APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/312

Neutral Citation Number: [2024] IECA 195

Pilkington J.

Allen J.

Butler J.

BETWEEN/

JOHN COULSTON

PLAINTIFF/RESPONDENT

- AND –

PATRICK DOYLE

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Allen delivered on the 26th day of July, 2024

Introduction

1. This is an appeal against the judgment of the High Court (Cregan J.) delivered on 10th August, 2023 ([2023] IEHC 546) and consequent order made on 6th October, 2023, vacating a *lis pendens* registered by the appellant on 4th November, 2016 in relation to the lands comprised in Folio 21063F, County Carlow and restraining the appellant from registering any further *lis pendens* in relation to that property.

2. The core issue on the appeal is whether the respondent receiver had sufficient standing to apply for an order vacating the *lis pendens* but the appellant also raises an issue as to the jurisdiction of the High Court to make such orders. Specifically, the appellant contends that the jurisdiction of the High Court to make such orders is limited to the express statutory jurisdiction conferred by s. 123 of the Land and Conveyancing Law Reform Act, 2009.

3. On 3rd November, 2016 the appellant issued a plenary summons against Allied Irish Banks p.l.c. *("AIB")* and the respondent. On 4th November, 2016 the appellant registered that action as a *lis pendens* in the Central Office register of *lis pendens* and on 28th November, 2016 registered the *lis pendens* as a burden on Folio 21063F, County Carlow. The summons was never served on either defendant.

4. The High Court judge found that the proceedings were not issued in a *bona fide* manner; that they had not been prosecuted in a *bona fide* manner; that there had been unreasonable delay on the part of the appellant in prosecuting the proceedings; and that the summons had been issued and the *lis pendens* registered with the sole objective of frustrating any attempt to sell the property. There is no appeal against those findings.

5. If the appellant's objective in issuing the proceedings and in registering the action as a *lis pendens* was to frustrate any attempt to sell the property, it follows that his objective in resisting the respondent's application to vacate it must be the same. Either of the judge's findings that there had been unreasonable delay in prosecuting the action or that it was not being prosecuted *bona fide* would have justified the making of an order pursuant to s. 123 of the Act of 2009 vacating the *lis pendens*. Thus – as far as the order to vacate the *lis pendens* is concerned – the core, and indeed the only real, issue is whether the respondent had standing to apply to the High Court for the order which was made. However, the order restraining the appellant from registering any further *lis pendens* in relation to the land goes

beyond the power conferred by s. 123 of the Act of 2009 and can only have been founded on an inherent jurisdiction to make such an order.

6. As I will come to, the inherent jurisdiction of the High Court to regulate the use and abuse of its procedures for the registration of *lis pendens* is well established.

Factual background

7. On or about 12th March, 2009 the respondent and a Ms. Margaret O'Neill borrowed from AIB the sum of €689,000 on the security *inter alia* of an all sums mortgage over what was then described as a one acre site at Tullow Industrial Estate, Bunclody Road, County Carlow. The terms of the loan were set out in a letter dated 12th March, 2009 which described itself as a credit agreement and which provided that the loan was to be repaid on 27th March, 2009 – that is, about a fortnight later – by a single instalment of €690,998.80.

8. By a deed described as a mortgage dated 9th April, 2009 made between Ms. O'Neill and the appellant – together described as the Mortgagor – and AIB Mortgage Bank *("AIBM")* and AIB – together described as the Lenders – Ms. O'Neill and the appellant charged the lands comprised in Folio 21063F, County Carlow, with the payment of the *"Total Debt"* therein defined owing to each of the Lenders, severally but not jointly. On 3rd December, 2009 the charge was registered as a burden on the Folio.

9. Ms. O'Neill and the appellant defaulted on their obligations. On 20th May, 2013 AIB made a demand for repayment of the sum of €836,008.21 and on 25th May, 2013 issued a summary summons for that sum. On 28th July, 2014, on a motion for summary judgment, AIB recovered judgment for the sum claimed. An appeal by the appellant to the Supreme Court was transferred to the Court of Appeal pursuant to Article 64 of the Constitution and was eventually struck out by reason of his failure to comply with directions.

10. By deed of transfer and assignment made the 16th August, 2016 between AIBM and AIB the mortgage was formally transferred to AIB, and the Folio was updated on 23rd August, 2016.

11. I pause here to say that one of the many and varied issues which the appellant sought to agitate in these proceedings was the validity of the demand of 20th May, 2013 on the ground that it had been made by AIB only. However, AIBM, although it was party to the deed of charge, was not party to the credit agreement. The deed of mortgage and charge anticipated that either or both of AIBM and AIB might be a Lender and provided that the charge should rank in priority as security for any liabilities to AIBM; but there never were any such liabilities. Moreover, the credit agreement stipulated that the loan was to be repaid on 27th March, 2009 by a single instalment. For good measure, the AIBM and AIB Mortgage Conditions (2006 Edition) which were expressly incorporated into the mortgage provided that:-

> *"7.2 (a) The Total Debt owing to the Lender (whether demanded or not) shall be deemed to become due within the meaning and for all the purposes of the Conveyancing Acts on the execution of the Mortgage."*

12. Thus, AIBM had no involvement so that it is difficult to see where the point which so exercised the appellant could ever have gone.

