

THE HIGH COURT

[2022] IEHC 286
[2016 No. 9951 P.]

BETWEEN

PATRICK MCLAUGHLIN AND ROSEANN MCLAUGHLIN

PLAINTIFFS

AND

ENNIS PROPERTY FINANCE LIMITED AND TOM KAVANAGH

DEFENDANTS

JUDGMENT of Ms. Justice Nuala Butler delivered on the 11th day of May, 2022

Introduction

1. This judgment deals primarily with an application by the defendants to strike out the plaintiffs' proceedings on a number of grounds including that they constitute an abuse of process and do not disclose a reasonable cause of action and because of the failure of the plaintiffs to prosecute the proceedings within a reasonable timeframe. The defendants also seek an order under s. 123 of the Land and Conveyancing Law Reform Act, 2009 vacating a *lis pendens* registered by the plaintiffs in the Central Office following the issuing of these proceedings in November, 2016 on the grounds that the proceedings are not being prosecuted *bona fide* or, alternatively, that there has been an unreasonable delay in prosecuting them. The first defendant is sued as the current owner of loans and of mortgages and charges relating to those loans over property belonging to the plaintiffs and the second defendant is sued as the receiver appointed by the first defendant's predecessor over certain of those properties.
2. There are also two other motions before the court brought by the plaintiffs. These are, in chronological order, an application for judgment in default of defence in favour of the plaintiffs and an application for an order directing the Official Assignee in Bankruptcy to oppose the defendants' motion seeking to strike out the proceedings on behalf of the bankrupts' estates. The latter motion was issued because, since the institution of these proceedings and the issuing of the defendants' motion, both plaintiffs were adjudicated bankrupt (in February, 2021). In circumstances where the need for the defendants to file a defence will only arise if the proceedings are not struck out, I do not propose to address this motion until after I have delivered this judgment.
3. The position in respect of the Official Assignee is somewhat more complex. Legally, once the plaintiffs were adjudicated bankrupt then under s. 44 of the Bankruptcy Act, 1988, all property belonging to them vested in the Official Assignee for the benefit of their creditors. Property is defined under the 1988 Act in a manner which includes "*things in action*". Under s. 61(3)(d) of the 1988 Act, an express power is conferred on the Official Assignee "*to institute, continue or defend any proceedings relating to the property*". In principle, a bankrupt no longer has locus standi to maintain proceedings in respect of their property after an adjudication in bankruptcy. Thus, as an automatic legal consequence of the plaintiffs being adjudicated bankrupt, their property, including their interest in these ongoing legal proceedings, vested in the Official Assignee who thereafter had the power to decide whether to continue or to discontinue the proceedings. On 7th May, 2021, the Insolvency Service of Ireland on behalf of the Official Assignee wrote to

the solicitor acting for the defendants indicating that, having considered the pleadings, it had been determined that there would be no benefit to the estates of the bankrupts in continuing them and, consequently, the Official Assignee was consenting to the defendants' motion.

4. In the intervening period, the first plaintiff had brought an appeal to the Court of Appeal from the decision adjudicating him a bankrupt and the second plaintiff had brought an application to the High Court seeking to show cause against her adjudication in bankruptcy. The second plaintiff's application was dismissed by the High Court on 5th March, 2021, at which time the first plaintiff's appeal was still pending before the Court of Appeal and the second plaintiff subsequently brought a similar appeal. Consequently, the plaintiffs issued their motion against the Official Assignee on 22nd July, 2021 disputing the Official Assignee's conclusion that the litigation would not be of substantial benefit to their estates in bankruptcy and arguing that it was premature for the Official Assignee to allow the defendants' motion proceed unopposed while an appeal to the Court of Appeal as regards their adjudication in bankruptcy was still pending.
5. The defendants and the Official Assignee adopted a pragmatic approach to this application which facilitated the court in hearing the defendants' motion without having to hear and determine the plaintiff's motion against the Official Assignee in advance. The court was advised that it remained the Official Assignee's position that he was consenting to the defendants' motion to strike out the proceedings but, in light of the pending appeal to the Court of Appeal the defendants were not taking any point as to the plaintiffs' *locus standi* or consequent right of audience, both defendants agreed that the solicitor for the plaintiffs could oppose this motion on their behalf. Counsel for the Official Assignee remained in court during the hearing and provided helpful assistance to the court on procedural and technical aspects of the bankruptcy and insolvency processes. As it happens, this application was heard over two separate days in October and November, 2021 and, during the intervening period, the Court of Appeal (Haughton J.) delivered judgment dismissing the first plaintiff's appeal against his adjudication in bankruptcy [2021] IECA 292.

