

THE HIGH COURT

Record Number: 2018/1517P

BETWEEN/

MARY BREIDEGAM

PLAINTIFF

- AND -

DANIEL J. REILLY

DEFENDANT

JUDGMENT of Ms. Justice Power delivered on the 7th day of April 2020

1. This is an application brought by the defendant pursuant to Order 49, rule 7(1) of the Rules of the Superior Courts and/or pursuant to section 25 of the Courts of Justice Act 1924, as amended (the 'Act of 1924') to remit the proceedings herein to the Circuit Court, specifically, to the Eastern Circuit sitting in the County of Louth.
2. The application is brought by Notice of Motion dated 10 December 2019 and is grounded upon the affidavit of the defendant herein. The proceedings were instituted by Plenary Summons dated 12 November 2018. The Statement of Claim was delivered on the 7 March 2019 and the Defence was filed on 1 October 2019. Essentially, the General Indorsement of Claim on the Plenary Summons seeks specific performance of an agreement made in March 2008 whereby the property of the plaintiff's deceased father was to be sold and the proceeds thereof distributed in accordance with the terms of said agreement. In the alternative, the plaintiff seeks damages in lieu of specific performance, damages for breach of contract and further or other relief. The Defence pleads issues of delay and/or laches and raises the Statute of Limitations 1957 (hereinafter the 'Statute') in relation to the claim for damages in lieu and/or damages for breach of contract.

Background

3. The facts of the case are set out in the pleadings and they may be summarised as follows. Mr. Joseph L. Reilly died on 14 May 1995. In his will, he left pecuniary legacies to the eight of his ten children who had survived him and to his grandchildren alive at the time of his death. Other bequests were made and the balance of his estate, including his property, was left to the defendant. The defendant was the executor of the will and is described therein as the 'good and loyal friend' of the testator. Probate proceedings seeking to condemn the will were instituted against the defendant by five of Mr. Reilly's surviving children, including, the plaintiff. A settlement agreement was reached by the parties on 31 March 2008 (hereinafter the 'March 2008 agreement'). Essentially, it provided that the property of the deceased known as 'Weirhope House' was to be sold and that, after deductions for identified costs were made, the net estate was to be divided in the following manner. The defendant was to receive 55% and the remaining 45% was to be divided equally among nine of the testator's children in such a way that the five who were alive at the time of his death took their one ninth share of the 45% and the one ninth share of each of the four who were no longer alive at the time of settlement went to their issue/estates on a *per stirpes* basis. There was no disagreement between the parties about the fact that the March 2008 agreement resulted in the plaintiff being

entitled to a payment of the value of a one ninth share of 45% of the estate—or, in other words, to 5% of the estate (after the aforesaid deductions had been made).

4. The terms of settlement were signed by the plaintiff (she, being one of five) on the one part and by the defendant, on the other. The solicitors who represented her in those probate proceedings, Messrs Benen Fahy Associates, also represented the four other plaintiffs.
5. The March 2008 agreement was made the subject of an Order of the High Court (McGovern J.) on 7 April 2008. That Order confirms that on that date the Court received and filed the terms of settlement agreed between the parties and ordered as follows:-
 - (i) *That the testamentary document dated 10 day of February 1995 be established as the Will of Joseph L. Reilly Deceased;*
 - (ii) *All Caveats and Warnings and Appearances entered herein be here and the same set aside;*
 - (iii) *The costs of the Plaintiffs and the Defendant and the signatories to the Terms of Settlement be paid out of the estate of the Deceased to be taxed in default of agreement on the Executor's scale save and except the costs of Margaret Reilly (if any) be taxed prior to payment from the estate;*
 - (iv) *The proceedings do stand struck out; and*
 - (v) *The parties to have liberty to apply.*
6. Of some significance (for reasons that will become apparent) is the fact that the Order of McGovern J. confirmed that the Court had heard the oral evidence of Marie Foley and was satisfied as to the due execution of the will of Joseph L. Reilly, deceased, which said will was dated 10 February 1995 and established same as the true and original last will and testament of Joseph L. Reilly deceased.
7. The events which followed the March 2008 agreement are set out in the defendant's affidavit sworn on 10 October 2019. His evidence (much of which is also pleaded in the Defence) is that subsequent to the March 2008 agreement he entered into a further agreement with the plaintiff's sister, Ms. Ann Waldron, who was acting on her own behalf and on the instructions of all of her living siblings, with the exception of the plaintiff whom she stated she was unable to contact, and on the instructions of the estates of her deceased siblings ('the other plaintiffs in the probate proceedings.') Under this new agreement of October 2016, the defendant, who already had a majority share in the estate of the deceased, agreed to buy out the interests of the other plaintiffs in the probate proceedings by paying them €25,000 each in lieu of their share of the property. €25,000 was to be paid to Ms Waldron and to each of her living siblings, including the plaintiff, notwithstanding that she was not a party to the October 2016 agreement, and €25,000 to the estates of the deceased siblings. The Court was informed by counsel for

the defendant that the agreement of October 2016 resulted from an initial approach made by Ms Waldron to the defendant.

8. According to the Defence filed herein, the figure of €25,000 to each of the nine beneficiaries was agreed based on a valuation of the property in October 2016 by Colliers International in the amount of €675,000 and following the deduction of certain crystallised and anticipated costs that are set out in the Defence.
9. Various efforts were made by the defendant to pay the plaintiff her 5% share of the estate. The first was made in October 2017 when a cheque for US\$28,670 (being at that time equivalent to €25,000) was sent to the plaintiff. This was rejected. In August 2019 the property was valued by Colliers International at between €685,000 and €700,000. The defendant offered to purchase the plaintiff's 5% of the property based on the upper end of that valuation and after the deduction of costs, as aforesaid. To this end, an increased offer in the sum of €33,750 was made to the plaintiff in September 2019 with an undertaking to defray the plaintiff's reasonable costs which would be on the Circuit Court scale given the figures advanced. The plaintiff, it is said, failed to engage and that offer remained open at the hearing of the application to remit.

