THE COURT OF APPEAL

UNAPPROVED
No Redactions Needed
Appeal Number: 2018/305

Whelan J.
Collins J.
Pilkington J.

Neutral Citation Number [2022] IECA 50

BETWEEN/

THOMAS CONDRON

RESPONDENT

- AND –

GALWAY HOLDING COMPANY LIMITED AND DANMAR CONSTRUCTION LIMITED AND STEPHEN TREACY AND MAUREEN TREACY

APPELLANTS

Judgment of Ms Justice Whelan delivered on the 2nd day of March 2022

Introduction

1. This judgment is directed towards the respondent's cross-appeal against the costs judgment delivered on 19 June 2018 by the High Court (McDermott J.) which directed that the appellants pay the respondent's costs at the Circuit Court scale with a certificate for senior counsel pursuant to s. 17(1) of the Courts Act 1981 ("the 1981 Act"), as amended. The trial judge separately refused the appellants' application for a differential costs order pursuant to s. 17(5) of the 1981 Act.

2. The said costs order arose in a context where, for the reasons set out in the High Court's judgment of 17 April 2018 (and upheld on appeal by this court; see, *Condron v. Galway Holding Co. Ltd.* [2021] IECA 216), the trial judge determined that the appellants had committed an act of

trespass in constructing a footpath on the grass verge on the southern side of Seamount Road, Malahide, Co. Dublin, along the length of the road-facing boundary of the respondent's property. The respondent obtained orders that the appellants restore the said grass verge to reverse any changes effected to same and pay the respondent €10,000 by way of damages for trespass.

3. The respondent sought an order for costs. The appellants contended that, if entitled to costs, the respondent was entitled only to the costs appropriate to the level of damages awarded which was well within the jurisdiction of the Circuit Court where the proceedings ought to have been initiated and maintained. The appellants also sought an order from the High Court awarding them an amount equal to the difference in the costs that the appellants would have incurred if the proceedings herein had been brought in the Circuit Court, and the costs that were incurred in defending the proceedings in the High Court, pursuant to s. 17(5)(a) of the 1981 Act. The latter application was refused by the High Court order of 26 June 2018.

4. In the notice of cross-appeal, the respondent contends that the trial judge erred in law and in fact in finding that the appropriate jurisdiction in which to commence the within proceedings was the Circuit Court.

Submissions of the parties on costs in the High Court

5. As outlined in the trial judge's cost judgment, the appellants relied primarily on s. 17(1) of the 1981 Act in asserting that the respondent was only entitled to his costs as measured on the Circuit Court scale. They submitted that, on the basis of *Meath County Council v. Rooney* [2009] IEHC 564, the trial judge had no discretion other than to award costs on that basis.

6. The respondent contended that at the relevant time there had been considerable uncertainty surrounding the jurisdiction of the Circuit Court to hear claims in relation to land and whether that court had jurisdiction in circumstances where the land at issue was part of domestic premises that did not have a rateable valuation. The respondent submitted that due to uncertainty surrounding the appropriate jurisdiction in which to commence the proceedings created by conflicting High

Court judgments on the issue, it had been appropriate in April 2016 to institute the proceedings in the High Court.

7. The conflicting High Court decisions referred to were the judgment of Murphy J. in *Bank of Ireland Mortgage Bank v. Finnegan* [2015] IEHC 304 and that of Noonan J. in *Bank of Ireland Mortgage Bank v. Hanley* [2015] IEHC 738. In *Finnegan,* Murphy J. determined, in connection with a dwelling constructed after 2 May 2002 (the date on which the Valuation Act 2001 ("the 2001 Act") commenced by virtue of S.I. No. 131/2002), that the Circuit Court did not have jurisdiction in relation to property without a rateable valuation, whereas Noonan J. in *Hanley* reached the opposite conclusion.

The High Court costs judgment

8. After setting out the respective positions of the parties, the trial judge noted that the issue of the Circuit Court's jurisdiction to hear claims in relation to land had been conclusively determined by the Supreme Court in *Permanent TSB plc v. Langan* [2017] IESC 71, [2018] 1 I.R. 375 which held that the Circuit Court has jurisdiction to entertain possession proceedings in cases where the relevant property either has a rateable valuation which is shown not to exceed €253.95 or the property is shown not to have a rateable valuation at all.

9. The trial judge noted that the conflict of High Court authorities continued during the course of the proceedings up to the conclusion of the hearing. He considered that it was clear in light of the Supreme Court decision in *Langan* that the Circuit Court had been the appropriate jurisdiction in which to initiate these proceedings but the controversy surrounding the Circuit Court jurisdiction was a live one and it was difficult to criticise the respondent for initiating these proceedings in the High Court in light of that controversy. Nonetheless, he concluded that:-

> "…this action ought to have been instituted in the Circuit Court based (1) upon the nature of the claim, (2) the issues arising in relation to the margin of land the subject matter of the proceedings and (3) the amount of damages ultimately awarded. I am therefore satisfied

that the plaintiff is entitled to the costs of the proceedings on the basis of the Circuit Court scale with a certificate for senior counsel." (para. 11) (numbering added)

10. He further observed that no application was made by either party to remit the case to the Circuit Court at any stage as being the appropriate court to exercise jurisdiction. It was noted that the Court of Appeal delivered judgment in *Langan* on 28 July 2016 ([2016] IECA 229) and the Supreme Court reversed that decision and delivered judgment on 12 December 2017.

