registered land under s. 69 or it is a right which whether or not is registered affects land as a burden under s. 72 but cannot be both. In *Tynan*, Laffoy J. noted at paragraph 3.3:

"An issue arose at the hearing of the application as to whether the title position of a right of residence such as is claimed by the plaintiff is governed by s. 69 or s. 72 of the Act of 1964. It can only be governed by one or other of those sections."

Laffoy J. went on to state as follows at paragraph 3.4:

"Although s. 69(1) lists burdens which "may" be registered as affecting registered land, the failure to register a right which is a s. 69 burden on the relevant folio has consequences which are provided for throughout the Act of 1964. For instance, s. 52 sets out the effect of the transfer of freehold land with absolute title and provides that, on the registration of the transferee, the land vests in the transferee –

'subject to –

(a) the burdens, if any, registered as affecting the land, and

(b) the burdens to which, though not so registered, the land is subject by virtue of section 72,

but shall be free from all other rights, including rights of the State.'

Accordingly, it is quite clear that, if a s. 69 type burden is not registered on the folio, a transferee takes clear of it."

The *Tynan* case concerned a claim to a right of residence in respect of which Laffoy J. held at paragraph 3.3:

"In my view, there is absolutely no doubt that the right of residence which the plaintiff claims and in respect of which she seeks a declaration in these proceedings, which it is acknowledged is governed by s. 81, is not a right which falls within paragraph (j) of s. 72(1). Rather it is a right which comes within paragraph (q) of s. 69(1). Having regard to the terminology used by the Oireachtas in s. 69(1)(q) and in s. 81, the contention that a right of residence governed by s. 81 is a s. 72 burden is wholly unstateable."

25. In this regard, the Bank notes that the contended right in this case is expressly provided for under s. 69(1)(f) as "any lien on the land for unpaid purchase money". Therefore, the Bank's position is that in the circumstances where the right asserted by the plaintiffs is one that is capable of registration under s. 69 of the 1964 Act, it cannot also be caught by s. 72 of the same Act. In his submissions, counsel for the Bank argues:

"As Laffoy J. noted, such a contention is 'unstateable' on the proper construction of the 1964 Act."

On that basis, the Bank argues that the failure on the part of the plaintiffs to have registered their asserted right on the relevant folios prior to the registration of the Bank's security has the effect that the Bank takes free of it. The Bank submits that the plaintiffs' claim cannot therefore succeed and falls to be dismissed.

26. In response to this argument, counsel for the plaintiff cites the discussion of the nature of a vendor's lien offered in Wylie, *'Conveyancing Law'* (Dublin, 2nd Edition), from paragraph 12.15 onwards, placing particular emphasis on the classification of a lien for unpaid purchase money as a proprietary rather than a personal right:

"[T]he vendor has a lien on the land for unpaid purchase money. Where he has retained possession, he has a common law lien, ie, the right to retain possession until the debt is paid, but not the right to sell or otherwise deal with the property in discharge of the debt. If he has parted with possession he still has an equitable lien on the land, ie, an equitable charge which entitles him to apply to the court for an order of sale of the land and discharge of his debt out of the proceeds of sale..."

...The lien arises on the signing of the contract, but relates only to the land which forms the subject-matter of the contract... The lien subsists so long as any part of the purchase money remains owing. It may still be invoked even though a conveyance of the land has been executed which contains the usual receipt clause purporting to suggest that the full consideration has been paid, if in fact it has not been paid."

27. The plaintiffs thus argue that it is important to note that *Tynan* related to a right of residence rather than a vendor's lien. The nature of a right of residence over registered land is specifically defined by section 81 of the Registration of Title Act 1964 which states as follows:

"A right of residence in or on registered land, whether a general right of residence on the land or an exclusive right of residence in or on part of the land, shall be deemed to be personal to the person beneficially entitled thereto and to be a right in the nature of a lien for moneys worth in or over the land and shall not operate to create any equitable estate in the land."

28. The plaintiffs argue that it follows from the above definition of a right of residence that such a right creates personal rather than proprietary rights. In this regard, the plaintiffs note that it has been established since *Guckian v Brennan* [1981] IR 478 that rights for the purposes of section 72(1)(j) means proprietary rights only, so that mere personal rights are excluded from the ambit of that subsection. Accordingly, the plaintiffs submit that such an interpretation would mean that irrespective of whether or not it is capable of being registered under s. 69, a right of residence could never constitute an overriding interest within the meaning of s. 72.

29. The plaintiffs further note that s. 70(1)(g) of the Land Registration Act 1925, the Act which governs the United Kingdom's system of land registration, is an identically worded provision to s. 72(1)(j) of the 1964 Act which operates in this jurisdiction. The plaintiffs therefore place reliance on what they refer to as a "wealth of caselaw" from the United Kingdom, establishing that a vendor's lien is an overriding interest entitled to priority where the vendor remains in actual occupation. The plaintiffs note that this applies

irrespective of the fact that, in the United Kingdom as in Ireland, a vendor's lien is an interest capable of being registered as a minor interest.