13. By deed dated 5th October, 2016, AIB, in pursuance – or, the appellant would say, purportedly in pursuance – of the powers contained in the mortgage, appointed the respondent *("Mr. Coulston")* as receiver of the property and Mr. Coulston notified the appellant of his appointment by letter dated 12th October, 2016.

14. By letter dated 3rd November, 2016 the appellant thanked Mr. Coulston for his correspondence and wrote:-

"For the avoidance of doubt, I am putting you on notice that your deed of appointment of receiver is invalid and should we suffer any damage as a result of your alleged appointment we hold you personally liable therefore proceedings have been issued from the central office of the High Court record number 2016/9774P and we reserve the right to serve them in due course in the absence of any evidence supporting your alleged appointment."

15. The appellant's letter went on to assert that the matter was *sub judice* and to say that he would not enter into lengthy correspondence but invited Mr. Coulston, *"should [he] be desirous of reverting"*, to provide copies of various documents. Under cover of a letter dated 8th November, 2016 Mr. Coulston provided copies of some of the documents sought which, he asserted, were adequate to explain – I think he must have meant to vouch – his appointment. Mr. Coulston said that, like the appellant, he did not wish to be drawn into protracted correspondence.

16. As he said that he had, the appellant had issued High Court proceedings under record number 2016 No. 9774P. The summons was issued by the appellant *pro se* on 3rd November, 2016 and named AIB and Mr. Coulston as defendants. On 4th November, 2016 the appellant registered the action as a *lis pendens* and on 28th November, 2016 registered the *lis pendens* as a burden on the Folio. The entry reads:-

"Proceedings affecting the interest of Allied Irish Banks plc in the property are pending in the High Court (Record No 2016/9774P) in a matter of Patrick Doyle (plaintiff) -v- Allied Irish Banks plc and John Coulston (defendants)"

17. As I have said, the plenary summons was never served, nor did the appellant give notice to Mr. Coulston or AIB that he had registered the *lis pendens.*

18. As I will come to, the appellant was initially unrepresented in the High Court. The High Court judge ultimately found that it was particularly striking that at the first hearing of

the application the appellant had made absolutely no submissions in relation to the 2016 proceedings; had not sought to explain why they had not been served or why he had failed to take any step to prosecute them; and had not in any way sought to refute or reject Mr. Coulston's case that the 2016 proceedings had been instituted and the *lis pendens* registered purely as a tactical move to prevent the receiver or the Bank or their assigns from selling the property. At para. 36 of the judgment, the judge found – for the reasons which he set out at paras. 37 and 38 – that:-

> *"… this is a paradigmatic example of a case where proceedings were not issued in a bona fide manner, and/or are nor being prosecuted in a bona fide manner and where the registration of a lis pendens was not done in a bona fide manner …"*

19. As I have said, there is no appeal against that finding and no challenge to the correctness of the reasons on which it was based.

20. By deed dated 14th June, 2019 made between AIB, AIBM, EBS DAC *("EBS")*, Haven Mortgages Ltd. *("Haven")* and AIB Group (UK) plc *("AIB Group")*, as sellers, and Everyday Finance DAC *("Everyday")*, as buyer, a bundle of loans and securities, including the liabilities of Ms. O'Neill and the appellant to AIB and the security held for them, were transferred to Everyday. Ms. O'Neill and the appellant were given notice of the assignment by AIB by letters dated 20th June, 2019 and by Everyday by letters dated 28th June, 2019 and the Folio was updated on 15th August, 2019 to show Everyday as the owner of the charge which had been registered on 3rd December, 2009.

21. In advance of the transfer to Everyday, a standard form of deed described as a deed of novation was prepared by which AIB, AIBM, EBS, Haven and AIB Group, as transferors, and Everyday, as transferee, would agree to the substitution of Everyday for AIB as a party to what was described as the receiver agreement – that is, the deed of appointment – and by which Mr. Coulston, as continuing party, would agree to perform and discharge all

obligations and liabilities thereunder in all respects as if Everyday were the original party to the receiver agreement instead of AIB. The form of deed of novation contemplated that it would be executed by all of the parties but what was put before the High Court was a copy of a form of the deed dated 14th June, 2019 which had been executed by Mr. Coulston, only. Following an unsuccessful quest to find a deed of novation dated 14th June, 2019 executed by all of the parties, a new deed of novation in precisely the same form was executed by all of the parties on 10th March, 2022 and put into evidence.