Procedural Background

6. The procedural background to this application is extraordinarily complex by virtue of the large amount of litigation the plaintiffs' loans have engendered. It is telling that nearly nine years ago, in delivering what has become the first of many judgments involving the plaintiffs and these loans, Birmingham J. stated "*So far as the claim for judgment is concerned it is a striking feature of this case that it is not in dispute that the sums in question were borrowed and have not been repaid*" (see *Kavanagh v. McLaughlin* [2013] IEHC 453 at para. 2). The judgment then proceeded to deal with what Birmingham J. described as "*a series of technical defences*". Very little has changed over the succeeding years save that the plaintiffs' indebtedness has been reduced by virtue of the sale by the receiver of two of the four properties the subject of the litigation. Further, the plaintiffs do now dispute the amount of the residual debt contending that it should be reduced further

by virtue, *inter alia*, of amounts which the receiver could have received as rent had the properties been let or let in a more advantageous manner during the receivership.

7. Going back to the beginning of what has, by now, become a saga, between July, 2005 and August, 2008, Bank of Scotland Ireland (BOSI) advanced monies to the plaintiffs by way of loans secured on three properties in South County Dublin, namely Latona on Torquay Road, No. 40 Kerrymount Rise (both in Foxrock) and 12 Hawthorn Manor in Blackrock. The plaintiff subsequently constructed another property, which is now their private dwelling house, at 40A Kerrymount Rise on a site which was previously part of the garden of No. 40 and which also became part of the security for their loans. Since the litigation started, there has been a dispute as regards the terms on which these loans were repayable and, in particular, whether there was an agreement that the loans would be discharged out of the proceeds of sale of Latona and consequently either would not or could not be called in until Latona had been sold by the plaintiffs ("the Latona clause"). This contention was rejected by the Supreme Court in the 2012 proceedings.
8. In 2010, BOSI merged with Bank of Scotland ("BOS") under the EC (Cross-Border Merger) Regulations, 2008 (SI No. 157 of 2008) and Council Directive 2005/56/EC. That Directive provides a mechanism for the dissolution of a limited liability company without going into liquidation through the transfer of all of its assets and liabilities to another company holding the entire share capital and/or securities in the company being dissolved. The merger was approved in this jurisdiction by an order of the High Court (Kelly J.) on 22nd October, 2010 and in Scotland by the Court of Session on 10th December, 2010. The effect of those orders was to ensure that all of the assets and liabilities of BOSI were transferred to BOS at 23:59pm on 31st December, 2010 and BOSI then stood dissolved without liquidation and ceased to exist. The plaintiffs have already contended, unsuccessfully, in the 2012 proceedings that their mortgages were not part of the assets transferred by BOSI to BOS.
9. Subsequent to the merger, BOS called in the plaintiffs' loans and, when the debt was not repaid, appointed a receiver (the second defendant) on 6th June, 2012. The receiver was appointed over three of the four properties in issue excluding No. 40A Kerrymount Rise. Because the receiver perceived that the plaintiffs were interfering with the receivership, he and BOS issued proceedings against the plaintiffs in 2012 in which the receiver sought declarations as to the validity of his appointment and the bank sought judgment in the amount then outstanding on foot of the loans which exceeded €4 million. The plaintiffs (as defendants in those proceedings) raised a number of grounds in defence of the proceedings. These included asserting that the loans were not due, that the mortgages had not been transferred to BOS as part of the merger, that the receiver was not validly appointed and that BOS was not the registered owner of the charges and, consequently, did not have power to execute. The plaintiffs' defence was unsuccessful and, on 30th September, 2013, Birmingham J. gave judgment and made declarations as to the validity of the receiver's appointment and granted judgment to BOS.

