THE HIGH COURT

[2022] IEHC 103

[2020 No. 6507 P.]

BETWEEN

LAURENCE ELLIS

PLAINTIFF

AND

BOLEY VIEW OWNERS MANAGEMENT COMPANY LTD (BY GUARANTEE)

DEFENDANT

JUDGMENT of Ms. Justice Nuala Butler delivered on the 25th day of February, 2022

Introduction

1. The defendant has applied under s. 123 of the Land and Conveyancing Law Reform Act, 2009 to vacate a *lis pendens* registered in the Central Office under s. 121 of the 2009 Act. The *lis pendens* was registered by the plaintiff on 20th October, 2020 and relates to plenary proceedings issued by the plaintiff against the defendant on 22nd September, 2020. Significantly, the plenary summons issued by the plaintiff in September, 2020 has never been served on the defendant nor has a statement of claim been issued or served. Mr. Joseph Doyle, a director of the defendant, states on affidavit that the defendant became aware of the existence of the *lis pendens* and, consequently of the proceedings, in early December, 2021 in the course of a conveyancing transaction when the purchaser's solicitor advised that the *lis pendens* had shown up in routine title searches.

2. The defendant's application is made pursuant to s. 123(b)(ii) of the 2009 Act the relevant parts of which provide as follows:-

"Subject to section 124, a court may make an order to vacate a lis pendens on application by—

……

(b) any person affected by it, on notice to the person on whose application it was registered—

……

(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."

The defendant relies on both limbs of subpara. (ii), namely that the plaintiff has delayed unreasonably in prosecuting the action and that the action has not been prosecuted *bona fide.*

3. Although it is clear that the plaintiff opposes the application, the precise basis on which he does so is less clear. The plaintiff filed a lengthy affidavit but did so outside the time directed by the court for the filing of a replying affidavit, in consequence of which the plaintiff has raised a preliminary issue as to the admissibility of that affidavit. The plaintiff makes an argument about the legal effect of the defendant having entered an unconditional appearance to the proceedings, despite not having been served with them.

He also alleges breaches by the defendant of the duty of candour which arises in the context of an *ex parte* application. An *ex parte* application for short service was made to facilitate the motion obtaining an early hearing date but the substantive hearing of the defendant's motion has been conducted on an entirely *inter partes* basis. The plaintiff makes numerous assertions about the underlying dispute between the parties which are, presumably, relevant to the claim made but as the plenary summons has not been put before the court it is difficult to be precise as regards this.

4. Thus, there are two preliminary issues to be dealt with before I examine the central question as to whether the *lis pendens* should be vacated. These are the admissibility of the plaintiff's affidavit and the legal effect of the entry of an appearance in the circumstances of this case. I will deal with the allegations of lack of candour in the context of setting out the background to the dispute between the parties and where it intersects with the particular arguments made by the plaintiff. However, before looking at the legal issues, it may be useful to set out the background against which this application has been made.

Background Facts and Circumstances

5. The defendant company was established on 14th June, 2018 as an owners' management company pursuant to the Multi-Unit Development Act, 2011 for the purposes of retaining ownership of the common areas of a development of five houses known as Boley View at Rossminoge near Gorey, County Wexford. The envisaged scheme is that full ownership of the lands on which the development is constructed has been transferred to the company and then, as the houses are sold, fee simple title to each individual plot is transferred to each purchaser by the creation of a sub-folio, leaving the company in possession of only the common areas. On 18th October, 2018, the transfer of the lands comprised within folio 37998F in County Wexford from Mr. Joseph Doyle to the defendant was registered in the Property Registration Authority.

6. The plaintiff's proceedings seem to concern the circumstances in which, and the terms upon which, Mr. Doyle came to be in possession of the lands. The folio records Mr. Doyle as having been registered as full owner on 14th December, 2009 and the previous registered owners were a couple called Sheehan. The plaintiff's title appears never to have been registered but his previous ownership is not disputed. Mr. Doyle states, on affidavit, that he purchased the lands from the plaintiff for a sum of €130,000 and a contract to that effect dated 28th April, 2009 between Mr. Doyle and the plaintiff is exhibited. Mr. Doyle and his building company constructed, or, on the plaintiff's argument, completed, a development of five houses on the site. The issues now before the court have arisen in the context of the sale of one of those houses to an individual purchaser.

7. Mr. Doyle acknowledges a history of prior dealing between himself and the plaintiff between 2006 and 2008. These dealings were centred around property development in County Wexford. The timing was not auspicious and both men were left financially exposed and suffered losses as a result of their inability to develop a different site due to the property crash in late 2008. Mr. Doyle states that his purchase of the Boley View

lands came about because the plaintiff was keen to sell as he was under financial pressure and knew he was facing bankruptcy. He also alleges that although the plaintiff had assured him that no money was owed on the lands, a *lis pendens* recording the existence of proceedings affecting the interests of both the Sheehans and of the plaintiff in the lands was registered on 24th September, 2009, shorty prior to Mr. Doyle's title being registered. He states that he has had no dealings with the plaintiff since 2009.