11. With regard to the appellants' contention that a differential costs order should be made under s. 17(5) of the 1981 Act, he held that in light of the surrounding circumstances and legal uncertainty concerning jurisdiction, though the claim fell within the jurisdiction of the Circuit Court, there was no particular feature of the case which, as a matter of fairness, required the court to make such an order in favour of the appellants. He noted that this was not a case in which a significant element ought not to have been pursued at all. It was further observed that the respondent had succeeded in proving his substantive right to title and ownership of the margin of land which was the main focus of the evidence adduced during the course of the hearing and the submissions of law made in the case. The trial judge also had regard to the fact that the legal issue of jurisdiction had not been resolved until the Supreme Court decision in *Langan*.

Relevant timeline

12. The following dates are of material relevance to the issues arising:

- 20 May 2015 – High Court judgment in *Bank of Ireland Mortgage Bank v. Finnegan*
- 26 November 2015 – High Court judgment in *Bank of Ireland Mortgage Bank v. Hanley*
- February 2016 – Baker J. in *Permanent TSB plc v. Langan* states a case to Court of Appeal
- 19 April 2016 – Plenary summons issued
- 16 June 2016 – Statement of claim delivered

- 28 July 2016 – Judgment of Court of Appeal in *Permanent TSB plc v. Langan*
- 17 November 2016 leave to appeal to the Supreme Court was granted in *Langan* [IESCDET] 139 - before the Supreme Court the Attorney General obtained leave to intervene on the basis that the issues raised were both of public importance in themselves and had the potential to affect other similar questions concerning statutory jurisdiction.
- 11 January 2017 – Section 45 of Civil Liability and Courts Act 2004 commenced pursuant to S.I. No. 2/2017
- 1 February 2017 – Hearing of this case (which lasted 11 days) commences in High Court
- 12 December 2017 – Judgment of Supreme Court in *Permanent TSB plc v. Langan*
- 17 April 2017 – Judgment of McDermott J. on the substantive issues in this case

Notice of cross-appeal

13. In his notice of cross-appeal, the respondent contends that the trial judge erred in law and in fact in finding that the appropriate jurisdiction in which to commence the within proceedings was the Circuit Court on the grounds that:

(1) when the proceedings were issued on 19 April 2016 two conflicting judgments of the High Court were extant. In circumstances where it was not clear if the Circuit Court had jurisdiction to hear such a case, the appropriate venue for same was the High Court. Furthermore, the decision of the Court of Appeal in *Permanent TSB plc v. Langan* [2016] IECA 229 (delivered prior to the trial of this action) found that the Circuit Court no longer had jurisdiction to hear claims pursuant to s. 22(1) of the Courts (Supplemental Provisions) Act 1961; and,

(2) the Supreme Court decision in *Permanent TSB plc v. Langan,* reversing the Court of Appeal, was delivered in December 2017, six weeks after the hearing of this action had concluded, but prior to delivery of judgment.

14. In his notice of appeal, the appellants sought a differential costs order under s. 17(5) of the 1981 Act but did not pursue this point in the context of the cross-appeal.

Submissions of the respondent

15. The respondent advanced two arguments as to why the High Court was the appropriate venue for this case, namely:

(1) the High Court was the only venue available in view of the decision of the Court of Appeal in *Permanent TSB v. Langan* [2016] IECA 229; and,

(2) it was the appropriate forum for a case of this complexity, in light of the questions of law raised and the very high value of the lands in question (which were required for access to a major development of over 150 dwellings).

16. With regard to the first argument, the respondent submitted that when these proceedings were commenced on 19 April 2016, the extant legal position as to the jurisdiction of the Circuit Court to hear such a claim was unclear as the issue of the applicability of the Valuation Act 2001 to the Courts (Supplemental Provisions) Act 1961 was the subject of a pending case stated to this court in *Langan*.

17. The respondent contended that the jurisdiction of the Circuit Court to hear a case in relation to land derives from s. 22(1) of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"), as amended, which provides:-

> "(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."

Noting that the legislation has been heavily amended, the respondent emphasised that the concurrent jurisdiction of the Circuit Court with regard to cases relating to land arose where the rateable valuation did not exceed €253.95.

18. The respondent noted that the decision of the Court of Appeal in *Langan* approved of the observation of Murphy J. in *Bank of Ireland Mortgage Bank v. Finnegan* that the Circuit Court jurisdiction appeared to be based upon whether or not a piece of land was *rated* and was *rateable.* The respondent submitted that this indicated that the Court of Appeal accepted the proposition that s. 67 of the 2001 Act cannot be used as a "saver clause" for property now deemed to be unrateable. It was noted that at para. 37 in *Langan,* the Court of Appeal held that "[o]ne might equally say that the Circuit Court has been given no jurisdiction in respect of unrateable property." The respondent contended that this would create a scenario where s. 22(1) of the 1961 Act and the accompanying Third Schedule would be contrary to Article 34.3.4 of the Constitution.

19. It was noted that domestic rates had been abolished following the Local Government (Financial Provisions) Act 1978. The respondent characterised the ensuing legal position thus:-

> "…rates would be valued by the rating authority and that the appropriate local authority would then grant the ratepayer an abatement in the value of the sum claimed. This seemingly arbitrary distinction meant that in practical terms, acts such as the 1961 Act and various Landlord and Tenant enactments would be unaffected, such as those falling under section 3 of the Landlord and Tenant Act 1980." (para. 12 of cross-appeal submissions)

The respondent submitted that this "somewhat anomalous" position had been finally resolved by s. 15(2) and Schedule 4 of the 2001 Act, and that the Court of Appeal in *Langan* rejected the "saver" contained within s. 67 of the 2001 Act which "allowed for a sort of quasi-valuation of land" (para. 15 of cross-appeal submissions).