The Motion

10. The defendant and moving party submitted that the plaintiff's claim is a matter more appropriately dealt with in the Circuit Court. Based on the pleadings which he opened to the Court, he said that it was clear that the action brought by the plaintiff concerns the sale of land and, in the alternative, seeks an award of damages in lieu of specific performance and/or damages for breach of contract.
11. The jurisdiction of the Circuit Court is prescribed by the Courts (Supplemental Provisions) Act 1961 (the 'Act of 1961').

Section 22 (1) of the Act of 1961 provides that:

- "(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."*

At column (2) of the Third Schedule, the following proceedings are listed as included therein: '*proceedings for specific performance of contracts*' (at Ref. No. 22) and '*proceedings for the partition or sale of land*' (at Ref. No. 23). However, in relation to proceedings for specific performance, jurisdiction of the Circuit Court is excluded where the subject matter '*insofar as it consists of land, exceeds the rateable valuation of £60*'. In relation to proceedings for the partition or sale of land, jurisdiction of the Circuit Court is excluded '*where the rateable valuation of the land exceeds £60*'. The exclusion of jurisdiction in such cases is set out in column (3) of the Third Schedule.

12. Subsequently, periodic amendments to the Third Schedule of the Act of 1961 were made. Section 2(1)(d) of the Courts Act 1971 increased the relevant provisions in respect of rateable valuation from £60 to £100, and s. 2(1)(d) of the Courts Act 1981 further increased this value from £100 to £200.
13. Section 45(1) of the Civil Liability and Courts Act 2004 further amended the Third Schedule of the Act of 1961 by the substitution of the term '*market value*' for the term '*rateable valuation*' in each place that it occurs, and by the substitution of '€3,000,000' for '€200' in each case where it occurs.
14. The result of the foregoing is that the Circuit Court has jurisdiction to hear and determine proceedings for the specific performance of contracts and proceedings for the partition or sale of land where the market value of the land does not exceed €3,000,000.
15. Periodic amendments to the monetary limit of the Circuit Court's jurisdiction have been made over time. Its monetary jurisdiction for the time being currently stands specified as €75,000 pursuant to s. 14 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

The Defendant's Submissions

16. Moving the application to remit, counsel for the defendant set out the law and then opened the evidence in the application. The defendant had exhibited a valuation report dated August 2019 prepared by Colliers International which indicated that the current value of the property is in the region of €685,000 to €700,000. This was the only evidence of the value of the property that was before the Court.
17. Counsel for the defendant pointed to the ten-year period of delay between the making of the March 2008 agreement and the plaintiff's issuing of the within proceedings on 19 February 2018. He submitted that insofar as the plaintiff seeks damages in lieu of specific performance and/or damages for breach of contract, her claim is statute-barred by operation of the Statute. The Court's attention was drawn, specifically, to certain matters pleaded in the Defence. The plaintiff's costs as well as those of the defendant were agreed to be matters for deduction from the gross proceeds of sale prior to the division of the remaining monies between the parties. The valuation of the property in or around the time of the deceased's death was IR£95,000 or €120,000. Claims made in respect of past offers allegedly made for the sale of the property were put in issue. At the date of the delivery of the Defence, eight of the nine payments to be made under the October 2016

agreement had been paid by the defendant. Insofar as the ninth payment was outstanding, he had tried to make that payment to the plaintiff as per the latter agreement, but she had rejected the offer. The Defence recites that an offer in the sum of €33,750 was made to the plaintiff in open correspondence calculated on the basis that it represents a 5% of the upper valuation of the property (being €700,000) provided by Colliers International. The Defence pleads that in or around October 2016, Messrs Benen Fahy Associates, the solicitors for the plaintiff (who were also solicitors for all of the other plaintiffs in the probate proceedings) furnished to the defendant, as personal representative of the estate of the deceased, a bill of costs of in respect of the probate action in the amount of €185,924.12.

18. The defendant's counsel submitted that the value of the land in this case is central and claimed that at the date of the death of the deceased, its value was in or about IR£95,000 or €120,000. This is verified in an affidavit referred to and produced by the defendant's solicitor—an affidavit which was sworn on 4 July 2008 and provided to the Revenue Commissioners at that time. Since then, he claimed, property values, generally, have increased and the current market value of the property is that as set out in the defendant's affidavit.
19. The defendant argued that the proceedings herein were instituted as a vehicle to recover costs to the plaintiff's solicitor. Counsel referred to the bill of costs for the probate proceedings in the sum of €185,924.12 that was served upon the defendant. He submitted that there was no basis for the plaintiff's claim to be entitled to recover those costs from the defendant. There is nothing, he argued, in the March 2008 agreement or in the Order of McGovern J. which gives to the plaintiff a proprietary interest in those costs. Insofar as the plaintiff will say that she is jointly and severally liable to the solicitor who represented all the plaintiffs in the probate proceedings, counsel argued that there is no evidence before the Court to substantiate this claim. Insofar as her solicitor had averred to the fact that the sum of €77,236.23 has been paid to date, counsel for the defendant took issue with this, stating that it was not consistent with his instructions.
20. The allegation that the defendant used undue influence in reaching a settlement with the other plaintiffs of the probate proceedings was denied, unequivocally. No such influence was exercised. Even if the plaintiff were correct in her claim in this regard (which was denied) it was argued that she had no *locus standi* to make such a claim on anyone else's behalf. An approach by one of the plaintiff's siblings had, in fact, initiated the 2016 agreement.
21. Counsel for the defendant concluded that, having regard to the fact that the market value of the land in question in this case is significantly less than €3,000,000, the claim for specific performance and/or the sale of land is one that clearly falls within the jurisdiction of the Circuit Court. If, in the alternative, an award of damages in lieu thereof or damages for breach of contract (which he claims would be statute-barred) were to be made, then, having regard to the plaintiff's 5% share of the property, and even including, a proportionate share of the costs of the probate proceedings, any damages that could be

awarded on these grounds would be in the region of €71,000 and thus would not exceed the jurisdiction of the Circuit Court.