8. The plaintiff disputes this account of events. Most significantly, he contends that Mr. Doyle did not pay him the entire of the purchase price due under the contract of 28th April, 2009 and that a sum of €30,000 of the agreed purchase price of €130,000 remains outstanding. He also claims that the sale price did not represent the full value of the lands and that he had a parallel oral agreement with Mr. Doyle that he would be paid €30,000 from the proceeds of sale of each house as the development was completed and the individual houses sold. There is no documentary evidence of this alleged agreement and the defendant queries whether such an agreement could be enforceable in the absence of a written contract in light of the Statute of Frauds.

9. Whilst disputing that he was facing bankruptcy at the time of the sale, the plaintiff was in fact adjudicated bankrupt, but not until 2014. Some of the plaintiff's assertions as regards his financial position at the material time are clearly inaccurate. He states quite categorically in his affidavit that "Bank of Ireland were never after me" and "*at no stage did Bank of Ireland issue legal proceedings against me"*. However, as previously noted, a *lis pendens* was registered on the lands in 2009 in respect of proceedings which Bank of Ireland issued against, amongst others, the plaintiff. This *lis pendens* was not cancelled until 2015 as a result of Mr. Doyle's engagement with the Bank. It may well be that this litigation, about which the court has not been told anything save its existence, was primarily due to the actions of another defendant, a solicitor who has since been convicted by the criminal courts of mortgage fraud. Nonetheless, it is manifestly incorrect for the plaintiff to say that Bank of Ireland never issued legal proceedings against him.

10. The plaintiff also makes two further substantive allegations against Mr. Doyle. He alleges that, for the purpose of the sale, the land was incorrectly recorded as a vacant site when in fact it had been partially developed by the plaintiff prior to its sale. According to the plaintiff, there is a material difference in the VAT and stamp duty applicable to the sale of a vacant site as opposed to a serviced site (although I note that a site can be both vacant and serviced). The plaintiff contends that he was forced under duress to sell his lands as a vacant site and, thus, to be a party to a fraud on the Revenue. The second of the two allegations is related to the first in that the plaintiff claims that the development was commenced and partially carried out by him before the lands were sold to Mr. Doyle in 2009. Consequently, he claims that he is potentially liable to the ultimate purchasers for any construction defects in the properties. He complains that the architect who has certified compliance of the development with planning permission and building regulations was Mr. Doyle's partner in the development and, thus, had a conflict of interest in providing the statutory certifications. The plaintiff does not state the basis on which he asserts the architect in question to have been a partner in the development and he does

not provide any evidence to support the assertion. The plaintiff also argues that as the planning permission for the development had been obtained by his company in February, 2007, Mr. Doyle's architect had not been involved in or responsible for the entire building process and, thus, could not certify compliance.

11. I do not propose to deal with any of these particular issues in this judgment. Firstly, the plaintiff's proceedings are not before the court, so I cannot be certain as to the exact nature of the claim made. Secondly, the plaintiff's affidavit (the admissibility of which is in dispute) is repetitive, unstructured and contains a large number of typographical errors and omissions which make it difficult to understand in parts. Whilst the gist of the allegations is apparent, the detail is jumbled and at times incoherent. Thirdly, the vacation of a *lis pendens* would not, of itself, prevent the plaintiff continuing to prosecute his claim and it seems that these arguments will be more properly ventilated in the context of a full plenary hearing. Finally, it is difficult to see the relevance of these allegations to the issues currently before the court which concern whether the plaintiff should be permitted to maintain a *lis pendens* in circumstances where proceedings have not yet been served over sixteen months after the *lis pendens* was registered. Consequently, I think it would be prudent not to express any view on these allegations until they are properly before a court.

12. It does not seem to be disputed that there was no contact between the plaintiff and Mr. Doyle between 2009 and 2021 when, on 13th December, 2021, as a result of becoming aware of the *lis pendens* Mr. Doyle made a telephone call to the plaintiff. There is a dispute between the two men as to some of the contents of that call. As I do not regard the disputed elements as particularly material to the issues which I have to decide, I do not propose to deal with them further. I note that common to both accounts is the fact that the plaintiff asserted the existence of an agreement that he would be paid €30,000 per house and that Mr. Doyle denied any knowledge of this agreement.

13. The plaintiff complains that he was not served with a warning letter as regards the issuing of this application nor afforded the opportunity to provide an undertaking to withdraw the *lis pendens.* I am not inclined to pay much heed to these complaints in circumstances where the plaintiff issued proceedings against the defendant, presumably without a warning letter, as the defendant remained unaware of both the proceedings and the *lis pendens* until they were drawn to its attention by a third party. Under s. 123(a) of the 2009 Act, the person who registers a *lis pendens* can withdraw it at any time so the lack of a formal request has not prevented the plaintiff from doing this were he so minded. Had the plaintiff withdrawn the *lis pendens* immediately on being served with this application, the lack of a warning letter might go to the question of costs. Since he has not done so, the substance of any complaint in this regard seems to me to be moot.

14. There are two final elements of the historic background to this case to be noted. Firstly, in November, 2018, the plaintiff issued plenary proceedings against Mr. Doyle in his personal capacity. Despite securing orders to amend the plenary summons and, apparently, extending the life of the summons, the plaintiff did not serve the proceedings

within the extended lifespan of the plenary summons. It seems that despite the lack of any communication with either Mr Doyle or with the defendant, the plaintiff has been minded to pursue his complaints through litigation for some time. Secondly, in addition to registering the *lis pendens* in the Central Office under the 2009 Act, the plaintiff lodged an application to the Property Registration Authority on 3rd June, 2021 to register a *lis pendens* on the Folio. This application has not yet resulted in a registration, but a dealing number has been assigned.