20. The respondent argued that when the proceedings were initiated it was not clear whether the Circuit Court retained jurisdiction to hear cases relating to land where its jurisdiction therein was

based upon rateable valuation. It was contended that that position was crystallised on 28 July 2016 by the Court of Appeal in *Langan* which suggested that property must be both rateable and rated for the Circuit Court to have jurisdiction. Thus, the respondent submitted, when this case came on for hearing in February 2017 the Circuit Court was thought not have jurisdiction to hear any matters relating to residential property, as same were judicially considered to be unrateable.

21. The respondent noted that the decision of the Supreme Court in *Permanent TSB plc v. Langan*, which comprehensively reversed the Court of Appeal, was delivered on 21 December 2017, following conclusion of the 11-day hearing of these proceedings in the High Court.

22. The respondent acknowledged that s. 45 of the Civil Liability and Courts Act 2004 had been commenced by S.I. No. 2/2017 on 11 January 2017 which had substituted a market value of €3,000,000 in lieu of a rateable valuation as the jurisdiction for the Circuit Court in cases relating to residential property. The respondent submitted that:-

> "…it is not clear what the value of the premises herein actually is but the costs of development of same must have been in the millions given the scale and size of the development and the value must be somewhat commensurate to same. Furthermore, the lands of the respondent are clearly worth far in excess of the sum of €3,000,000." (para. 20 of cross-appeal submissions)

23. The respondent contended that attributing a value to the grass verge was a much more complex process and referred to authorities on the approach applied in cases of compulsory acquisition. Reliance was placed on para. 28.29 of Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* (2nd ed., Bloomsbury, 2013), a leading text, which provides:-

> "In [*Stokes v. Cambridge Corporation* (1961) 13 P. & C.R. 77 Lands Tribunal] where the land being acquired had no satisfactory development access but was otherwise suitable for development, a deduction of one-third of the development value was made to take account

> of the probable cost of acquiring such access. The fact that the access land was owned by the acquiring authority had to be ignored. Quite a number of valuers seem to assume that the fraction of one-third taken in that case is sacrosanct and is to be adopted in all similar cases. There is no justification for this assumption. The appropriate deduction to be made where an access will have to be acquired, or the additional price to be paid where the land being acquired controls the access to other development land will depend on the circumstances of the case and market conditions at the time."

24. The respondent submitted that were the disputed grass margin placed on the open market, the value of same would have to take into account the fact that it is the only suitable access site for a development of over 150 properties. Although unclear what value could be attributed to the lands the subject matter of these proceedings, the respondent posited that the grass margin must be worth considerably more than €3,000,000 as it is the only means of accessing the respondent's own lands, and is required to access the appellants' lands which complies with planning permission.

25. With regard to the complexity of the case, the respondent sought to rely on the judgment of Laffoy J. in *O'Brien's Irish Sandwich Bars Ltd. v. Byrne* [2009] IEHC 30, wherein it was held, in relation to an invocation by a defendant of the principles of s. 17(1) of the 1981 Act, that:-

> "The award in this case comes within that exception to s. 17(1). In my opinion, because the principal relief being sought by the plaintiff was declaratory and injunctive relief to enforce the complex provisions of the Franchise Agreements and the claim for damages was, in a real sense, ancillary, it was reasonable in the interests of justice generally, owing to the difficult issues of law which could have been anticipated and, in fact, did emerge, that the proceedings should have been commenced and determined in this Court, and I so certify. Apart from that, another factor which I consider to be relevant is that the quantum of damages to which a franchisor plaintiff enforcing a Franchise Agreement may ultimately be entitled, if successful, will in many cases depend on how quickly the impugned conduct

is restrained by injunction or undertaking, which may be difficult to predict for a variety of reasons, including how quickly the matter can get a full hearing in Court. If the parties had not been accommodated by an early hearing in this matter, the damages may well have been outside the jurisdiction of the Circuit Court." (para. 12)

26. In reliance on the above passage, the respondent submitted that:

(1) the principal reliefs sought in these proceedings were declaratory and injunctive and that the claim for damages was at all material times ancillary to same;

(2) this case did involve difficult issues of law, including:

(i) the opaque nature and history of the "taking-in-charge" of roads in Irish law;

(ii) the absence of any recent case law on that issue;

(iii) the failure of Fingal County Council and its predecessors to comply with various statutory provisions; and,

(3) had the respondent not intervened immediately, the damages and costs to all parties could have been higher.

27. The respondent argued that the facts were more complicated than would normally be the case in a boundary dispute, that there has been a minimum of statutory intervention in the concept of "taking-in-charge" of roads by a local authority and that the Planning and Development Act 2000 alludes to the concept of "taking-in-charge" as if it is an accepted part of Irish law.

28. The respondent argued that *Holland v. Dublin City Council* [1979] 113 I.L.T.R. 1 and *Attorney General (Cork County Council) v. Perry* [1904] 1 I.R. 247 appear to be the only Irish authorities regarding this facet of Irish local government. In those circumstances, the respondent submitted, it was more appropriate to bring this case in the High Court.

29. The respondent further contended that the local authority had failed to maintain any records of which roads had in fact been taken in charge, other than an extract from a Roads Schedule, the exact date of which was unknown, and, in fact, the original of same could not apparently be

located. It was argued that the instant case would have been considerably simpler if there was a clear record of what the local authority had taken in charge.

30. As a final point, the respondent noted that it was an unusual feature of this dispute that the road itself is crucial to the planning permission for a major development. In addition to the financial implications of that, the respondent said, it meant that this case required careful consideration of a complicated planning process in order to understand the actions of the appellants.