The Plaintiff's Submissions

22. The plaintiff opposes the application and to this end a replying affidavit sworn by her solicitor, Mr. Benen Fahy, was filed on 31 October 2019. The averments made in that affidavit may be summarised as follows. The Circuit Court does not have jurisdiction to hear and determine these proceedings because the subject matter of the contract in question does not concern the sale of land but concerns, rather, the validity of a will and the manner in which an estate is to be distributed. The Circuit Court would have jurisdiction if these proceedings comprised a straightforward action seeking specific performance of a contract for the sale of the land by the defendant to the plaintiff. However, even then the value of the land in question is such it could not be said that the action is not fit for prosecution in the High Court. The plaintiff requires the sale of the property. The March 2008 agreement required that the costs of the defendants (sic)—(that should read 'plaintiffs')—in the probate proceedings be paid out of the sale price. These costs amount to €185,924.12. The plaintiff in this case is jointly and severally liable for same. The plaintiff has paid €77,236.23 and should be reimbursed. There is a rebuttable presumption of undue influence which may give rise to an award of punitive or exemplary damages.
23. At the hearing, counsel for the plaintiff submitted that this was a matter that involved a breach of the terms of the settlement which was made the subject of the High Court Order of 7 April 2008. In the event of the Circuit Court determining that the appropriate remedy was one of damages in lieu of specific performance, then the damages that would arise in this case were in excess in the jurisdiction of the Circuit Court. It was also pointed out that the plaintiff had raised a point in her pleadings that undue influence had been exerted upon the other members of her family by the defendant resulting in the settlement of October 2016.
24. Counsel for the plaintiff recalled that s. 25 of Act of 1924 had been amended by s. 11 of the Courts of Justice Act 1936 (the 'Act of 1936'.) Section 11 of the Act of 1936 provides as follows:
 - "11(1) *An application under section 25 of the Principal Act for the remittal or transfer of an action pending in the High Court may be made at any time after an appearance is entered therein and before service of notice of trial therein and, where the summons in such action is required by rules of court to be set down for hearing before the Master of the High Court, notwithstanding that such summons has not been so set down.*
 - (2) *Notwithstanding anything contained in section 25 of the Principal Act the following provisions shall have effect in relation to the remittal or transfer of actions under that section, that is to say:-*

- (a) *an action shall not be remitted or transferred under the said section if the High Court is satisfied that, having regard to all the circumstances, and notwithstanding that such action could have been commenced in the Circuit Court, it was reasonable that such action should have been commenced in the High Court;*
- (b) *an action for the recovery of a liquidated sum shall not be remitted or transferred under the said section unless the plaintiff consents thereto or the defendant either satisfies the High Court that he has a good defence to such action or some part thereof or discloses facts which, in the opinion of the High Court, are sufficient to entitle him to defend such action."*

25. He submitted that s. 11(2) of the Act of 1936 gives this Court a discretion by providing that an action shall not be remitted or transferred under s. 25 of the principal Act of 1924 if the High Court is satisfied that, having regard to all the circumstances and notwithstanding that such action could have been commenced in the Circuit Court, it was reasonable that such action should have been commenced in the High Court.
26. This application was not concerned with matters that could arise at the trial of the action but rather was about the plaintiff's claim as it stands. What was pleaded in the Defence was of little relevance to the present application. As executor of the estate, the defendant was obliged to sell the property and he did not do so. As he already owned 55% of the property, it was clear that he wanted to renege on the agreement to sell and had purported to purchase the beneficiaries' interest in equity. The rule of fair dealing operates in such a way that it is for the executor to prove his innocence in this respect. Insofar as the defendant, as executor, had failed to do so, an award of punitive damages was possible. It was also clear that the March 2008 agreement provided that costs were to be paid out of the proceeds of sale. The plaintiff was entitled to frame her claim either as a claim for specific performance or for one of damages in lieu thereof or for damages for breach of contract. The trial court may well decide that the appropriate way to conclude the matter is by an award of damages for breach of contract. This Court is required for the purpose of this application to take the plaintiff's claim at its height. Assuming that the plaintiff is jointly and severally liable for costs of the probate proceedings in the sum of €185,924.12 and adding a one ninth share of the current value of the property (approximately €35,000), the monetary value of the damages claim in this case could be in the region of €220,000. The defendant cannot dispute the plaintiff's entitlement to her costs as part of the March 2008 agreement. If the Court were to consider that the plaintiff's claim does not, on its face include a claim for joint and several liability in respect of the sum of €185,924.12, then the appropriate way to proceed was for the plaintiff to bring an application to amend her pleadings rather than have the matter remitted to the Circuit Court.
27. Counsel for the plaintiff concluded whilst the case concerned an action for specific performance, it was not an action of the type contemplated by the legislature in the Third Schedule of the Act of 1961, as amended. The test that this Court must apply is whether

the action could have been commenced in the Circuit Court. In exercising its discretion, the Court should bear in mind that there were good reasons for retaining this matter within the High Court jurisdiction. These included the fact that the matter concerned terms of a settlement that had been the subject of a High Court Order and that as a probate matter, it is within the jurisdiction of the High Court. Finally, damages, including, punitive damages for breach of contract could be in the region of €220,000.