The High Court application

22. By special summons issued on 19th July, 2021 Mr. Coulston applied for an order pursuant to the inherent jurisdiction of the court and/or pursuant to s. 123(b)(i) and/or s. 123(b)(ii) of the Land and Conveyancing Law Reform Act, 2009 vacating the *lis pendens*; and an order restraining the appellant from registering any further *lis pendens* in relation to Folio 21063F, County Carlow.

23. The special indorsement of claim got off to a bad start by asking for an order vacating the *lis pendens* registered on the Folio on 28th November, 2016 rather than an order vacating the *lis pendens* registered on 4th November, 2016 in the Central Office Register of *lis pendens* in Book 8, page 193. The substance of the challenge was to the registration of the *lis pendens per se* rather than to its registration as a burden on the Folio.

24. Moreover, the reference in the indorsement of claim to s. 123(b)(i) of the Act of 2009 was clearly misplaced. Section 123(b)(i) applies to cases in which the action to which it relates has been discontinued or determined; which clearly was not this case.

25. As to the jurisdiction invoked, however, the indorsement of claim was focussed. The grounds on which the inherent jurisdiction was invoked was that the *lis pendens* did not comply with s. 121 of the Act of 2009. The grounds on which s. 123(b)(ii) was invoked was

that there had been unreasonable delay in prosecuting the action and/or that or had not been prosecuted *bona fide*.

26. The application was grounded on a short affidavit of Mr. Coulston in which he summarised the background. He referred to the AIB credit agreement; the charge; the demand by AIB; the transfer of the charge from AIBM to AIB; his appointment by AIB; the issue of the plenary summons; the registration of the *lis pendens*; the registration of the *lis pendens* as a burden on the Folio; the transfer from AIB to Everyday; and his alleged novation by deed of novation dated 14th June, 2019.

27. Mr. Coulston deposed – and as I have said, it was and is uncontested – that the plenary summons had not been served; that neither he nor AIB had been notified of the registration of the *lis pendens* or of the appellant's intention to do so; that the plenary proceedings had not been prosecuted; and that he believed that the plenary proceedings had been issued for the sole purpose of frustrating any attempt to sell the property.

28. Mr. Coulston deposed that the *lis pendens* had come to his attention when – he did not say when it was – he was endeavouring to find a purchaser for the property and that as a result of the registration, he had been unable to complete any contract for sale. He deposed that he was desirous that the property be sold in order that the debt due to Everyday might be reduced or discharged but that his ability to sell or otherwise deal with the property was hindered by the existence of the *lis pendens*. He said that he was – and had been advised that he was – *"a person affected"* by the *lis pendens*.

29. I pause here to say that if the appellant's object in registering the *lis pendens* was clear, Mr. Coulston's object in moving to have it vacated was not. The standard form AIBM and AIB Mortgage Conditions – which were incorporated into the deed of mortgage and charge – confirmed that the Lender had all of the statutory powers conferred by the Conveyancing Acts which obviously included the power to appoint a receiver but did not

provide that any receiver so appointed would have a power of sale. On the face of things, there was no reason why Mr. Coulston might have been endeavouring to find a purchaser and it is difficult to understand how Mr. Coulston might have been impeded in doing something which he had no power to do. He did, it is true, say – and the italics are original – that he was advised and believed that he was *"a person affected by"* the *lis pendens* but did not say how. And while he did say that his ability to sell *"or otherwise deal with the property"* was hindered by the *lis pendens*, he did not say how.

30. I think that it is fair to say that Mr. Coulston's grounding affidavit gave the distinct impression that the registration of the *lis pendens* was an impediment to his doing something which he was not empowered to do. He did not offer any specific justification for the order sought by the summons restraining the registration of any further *lis pendens*.

31. In his replying affidavit filed on 9th March, 2022 – which was to prove to be the first of five – the appellant did not contest any of the facts but made a number of points. He suggested that Mr. Coulston did not have *locus standi* to apply for either of the orders sought. He took issue with Mr. Coulston's averment that he was a person affected by the *lis pendens.* He asserted that Mr. Coulston was a stranger to him and that he had never had any dealings with him: which, as I will come to, was plainly false. He asserted that Mr. Coulston had not been validly appointed as receiver and that, even if he had, he had no power of sale over the property. He asserted that all that Mr. Coulston had said as to his dealings with AIB was hearsay and sought to make much of the fact that the copy credit agreement which was exhibited by Mr. Coulston was unsigned: without going so far as to say that he had not signed it.

32. The appellant challenged the validity of Mr. Coulston's appointment on a number of grounds, including the alleged absence of an allegedly necessary valid demand for repayment of the loan; the entitlement of AIB – by reference to the relationship between AIB and AIBM

– to have appointed a receiver; an asserted absence of notice of the assignment by AIBM to AIB; and an alleged failure to prove the authority of the AIB officials who signed the deed of appointment to have done so.