Procedural History

15. The procedural history of this particular application should be largely irrelevant given the speed with which it has moved. However, the plaintiff makes a number of allegations as to a lack of candour on the part of the defendant in the context of two *ex parte* applications made at an early stage. Given that these applications dealt only with the question of short service, it is difficult to understand the rationale for the plaintiff's pursuit of this issue with such vigour. He suggests that the absence of a more detailed explanation as to precisely what steps were taken by the defendant between being notified of the existence of the *lis pendens* on 3rd December, 2021 and the defendant's solicitors' examination of the register of *lis pendens* maintained by the High Court Central Office on 20th December, 2021, reflects a contrived urgency on the part of the defendant in seeking an early date for the hearing of its application. I have great difficulty understanding these arguments.

16. Mr Doyle, who is a director of the defendant, has set out on affidavit that the existence of the *lis pendens* came to light in the course of exchanges between a purchaser's solicitor and the defendant's conveyancing solicitor in the context of the intended sale of one of the houses in the development. The defendant is now unable to complete the sale because the financial institution involved is not prepared to advance the purchase funds to the purchaser where there is an issue about the title to the property which will be security for that loan. Of itself, this is unsurprising. The defendant has permitted the intending purchaser to occupy the premises as a licensee pending completion of the sale despite not yet having the benefit of the purchase monies. As the sale has not closed, money due to tradesmen for the completion of the property remain outstanding. The plaintiff is dismissive of these concerns suggesting that, in a rising property market, any delay caused by the existence of the *lis pendens* will ultimately benefit the defendant through securing a higher sales price. This ignores the fact that the defendant has entered into contractual arrangements with a third party.

17. The defendant's conveyancing solicitor became aware of the existence of the *lis pendens* on 3rd December, 2021. Various enquiries were conducted on behalf of the defendant which included, on 13th December, 2021, the telephone conversation between Mr. Doyle and the plaintiff referred to above. On 16th December, 2021, the defendant, through its solicitor, entered an appearance to the proceedings which appearance required the delivery of a statement of claim. The following day, on 17th December, 2021, an *ex parte* application was made to Allen J. for short service of this motion. At that point in time, the defendant's solicitor had not yet conducted an examination of the register of *lis pendens*

kept by the Central Office and, consequently, this material was not before the court. Allen J. refused the application but indicated that another application could be brought when all the relevant material was available.

18. On 20th December, 2021, the defendant's solicitor attended at the Central Office by appointment for the purposes of inspecting the register of *lis pendens*. During the hearing it emerged that the defendant's solicitor had been unable to attend an earlier appointment, a fact which the plaintiff contended amounted to a material non-disclosure since it was not referred to on affidavit. Following the inspection, he swore an affidavit exhibiting particulars of the *lis pendens* which is the subject of this application. The following day the defendant renewed its application for short service before Stack J., who made an order granting the defendant liberty to serve short notice of this motion which was made returnable for 11th January, 2022. The defendant's solicitor immediately notified the plaintiff by text message of the making of this order and also formally served the motion papers by registered post which is recorded as having been delivered on 22nd December.

19. The matter came before the High Court on 11th January, 2022 and on the same date a firm of solicitors entered an appearance on behalf of the plaintiff. Counsel for the plaintiff was granted an adjournment subject to directions which required any replying affidavit to be filed and served by 18th January and any supplemental affidavit from the defendant to be filed and served by 25th January. In the event, the plaintiff's replying affidavit was not filed or served by the date stipulated. Instead, at some time after close of business on Friday, 28th January, the plaintiff's replying affidavit was served by delivering it through the post box of the defendant solicitor's office when that office was shut. As it happens, the defendant's solicitor was working over the weekend and discovered it in his post on Sunday, 30th January.

Admissibility of Plaintiff's Affidavit

20. The defendant objects in principle to the admission of the plaintiff's replying affidavit which was delivered ten days after the date fixed by the court, too late to enable the defendant to reply without adjourning the hearing and in a manner which meant there could be no certainty that the defendant's solicitor would actually receive it for a further three days. The defendant points to O. 40, r. 4 of the Rules of the Superior Courts which provides that where a special time is limited for the filing affidavits, no affidavit filed after that time shall be used, unless by leave of the court. Therefore, in order to rely on his affidavit, the plaintiff needs the leave of the court. The defendant's counsel argued, not unreasonably, that the timing and manner in delivery of the replying affidavit put the defendant's legal advisors under undue pressure in respect of this application. Nonetheless, the defendant indicated that, on balance, it was not seeking an adjournment to file a reply in circumstances where this would be counterproductive as it had already sought and obtained short service of the motion and an early hearing date.