The Defendant's Reply

28. By way of reply, three main propositions were advanced by counsel for the defendant. Firstly, the Act of 1961 makes no reference whatsoever to the subject matter of an action for specific performance of a contract. The plaintiff is seeking specific performance of a contract and her claim came within the jurisdiction of the Circuit Court. Secondly, insofar as she claims that the subject matter of the specific performance is not land, the Statement of Claim seeking specific performance identifies four reliefs at para. (a)(i)-(iv), all of which seek orders relating to the sale of land. Consequently, Ref. Nos. 22 and 23 of the Third Schedule of the Act of 1961 apply. Thirdly, insofar as the plaintiff claims that the validity of the will is in issue in this case, that matter was determined in the Order of McGovern J. of 7 April 2008. The Order recites that the High Court, having heard evidence in this regard, confirmed the validity of the will. That Order has not been appealed. Consequently, the validity of the will has been settled and it was, therefore, not in issue in these proceedings.
29. Insofar as undue influence was raised, counsel for the defendant reiterated that the October 2016 settlement was reached following an approach from the plaintiff's sister on behalf of all the other beneficiaries and, in any event, the plaintiff had no *locus standi*.
30. Even assuming the plaintiff could overcome the defence of laches, the essential claim in the Statement of Claim is for specific performance of a contract. That contract concerns the sale of land. A very broad discretion has been conferred on the Circuit Court for specific performance actions subject only to the two limiting provisions outlined earlier, neither of which apply in this case. The property's value is five times below the monetary jurisdiction of the Circuit Court. Where the only evidence as to the value of the land is uncontroverted, the matter should end there. The application to remit can be determined by reference to the reliefs claimed by the plaintiff and by reference to the provisions of the Act of 1961, as amended.
31. Even if the Court were disinclined to accept this submission and to consider the matter from the perspective of a claim in damages, then the Circuit Court would still remain vested with jurisdiction having regard to any likely damages that the plaintiff may recover. Insofar as the Statute provides for a six-year period for breach of contract, the plaintiff's action in this regard is statute-barred. Should that defence not succeed, then taking the valuation at its height, the plaintiff's 5% share of the value of the property would give her an entitlement to, approximately, €35,000, having deducted the expenses defrayed to date.

32. The plaintiff was not entitled to expand her claim and seek reimbursement for legal costs in the sum of €185,924.12. There were five plaintiffs in the probate proceedings. There was no evidence to show that she was jointly and severally liable to the solicitors (who acted for all plaintiffs) for such costs. Paragraph 14 of the March 2008 agreement refers, specifically, to the costs of all five plaintiffs. It is not acceptable that this one plaintiff—the only one who is not a party to the subsequent agreement reached with the other eight parties—should claim an entitlement to recover all of the costs of the probate proceedings. There is no provision in the March 2008 agreement allowing her to seek 100% of the costs of the probate proceedings. Even if she were entitled to recover a share of the costs (and the defendant does not concede that she has any proprietary right in this regard) that would still not bring the overall value of the plaintiff's claim beyond the jurisdiction of the Circuit Court. It was not reasonable that she should have commenced proceedings in the High Court.
33. The plaintiff was bound by the manner in which the case had been pleaded. The case which the defendant came to meet was the case as pleaded in the Statement of Claim, namely, and entitlement to 5% of the net proceeds of the sale. The Statement of Claim makes no reference to a claim for costs in the sum of €185,924.12. The first time that any reference to a claim for joint and several liability for such costs was made, was in the affidavit filed opposing this motion.
34. In summary, counsel for the defendant concluded that, having regard to Ref. Nos. 22 and 23 of the Third Schedule, the plaintiff's claim was clearly a matter within the jurisdiction of the Circuit Court. It involved an action for specific performance for the sale of land with a market value well below €3,000,000. If damages in lieu of specific performance and/or damages for breach of contract were awarded, her claim for any liquidated sum would still fall within the monetary jurisdiction of the Circuit Court.

Legal Principles

35. Section 25 of the Act of 1924 (as amended) provides for the remittal to a lower court of proceedings from the High Court which could have been commenced and can properly be tried in this lower court.
36. On the general policy of the Act of 1924, Kennedy C.J. in *Hosie v. Lawless* [1927] I.R. 464, stated (at p. 471):

"The policy was decentralisation of jurisdiction, though, no doubt the High Court has, under the Constitution, and still keeps, original jurisdiction, which may be exercised in any case; but as we have stated in this Court on many occasions, if an action is prima facie within the jurisdiction of the Circuit Court, and there are no special circumstances indicating that it ought to be withdrawn from that Court, then it ought to be tried in the Circuit Court."

According to *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) the question for the Court where the plaintiff's claim is for damages will be whether the plaintiff could recover a sum in excess of the jurisdiction of the lower court. This test was

laid down by Fitzgibbon J. in *O'Connor v. O'Brien* [1925] 2 I.R. 24, where he stated at p. 31:-

"...if the amount of damages recoverable is the only question involved in the decision, the Court must consider whether the plaintiff could reasonably contemplate the recovery of a sum of damages beyond the jurisdiction of the Circuit Court."

This test was cited with approval by O'Dálaigh C.J. in the Supreme Court decision of *Ronayne v. Ronayne* [1970] 1 I.R. 15.