33. The thrust of the case made by the appellant, I think it is fair to say, was, first, that the onus was on Mr. Coulston to prove that he was validly appointed as receiver and, secondly, even if he could, that he was not a person affected by the *lis pendens* on the basis that it was not an impediment to a sale of the property by him because he had no power of sale.

34. There followed – over the following year or so – a protracted exchange of affidavits in which, in the main, the parties repeated the arguments they had already set out. Significantly, however, Mr. Coulston deposed in his second affidavit that he was a person affected by the *lis pendens* by reason of the fact that he had been named as a defendant to the plenary proceedings and that he had had difficulties with a previous tenant who had initially disputed his authority to collect the rent but who had later paid the rent. The existence of the *lis pendens*, he said, had affected the timely collection of rent. The appellant, in his second affidavit, acknowledged that Mr. Coulston had collected rents. Surprisingly, he deposed that he had not previously been aware of that. Optimistically, he expressed an expectation that the rents – which, if he was to be believed, he had not missed – would be returned to him, with interest.

35. The evidence – I think that it is only fair to say, on both sides – was very thin. The property, by reference to the description in the credit agreement, was at one time a one acre industrial site at Tullow Industrial Estate. While neither side clearly said so, it appears there was a tenant in the property at the time of Mr. Coulston's appointment who initially evidenced some reluctance to pay the rent to Mr. Coulston but who eventually did. The tenant – whoever it was – appears to have remained in occupation until some time in the Spring of 2019, since when the property has been vacant. The appellant, in his second

affidavit, asserted that the property is not vacant: but not because there is someone in occupation but because after – on an unspecified date – Mr. Coulston had the locks changed, he was told by the tenant that the tenant had changed them back. This is a *non sequitur*.

36. Perversely, the appellant in his second affidavit asserted that Mr. Coulston was guilty of inexcusable and inordinate delay in bringing proceedings which – according to the appellant – he was not entitled to have brought at all. The appellant asserted that Mr. Coulston was aware of the *lis pendens* since Spring, 2019. That was the date on which the property apparently became vacant. The only link between the tenant and Mr. Coulston's knowledge of the existence of the *lis pendens* was Mr. Coulston's averment that its existence had created difficulties in the collection of rent. Thus, it seems to me, the premise of the appellant's assertion of inordinate delay was an acceptance that it had in fact given rise to difficulty and delay in the collection of the rent.

37. Mr. Coulston, for his part, first deposed that his ability to sell *"or otherwise deal with"* the property was hindered by the existence of the *lis pendens* but did not say how, otherwise, his ability to deal with the property was hindered or how or when, otherwise, he had been so hindered. In his second affidavit, Mr. Coulston deposed that his attempts to rent or otherwise deal with the property continued to be affected by the existence of the *lis pendens* but did not say what attempts he had made to rent the property, or when. As previously observed, while Mr. Coulston deposed that the *lis pendens* first came to his attention when he was endeavouring to find a purchaser, he did not say when that was.

38. Mr. Coulston did not engage with the appellant's assertion that he – Mr. Coulston – did not have a power of sale. However, as thin as the evidence may have been, it was common case that at some stage after his appointment by AIB in October, 2016 Mr. Coulston was in receipt of the rent; and Mr. Coulston's evidence that he had been hindered in the collection of the rent by the registration of the *lis pendens* was uncontested.

39. Insofar as is now material, the High Court judge found that:-

1. Apart from the statutory jurisdiction conferred by s. 123 of the Act of 2009 the court has an inherent jurisdiction to vacate a *lis pendens* in circumstances in which the proceedings are not being prosecuted *bona fide* or in circumstances in which the issuing of the proceedings and the registration of the *lis pendens* are an abuse of process;
2. That the proceedings were not issued, nor were they prosecuted, in a *bona fide* manner, nor was the *lis pendens* registered in a *bona fide* manner;
3. That Mr. Coulston was a validly appointed receiver at the date of the hearing;
4. That Mr. Coulston, as receiver, was a person affected by the *lis pendens.*"

40. The judge made an order vacating the *lis pendens* and restraining the defendant from registering any further *lis pendens* in relation to the land.

The appeal

41. By notice of appeal filed on 7th December, 2023 the appellant appealed against the judgment and order on eight grounds but in his written submissions confined himself to three issues. Specifically, the appellant abandoned his reliance on the points he had argued in the High Court as to the validity of the novation of the receivership; the validity of the demand for repayment of the loan; the validity of the appointment of the plaintiff by reference to the demand relied on; and the absence of notice of the assignment by AIBM to AIB.

42. The issues on the appeal, as identified in the written submissions filed on behalf of the appellant – in the order in which they were listed – and as argued at the oral hearing, were:-

- Whether the High Court has an inherent jurisdiction to vacate a *lis pendens* which is separate and distinct to the statutory jurisdiction under s. 123 of the Act of 2009;

- Whether Mr. Coulston – as a rent receiver – is a *"person affected"* by the *lis pendens* under s. 123 of the Act of 2009; and
- Whether the judge was correct to conclude – on an application to vacate a *lis pendens* – that Mr. Coulston was validly appointed as receiver over the property.