10. The plaintiffs appealed to the Supreme Court which dismissed their appeal (see *Kavanagh v. McLaughlin* [2015] 3 IR 555). Clarke J. (as he then was) delivered judgment with which the other members of the court agreed (Laffoy J. delivered a concurring judgment which dealt only with a discrete aspect of the case, namely the non-registration of BOS as owner of the charge). He identified three issues arising on the appeal. Firstly, the "*Latona clause*" and whether BOS was entitled to call in the loan before that property had been sold by the plaintiffs; secondly, issues relating to the non-registration of BOS as the owner of the charge previously registered in favour of BOSI; and, thirdly, whether the plaintiff's loans and related security had been validly transferred as part of the cross-border merger. In judgments delivered on 19th March, 2015, all of these issues were decided against the plaintiffs in this case.
11. On the day after the Supreme Court delivered its judgment, 20th April, 2015, BOS transferred a portfolio of loans and related securities (called the "*purchased assets*") including the plaintiffs' mortgages to the first defendant in these proceedings, Ennis Property Finance (subsequently Ennis Property Finance DAC and referred to in this judgment as "Ennis"). This transfer took place on foot of an agreement made between BOS and a company called EQI on 29th November, 2014 for which Ennis was substituted as proposed purchaser by deed of novation on 12th December, 2014. The plaintiffs were notified of the proposed sale by letter dated 20th March, 2015. The sale was effected by a deed of assignment of the purchased assets, a deed of transfer of the registered charges and a deed of conveyance and assignment of the related mortgages all of which were executed on 20th April, 2015. Following completion of the sale, Ennis authorised the second defendant to continue to act as receiver in respect of the plaintiffs' properties.
12. On 8th November, 2016, the plaintiff issued these proceedings ("*the 2016 plenary proceedings*") against Ennis and the receiver. The endorsement of claim on the plenary summons seeks 88 separate reliefs and while it is not practical to set these out in full, they include reliefs directed to the question of whether the cross-border merger between BOSI and BOS validly transferred the plaintiffs' mortgage and the validity of the receiver's appointment. The plaintiff also raised issues concerning the solvency of BOSI at the time of the merger and whether the merger was, consequently, invalid and the tax treatment of its losses within the Lloyd's Banking Group subsequent to the merger. The plaintiffs contend that these are new issues which were not covered by the Supreme Court judgment in the 2012 proceedings. The day after the proceedings were issued, the plaintiffs' registered a *lis pendens* in the Central Office. Unfortunately, this *lis pendens* has not been exhibited and is not before the court so it is not clear whether it covers all four properties or only the three in respect of which the receiver has been appointed.
13. Notwithstanding the issuing of the proceedings and, more significantly, the registration of a *lis pendens* based on the existence of the proceedings, the plenary summons was not served on the defendants until, after being renewed on 18th December, 2017, it was eventually served over nineteen months later on 14th June, 2018. Following the entry of an appearance on behalf of the first defendant on 22nd July, 2019, this motion seeking to strike out the proceedings was brought on 6th December, 2019.