21. When afforded the opportunity to explain his delay and to justify the admission of his affidavit despite non-compliance with the time fixed, the plaintiff initially did not do so. Instead, he made a series of complaints in respect of the way the defendant and its

lawyers had handled the *ex parte* application, largely to the effect that there had been a lack of full disclosure in the affidavits grounding the application. In my view, the complaints made against the defendant's lawyers are both misplaced and misconceived. The only application made on an e*x parte* basis, initially to Allen J. and then to Stack J., was for short service. No interim relief was sought nor granted. The basic facts upon which short service was sought, namely that the plaintiff had issued but never served proceedings and then filed a *lis pendens* based on the existence of these proceedings which is impeding the conveyance of a property, were not disputed. The plaintiff argues that the urgency relied on by the defendant to obtain short service and subsequently an early hearing date was somehow contrived because a more detailed chronology of the steps taken by the defendant's lawyers between 3rd and 17th (or perhaps the 20th) December was not provided. I have some difficulty understanding this argument. This two-week period does not, of itself, seem unfeasibly long in circumstances where the defendant had not been served with, and consequently was unaware of, the contents of the plaintiff's proceedings and so was moving from a standing start. It is not a delay which prejudices the plaintiff in any way nor one which could amount to acquiescence by the defendant as regards the maintenance of the *lis pendens*. I do not accept that there was any breach of the duty to assist the court on the part of the defendant's lawyers.

22. The complaints of nondisclosure made against the defendant alone seem to concern the non-admission of allegations made by the plaintiff as regards tax evasion and the identity of the defendant's business partner. These allegations are made in the plaintiff's affidavit but, as the plaintiff's proceedings have not been served and are not before the court, it is not possible to say if they are relevant to the issues in those proceedings. I regard these allegations as misconceived and entirely irrelevant to the admissibility of the plaintiff's affidavit. The duty of disclosure on a party moving an *ex parte* application relates to matters relevant to the court's understanding of the issues in the proceedings, even where those matters do not favour the party in question. Logically, if a party is unaware of the nature of the substantive proceedings, they cannot be under a duty to disclose all matters relevant to those proceedings as that would impose upon the party a duty with which they could never confidently comply. Any assessment of whether the duty of disclosure has been complied with must be calibrated by reference to the extent to which it is reasonable for the party concerned to have understood the necessity of disclosing the particular information. Thus, the duty of the disclosure in this case could never have required the defendant to engage with and rebut the details of the plaintiff's case unless and until that case was made known to it through the service of the proceedings, or at very least through the setting out of the plaintiff's claim in formal correspondence. I do not regard the contents of a disputed telephone call as defining the extent of the duty nor the assertion that the defendant's principal was aware of the historical business dealings between himself and the plaintiff. These are too nebulous and imprecise to enable a court to form any view as to whether the duty has been breached.

23. Further, insofar as the defendant's application is a discrete application under s. 123 of the 2009 Act, I note that that section does not prescribe a "*balance of convenience*" test nor the exercise of a judicial discretion in relation to the vacation of a *lis pendens*. The test

with which the court will be primarily concerned in this judgment is whether there has been an unreasonable delay on the part of the plaintiff in prosecuting the proceedings. It seems to me that these allegations made by the plaintiff might be relevant to the full hearing of the substantive proceedings but are manifestly not relevant to the issue of whether the plaintiff himself is guilty of unreasonable delay in prosecuting his action.

24. The last argument made by the plaintiff was the only one bearing upon reason for the delay in filing his affidavit. It was argued that the delay was due to detective work which had to be carried out in order to obtain a number of reports which are exhibited in that affidavit. However, when the plaintiff's affidavit is examined, almost all of the material exhibited predates the transfer of the land by the plaintiff to Mr. Doyle in 2009. The only item which postdates the transfer is a 2012 valuation report on a separate property about which the plaintiff makes different allegations concerning a right of way. As all the exhibited material appears to have been generated by or on behalf of the plaintiff, it is unclear why it was not already in his possession or immediately available to him when he went to swear his affidavit. Although the plaintiff was given one week from the 11th of January 2022 to file a replying affidavit, he was on notice of the application having been served with the papers on 22nd December 2021. Therefore, he had a period of just under a month to pull together material which was already in existence and, presumably, in his possession.

25. Because the argument as to the admissibility of the affidavit was threatening to absorb all of the time available for the hearing of the application, attempting to be pragmatic, I indicated that I would accept the affidavit *de bene esse* and formally rule on its admissibility in the context of this judgment. That decision has proved more difficult than anticipated. On the one hand, if I were to exclude the affidavit, then much of the argument made on behalf of the plaintiff would fall away as there would be no evidence to support it. On the other hand, the plaintiff has not really given any valid excuse for his delay in filing it nor advanced any particular reason why, notwithstanding that delay, the affidavit should nonetheless be admitted save of course that the plaintiff wants this evidence to be considered. The only excuse offered, namely the need to conduct detective work in order to obtain the exhibited reports, is one which does not withstand scrutiny.

26. It is hard not to suspect that the delivery of the affidavit after close of business on a Friday, when the motion was listed for hearing the following Tuesday, was designed to put the defendant in a position where it would be forced to seek an adjournment in order to respond to the various allegations raised. I note also that during the ten-day period after the expiration of the time limit fixed by the court, there was no communication from the plaintiff's solicitors asking the defendant for an extension of time for the filing of this affidavit nor advising that an affidavit was about to be delivered at a very late stage. Were it not for the happenstance that the defendant's solicitor was working over the weekend, the defendant would have had only one day's notice of the contents of the affidavit before the hearing of the motion commenced. Indeed, the plaintiff did not even make a formal application to court for the admission of the affidavit but simply opposed the defendant's objection to it.