Inherent jurisdiction

43. On the facts, the first issue identified by the appellant appears to be entirely academic.

44. The statutory jurisdiction in s. 123(b)(ii) to make an order to vacate a *lis pendens* covers a case in which there has been unreasonable delay or a case in which the action is not being prosecuted *bona fide*. If the provision does not expressly refer to an action which has not been issued in a *bona fide* manner, it is difficult to see how, in principle, such an action could be prosecuted *bona fide*, and so not come within the statutory jurisdiction. Similarly – if there is any difference between an action which has not been issued *bona fide* and an action which can be demonstrated to be an abuse of process – it is difficult to see how an action which is an abuse of process might be prosecuted *bona fide*, and so not come within the statutory jurisdiction.

45. There is no appeal against the finding that the requirements of s. 123(b)(ii) had been met.

46. The statutory jurisdiction in s. 123(b)(ii) may be invoked by *"any person affected by"* a *lis pendens.* In principle, any person seeking to invoke any equivalent – or separate and distinct – inherent jurisdiction (if any) to vacate a *lis pendens* would have to demonstrate *locus standi*. The arguments were not terribly precise but it is difficult to see how a person who is not affected by a *lis pendens* – and so entitled to invoke the statutory jurisdiction – might have sufficient standing to invoke any inherent jurisdiction.

47. I should say that I do not overlook the *dictum* of Clarke J. (as he then was) in *Moorview Developments Ltd. v First Active plc* [2010] IEHC 35 in which he held that a receiver was entitled to have a *lis pendens* vacated if it was not properly registered, irrespective of whether its registration had any affect on him but this case was argued and decided on the basis that Mr. Coulston was a person affected.

48. The appellant's submission takes issue with the judge's finding, at para. 30, that:-

> *"Apart from the statutory jurisdiction conferred on the court to vacate a lis pendens pursuant to s. 123 of the Land and Conveyancing Law Reform Act, 2009, it is clear that the High Court retains an inherent jurisdiction to vacate a lis pendens where proceedings are not being prosecuted bona fide and in circumstances where the issuing of proceedings and the registration of the lis pendens are an abuse of process."*

49. In so finding, the judge referenced his earlier judgment in *Tola Capital Management LLC v. Linders (No. 2)* [2014] IEHC 324, in which, having reviewed the authorities, he said, at para. 136:-

> *"In the light of the authorities set out above, it is also clear that the courts have an inherent jurisdiction to strike out a lis pendens either where it is of the view that the lis pendens was not properly registrable or that the action was not being prosecuted bona fide. On the facts of this case, I would also have struck out the lites pendentes on both of the above grounds pursuant to the inherent jurisdiction of the court."*

50. The issue as canvassed on the appeal – on both sides – was whether the High Court has an inherent jurisdiction which is parallel to and coextensive with the jurisdiction conferred by section 123. However, that is based on a misunderstanding of the authorities and what Cregan J. held in *Tola*. Moreover, as I will endeavour to demonstrate, the arguments did not address the issue as formulated.

51. Section 121(1) of the Act of 2009 provides for the establishment and maintenance in the Central Office of a register of *lis pendens* in the manner prescribed by rules of court. Section 121(2) permits the registration as a *lis pendens* of any action in the Circuit Court or the High Court in which a claim is made to an estate or interest in land, whether by way of claim or counterclaim, and any proceedings to have a conveyance of an estate or interest in land declared void. The relevant rules of court are the Rules of the Superior Courts (Land and Conveyancing Law Reform Act 2009) 2010 (S.I. No. 149), which came into operation on 10th May, 2010 and *inter alia* prescribe the forms to be used to register and cancel a *lis pendens*.

52. Section 123 of the Act of 2009 empowers the court to make an order to vacate a *lis pendens* (a) on application of the person on whose application it was registered or (b) on application by any person affected by it (i) where the action to which it relates has been discontinued or determined, or (ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted *bona fide*.

53. It is clear from s. 121 that only those actions specified in s. 121(2)(a) and (b) may be registered as a *lis pendens*. The registration of actions as a *lis pendens* is governed by rules of court and so such registration is a process of the court. It is trite that the High Court has an inherent jurisdiction to control its own processes and procedures and to prevent and deal with any abuse of process. There is no jurisdiction conferred by the Act of 2009 to regulate compliance with the requirements of s. 121 or with the requirements prescribed by the rules of court. Nor is there any procedure prescribed by the 2010 rules in the event of the registration or purported registration of a *lis pendens* otherwise than in compliance with the requirements of the Act and the rules of court. It is clear that the premise of the jurisdiction conferred by s. 123 to vacate a *lis pendens* is that it has been properly registered in the first place.