14. However, matters have progressed on different fronts. The receiver sold two of the four properties (Latona on 17th November, 2016 and No. 40 Kerry Mount Rise on 20th February, 2017) and the proceeds of sale were applied to reduce the plaintiffs' indebtedness to about half the sum in respect of which judgment had been granted. That amount remained unpaid as a result of which the defendant issued a statutory demand for payment of the sum of €2,006,898.01 on 7th August, 2018. As the demand was unsatisfied, a bankruptcy summons was issued against both defendants by BOS on 19th November, 2018 followed by a bankruptcy petition on 18th February, 2019. In the intervening period, the plaintiffs issued a notice to dismiss the bankruptcy summons on 21st December, 2018. The progress of the bankruptcy petition is set out in detail in the judgment of Haughton J. in *Pepper Finance Corporation (Ireland) DAC v. McLaughlin* [2021] IECA 292. Crucially, after a number of hearing dates had been adjourned to facilitate the plaintiffs, at the request of the plaintiffs' personal insolvency practitioner a final adjournment was granted peremptorily against them to 13th December, 2019.
15. At this point, the plaintiffs sought to avail of the personal insolvency process under the Personal Insolvency Act, 2012. One of the features of the 2012 Act is that debtors can apply to court for a protective certificate which, if granted, provides an extendable period of 70 days during which the debtor can explore the possibility of reaching a personal insolvency arrangement with their creditors. The "protection" arises from the fact that creditors are precluded from taking steps to enforce the debt whilst a protective certificate is in place. In order to apply for a protective certificate, debtors must make a prescribed financial statement in which all of their assets and liabilities must be set out and make a statutory declaration confirming the completeness and accuracy of the statement. Although this was not averred to on affidavit, the court was advised by counsel for the defendants that the defendants' solicitor had brought the fact that the plaintiffs were disputing the debt and had issued proceedings in respect of it to the attention of the plaintiffs' personal insolvency practitioner as the defendants regarded this as a consideration relevant to the *bona fides* of the plaintiffs as applicants in the personal insolvency process and asked that this be brought to the attention of the court. An initial application by the plaintiffs to the Circuit Court for a protective certificate was refused because the court was informed that although the debt owed to the first defendant was set out in the prescribed financial statement, the debtors intended admitting that debt in the personal insolvency process but denying it in the plenary proceedings.
16. This refusal prompted a re-assessment of the situation by the plaintiffs and their professional advisors. Consequently, on 12th December, 2019, the plaintiffs' personal insolvency practitioner wrote to the Insolvency Service of Ireland stating:-
 1. I was informed by the Debtors during my consultation with them on Friday 06 December 2019 that any/all proceedings previously instigated by them against Ennis Property Finance DAC have been or will immediately be discontinued; and
 2. I spoke with the Debtors this morning by phone to have them confirm to me once more that any/all proceedings previously instigated by them against Ennis

Property Finance DAC have been or will immediately be discontinued, and they confirm same to me.”

On the same date, the solicitors acting on behalf of the plaintiffs also wrote to the Insolvency Service of Ireland stating:-

“Secondly, we hereby confirm having been duly authorised so to do for and on behalf of Patrick Mc Laughlin and Roseann Mc Laughlin that any proceedings they may have issued concerning either Bank of Scotland, plc and/or Ennis Property Finance DAC will immediately be discontinued. In this regard, appropriate Notices of Discontinuances have been drafted up for completion by our clients and we confirm same will be stamped and lodged with the Central Office of the High Court, forthwith.”

It is clear from the correspondence from both of these professionals that the plaintiffs received specific advice as to the requirement for and the significance of discontinuing these proceedings (i.e. the 2016 plenary proceedings) if they wished to progress their application for a protective certificate in the personal insolvency process. The correspondence records, at a minimum, three separate interactions between the plaintiffs and their advisors in which they clearly instructed their professional insolvency practitioner and their solicitor that they would discontinue these proceedings. The personal insolvency practitioner took care to confirm his understanding of the plaintiffs’ position before communicating it to the Insolvency Service of Ireland. Further, the plaintiffs’ solicitor was expressly authorised to advise the Insolvency Service of Ireland (through which the paperwork required for an application for a protective certificate is presented to court) that the plaintiffs had confirmed their intention to discontinue the proceedings.

17. The bankruptcy petition in respect of the plaintiffs was listed peremptorily against them in the High Court the following day, 13th December, 2019. On that morning, the application for a protective certificate was renewed by counsel acting on behalf of the plaintiffs before Judge Enright of the Circuit Court who made an order granting the protective certificate in the following terms:-

“On the understanding that the Plenary hearings in the High Court will be withdrawn and the application for dismissal of the bankruptcy proceedings will be withdrawn, thereby resulting in the vacation of the lis pendens, the Court grants the Protective Certificate.”