37. As noted above, s. 25 of the Act of 1924 was amended by s. 11 of the Act of 1936. It gives the Court a discretion by providing that an action shall not be remitted if the High Court is satisfied that, having regard to all the circumstances, notwithstanding the fact that such an action could have been commenced in the Circuit Court, it is nevertheless reasonable that it should have been commenced in the High Court. The proper construction of s. 11(2)(a) of the Act of 1936 was considered by Morris J. in *O'Shea v. Mallow Urban District Council* [1994] 2 I.R. 117. In that case it was submitted that any order remitting the action to the Circuit Court must contain an express finding that it was not reasonable to have commenced the action in the High Court. Morris J. stated that the subsection removes from the High Court the obligated transfer of an action simply because the subject matter of the action fell within the Circuit Court jurisdiction. It provided for a circumstance where notwithstanding the fact that the subject matter of the action fell within the jurisdiction of the Circuit Court, it was, nevertheless, reasonable and proper to retain the action in the High Court. If such circumstances existed, then the High Court could retain the action. It did not necessarily follow that simply because the court might make an order remitting the action to the Circuit Court, it was unreasonable to have commenced the proceedings in the High Court. He noted that the provisions of s. 20 of the Act of 1936 provide that where an action is remitted to the Circuit Court, there might be an award in excess of the normal Circuit Court jurisdiction. In these circumstances, Morris J. concluded that he should make an order remitting the action to the Circuit Court for hearing.
38. More recently, the Court of Appeal has considered the legal principles underlying applications for remittal of proceedings in the case of *Allied Irish Banks Plc v. Gannon* [2017] IECA 291. In that case, the applicant bank brought High Court proceedings seeking an order declaring void the transfer of the first respondent's interest in a property to her husband, the second respondent. The bank alleged that the intention of the transfer was to defraud the plaintiff. The first respondent was heavily indebted to the plaintiff and the transfer, it was claimed, would prevent the bank from realising any judgment it might obtain against her. Judgment was subsequently obtained in default of appearance against the first respondent in the sum of €653,809.03. Several written requests seeking consent to remit were refused. A motion to have the matter remitted to Cork Circuit Court was brought and it was claimed that the remittal '*would mitigate the costs of defending this action.*' The High Court (Binchy J.) refused the application. Delivering the judgment of the Court of Appeal, Hogan J. allowed the appeal, determining

that pursuant to s. 74(3) of the Land and Conveyancing Act Law Reform Act 2009, the Circuit Court had jurisdiction to entertain such an application.

39. In considering whether the proceedings should be transferred to the Circuit Court, Hogan J. referred to s. 25 of the Act of 1924, s. 11(2)(a) of the Act of 1936, and Order 49, rule 7 of the Rules of the Superior Courts. Following the jurisprudence set out in earlier case law (*Stokes v. Milford Co-operative Creamery Ltd.* (1956) 90 I.L.T.R. 67 and *O’Shea v. Mallow Urban District Council* [1994] 2 I.R. 117), he held that there was nothing unusual or special about the facts of the case which would have rendered it reasonable for the proceedings to have commenced in the High Court. In considering the factors which might be taken into account in deciding whether it was ‘reasonable’ to commence proceedings in the High Court, Hogan J. commented at para. 26:

“There may well be cases where for any number of reasons it was reasonable to commence the proceedings in the High Court in the sense contemplated by the sub-section. Thus, for example, the proceedings may be linked or otherwise bound up with existing High Court proceedings or where all the witnesses were based in Dublin where the alternative was a Circuit Court hearing at a rural venue or where the case raised an unusually important point of law suitable for adjudication by the High Court. Depending, of course, on the facts of the particular case, these examples might well amount to instances where the High Court might be satisfied within the meaning of s. 11(2)(a) of the 1936 Act that it was reasonable to commence the proceedings in that forum.”

Finding that no such factors arose in the case before him, Hogan J. held that it was, therefore, appropriate to allow the appeal and to remit the matter to Cork Circuit Court.

40. In an application for leave to appeal that judgment, the Supreme Court in *Allied Irish Banks v. Gannon* [2018] IESCDET 95 refused leave, noting that the judgment of the Court of Appeal ‘did not involve a departure from established principles’ or create any confusion in respect of the prevailing law in respect of the interpretation of these sections. I am satisfied that *AIB v. Gannon* may, therefore, be considered to be settled authority for the proposition that whilst the High Court has the power to retain an action that could have commenced in the Circuit Court, it must be satisfied that specific circumstances exist that make it reasonable and proper to retain the action in the High Court and, in a case with no special features, the High Court could not be so satisfied.
41. An example of the type of specific circumstances that would make it reasonable and proper to retain an action in the High Court may be seen in the recent case of *Promontoria (Oyster) Designated Activity Company v. Fox* [2020] IEHC 12. Noting (at para. 27) that one of the factors to be considered on an application to remit is whether a case raises ‘an unusually important point of law’ suitable for adjudication by the High Court, Simons J. refused the defendant’s application to remit in the light of the potentially difficult legal issues for consideration in the case. In circumstances where the defendant intended to advance an argument to the effect that the security sought to be relied upon by the plaintiff would in fact fall foul of legislative amendments under the Registration of

Deeds and Title Act 2006 which were intended to preclude the creation of new equitable mortgages, the trial judge considered that significant legal issues might need to be determined, and accordingly, the case would '*benefit from a hearing before the High Court at first instance.*'

Discussion

42. Turning to the facts of the present application and in the light of the legal principles outlined above, the Court is obliged to consider the following questions: -

- (i) *Whether, on its face, the plaintiff's action for specific performance could have been commenced in the Circuit Court?*
- (ii) *Whether the plaintiff could contemplate the recovery of damages in excess of the Circuit Court's jurisdiction?*
- (iii) *Whether there is anything significant as would warrant the refusal of the application to remit?*

Whether, on its face, the plaintiff's action for specific performance could have been commenced in the Circuit Court?