54. On the appeal, the appellant contested the finding of the High Court judge as to the inherent jurisdiction of the court but did not engage with the principles or with any of the authorities on which it was based. The submission was simply that the Oireachtas, in s. 123(b)(ii) had specifically delineated the jurisdiction of the High Court to vacate a *lis pendens*, which – it was said - left no scope for an inherent jurisdiction *"separate and apart"* from section 123(b)(ii). On the appeal, the appellant relied on a long and well-established line of authority starting with the judgment of Murray J. (as he then was) in *G. McG. V. D.W (Joinder of Attorney General)* [2000] 4 I.R. 1 in support of the proposition that *"inherent jurisdiction by its nature only arises in the absence of the express."* The respondent's answer was that this point had not been argued below and that this court should not entertain it.

55. This, with respect, misses the point completely. The jurisdiction conferred by s. 123(b)(ii) is a jurisdiction to deal with a *lis pendens* which has been properly registered in compliance with the requirements of section 121. In the case of an action which does not meet the requirements of s. 121 – and its forbears – the inherent jurisdiction of the court to make an order to vacate a *lis pendens* is well and long established.

56. *Heywood v. D.D.C. Properties, Ltd.* [1964] 2 All E.R. 702 (a case to which Cregan J. referred in *Tola*) was a case in which somehow or other – it was a mystery to the Court of Appeal in England – a *lis pendens* was registered by a defendant to proceedings who had not counterclaimed. An application by the plaintiff pursuant to s. 2(6) of the Land Charges Act, 1925 for an order vacating the registration of the *lis pendens* on the ground that *"the proceedings are not prosecuted in good faith"* was refused by the High Court on the ground that there were no proceedings in being. The Court of Appeal upheld the finding of the High Court that there was no jurisdiction under the section to vacate the registration but found – in

no uncertain terms – that the registration was wrongful and ought never to have been there and that there was an inherent jurisdiction not to *"let an abuse of this sort go on."*

57. *Calgary & Edmonton Land Co. Ltd. v. Dobinson* [1974] Ch. 102 (which was considered at some length by Cregan J. in *Tola*) was another case in which the *lis pendens* ought never to have been registered. The action did not claim any interest in the land but merely sought to restrain any disposition of it. Megarry J., applying *Heywood*, held that the court had both an inherent and a statutory jurisdiction to order that the entry be vacated.

58. Closer to home – and by way of example only – in *Coffey v. Brunel Construction* [1983] 1 I.R. 36 the Supreme Court ordered that the registration of a *lis pendens* be vacated on the ground that the plaintiff had no estate or interest in the land at the date of registration. As I did in *Goodbody Pensioneer Trustees Ltd. v. Hevac Ltd.* [2019] IEHC 114 where a judgment obtained against the second plaintiff personally had been registered as a judgment mortgage against a property held by her in trust.

59. In *Cullen v. Glencullen Holdings Ltd.* [2020] IEHC 685, I made an order vacating a number of *lites pendentes* registered by the first plaintiff on the grounds that they had not been properly registered in accordance with the requirements of s. 121(2)(a) of the Land and Conveyancing Law reform Act, 2009. In the case of some of the defendants, they had no estate or interest in the lands and in the case of others – who did have an estate or interest in the lands – the plaintiffs' claims were money claims.

60. The distinction between the two separate jurisdictions was clearly spelled out by Cregan J. in *Tola* at para. 109:-

> *"... Section 121(2) of the Land and Conveyancing Law Reform Act 2009 provides that only certain matters may be registered as a lis pendens, i.e. those matters that fall within the precise terms of s. 121(2)(a) and (b). If a lis which has been registered as a lis pendens does not fall within the statutorily permissible type of*

action which can be registered as a lis pendens, then it follows that the lis should not have been registered as a lis pendens in the first place. Thus, the court may consider whether the lis pendens was properly registered at all. It is only if the court is satisfied that the lis pendens was properly registered that the court goes on to consider whether to vacate the lis pendens on the grounds set out in s. 123 of the Act."

61. To go back to the beginning, although the special indorsement of claim on the special summons was in some respects confused, it clearly identified the statutory jurisdiction conferred by s. 123 (b)(ii) to deal with a *lis pendens* in a case in which there has been unreasonable delay or which is not being prosecuted *bona fide* and the separate inherent jurisdiction to deal with a *lis pendens* which does not meet the criteria prescribed by s. 121 of the Act of 2009.

62. On the first issue on this appeal, I am quite satisfied that the High Court has an inherent jurisdiction to vacate a *lis pendens* which extends beyond the express statutory jurisdiction under s. 123 of the Act of 2009.