27. In all of the circumstances, I have come to the view that I should formally decline to admit this affidavit. This is an application in respect of which the High Court has accepted the defendant's claim to urgency by both allowing short service and by giving specific directions as to the exchange of affidavits. That claim to urgency is not contrived – the existence of the *lis pendens* is having a material effect on the defendant's ability to deal with its property. The plaintiff has not complied with the directions given and has not given any meaningful excuse which would either explain his non-compliance or justify the admission of the late affidavit. Rather, the plaintiff and his legal advisors seem to be of the view that the mere fact an affidavit was delivered through the letterbox of an empty solicitor's office over the weekend, some ten or twelve days after it was due, is sufficient of itself to justify its admission. I do not agree.

28. Notwithstanding that I have ruled the plaintiff's affidavit to be inadmissible, I have obviously read that affidavit and had argument made to me on foot of its contents. Consequently, lest I am found to be incorrect in my decision refusing to admit the affidavit, I will refer to its contents *de bene esse* throughout the balance of this judgment. In doing so I am conscious that my ultimate conclusion is that the plaintiff has not shown a good excuse for his delay in prosecuting the action, regardless of whether the evidence in the affidavit is taken into consideration or not. I acknowledge that ruling the affidavit to be inadmissible might have been more difficult if it had provided the basis for such an excuse.

Entry of Appearance by Defendant

29. Despite not having been served with the plenary summons, the defendant entered an appearance on 16th December, 2021 for the purposes of bringing this motion. The defendant's counsel explained that the Central Office would not accept papers in this motion from the defendant's solicitor unless that solicitor were formally on record in the proceedings. Counsel acknowledged that there were two alternative procedures available but indicated that neither of them were particularly satisfactory. The first would have obliged the defendant to bring a separate application seeking the leave of the court to bring this application and the other would have entailed bringing an application in the Land Registry list being a list in which a judge sits only intermittently. It seems that the Central Office did not have any difficulty in accepting the appearance filed by the defendant's solicitor notwithstanding the provisions of O. 12, r. 2(1) which provide that an appearance to any plenary summons shall be entered within eight days after the service of the summons, unless the court otherwise orders. It may be that as the Central Office does not necessarily have knowledge of when a summons has been served, it accepts the entry of an appearance on the assumption that such appearance has been prompted by the service of a summons.

30. The plaintiff notes that a general appearance has been entered by the defendant and not a conditional appearance. The plaintiff relies on the statements of principle now contained at paras. 4-11 and 4-12 of *Delany and McGrath on Civil Procedure in the Superior Courts* (4th edn, Roundhall 2018) to the effect, firstly, that the entry of an unconditional appearance constitutes a submission to the jurisdiction of the court so as to preclude a

defendant from subsequently seeking to challenge it and, secondly, that an unconditional appearance also constitutes an acknowledgement that the defendant is on notice of the proceedings and constitutes a waiver of the right to object to any defect in service or irregularity in the form of the summons. At the same time, the plaintiff expressly accepts that the proceedings have not in fact been served.

31. The defendant argues that the entry of an unconditional appearance is for the purposes of contesting the jurisdiction of the court. The defendant in this case does not intend raising any issue as to the jurisdiction of the court. On the contrary, the defendant invokes the court's jurisdiction under s. 123 of the 2009 Act. Consequently, it would not have been appropriate for the defendant to enter a conditional appearance. The rules do not make express provision for the entry of an appearance in the circumstances which pertain here.

32. I do not think that the defendant's entry of an appearance, notwithstanding the fact that the plaintiff has not yet served the proceedings, has any bearing on the decision the court must make under s. 123 of the 2009 Act. Clearly, the defendant has *locus standi* to bring this application and would have such *locus standi* whether the application is brought in the context of the plaintiff's proceedings or through a separate procedure or in a different list. The absence of express provision in the rules for the entry of an appearance in unserved proceedings cannot operate so as to deprive the defendant of the relief which the Oireachtas clearly intended that it should be permitted to seek under s.123(b)(ii). I think the approach taken by the defendant's solicitor, which was to file an appearance in these proceedings in order to be on record for the purposes of bringing this application, is an entirely pragmatic one.

33. The legal effect of the defendant's appearance may have a bearing on an issue which will arise in this case, but which is not part of the application before me. Because the plaintiff did not serve the plenary summons issued in September, 2020, under O. 8, r. 1(1) that summons expired twelve months after its issue in September, 2021. The plaintiff could have applied before the expiration of twelve months to the Master of the High Court to renew the summons but did not do so. Consequently, under O. 8, r. 1(3), if the plaintiff wishes to serve the proceedings, he must now make an application to the High Court in order to renew the summons. Such an application is normally made *ex parte*. Under O. 8, r. 2, in any case where a summons has been renewed on an *ex parte* application, the defendant is at liberty, before entering an appearance, to seek to have the order renewing the summons set aside. The fact that this defendant has already entered an appearance may be relevant to whether it can bring an application under O. 8, r. 2 to have any renewal of the plaintiff's plenary summons set aside. All of this is currently hypothetical as the plaintiff has not yet made an application to renew his summons nor has the High Court granted such liberty. Certainly, it seems to me that the plaintiff could not now make such an application without advising the court of this application and of the fact that the defendant has a solicitor on record, which may ensure that the defendant is put on notice of any such application. Consequently, I do not propose to address this matter any further.