31. As explained below, s. 17(2) and the decision in *O'Brien's Irish Sandwich Bars* do not assist the respondent in his cross-appeal.

Submissions of the appellants

32. The appellants submitted that this court should not overturn the trial judge's refusal to award the respondent costs on the High Court scale, noting that the award of damages in the sum of €10,000 has not been appealed by the respondent. It was posited that in light of the decision in *Meath County Council v. Rooney*, the terms of s. 17(1) of the 1981 Act are mandatory and that this court has no discretion other than to uphold the High Court's order for costs.

33. The appellants contended that even if the court had a discretion, an award of costs at the High Court scale against the appellants for proceedings which lasted for eleven days would constitute a disproportionate imposition on the appellants in circumstances where the trial judge held that the level of inconvenience and disruption suffered by the respondent justified an award of €10,000 in damages.

34. The appellants argued that the respondent ought to have applied for remittal to the Circuit Court when the decision of the Court of Appeal in *Langan* was delivered on 28 July 2016. The appellants submitted that there was no onus on them to make such an application and it was at the respondent's risk to proceed in the High Court despite the Court of Appeal having delivered a judgment confirming the Circuit Court jurisdiction.

The law

35. Central to the appellants' position on costs is s. 17(1) of the 1981 Act, as substituted by s. 14 of the Courts Act 1991, which provides:-

> "(1) Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (other than an action specified in subsections (2) and (3) of this section) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the said lowest court." (emphasis added)

36. At the core of this cross-appeal is the issue whether the provisions of s. 17(1) of the 1981 Act, as amended, were engaged or whether on the totality of the relevant evidence there was sufficient degree of doubt or uncertainty subsisting on the issue of the Circuit Courts had jurisdiction to entertain the claim such that it would be contrary to the interests of justice or otherwise disproportionate to apply and enforce s. 17(1) on the basis of a judgment of the Supreme Court delivered on 12 December 2017.

37. The trial judge *was prima facie* entitled to reach his conclusion at para. 11 in the judgment that "this action ought to have been instituted in the Circuit Court based upon the nature of the claim, the issues arising in relation to the margin of land the subject matter of the proceedings and the amount of damages ultimately awarded" if the High Court was, in the language of the sub section, "not the lowest court having jurisdiction to make an order granting the relief*"*. He reached that conclusion in reliance on the *Langan* decision which had reversed the earlier Court of Appeal decision which the latter decision had represented the state of the law throughout the currency of the litigation.

38. In his written and oral submissions to this court, counsel on behalf of the respondent contended that there was considerable uncertainty at the time of institution of the within proceedings in April 2016 as to the state of the law concerning the jurisdiction of the Circuit Court to hear claims pertaining to land. This uncertainty was brought about in particular, he posited, by three factors that obtained at the date of the institution of the proceedings: firstly, the judgment of the High Court in *Bank of Ireland Mortgage Bank v. Finnegan*; secondly, the decision in *Bank of Ireland Mortgage Bank v. Hanley*; and thirdly, a consultative case stated submitted by Baker J. in early 2016 to the Court of Appeal on this jurisdictional issue in light of the clear conflicts between the decisions in *Finnegan* and *Hanley* led to the judgment of the case stated to Court of Appeal in *Permanent TSB plc v. Langan* which was delivered on 28 July 2016.

39. Before considering those separate factors and their relevance to the costs issue in this appeal, it is necessary to have regard to salient determinations pertaining to the property. The evidence was that the respondent had inherited the holding, which operated as a farm, in or about 1979. He subsequently constructed a dwelling of which the disputed portion of ground the subject matter of these proceedings formed part. No certificate of rateable valuation in respect of the dwelling was produced in court by either side. However, it was acknowledged on behalf of the respondent that the property was rated and that had a rateable valuation was less than €253.95.

40. The rateable status of the property was readily ascertainable by the respondent prior to the institution of these proceedings in April 2016. As a matter of law, rates were no longer levied on domestic dwellings since the enactment of the Local Government (Financial Provisions) Act 1978 and in particular s. 3 thereof which came into operation on 20 December 1978.

41. The Court of Appeal in *Langan* observed at para. 29 that the legislative drafting technique deployed to achieve this outcome had the effect that "domestic rates were not abolished for all purposes by the 1978 Act. Section 3 of the 1978 Act rather required each local authority 'to make an allowance to the [domestic ratepayer] and, accordingly, the rate so made shall be abated.'"

42. In effect, on and after 20 December 1978, domestic premises were rateable even though rates had not been levied on them nor could they be so levied from that date. That position was apparent from the *obiter* observations of Murphy J. in *Bank of Ireland Mortgage Bank v. Finnegan*. The Head of Valuation Services in the Valuation Office had given evidence in *Finnegan* and a précis of his evidence is set out at para. 19 of her judgment. It is evident that domestic properties built in the 1980s and 1990s, and up to the commencement of the Valuation Act 2001 on 2 May 2002, continued to be rateable even though rates had not been levied upon them since the coming into operation of s. 3 of the Local Government (Financial Provisions) Act 1978.

43. Strictly speaking, the salient facts in this case, and in particular the rated status of the respondent's property could be characterised as distinguishable from those in the *Finnegan* and *Hanley* cases where the dwellings concerned were built after the 2001 Act came into force.

Valuation Act 2001

44. This statute brought about a fundamental sea-change in the approach to *rateability* of property. By virtue of its provisions, certain categories of property were excluded from rating. Those categories are found in Schedule 4 of the 2001 Act. Category 6 (excluding provisos which are not relevant) encompasses "any domestic premises".