Whether Mr. Coulston is a person affected

63. The second issue identified by the appellant is whether Mr. Coulston – as a rent receiver – is a person affected by the *lis pendens.*

64. The appellant submits that the High Court judge erred in determining that Mr. Coulston was a person affected by the *lis pendens*. First, it is said, the judge gave great weight to Mr. Coulston's averment that the *lis pendens* affected the timely collection of the rent. The appellant points to the averments in the grounding affidavit that the *lis pendens* first came to Mr. Coulston's attention when he was endeavouring to find a purchaser and that he had been unable to complete any contract for sale. The appellant argues – by reference to the mortgage conditions – that it was Everyday who was the *"person affected"* if the *lis*

pendens affected the collection of the rent. It is said that the judge failed to adequately scrutinise Mr. Coulston's averments which – it is said – lacked credibility and were in fact bare assertions and that Mr. Coulston had not averred that he had lost rents but only that the *lis pendens* had affected their *"timely collection."*

65. I see the point as to the thrust of the case made in the grounding affidavit. Since he had no power of sale, Mr. Coulston cannot have been affected by any inability to sell or conclude a contract for sale. I see no merit whatsoever in the suggestion in Mr. Coulston's respondent's notice and in argument that *"the receiver could be granted a power of sale by the mortgagee."* What appears to have been behind this was not that Everyday might have granted Mr. Coulston a power of sale – which it plainly could not have – but that Everyday might have engaged Mr. Coulston as its agent to sell the property. This was entirely hypothetical. Leaving aside any question as to whether an agent might properly be said to be affected by the obstruction of his principal, there was not a shred of evidence that Mr. Coulston had been appointed as Everyday's agent.

66. However, in his second affidavit, Mr. Coulston averred that the *lis pendens* had in fact affected his ability to deal with the property, specifically by having given rise to difficulties with the tenant who did not initially accept his authority to deal with the property but who eventually paid the rent; and that after Spring 2019 his attempts to rent or otherwise deal with the property continued to be affected. If this evidence was rather general, it was, as the judge found, uncontroverted.

67. The judge addressed Mr. Coulston's evidence and the appellant's response to it – which was that it was *"... complete nonsense. If tenants refuse to pay the rent to him, that can only be a decision for the tenants to take, it certainly would not be affected by a lis pendens which the tenant's [sic.] were likely to be completely unaware of."* The juxtaposition was of positive – if rather vague – averments as to what had happened, and

hypothesis. The tenant or tenants, who must have had a lease or letting from the appellant – or the appellant and Ms. O'Neill – would self-evidently be concerned by a tussle between the appellant and a receiver – or purported receiver – as to who was entitled to be paid the rent. By his acknowledgement that he had not been aware that Mr. Coulston had collected the rent, the appellant implicitly acknowledged that Mr. Coulston had in fact collected the rents. The fact that the summons or the *lis pendens* might have interfered with the rights of the mortgagee under the mortgage could not displace the effect of the pending action on the receiver. In principle, Mr. Coulston was no less affected by the impediment to the collection of the rent because it proved to be temporary rather than permanent.

68. In my view, the appellant has failed to establish any error on the part of the judge in his finding that Mr. Coulston was a person affected by the *lis pendens.*

69. I would add that it was a cause of some disquiet to this court that, despite being asked by the court in advance to do so, the appellant failed to produce a copy of the plenary summons or to offer any explanation as to why he did not do so. While it may not necessarily follow that every person named as a defendant to proceedings is a person affected by the registration of a *lis pendens* – for example where there are separate causes of action pleaded, some of which are, and others of which are not, claims in relation to an estate or interest in land – it was in my view wholly inappropriate that the appellant should have contested the standing of Mr. Coulston to apply for an order to vacate a *lis pendens* while suppressing the means by which it might readily be determined.

70. By reference to the appellant's letter of 3rd November, 2016, it can be inferred that the cause of action was a challenge to the validity of Mr. Coulston's appointment and his entitlement to deal with the property. If the object of the action was – as it was – to obstruct the receivership, it could hardly be said that Mr. Coulston was not affected by the

proceedings. If the object of the registration of the action as a *lis pendens* was the same, I fail to see how it could be said that Mr. Coulston was not similarly affected by the registration.

Whether Mr. Coulston was validly appointed over the property

71. The third issue identified by the appellant is whether the judge was correct to conclude that Mr. Coulston was validly appointed over the property.

72. The thrust of the appellant's case in the High Court was that Mr. Coulston had not been validly appointed as receiver for a number of reasons and that, even if his appointment was valid, he was not a person affected by the *lis pendens* because he had no power of sale. Thus, the judge was asked to decide (1) whether Mr. Coulston had been validly appointed, and (2) if he was, whether he was a person affected by the *lis pendens*.

73. On the appeal, the appellant adopted what I consider to be the contradictory positions, on the one hand, that the High Court judge erred in finding that Mr. Coulston was validly appointed and of the other, *"more fundamentally it is disputed that the learned High Court judge was entitled to go so far as to determine the validity of the purported appointment of [Mr. Coulston]."* It seems to me that any argument as to whether the judge was correct in finding that Mr. Coulston was or was not validly appointed is inconsistent with any argument that he ought not to have decided the issue one way or the other. No less, the appellant can hardly be heard to complain that the judge decided the case against him on an issue which had been raised by the appellant and – on the appellant's case – upon the determination of which the case would turn.