30. The plaintiffs firstly cite *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499 in support of their contention. In that case Brightman J. accepted that an unpaid vendor's lien was a right within s. 70(1)(g) of the Land Registration Act 1925, and as such constituted an overriding interest notwithstanding that the vendor had gone out of occupation before the commencement of the proceedings, the relevant date being that of registration of the proprietor against whom the interest was sought to be enforced. Similarly, in *Nationwide Anglia Building Society v Ahmed and Balakrishnan* (1995) 70 P. & CR. 381, Aldous J, after setting out the principle, referred to above, that mere personal rights do not come within s. 70(1)(g), considered it settled law that a vendor's lien, on the other hand, was capable of constituting an overriding interest under this subsection.

31. The plaintiff also relied on the recent Northern Irish case of *Clure v CRF Developments Ltd (In Administration)* [2013] NICH 9. Here, a vendor was found to have relinquished an equitable lien over land in respect of the balance of unpaid purchase monies when he obtained a legal charge over the land in respect of those monies. It was accepted by Deeny J, applying *London and Cheshire*, that if the vendor enjoyed such a lien it would, in normal circumstances, have priority over the relevant registered charge.

32. The plaintiffs therefore argue that a degree of overlap between minor and overriding interests has always been a characteristic of the registered land system both in the UK and Ireland, with the fact that an interest may be both a minor interest capable of being registered and (if vested in persons in occupation) an overriding interest recognised by UK property law texts.

33. The plaintiffs further cite, what they refer to as a "*uniquely Irish*" example of this phenomenon, which relates to prescriptive easements. Under the 1964 Act, as amended by the Land and Conveyancing Law Reform Act 2009, a prescriptive easement is capable of being registered as a minor interest. However, even if not so registered, it will bind the purchaser as an overriding interest under s. 72. Prescriptive easements do not need to be registered in order to bind the purchaser; they are registered because so doing removes the need to prove the requirements of prescription in any subsequent court proceedings and also because registration makes it more difficult for them to be extinguished by non-user.

34. It is the plaintiffs position therefore that the *dictum* of Laffoy J. in *Tynan* that s. 72(1)(j) cannot include rights capable of being registered under s. 69 must be regarded as limited to the facts of that case, which as argued, involved a right defined by s. 81 of the 1964 Act as personal in nature, and therefore not capable, on any Irish or UK authority, of being an overriding interest under s. 72(1)(j) in any circumstances. The plaintiffs further argue that not only does this render the situation distinguishable, it also makes any such dictum obiter and therefore not binding on the court. The plaintiffs submit therefore that such an assertion cannot stand against the wealth of decided authority confirming that a vendor's lien is an interest capable of amounting to an overriding interest under s. 72(1)(j) when the vendor is in actual occupation, irrespective of whether or not it is registered as a minor interest.

Decision of the Court

35. While the Court is not satisfied that the evidence adduced by the plaintiffs would be sufficient to allow the Court to grant the declarations sought in the plaintiffs proceedings, the Court is not satisfied either that their claim as pleaded is unstateable, frivolous or vexatious. The Court notes, as it did at the outset of this application, that the threshold in respect of the striking out of proceedings is a high one. The Court is not satisfied in this instance that such a test has been met by the third named defendant in circumstances where there is a conflict between the *dictum* of a recent decision of the High Court and a number of cases of persuasive authority from a neighbouring common law jurisdiction on the basis of an identical statutory provision. The Court is wholly in agreement with the conclusion of Laffoy J, in *Tynan* that "*the contention that a right of residence governed by s. 81 is a s. 72 burden is wholly unstateable*". The third named defendant suggests that this statement extends to support the proposition that it is "wholly unstateable" that a right capable of registration under s. 69 of the 1964 Act could also come under s. 72 of the same Act. In this regard, the Court notes the statement of Costello J. in *DK v. King* [1994] 1 IR 166, at p. 172 that:

"a motion of this sort is not one on which the court should adjudicate on controversial legal issues. It will suffice if I conclude, as I do, that the point is not a frivolous or an obviously unsubstantial one."

In light of the caselaw of the United Kingdom cited by the plaintiffs the Court is satisfied that the arguments made by the plaintiff in relation to the interaction of s. 69 and s. 72 insofar as vendors' liens are concerned where the vendor remains in occupation is not a frivolous, vexatious or obviously unsubstantial point. Rather, the plaintiffs have raised legal issues upon which it is not proper for the Court to adjudicate in an application of this nature. Therefore, the Court is not convinced, in light of the test referred to by the Supreme Court in *Lopes* that the third named defendant has established either that "*on the basis of the facts as pleaded, the case is bound to fail*" such as would warrant an order striking out the proceedings on the basis of the Court's rules-based jurisdiction, or that "*there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits*" such that the Court's inherent jurisdiction to strike out the proceedings should be exercised.

36. The Court has been left with a distinct impression that underlying this whole case are some murky, shadowy dealings which may only emerge into the full light on a plenary hearing. The Court therefore proposes to remit this matter to plenary hearing.