45. The net effect of the 2001 Act was that any new domestic premises constituted after its commencement was not rateable at all from and after 2 May 2002. This fact is uncontroversial. It was not in contention or disputed in the *Finnegan* or *Hanley* decisions.

46. The narrow ambit of her judgment is reiterated on several occasions by Murphy J. in *Finnegan*. The dwelling in question in *Finnegan* was constructed in 2006, four years after the coming into operation of the 2001 Act. Murphy J. noted the evidence of the Head of Valuation Services in the Valuation Office who had stated that "the Valuation Office would not be legally empowered to issue a valuation in respect of a 2006 domestic property because the 2001 Act provides that such properties are not rateable." (para. 33)

47. At para. 55 of her judgment in *Finnegan*, Murphy J. observed:-

> "…On the facts of this case the Court does not need to consider the effect (if any) of these provisions on the rateable valuation of domestic premises which predate the Valuation Act [2001]."

48. By contrast with the factual matrix in *Finnegan* and *Hanley* respectively, the respondent's domestic property, of which the disputed portion of ground formed part, was constructed after 1979 but before the commencement the relevant provision of the 2001 Act on 2 May 2002. It was a property in respect of which, at all material times and in particular at the date of the institution of the within proceedings, there was an ascertainable rateable valuation. A certificate of rateable valuation was procurable. That certificate, as the respondent concedes, would have demonstrated that the rateable valuation was less than €253.95.

49. The decision in *Finnegan* did not present any direct express difficulty at the date of the institution of the within proceedings to the general understanding that had hitherto prevailed that the Circuit Court had jurisdiction pursuant to s. 22(1) of the Courts (Supplemental Provisions) Act 1961, as amended, and the Third Schedule to that Act to hear and determine the issues such as were arising in the within proceedings. That said, the decision did give rise to uncertainty amongst practitioners as to whether the principle enunciated by Murphy J. extended to dwellings, such as the respondent's, built after 1979 and rated prior to the commencement of the Act in 2 May 2002.

Jurisdiction of the Circuit Court and Costs under the Valuation Act 2001

The impact of *Permanent TSB plc v. Langan* [2016] IECA 229

50. *Langan* had its genesis in a consultative case stated framed and put forward by the High Court to this court in February 2016, some two months or so prior to the institution of the within proceedings. In my view, the existence of that pending hearing and the tenor of the issues identified therein did give rise to a reasonable concern amongst practitioners that the effect of the 2001 Act might have been to render all domestic property unrateable. That view is borne out by the language

of the Court of Appeal judgment itself in *Langan* and some observations of the Chief Justice in the Supreme Court's appeal judgment.

51. Over nine weeks after the institution of the within proceedings on 28 July 2016, the judgment of this court in *Langan* was delivered. Between that date and 12 December 2017 (well after the conclusion of the 11-day hearing of this case) the Court of Appeal decision represented the state of the law regarding the concurrent jurisdiction of the Circuit Court to hear and determine such proceedings. Could the judgment of this court have been reasonably understood to potentially extend to a domestic property constructed prior to 2 May 2002 which had a rateable valuation and appeared on valuation lists as the respondent contends? The Supreme Court decision suggests that the answer is yes. The decision of this court was not expressly confined exclusively to domestic properties constructed after the coming into operation of the Valuation Act 2001 that were not rated and had never appeared on any valuation lists.

52. I am satisfied that there was some degree of uncertainty from February 2016 when the *Langan* case-stated commenced and particularly after the judgment of this court in late July 2016 such that it was not unreasonable for the respondent and his legal advisors to reach a litigation decision that, on balance, it could not safely be assumed that the Circuit Court was "the lowest court having jurisdiction to make an order granting the relief the subject of the order" within the meaning of s. 17(1) of the Courts Act 1981, as amended.

53. In summarising the jurisdictional issue, the Court of Appeal in *Langan* stated at para. 46:-

> "…in the case of possession proceedings concerning property, the entire premise of the jurisdiction of the Circuit Court as vested by s. 22(1) of the 1961 Act and the Third Schedule (as amended) is that the property in question must be rateable. Although the effect, however, of the 2001 Act was to make dwellings no longer rateable, this also had the consequence that the Circuit Court had no jurisdiction to hear disputes in relation to such property."

The judgment went on to consider subsequent statutory provisions such as the Land and Conveyancing Law Reform Act 2013 which have no bearing in the instant case.

54. The answers by this court in *Langan* to two questions in the case stated are of particular relevance. Question 1 asked, "If a property is not rateable by virtue of the Valuation Act 2001, or otherwise, is the Circuit Court's jurisdiction under s. 22(1) of the Courts (Supplemental Provision) Act 1961 excluded?" The answer stated, "Yes, subject to the answer given in respect of question three".

55. Question 3 asked, "Is the Circuit Court entitled to proceed to judgment, unless it is shown by evidence that there is a rateable valuation which exceeds €253.95?" The answer was:-

> "Where the defendant has put the jurisdiction of the Circuit Court at issue, that court is not entitled to proceed to judgment in respect of a domestic dwelling which has been rendered unrateable by the Valuation Act 2001, unless the case in question comes within either Part 10 of the [Land and Conveyancing Law Reform Act 2009] or s. 3 of the [Land and Conveyancing Law Reform Act 2013]." (emphasis added)

56. Paragraph 37 of the judgment provided:-

> "One might equally say that the Circuit Court has been given no jurisdiction in respect of unrateable property. If the Oireachtas had ever intended that the Circuit Court should enjoy a jurisdiction in respect of unrateable property, then the limits of that jurisdiction would have to be specified by law in the manner specified by Article 34.3.4. But since there are no such limits specified by law, this in itself is a further indicator that the Circuit Court has no such jurisdiction in such cases, as any other conclusion would suggest that the Oireachtas impliedly sought to confer an unlimited jurisdiction on the Circuit Court in respect of rateable property in a manner contrary to the terms of Article 34.3.4 itself."