Vacation of *Lis Pendens*

34. In moving his application to vacate the *lis pendens*, counsel for the defendant relied in large part on the judgment of Barniville J. in *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611. This, along with the earlier decision of Cregan J. in *Tola Capital Management LLC v. Linders* [2014] IEHC 324 were among the first cases to consider the newly introduced jurisdiction to vacate a *lis pendens* for unreasonable delay in the prosecution of proceedings under s. 123(b)(ii) of the 2009 Act. At para. 76 of his judgment, Barniville J. notes that the jurisdiction to vacate a *lis pendens* where an action was not being prosecuted in a *bona fide* manner pre-existed the 2009 Act and was continued under s. 123(b)(ii). However, the jurisdiction to vacate where there has been an unreasonable delay in prosecuting an action did not exist prior to the 2009 Act and, consequently, is a new jurisdiction.

35. At para. 81 of his judgment, Barniville J. noted that this new jurisdiction imposes an obligation on a litigant to prosecute the proceedings expeditiously and that this is an obligation "*over and above the obligation which already exists under the Rules of Superior Courts prescribing time limits for the delivery of pleadings and for the taking of steps in the proceedings and over and above the jurisdiction which already inheres in the court to dismiss proceedings in the circumstances outlined by the Supreme Court in Primor plc. v. Stokes Kennedy Crowley[1996] 2 IR 459*". The duty on the plaintiff has been characterised by Haughton J. in *Togher Management Company Ltd v. Coolnaleen Developments Ltd (In Receivership)* [2014] IEHC 596 as being one to exercise expedition and vigour in the prosecution of the proceedings.

36. In my view, the distinction drawn by Barniville J. between the *Primor* line of jurisprudence and the statutory jurisdiction under s. 123(b)(ii) is a significant one. Under *Primor,* the party seeking to strike out proceedings must establish that the other party's delay is, firstly, inordinate (i.e. excessively long) and, secondly, inexcusable (i.e. there is no justification for it). In cases where it is established that the delay is both inordinate and inexcusable, the court then moves to conduct a balancing exercise in order to determine whether, notwithstanding inordinate and inexcusable delay, the plaintiff should be permitted to continue the proceedings. The statutory jurisdiction under s.123(b)(ii) requires only that it be shown that there has been an unreasonable delay in the prosecution of an action by a person who has registered a *lis pendens*. It is not necessary that this delay be inordinate, although there is obviously a significant overlap between delay that is unreasonable and delay that is inordinate, nor must it be shown that the delay is inexcusable. Therefore, the reason for the delay is less significant when it would be in a case under the *Primor* principles although it may still have a bearing on whether the delay is reasonable.

37. Whilst the analysis of whether there has been unreasonable delay for the purposes of s. 123(b)(ii) does not move through the same stages nor apply the same tests as the *Primor* jurisprudence, the concept of delay being "*unreasonable*" does import some consideration of the reason proffered for that delay. As Barniville J. put it in *Hurley v. Charleen* (at para. 83), the proffering of a good reason for the delay may be crucial:-

"Further, while the question of unreasonableness in the context of a delay in the prosecution of proceedings will always depend on the context and on the particular facts, the policy of the section and the intention of the Oireachtas is clear. There is a particular and special obligation on a person who has issued proceedings and then registered a lis pendens for the purpose of those proceedings to bring those proceedings on expeditiously. That person is not permitted to sit back or to proceed with the action at leisure or to take time which might otherwise be tolerated or excusable in the conduct of the action. Since the expeditious prosecution of the proceedings is essential, a court considering whether to vacate a lis pendens under the first part of s. 123(b)(ii) should not tolerate delays in the prosecution of the action, such as in the service of the proceedings or subsequent pleadings in the proceedings without very good reason. The absence of a good reason for a delay is likely to lead the court to conclude that the delay has been unreasonable for the purposes of the section."

38. Once it has been established that the delay is unreasonable, the court does not proceed to conduct a balancing exercise between the respective interests of and prejudice to the plaintiff and the defendant. This may be because the vacation of a *lis pendens* does not deprive the party who has registered the *lis pendens* of their right of action in the way that striking out the proceedings would. The proceedings may continue but the additional security obtained through the registration of the *lis pendens* is lost. In this case if the plaintiff were to establish the existence of an enforceable agreement in the terms he alleges, he might well be entitled to relief (although arguably not as against the company). That relief would take the form of declarations and perhaps monetary orders reflecting the plaintiff's entitlements in respect of the proceeds of sale of the houses already sold. All of these reliefs remain available to the plaintiff even if the *lis pendens* is vacated.

39. Further, as Barniville J. notes (at para. 83 of his judgment), the section refers to unreasonable delay in "*prosecuting the action*". Delay prior to the institution of proceedings are not relevant to the courts consideration of whether there has been an unreasonable delay in prosecuting the action as the action only comes into being once the proceedings have been instituted. Therefore, although the events underlying the plaintiff's complaints predate the institution of proceedings by more than a decade, this decade is not factored into the court's consideration of whether there has been unreasonable delay in the prosecution of the action since September, 2020.