43. Section 22 and the Third Schedule to the Act of 1961 confer jurisdiction in civil matters on the Circuit Court (concurrently with the High Court) in a range of miscellaneous circumstances, each of which is subject to certain exceptions and qualifications. Two specific provisions of the Third Schedule, namely, Ref. Nos. 22 and 23, are relevant to this application.

44. In these proceedings, the plaintiff seeks an order for specific performance of the March 2008 agreement and made the subject of an Order of McGovern J. on 7 April 2008. This agreement was in settlement of High Court proceedings brought by the plaintiff and her four siblings against the defendant. At para. (a) of the reliefs claimed in the General Indorsement of Claim, the plaintiff seeks an order for specific performance of the aforesaid agreement. Sub-paragraphs (i) to (iv) thereof seek various orders which include (i) directing the defendant to market and sell the property in question; (ii) instructing two firms of solicitors (namely, the defendant's former solicitors and the plaintiff's current solicitors) to have joint carriage of the sale of the property; (iii) directing that any deposit paid on foot of a contract for the sale of the said property be held as to 45% and as to 55% by the respective solicitors and that when the balance of the purchase monies are paid 45% thereof will be paid to the plaintiff's solicitors with the remaining 55% to the solicitors then on record for the defendant; and (iv): directing the aforesaid solicitors to deal with the purchase monies received by them in the manner outlined in para. 13 of the aforesaid agreement.

45. In the alternative, the plaintiff seeks damages in lieu of specific performance of the said agreement, damages for breach of contract; if necessary, an interlocutory injunction restraining the defendant from selling or disposing of the property otherwise than in accordance with the terms of the aforesaid agreement; such further or other reliefs as to the High Court seem appropriate and costs. Precisely the same reliefs are sought by the

plaintiff in the Statement of Claim with the exception that the claim for damages for breach of contract includes a claim for punitive or exemplary damages. There is no claim made in respect of an entitlement to 100% of the costs of the probate proceedings.

46. The defendant in this application seeks the remittal of these proceedings to the Circuit Court, as being fit to be tried in that jurisdiction. He relies on the provisions of s. 22 of the Act of 1961, as amended, which provide that the Circuit Court has jurisdiction to deal with proceedings for specific performance of contracts and proceedings for the partition or sale of land. He claims that the subject matter of the proceedings for specific performance consists of land, and that the market value of that land does not exceed €3,000,000.
47. The plaintiff, in opposing the application to remit, claims that these proceedings concern the validity of a will and the administration of an estate and not the sale of land. I do not accept the plaintiff's submission in this regard. The validity of the will was firmly determined after evidence thereon had been heard by McGovern J. He accepted that evidence. This fact and the other terms of the March 2008 agreement were the subject of the Order made by him on 7 April 2008. That Order has not been appealed. It is not open to the plaintiff at this stage—some 25 years after the death of the testator and some 12 years after the Order of McGovern J.—to raise the issue of the validity of the will. Consequently, I am satisfied that the subject matter of the proceedings for specific performance in this case does not relate to the validity of a will. I am further satisfied that there is nothing in the wording of the Third Schedule to suggest that the type of action for specific performance of a contract for the sale of land that was contemplated by the legislature is limited, curtailed or confined in the manner suggested by Counsel for the plaintiff.
48. In an application of this nature, it is important that sufficient evidence is put before the Court to satisfy it that the case is one which falls within the jurisdiction of the Circuit Court. As to the market value of the property in issue, the defendant has produced evidence to establish that its current market value lies in the region of between €685,000 and €700,000. The plaintiff, on the other hand, claims the value of the land is such that one could not say that it is not fit for prosecution in the High Court. She has, however, produced no evidence whatsoever to challenge the valuation report of Colliers International dated August 2019. Based on the uncontroverted evidence that is before this Court, I am satisfied that the value of the land does not exceed €3,000,000.
49. In view of the foregoing, I am led to the conclusion that, based on the Plenary Summons and the Statement of Claim herein, these proceedings concern an action for specific performance of a contract or agreement and that the subject matter of the proceedings consist of land, the market value of which does not exceed €3,000,000. Consequently, I find that the plaintiff's claim, insofar as it consists of an action for specific performance of the March 2008 agreement, comes within the provisions of the Third Schedule to the Act of 1961, as amended, more specifically, Ref. Nos. 22 and 23 thereof. I am satisfied that

insofar as this is an action for specific performance of an agreement that it is one which, on its face, could have commenced in the Circuit Court.

50. However, matters cannot rest there because the plaintiff has claimed, in the alternative, damages in lieu of specific performance or damages (including, punitive or exemplary damages) for breach of contract. Consequently, the second question noted above requires to be considered.

Whether the plaintiff could contemplate the recovery of damages in excess of the Circuit Court's jurisdiction?

51. Counsel for the plaintiff submitted that when dealing with an application to remit which is opposed by the plaintiff, the Court must take his client's case at its highest. I accept his submission in this regard. This Court is obliged to determine this application on the basis of the maximum damages that could reasonably be awarded to the plaintiff rather than any damages which the Court considers will probably be awarded. As stated in *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) at para. 8–13, p. 392:

"[T]he court, when dealing with an application to remit that is opposed by a plaintiff, will take the plaintiff's case at its highest, i.e. it will determine the application on the basis of the maximum damages that could reasonably be awarded to the plaintiff rather than the damages that the judge thinks will probably be awarded."