57. The Supreme Court on appeal, [2017] IESC 71, [2018] 1 I.R. 375 reversed the decision. Clarke C.J. observed at para. 49:-

"… it is… necessary to identify and keep a clear distinction in mind between two different concepts. The first is the question of 'rateability' which, when the term is properly used, refers only to the question of whether rates can actually be levied on the property concerned. The second, being 'rateable valuation', refers to the question of whether a property has (or could have) a valuation attributed to it in accordance with the 2001 Act or any of its predecessors." (emphasis added)

58. The significance of that distinction is underscored at para. 50 where Clarke C.J. observed:-

"It may be that the word 'rateable', as used in some of the judgments in this area to date, and, indeed, in the answer to question 3 given by the Court of Appeal to the questions raised … may not have fully adopted the appropriate terminology having regard to that distinction."

59. In the course of his judgment the Chief Justice analysed the important distinction between a property which may be rateable pursuant to the provisions of the 2001 Act and the distinct issue of whether a given property actually has a rateable valuation.

60. The Chief Justice addressed questions 3 to 5 of the case stated jointly, concluding at paragraph 82 of his judgment:-

"…I would propose that these be answered by indicating that it is necessary for a plaintiff in a possession action of the type which is the subject of this appeal to establish jurisdiction. That jurisdiction may be established by producing a certificate of rateable valuation which demonstrates that the property is rated below €253.95. Alternatively, that jurisdiction may be demonstrated by producing admissible evidence that the property concerned does not in fact have a rateable valuation. Given the possibility that a property may have a rateable valuation even though it is not rateable in the sense in which that term is used in the 2001 Act, it is insufficient, for the purposes of demonstrating that a property does not have a rateable valuation, to establish that the property is not rateable. Rather, admissible evidence

of the fact that the property does not actually have a rateable valuation must be produced." (emphasis added)

61. In my view, during the intervening year and a half or so between the delivery of the *Langan* judgment in this court on 28 July 2016 (or arguably, from February 2016, when the consultative case stated in *Langan* was framed and forwarded to the Court of Appeal) and delivery of the judgment of the Supreme Court on 12 December 2017 – a period of time that substantially overlapped with the progression of this litigation through the High Court – there was significant uncertainty and doubt as to the jurisdiction of the Circuit Court, not alone in relation to domestic properties built after the coming into operation of the 2001 Act on 2 May 2002, but also domestic properties which had a rateable valuation prior to the coming into operation of that Act. That uncertainty derived from the overall tenor of the Court of Appeal judgment which appeared to suggest that the Circuit Court no longer had jurisdiction to hear claims concerning "such properties" pursuant to s. 22(1) of the Courts (Supplemental Provisions) Act 1961.

62. The judgment – implicitly, if not expressly – encompasses the possibility that the underlying basis for the jurisdiction of the Circuit Court in property cases effectively disappeared upon the coming into force of the 2001 Act on the 2 May 2002. In such circumstances, no prudent legal adviser could have confidently asserted prior to 12 December 2017 either that the Circuit Court was the lowest court or that the High Court was "not the lowest court having jurisdiction to make an order granting the relief the subject of the order".

63. The respondent could not reasonably anticipate the outcome of the Supreme Court appeal in *Langan*. It follows, therefore, that his legal advisors could not be satisfied as a matter of certainty, at any time prior to the conclusion of the hearing in the High Court that it was "not the lowest court having jurisdiction" or that the Circuit Court had jurisdiction to make the orders sought.

Section 45 of the Civil Liability and Courts Act 2004

64. The appellants sought to rely on s. 45 of the Civil Liability and Courts Act 2004 as a statutory provision which was operative at the date of the hearing and which provided for a basis of jurisdiction for the Circuit Court based upon the market valuation of the property. Section 45 provides:-

> "(1) Section 2 of the Courts (Supplemental Provisions) Act 1961 is amended by the insertion, in subsection (1), of the following definition:
>
> > '"market value" means, in relation to land, the price that would have been obtained in respect of the unencumbranced fee simple were the land to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land.'.
>
> (2) The Third Schedule to the Courts (Supplemental Provisions) Act 1961 is amended, in column (3), by the substitution of–
>
> > (a) 'market value' for 'rateable valuation' in each place that it occurs, and
> >
> > (b) '€3,000,000' for '£200' (inserted by section 2(1)(d) of the Act of 1981) in each place that it occurs."

65. At the date of the institution of the within proceedings on 16 April 2016 the said section had not been commenced in accordance with s. 1(2) of the Civil Liability and Courts Act 2004. In fact, commencement was not effected and the section did not become operative until the enactment of S.I. No. 2/2017 which provided, *inter alia*, that s. 45 of the Civil Liability and Courts Act 2004 "shall come into operation on 11 January 2017". By then, the trial was due to commence in February 2017. The relevance and implications of that are considered below.

Statutory Restrictions on Recovery of Costs under Section 17

66. In *Meath County Council v. Rooney*, delivered on 21 December 2009, Dunne J. held that s. 17(1) is mandatory in effect, and where it is determined that a case is one in which the Circuit Court was "the lowest court having jurisdiction", an order for Circuit Court costs should be made.

