

**APPROVED**

**[2021] IEHC 796**



**THE HIGH COURT**

2019 No. 247 SP

**BETWEEN**

**PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY**

**PLAINTIFF**

**AND**

**MICHAEL KEAN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Garrett Simons delivered on 21 December 2021**

**INTRODUCTION**

1. This judgment is delivered in respect of an application to have the within proceedings remitted to the Circuit Court.

**PROCEDURAL HISTORY**

2. These proceedings have been instituted by way of Special Summons in accordance with Order 38 of the Rules of the Superior Courts. The proceedings seek to enforce a lien in respect of a debt for which, it is said, the Defendant is liable to the Plaintiff. The Plaintiff is said to have succeeded to the interest of Ulster Bank Ireland DAC.

**NO REDACTION REQUIRED**

3. The principal reliefs sought in the proceedings are, first, a well charging order, i.e. a declaration that the Defendant's interest in certain registered lands is well charged with the payment of all monies due and owing by the Defendant to the Plaintiff (and/or its predecessors in title) under specified loan agreements; and secondly, a declaration that there is due and owing to the Plaintiff a total sum of €310,512.83 together with continuing interest pursuant to contract and/or statute.
4. The application for the well charging order is made in reliance upon a lien which has been registered as a burden on freehold lands held in the name of the Defendant.
5. The Defendant contends that the lien was not validly registered. This contention is predicated on an argument that the transitional provisions under section 73 of the Registration of Deeds and Title Act 2006 required that the registration of a lien have been *completed* by 31 December 2009. The Defendant has exhibited documentation which might suggest that whereas an application had been made to register the lien on 31 December 2009, the land certificate may not have been actually lodged until 11 March 2010. The Defendant has also exhibited a letter dated 21 April 2010 which informs Ulster Bank that the application has been completed.
6. The response made an affidavit on behalf of the Plaintiff is that it is sufficient that an application for registration have been made prior to 31 December 2009.

#### **APPLICATION TO REMIT TO CIRCUIT COURT**

7. The Defendant has brought a motion seeking to have the proceedings remitted to the Circuit Court. The motion came on for hearing before me on 29 November

2021. Both sides had prepared helpful written legal submissions which were supplemented by oral argument.

8. Counsel on behalf of the Defendant submits, by reference to the judgment of the Court of Appeal in *Allied Irish Banks plc v. Gannon* [2017] IECA 291, that the legislative policy underlying section 25 of the Courts of Justice Act 1924 is to promote a form of legal decentralisation. Litigants are to be encouraged and facilitated in commencing their proceedings at the lowest level of the legal system appropriate to those proceedings. It is submitted that in order to best give effect to this legislative policy, well charging proceedings concerning lands falling below the market value threshold of €3,000,000 ought to be commenced in the Circuit Court. It is said that the within proceedings do not give rise to any unusually important point of law. The case falls to be determined primarily on whether or not the Plaintiff has adduced sufficient evidence that the lien was registered by 31 December 2009. The proceedings are said to involve the consideration and application of established jurisprudence, and consideration of the evidence adduced by the parties; all of which is entirely within the competence of the Circuit Court.
9. It is further said that the administrative convenience of the Plaintiff, in having various sets of special summons proceedings issued *en masse* in the High Court cannot take precedence over the legislative intent.
10. The nature, location and extent of the lands; the amount of the alleged indebtedness; and the means of the Defendant himself; are all said to be modest in relative terms.

## DISCUSSION AND DECISION

11. The parties are in broad agreement as to the principles governing an application to remit, citing *Allied Irish Banks plc v. Gannon* [2017] IECA 291 and *Promontoria (Oyster) DAC v. Fox* [2020] IEHC 12.
12. One of the key 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. For the reasons which follow, I am satisfied that such a point of law does arise. The principal line of defence advanced in these proceedings presents a significant question of statutory interpretation, namely, whether it is sufficient for the purposes of section 73 of the Registration of Deeds and Title Act 2006 that, prior to 31 December 2009, the holder of such a lien merely have made an application to the Property Registration Authority for registration of the lien as a burden, irrespective of the date upon which the registration is actually completed. This is an issue of general public importance and transcends the facts of the within proceedings.
13. The resolution of this question of statutory interpretation will necessitate a careful consideration of the Act, by reference, in particular, to the judgment of the Supreme Court in *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49; [2020] 1 I.R. 364 and that of the Court of Appeal in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93. It would be of benefit were there to be a written judgment of the High Court (and, if necessary, the Court of Appeal or Supreme Court) on this issue. This would provide legal certainty.
14. The practical advantages typically associated with a hearing in a local venue, e.g. in terms of parties and witnesses not having to travel to Dublin, would not

accrue in this case. This is because the proceedings are on affidavit only, and the hearing will be by way of a remote or virtual hearing.

15. The concerns raised by the Defendant in respect of the additional costs which a hearing before the High Court would entail, as compared to a hearing before the Circuit Court, can be addressed by the making of an appropriate costs order. In circumstances where the retention of the proceedings in the High Court is of greater practical benefit to the Plaintiff, as an entity involved in multiple proceedings of this type, than to the Defendant as a once-off litigant, it is in the interests of justice that the Plaintiff should bear the burden in respect of the costs differential between the High Court and the Circuit Court. Accordingly, I direct that any costs order which might ultimately be made against the Defendant is to be confined to costs on the Circuit Court scale. This pre-emptive or protective costs order will ensure that the Defendant is not prejudiced by the refusal to remit the proceedings to the Circuit Court.
16. In the event that the Defendant is successful in the proceedings, he remains entitled to make an application for a differential costs order pursuant to section 17 of the Courts Act 1981 (as amended).

#### **FORM OF ORDER**

17. The application to remit the proceedings is refused, subject to the protective costs order indicated above.
18. My provisional view is that there should be no order as to costs in respect of the motion to remit. Whereas the motion has been dismissed, the Defendant did obtain some success, i.e. in the form of a protective costs order.

19. The proceedings will be listed for case management on Monday 24 January 2022 at 2 PM. If either party wishes to contend for a different form of order in respect of the costs of the motion, they may do so on that date.

*Appearances*

Eoghan Casey for the Plaintiff instructed by O'Brien Lynam Solicitors  
Diarmuid Padraig Murphy for the Defendant instructed by Michael Keane & Co. Solicitors

Approved  
Gemma S. Mans