52. At the hearing, the Court was informed that a calculation of value of the plaintiff's claim in damages, taken at its height, would lie in the region of €220,000. This sum was calculated on the basis of a claimed entitlement to recover the full costs of the probate proceedings (c. €185,000) together with the value of her 5% share of the property (c. €35,000). Her claimed entitlement to recover the full costs of proceedings (in which she was but one of five plaintiffs) is based on an assertion that she is jointly and severally liable in respect thereof. She claims that she has already discharged €77,236.23.
53. Counsel for the defendant rejects the submissions of the plaintiff in this regard. He argues that, firstly, there was nothing in the March 2008 agreement nor in the Order of the High Court of 7 April 2008 which granted to the plaintiff the right to claim reimbursement of 100% of the costs of the probate proceedings. The terms of the March 2008 agreement and the Order of the High Court, he submitted, clearly provide that the costs of all five plaintiffs and the defendant were to be deducted *from the estate*. Secondly, insofar as the plaintiff asserts that she is jointly and severally liable for those costs, there was no evidence whatsoever, whether in the form of a letter pursuant to s. 68 of the Solicitors' Amendment Act 1994 or otherwise, to support that claim. As to her claim that she personally discharged approximately €77,000 of those costs, his instructions on this point were different. He reiterated that she had not been conferred with any proprietary right to claim an entitlement in this regard. Fourthly, he argued that the plaintiff is bound by the case she has pleaded and the case which the defendant came to meet was that as stated in the Statement of Claim, namely, an entitlement to 5% of the net proceeds of the sale. The first reference to any claim for costs in the sum of €185,924.12 was in the

context of her opposition to this motion. Finally, even if the plaintiff were entitled to recover her share of the costs of the probate proceedings (and a proprietary right in this regard was not conceded) then her one fifth share of those costs (c. €37,000) together with her entitlement to 5% of the net proceeds after crystallised deductions (c. €35,000)—taken together—would still not bring the overall level of damages beyond the jurisdiction of the Circuit Court.

54. If this Court is satisfied that the plaintiff's claim for specific performance falls within the jurisdiction of the Circuit Court and the only remaining question centres on the plaintiff's alternative claim, namely, the amount of damages recoverable, then I am bound to apply the test laid down by Fitzgibbon J. in *O'Connor v. O'Brien*. That test requires this Court to consider whether the plaintiff could reasonably contemplate the recovery of a sum of damages beyond the jurisdiction of the Circuit Court.
55. It must be observed that in any civil case involving damages, any claim in any amount is contemplatable by any plaintiff. Contemplation costs nothing. The critical aspect of the test, however, is whether this plaintiff in all the circumstances could *reasonably* contemplate an award of damages in the amount of €220,000. In applying that test, I bear in mind all the circumstances of the case—both as opened on the pleadings and as pleaded at the hearing—together with the evidence that was put before the Court concerning the value of the estate in question and the plaintiff's 5% share therein.
56. A significant part (approximately 84%) of the plaintiff's calculation of her claim in damages made *in this application* is based on a claim for the recovery of 100% of the costs of the probate proceedings. Having considered the terms of the March 2008 agreement and the Order of the High Court of 7 April 2008, I am satisfied that nothing therein confers on the plaintiff a proprietary right to claim 100% of the costs of the probate proceedings. The defendant is obliged to discharge the costs of those proceedings out of the estate. He is not obliged to pay 100% thereof to the plaintiff. Furthermore, insofar as the plaintiff alleges a joint and several liability in respect of those costs, there is no evidence before this Court in support of that claim. There is nothing to establish that the solicitors who acted for all five plaintiffs in the probate proceedings has made any demand from only one of those plaintiffs, namely, this plaintiff, for the full amount of the costs arising therefrom. Nor is there any documentary evidence (such as an invoice or a receipt) in respect of the plaintiff's claim to have paid €77,236.23 specifically in respect of the probate proceedings. Most importantly, the Court must recognise that the case which the defendant came to meet on the pleadings makes no reference to a claim for the recovery of 100% of the costs of the probate proceedings. The first time that this claim was made was in the context of this application to remit the proceedings to the Circuit Court. The interests of justice would not be served if a case which a defendant must meet on the pleadings could be so easily and fundamentally enlarged in the context of an application to remit. There is no evidence at all in support of the plaintiff's augmented claim in this application (a claim which does not appear on the face of her pleadings) and certainly none sufficient for me to conclude that she could *reasonably* contemplate an award of damages in the amount now claimed.

57. In coming to this view, I was more persuaded by the defendant's argument that even if the plaintiff could establish a proprietary right to seek one fifth of the costs of the probate proceedings then based on the evidence that is before the Court in relation to the market value of the property, her claim in damages would still not exceed the jurisdiction of the Circuit Court.
58. As there is nothing in the pleadings claiming a right to recover 100% of the costs of the probate proceedings and as there is no evidence before the Court to support or substantiate the plaintiff's alleged entitlement in this regard, I am led to conclude—taking her claim at its highest—that the plaintiff could not reasonably contemplate the recovery of a sum of damages beyond the jurisdiction of the Circuit Court.

Whether there is anything significant as would warrant the refusal of the application to remit?