74. In his written submissions to the High Court, and in his notice of appeal, and in his submissions on the appeal, the appellant relied on my judgment in *Taite v. Molloy* [2022] IEHC 308. That was a case in which joint rent receivers sought a variety of interlocutory orders – including orders directed to obtaining possession – of three properties in order that they might be sold. The receivers had no power of sale. One of the properties was a farm

which was in the possession of the mortgagor and was being farmed by him. The farm was not generating any rent and there was no suggestion that the receivers proposed to let it. At para. 86 I identified the issue as being whether the receivers were entitled to take possession of the property for a purpose quite different and at variance to that for which they had supposedly been appointed. At para. 103, I characterised that issue as a real issue of substance to be determined as to the entitlement of the receivers to do what they had set out to do.

75. In this case, the appellant contends, variously, that the judge failed to consider his submission that the purpose of Mr. Coulston's appointment was improper, and that the judge was not entitled to go so far as to determine the validity of the appointment. Leaving to one side the inconsistency in these positions, it seems to me that the issue which arose in *Taite v. Molloy* simply does not arise in this case. In that case, the evidence was that the receivers, at the time of their appointment, had no intention of collecting any rent. In this case, the evidence is that for some time after his appointment Mr. Coulston did in fact collect the rent. In that case, the receivers asked for an interlocutory order for possession. In this case, the receiver asks for an order to deal with a paradigmatic abuse of process.

76. What is now behind the appellant's argument that the judge wrongly decided – or ought not to have decided – the validity of Mr. Coulston's appointment is an apprehension that it will preclude further proceedings or constrain the appellant in the issues which he may seek to raise in further proceedings. The appellant points to the observation of the judge at para. 76 that *"... whilst Mr. Doyle should not be prevented from issuing new proceedings should he wish to do so, he should be prevented from registering a lis pendens over the said folio in respect of those proceedings"* as leaving open the possibility of further proceedings and submits, in effect, that in such further proceedings he will be – or should be – at large as to the grounds on which he might impugn the validity of Mr. Coulston's appointment.

77. It seems to me that the effect of the judgment of the High Court on this application on any further proceedings which may be instituted by the appellant is a matter for another day. If the appellant is seeking comfort as to his entitlement to litigate in future proceedings issues which he raised or might have raised in his 2016 action or the issues which he has raised in these proceedings and which have been decided against him, I decline to give it.

Order restraining the registration of any future lis pendens

78. The last of the appellant's grounds of appeal was against so much of the order of the High Court as restrained the registration of any further *lis pendens* in relation to the lands in Folio 21063F, County Carlow. It was suggested that the judge erred in concluding that Mr. Coulston *"was entitled to relief over and above the vacating of the lis pendens"* on the ground that he conflated the issue as to whether the *lis pendens* should be vacated with the issue as to whether the appellant should be enjoined from registering any further action as a *lis pendens*. It was further contested that *"there was a sufficient evidential basis before the court below to grant such far reaching relief and/or curtail the rights and/or proprietary rights of"* the appellant. I would observe that there was no challenge to the judge's finding, at para. 76, that the identified abuse of process raised the distinct prospect that further proceedings might be brought in relation to the property which would be used for the purpose of registering a further *lis pendens*.

79. This ground of appeal was not addressed in the written submissions or in oral argument but since the jurisdiction to make such an order is not conferred by s. 123, the question of the making of such an order was perhaps linked to the issue which was canvassed as to the inherent jurisdiction of the court.

80. For the reasons already given, I am satisfied that the High Court has an inherent jurisdiction to prevent an abuse of the process provided by the Land and Conveyancing Law Reform Act, 2009 and the Rules of the Superior Courts (Land and Conveyancing Law

Reform Act 2009) 2010. In my view, that inherent jurisdiction extends beyond established past abuse to apprehended future abuse. If, left to my own devices, I would have been inclined to wonder what could be achieved by restraining the registration as a *lis pendens* of future litigation which – by reference to the Law Society of Ireland General Conditions of Sale – must be disclosed to any potential purchaser, the argument in relation to the order in relation to any future *lis pendens* was limited to the existence of the jurisdiction to make such an order and I would not interfere with the order made.

Conclusion

81. For these reasons, I would dismiss the appeal and affirm the judgment and order of the High Court.

82. The respondent having been entirely successful on the appeal, it seems to me that he is entitled to an order for his costs. If the appellant should wish to contend for any other costs order, he may within ten days of the electronic delivery of this judgment file and serve a short written submission (not exceeding 1,000 words), in which event the respondent will have ten days to file a response, similarly so limited.

83. As this judgment is being delivered electronically Pilkington and Butler JJ. have authorised me to say that they agree with it and the orders proposed.