40. In ascertaining what length of delay will be unreasonable, *Hurley v. Charleen* is particularly relevant to the defendant's case because Barniville J. found that a delay of six months between the issuing and serving of a plenary summons followed by a further delay of just under three months in the service of a statement of claim constituted unreasonable delay and vacated the *lis pendens*. Although Barniville J. acknowledged that the question of whether a particular delay was unreasonable would always depend on the context of the case and its specific facts, that period of delay is, by some measure, less than the period of delay in this case. It was also a period of delay within the time limited

by the rules for the service of the proceedings whereas in this case the plaintiff is already outside the prescribed time limit. Further, by the time the motion to vacate the *lis pendens* came before the court in *Hurley v Charleen*, both the plenary summons and the statement of claim had been served on the defendant, albeit after multiple requests by the defendant's solicitor that service of the proceedings be effected. For all of these reasons the defendant argues that the delay in this case cannot be regarded as reasonable.

41. The plaintiff accepted that there was a delay in the prosecution of the action. Indeed, he could hardly do otherwise since the motion was heard over sixteen months after the proceedings were issued and service still had not been effected at the time of the hearing. Whilst accepting that there was a delay, the plaintiff argued that it was not an inordinate or inexcusable delay and noted that the Statute of Limitations in property cases allowed a period of twelve years for the institution of proceedings. Without deciding whether the delay is actually inordinate and inexcusable, I do not think that this test is relevant to the discrete statutory test of "*unreasonable delay*" under s.123(b)(ii). Put simply, the standard which must be met by a defendant seeking to strike out proceedings under the *Primor* jurisprudence is higher than that which must be met by a defendant seeking to vacate a *lis pendens* under s.123(b)(ii). Therefore, even if I were satisfied that the plaintiff is correct in saying the delay was neither inordinate nor inexcusable, that would not be determinative of this application.

42. Much of the argument made on the plaintiff's behalf did not involve proffering an excuse for the delay but, rather, entailed making allegations against the defendant, some of which had to do with the substance of the underlying proceedings and others with the conduct of the application before the court. I have already rejected as unmeritorious the allegations made against the defendant's lawyers and indicted that, whatever their merits, allegations regarding tax evasion and the identity of Mr. Doyle's business partner have no relevance to the question of whether there was unreasonable delay in the prosecution of this action. Apart from their lack of relevance to the motion, these are allegations made against Mr. Doyle personally and/or a person with whom he may have been in partnership at the time of the development. The plaintiff has chosen to sue the defendant, which is an owner's management company under the Multi Unit Development Act, 2011, simply because it is the current owner of the property but has not purported to link these various allegations to this defendant in any way.

43. As regards the "*unreasonable*" criterion, counsel for the plaintiff focused on the fact that the plaintiff had been a lay litigant at the time of institution of the proceedings and of registration of the *lis pendens*. Further, the plaintiff, who had been made bankrupt in 2014, is a person of limited financial resources. Counsel pointed to the history of the disagreement between the plaintiff and Mr. Doyle and indicated that the purpose of registering the *lis pendens* was to bring the plaintiff's claim to the attention of Mr. Doyle when his solicitor would be checking title for the sale of the units in the development. There is a certain incoherence in this explanation because, if the objective was to bring the matter to Mr. Doyle's attention, then service of the proceedings (or even the earlier

proceedings issued against Mr. Doyle personally) would surely have done that independently of whether a *lis pendens* was registered.

44. I note that in *Hurley v. Charleen*, Barniville J. rejected one of the explanations advanced for the non-service of the proceedings which was that the plaintiff hoped that the parties might arrive at a settlement. Obviously, the settlement of proceedings is a desirable objective. Nonetheless, where, in addition to instituting proceedings, a litigant also registers a *lis pendens*, then that litigant assumes an obligation to advance the proceedings expeditiously even if settlement negotiations are conducted in tandem. In other words, once a *lis pendens* is registered, the existence of legal proceedings can no longer be treated simply as a negotiating tactic. The proceedings must be robustly pursued. The plaintiff in this case does not go so far as to suggest that he delayed service as he was hoping to achieve a settlement of his claims, realistically he could not do so where the fact of the claim had never been brought to the attention of the defendant. By inference, the plaintiff's explanation that he registered the *lis pendens* in order to bring the matter to the attention of Mr Doyle (presumably in the hope that the matter would then be resolved) is also not a good excuse for the delay.

45. The plaintiff insists that there was a *bona fide* dispute in respect of the land which is currently registered in the name of the defendant. Under s. 121(2) of the 2009 Act, the actions which may be registered as *lis pendens* include any action in which a claim is made to an estate or interest in land and any proceedings to have a conveyance of an estate or interest in land declared void. I have had some difficulty in understanding the assertion that the plaintiff's claim falls within one or other of these criteria since the description in the plaintiff's affidavit of the contract on which he now relies is that agreement was reached for payment to him of monies from the sale of each of the properties. He does not suggest that there was any agreement that title to the property would not pass or would not pass in full until that money had been paid. I note that Mr. Doyle was duly registered on the folio as the full owner of the property in December, 2009. If the plaintiff is correct, Mr. Doyle might owe the plaintiff the sum of €150,000 of which €60,000 may already have fallen due on the sale of the first two units. Any consideration of this issue is necessarily hypothetical since, as the plaintiff has not served the proceedings, neither the defendant nor the court knows exactly what claim is made in those proceedings. Nonetheless, on the basis of the plaintiff's affidavit, it has to be observed that it looks extremely unlikely that the claim he intends making is one which falls within the scope of s. 121 of the 2009 Act. This, of course, is not the basis of the application currently before the court. The defendant is not in a position to move an application on the basis that the *lis pendens* has not been properly registered under s. 121 since, in the absence of service of the proceedings, the defendant cannot say definitively what the plaintiff's claim is.