59. As noted earlier, s. 11(2)(a) of the Act of 1936 confers a discretion on the High Court in an application such as this one, not to remit proceedings if it is satisfied that having regard to all the circumstances it was reasonable that such proceedings were commenced in this Court. It will be recalled that in *AIB v. Gannon*, the Court of Appeal (Hogan J.) considered that there may be cases where, for any number of reasons, it was reasonable to commence the proceedings in the High Court in the sense contemplated by the subsection. A case, for example, may be linked to or otherwise bound up with existing High Court proceedings or all of the witnesses in a case may be based in Dublin or an unusually important point of law suitable for adjudication by the High Court may arise. Depending on the facts of the particular case, these examples might well amount to instances where the High Court might be satisfied within the meaning of s. 11(2)(a) of the Act of 1936 that it was reasonable to commence the proceedings in that forum.
60. Applying the principles set down by the Court of Appeal in *AIB v. Gannon*, this Court must consider whether there are factors or special circumstances arising in this case which satisfy the Court that it was 'reasonable' for these proceedings to have commenced in the High Court. Counsel for the plaintiff urged upon the Court three features of this case which indicate that it was reasonable to commence proceedings in the High Court: (i) that it involves an action concerning the validity of a will; (ii) that it relates to probate proceedings; and (iii) that the damages recoverable by the plaintiff could exceed the limit of the Circuit Court's jurisdiction.
61. I have already found that the action in this case does not concern the validity of a will, that issue having been determined by the final Order of McGovern J. on 7 April 2008. As to the probate proceedings, they were settled long ago and the terms of that settlement were made the subject of the aforesaid Order of McGovern J. Therefore, I am also satisfied that the action does not relate to probate proceedings. As to the level of damages, I have found that even taking the plaintiff's claim at its highest, she could not reasonably contemplate the recovery of damages beyond the jurisdiction of the Circuit Court.

62. In view of the foregoing, I am satisfied that it was not reasonable to have commenced this action in the High Court. There is nothing in the pleadings to suggest that the present proceedings are anything more than a standard or routine case seeking an order for specific performance of an agreement or damages in lieu thereof or damages for breach of contract. The only evidence before the Court indicates that the property (the subject matter of the agreement in respect of which specific performance is sought) has a market value in the region of €685,000 to €700,000. No evidence has been tendered by the plaintiff to contradict that valuation or to support her claim in respect of a personal entitlement to the full costs of probate proceedings to which she was but one of five plaintiffs and which were settled almost 12 years ago. There is nothing to indicate that there is anything unusual or special about these proceedings or that they raise any important point of law for adjudication by the High Court (*a contrario see Promontoria (Oyster) Designated Activity Company v. Fox* cited at para. 41 above).
63. Applying the test confirmed by the Court of Appeal in *AIB v. Gannon*, the Court does not find that there is anything so significant arising in these proceedings as would warrant the High Court exercising its discretion to refuse remittal and retain jurisdiction. I am satisfied that the Circuit Court has jurisdiction to hear and determine this matter and that there is nothing specific or unusually important about these proceedings that would make it reasonable and proper to retain the action in the High Court and to refuse the application to remit.
64. For that sake of completion, two further comments are apposite. Firstly, insofar as counsel for the plaintiff has urged upon this Court that what the defendant has pleaded in his defence is irrelevant to this application, the Court does not accept that submission insofar as a claim for liquidated damages forms part of the plaintiff's case. Section 11(2)(b) of the Act of 1936 makes provision in respect of the remittal of claims for liquidated damages. For the purpose of that subsection, the defendant, both in his pleadings and at hearing, has satisfied this Court that he has a good defence to the action and that he has disclosed facts which, in the opinion of the Court, are sufficient to entitle him to defend the action.
65. Secondly, it will be recalled that in the judgment of Morris J. in *O'Shea v. Mallow Urban District Council* [1994] 2 I.R. 117 he offered an interpretation of s. 11(2) of the Act of 1936 (which amended s. 25 of the principal Act of 1924). His interpretation was affirmed by Hogan J. in the Court of Appeal in *AIB v. Gannon*. In *O'Shea*, Morris J. concluded that he should make an order remitting the action to the Circuit Court for hearing and in support of his interpretation of s. 11(2) of the Act of 1936 he referred to the provisions of s. 20 of the Act, which provided that in an action remitted to the Circuit Court, there might be an award in excess of the normal Circuit Court jurisdiction. In coming to my decision in this case, I, too, have had regard to the provisions of s. 20 of the Act of 1936 (as substituted by s. 16 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013) which provide that where an action claiming unliquidated damages is remitted by the High Court to the Circuit Court, the Circuit Court has jurisdiction to award damages in excess of €75,000.

66. In summary and for the reasons set out in this judgment, I have come to the following conclusions:
- (1) the plaintiff's claim for specific performance is within the jurisdictional limits of the Circuit Court by reason of s. 22 of the Act of 1961 and the provisions of the Third Schedule thereto;
 - (2) the property, which is the subject of the agreement in respect of which specific performance is sought, comes within the limits specified therein;
 - (3) insofar as the plaintiff claims damages as an alternative to an order for specific performance, she could not reasonably contemplate the recovery of a sum of damages beyond the jurisdiction of the Circuit Court;
 - (4) these proceedings could have been commenced in the Circuit Court;
 - (5) notwithstanding (4) above, it was necessary to consider whether, having regard to all the circumstances, it was reasonable that these proceedings were commenced in the High Court;
 - (6) this case has no special features or specific circumstances by reason of which the action ought to have been brought in the High Court; and
 - (7) I am not satisfied that it was reasonable for the plaintiff to have commenced proceedings in the High Court within the meaning of s. 11(2) of the Act of 1936.
67. Accordingly, I will allow the defendant's application and direct that these proceedings be remitted from the High Court to the Circuit Court in accordance with s. 25 of the Act of 1924.