67. The decision of Laffoy J. in *O'Brien's Irish Sandwich Bars Ltd. v. Byrne* (delivered on 3 March 2009) is distinguishable, since on its facts the damages awarded came within s. 17(2) and Laffoy J. was satisfied that the facts and circumstances warranted the grant of a "special certificate" which effectively disapplied the statutory restrictions on the recovery of costs provided for by s. 17(1). The legal basis for such a special certificate was not made out on the facts of the instant case. The court in such circumstances lacks any residual jurisdiction to depart from the strict requirements of s. 17(1) of the 1981 Act.

68. There is no inconsistency between the decisions in *Meath County Council v. Rooney* and *O'Brien's Irish Sandwich Bars Ltd. v. Byrne.* Each is directed to a different sub section of s17. *Meath County Council v. Rooney* is now to be read in light of the dicta of this court in *Savickis v Governor of Castlerea* [2016] IECA 372 and *Morgan v. Slaneygio Ltd.* [2019] IECA 155.

Purposive construction

69. S. 17(1) is an important device in the armoury of the court to discourage wasteful or extravagant litigation conduct that causes hardship to litigants. As Hardiman J. observed in the Supreme Court in *O'Connor v. Bus Atha Cliath* [2003] 4 I.R. 459 at p. 505, para. 182;

> "… looking at s. 17 as a whole, it seems clear that the legislative purpose is to provide a strong incentive to the institution of proceedings, generally, in the lowest court having jurisdiction to make the award appropriate to them. In this case, it is now beyond argument that the plaintiff's claim could have been dealt with quite adequately in the Circuit Court. This did not occur. The reason it did not occur, as I have already found, was that the plaintiff maintained a studied vagueness on the amount of his claim…"

That statement identifies the mischief s.17 seeks to remedy.

70. It remains for a court on another day to enter upon a definitive analysis of the ambit in s. 17(1) of the Courts Act 1981, as amended. For the reasons stated hereafter, it is unnecessary to reach a determination on that issue in the context of this appeal.

Proper Jurisdiction: Application of the principles to the facts

71. The trial judge concluded that the High Court was "not the lowest court having jurisdiction to make an order". That determination was made based on the state of the law after the Supreme Court had delivered its judgment in *Langan*. Thus, the judge's rationale represented a degree of retrospective rationalisation that could not reasonably have been imposed on the plaintiff between April 2016 and 12 December 2017. A litigant, in making litigation decisions, should act on the basis of what the law regarding procedure is generally understood to be rather than what it is anticipated an appellate court may in the future determine it to be.

72. Applying a purposive reading to s. 17(1) and having due regard to the exceptional circumstances arising in this case it is reasonable to conclude that the Oireachtas in promulgating that provision could not have intended to penalise litigants such as the Plaintiff in the such circumstances as prevailed between April 2016 and 12 December 2017. I am satisfied that it is necessary to reverse the decision of the High Court as to costs and make an order allowing the cross-appeal. In doing so, I take into account the following factors;

a. The trial judge's own finding in his judgment that "… the controversy surrounding the Circuit Court jurisdiction was a live one and it is difficult to criticise the plaintiff for initiating these proceedings in the High Court in the light of that controversy." is undoubtedly correct.

b. The cumulative effect of the decisions in *Finnegan* in the High Court and Langan in this court in casting doubt on the jurisdiction of the Circuit Court to determine such

cases and the ensuing uncertainty for litigants and their advisers was central to the litigation decision.

c. The litigation trajectory in this case coincided very substantially with the pre-Supreme Court position in *Langan*.

d. Given the extensive nature of the housing development undertaken by the appellants there was clearly an urgency in having the issues determined.

e. The vast bulk of the costs had been incurred and the hearing concluded before the Supreme Court brought clarity to the issue on 12 December 2017.

f. The statutory intent of s17 as analysed by Hardiman J. in *O'Connor* above could not be said to be undermined by the litigation decision made in light of the prevailing jurisprudence at the material time.

g. No abuse of the process of the High Court of the kind contemplated by Irvine J. in *Savikis* (per para. 26 of that judgment) arises in the instant case.

h. It is a relevant, but neutral, factor that the appellants never objected to the respondent proceeding in the High Court.

i. The appellant did not bring an application to have the matter remitted to the Circuit Court – albeit in light of the decision in *Rooney* that is a neutral factor.

j. It was open to the appellants to expressly waive any jurisdictional point – particularly from and after July 2016 - that was perceived to arise from that judgment.

k. The sustained silence of the appellants in not raising any issue as to jurisdiction could, given the nature of the claim and the tenor of the counter-claim, when coupled with their own litigation decision to pursue a counter-claim in the High Court, be taken to be acquiescence by silence in the circumstances of this case.

73. Though strictly speaking, s. 45 of the 2004 Act was in operation from and after 11 January 2017, I am satisfied that it would have been both an unreasonable and disproportionate requirement to expect steps to be taken by the respondent at that very late stage for the remittal of the case to the Circuit Court. It will be recalled that given the urgencies attendant upon this litigation, the complexity of the matters and difficult issues of law arising (including public rights of way, dedication, "taking in charge" by a public authority and what constituted evidence of same), and the appellants' desire to resolve the issues for the purposes of, *inter alia*, obtaining good and marketable title to the access way to their development of over 150 dwellings, the matter had been expedited through the court lists from the date of the institution of the proceedings onward. An expeditious and early hearing was vital – especially to the appellants' own commercial interests.

74. It is relevant that a date had been fixed for hearing of the substantive action in the Chancery List of the High Court well before the coming into operation of s. 45 of the 2004 Act. A hearing date for 1 February 2017 was in place and both parties had organised themselves and their respective witnesses towards the expeditious disposition of the case in accordance with the directions, time frame and dates fixed by that court. Accordingly it would have been neither in the interests of justice nor proportionate for the respondent, subsequent to 11 January 2017, to be expected at such a late stage to have taken any step towards remittal of this case for trial to the Circuit Court.