46. All of this is relevant because, in my view, it goes to whether the delay in prosecuting the proceedings is unreasonable. Manifestly, the plaintiff has not prosecuted the proceedings with expedition or vigour (per Haughton J. in *Togher* above) nor has he advanced a good reason for the delay. The court is cognisant of the fact that the plaintiff was a lay litigant

at the time of institution of the proceedings and for a long time thereafter, although not at the time the motion was heard. As regards the principles applicable to the manner in which a case involving a lay litigant should be conducted, the defendant drew the court's attention to the judgment of Clarke J. (as he then was) in *AIB Bank Plc v. Frank and Ann Kelly* [2011] IEHC 7. Clarke J. approved a summary of the issues and principles which he described as "*most helpful*" contained in an article by Evan Bell entitled "*Judges, Fairness and Litigants in Person*" in *2010 Judicial Studies Institute Journal No. 1*. The passage quoted by Clarke J. focuses on the overriding principle of fairness and the need for a judge to balance the duty of fairness to a self-represented litigant with the rights of the other party to the litigation and the need for a speedy and efficient judicial determination. Although account must be taken of the lay litigant's lack of experience and training *"it is not unfair to hold a self-represented litigant to his choice to represent himself*". Thus, while the court is under a duty to minimise the self-represented litigant's disadvantage as far as possible, this should not entail conferring a positive advantage on the personal litigant over his represented deponent.

47. Although counsel for the plaintiff expressed the view that courts are generally unsympathetic to lay litigants with limited financial resources, in my experience that is not the case. Considerable latitude and, indeed, time are afforded by courts to lay litigants, often to the frustration of the other party to the litigation. Nonetheless, when a lay litigant chooses to engage in complex litigation without the benefit of legal representation, they have to accept that they are bound by the same rules, both procedural and statutory, as if they were legally represented. Ignorance of those rules cannot be relied on as an excuse for non-compliance. In fairness, the plaintiff does not assert that he was ignorant of the requirement to serve his proceedings and, indeed, could not do so in circumstances where he had previously sought and obtained an extension of time to serve an earlier set of proceedings against Mr. Doyle personally. Even allowing for the fact that the plaintiff was a lay litigant, there is no reasonable basis on which he could have assumed that it was acceptable to issue proceedings and register a *lis pendens* but fail to serve the proceedings.

48. I do not accept the plaintiff's characterisation of the approach taken by Haughton J. and Barniville J. as excessively technical. I agree with the views expressed by those judges to the effect that s. 123(b)(ii) of the 2009 Act imposes an obligation on a litigant who has registered a *lis pendens* to prosecute their proceedings with an element of expedition and vigour that goes beyond mere compliance with the time limits laid down in the rules or by statute. The person against whose property the *lis pendens* has been registered is prejudiced in dealing in the property by the mere fact of registration of the *lis pendens.* That prejudice to a person in the exercise of their constitutionally protected property rights justifies the imposition of a higher duty of expedition on the party whose *lis pendens* has created the prejudice.

49. I note that in this case the defendant asserts actual prejudice arising as a result of the consequences of being unable to complete an intended transaction. I accept that the prejudice set out on affidavit is real and has potentially adverse financial consequences

for the defendant. It is not a requirement under s. 123 that the person whose property is affected demonstrate prejudice when making an application to vacate a *lis pendens*. In some cases, the existence of prejudice may be a factor to be weighed against an ostensibly good excuse shown by a plaintiff in determining whether the delay is nonetheless unreasonable. In this case, as the plaintiff has not shown a good excuse for the delay, the court does not have to consider whether the acceptance of that excuse might be counterbalanced by the detrimental effects of the delay on the defendant.

50. I do not regard it as sufficient for the plaintiff to state simply that, as himself and Mr. Doyle had previous business dealings which broke down, Mr. Doyle necessarily knows both the nature and details of the plaintiff's claim. The business dealings between the plaintiff and Mr. Doyle concluded over thirteen years ago. From the affidavits, it seems that the two men have a very different idea of how those dealings concluded and what the outstanding obligations, if any, might be. If the plaintiff wishes to make a claim, whether against Mr. Doyle or against the defendant, he must actually do so, ideally by setting out the nature of the claim in pre-litigation correspondence affording Mr. Doyle and/or the defendant an opportunity to respond and, if no resolution is reached, then in proceedings which are both issued and served and prosecuted expeditiously. The plaintiff has done none of these things.

51. I am satisfied that the delay on the part of the plaintiff in this case is unreasonable. I will, therefore, make the order sought by the defendant in its notice of motion being an order under s. 123(b)(ii) vacating the *lis pendens* arising out of these proceedings. It is unnecessary for me to consider whether the action is being prosecuted *bona fide* in circumstances where the delay has been so manifestly unreasonable that the order can be made on that ground alone. As the issue of *bona fides* requires some knowledge of the nature of proceedings and the reason for which they have been instituted, it is not possible to embark on a consideration of these matters in circumstances where the plenary summons is not even before the court. It is arguable that an action is not being prosecuted *bona fide* when it is not being prosecuted at all but, in my view, this overlaps to such an extent with the alternate ground under s. 123(b)(ii) of unreasonable delay that it is unnecessary to consider it separately.