75. Hence, I am satisfied that whilst strictly speaking S.I. No. 2/2017 was indeed operative from 11 January 2017 it was neither reasonable nor realistic to expect that the respondent would move an application under its terms for remittal of this action to be determined by the Circuit Court. It must be taken to apply to cases that would be instituted after that date.

Estoppel

76. Counsel for the appellants argued that section 17(1) is absolute in its terms and that its application could not be affected by any dealings between the parties. The corollary of that

argument is that even if there had been an express agreement between the parties that the action should proceed in the High Court rather than in the Circuit Court, the operation of section 17(1) would not be affected. This proposition must be tested against the well-established principle that a party may by their conduct be estopped from relying on their strict legal or statutory rights where it would be unjust or inequitable to allow relevant acts and omissions or inconsistent representations or assurance to be disregarded. Cases in other analogous contexts such as *Murphy v Grealish* [2009] IESC 9, [2009] 3 I.R. 366, *Doran v Thompson Ltd* [1978] I.R. 223; *Daly v Minister for the Marine* [2001] IESC 77, [2001] 3 I.R. 513 demonstrate that the general surrounding circumstances and conduct of a defendant may, as here, give rise to an equitable estoppel precluding an entitlement otherwise arising to enforce a statutory entitlement.

Acquiescence of appellants and the Counterclaim

77. A comprehensive counterclaim was advanced by the appellants seeking declaratory and injunctive relief in relation to the appellants' development. The damages expressly claimed in the counterclaim exceeded the jurisdiction of the Circuit Court. On any assessment, the claim for damages for trespass was but a very ancillary aspect of the respondent's action. By virtue of the counter-claim, the appellants expressly invoked the jurisdiction of the High Court.

78. The appellants claimed *inter alia*:

(1) a declaration that the appellants were entitled to proceed with their development in accordance with the planning permission granted;

(2) an injunction preventing the respondent, his servants or agents interfering with the appellants' right and ability to carry out the works in accordance with the planning permission; and,

(3) damages for loss, expense and inconvenience suffered by the appellants arising from the wrongful injunctive relief sought and obtained by the respondent in the sum of €135,000 and continuing.

79. A counter-claim is in effect a cross-action and not merely a defence to the respondents claim. The counter-claim pleaded in this case was of such a nature that the High Court alone had jurisdiction to adjudicate upon it as a separate action in the event that the respondent abandoned his action, as determined in decisions such as *Williams Bros. v. Ed. T. Agius Ltd.* [1914] A.C. 422. Lord Esher M.R. in *Stumore v. Campbell & Co.* [1892] 1 Q.B. 314 at p. 317 observed that, for all purposes except execution, a claim and a counter-claim are two independent actions. That fact significantly undermines the appellants' stance in relation to jurisdiction and costs.

80. I note also that from 3 February 2014, following the commencement of s. 14 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, the monetary jurisdiction of the Circuit Court was limited to €75,000. The appellants' counterclaim far exceeds that jurisdictional limit.

81. Further, it is noteworthy that at no point did the appellants canvass the proposition that the case could appropriately or reasonably be tried and disposed on any basis of before the Circuit Court and in particular they never sought the consent of the respondent to remittal with consent to unlimited jurisdiction in respect of the counterclaim.

Conclusion

82. As the trial judge observed:-

> "10. It is clear in the light of *Langan* that the Circuit Court was the appropriate jurisdiction in which to initiate these proceedings but the controversy surrounding the Circuit Court jurisdiction was a live one and it is difficult to criticise the plaintiff for initiating these proceedings in the High Court in the light of that controversy."

That view is indeed correct. It speaks to the Supreme Court decision. However, that judgment was only delivered after the conclusion of the 11-day hearing of the action and over 20 months *after* the institution of these proceedings. It was reasonable for a litigant in the position of the respondent and his legal advisers at the date of institution of these proceedings to act on the basis that there

was a real and substantial risk that the Circuit Court lacked jurisdiction. That risk was reinforced by the tenor of the *Langan* judgment in the Court of Appeal.

83. For the reasons also outlined above and in circumstances where;

(i) the appellants never raised any objection to the respondent's invocation of the jurisdiction of the High Court or suggested that the Circuit Court was the appropriate jurisdiction in which the action heard and determined and

(ii) the appellants expressly invoked the jurisdiction of the High Court to advance a counter-claim that could not have been pursued in the Circuit Court,

I am satisfied that on the facts outlined above and the surrounding circumstances it would be fundamentally unfair to permit the appellants now to rely on section 17(1) in order to limit their costs liability to the respondent and they are estopped by their conduct from doing so. Therefore, based on the circumstances of the case, I would hold that in light of their active acquiescence in the case proceeding in the High Court coupled with their conduct otherwise the appellants are estopped now from relying on s. 17(1).

84. Accordingly, I would set aside the order of the trial judge that "the defendants do pay the plaintiff's costs at the Circuit Court scale with a certificate for senior counsel" and in lieu thereof order that the Defendants pay the Plaintiff's High Court costs when ascertained.

Costs of the cross-appeal

85. The respondent being entirely successful in the cross-appeal, my preliminary view is that he is entitled to an order for costs as against the appellants. If the appellants contend for an alternative order regarding costs, submissions in writing no longer than 2,000 should be filed with the Office of the Court of Appeal within 21 days from the date of the delivery of this judgment. Any replying submission no longer that 2,000 words to be likewise filed within 21 days thereafter.

86. Collins and Pilkington JJ. concur in this judgment.