At the same time, a separate team of solicitor and counsel appeared on behalf of the plaintiffs in the High Court and as soon as news came through that the protective certificate had been granted, this was brought to the attention of the High Court judge as a result of which the bankruptcy petition and the plaintiffs’ motion to dismiss it were adjourned generally with liberty to re-enter.

18. This motion, which had been listed for hearing on 22nd January, 2020 was unable to proceed for the same reason. On 24th January, 2020, the solicitors on behalf of the defendants wrote to the plaintiffs' solicitor noting that, contrary to what was expected in light of their letter of 12th December, 2019, no notice of discontinuance had been served. The defendants' solicitor requested that the 2016 proceedings be discontinued before the motion was back in court. The defendants' solicitor does not appear to have received a written reply to this correspondence but has sworn an affidavit in which he describes a subsequent telephone conversation with the plaintiffs' solicitor on 27th January, 2020 in which he was informed by that solicitor that they "*had no instructions to discontinue the within proceedings and would not therefore be in a position to do so*". As the solicitor had been authorised to confirm that the proceedings would be immediately discontinued on 12th December, 2019, one can only assume that the plaintiffs changed their instructions to their solicitor as soon as they had the benefit of the protective certificate and, quite possibly, that notwithstanding the instructions they clearly gave to both their personal insolvency practitioner and their solicitor the plaintiffs never intended to discontinue the 2016 proceedings.
19. As it happens, the plaintiffs were unable to reach a personal insolvency arrangement with the requisite percentage of their creditors – comprising principally BOS – as a result of which the protective certificate lapsed and both the bankruptcy proceedings and this application were resumed. All of this took some time during which the loans and the security were transferred by Ennis to Pepper Finance (Ireland) DAC ("Pepper"). The bankruptcy proceedings were listed and heard on 11th February, 2021. Humphreys J. rejected the plaintiffs' motion to dismiss the bankruptcy summons and adjudicated the plaintiffs bankrupt. His judgment, which deals with various points raised by the plaintiffs (i.e. the defendants in the bankruptcy proceedings), held that the plaintiffs were not entitled to re-open the question of the debt which had been determined by the Supreme Court and that it would be an abuse of process for the plaintiffs to be permitted to rely on the issues raised in the 2016 proceedings, having undertaken to withdraw them. He was quite clear in his view that it was an abuse of process for the plaintiffs to have sworn to the debt in one set of proceedings while seeking to deny it in another. The first plaintiff appealed this judgment to the Court of Appeal and, as previously noted, judgment was given by Haughton J. dismissing the appeal whilst this motion was at hearing before me. Haughton J. held that the trial judge was entitled to rely on the plaintiffs' admission of the debt in the personal financial statement made for the purposes of obtaining the protective certificate and the plaintiffs could not "*approbate and reprobate*" (see para. 67). I will return to this judgment in more detail when looking at the arguments made in respect of the 2012 Act in this case.
20. The defendants in this case re-listed their motion and secured a hearing date in October, 2021. On the opening of the matter, the solicitor for the plaintiffs sought an adjournment in circumstances where judgment on the appeal from the adjudication in bankruptcy was awaited. In the circumstances described above where the defendants and the Official Assignee had agreed to allow the solicitor for the plaintiffs defend the motion on their behalf and in light of the delays which had already occurred, I did not think it necessary

to await that judgment in order to determine the defendants' motion and the request for an adjournment was refused.

21. For the sake of completeness, the defendants' deponent set out on affidavit the state of the receivership at the time the motion was issued. As previously noted, two of the four properties, Latona and No. 40 Kerrymount Rise, were sold by the receiver and the proceeds of sale applied to the reduction of the plaintiffs' debt. The third property over which the receiver was appointed, No. 12 Hawthorn Manor, had been subject to an agreement for sale in 2017 but the sale did not proceed because of the plaintiffs' alleged interference. The second defendant was advised by the estate agent instructed in respect of the sale that the plaintiffs had placed a large sticker reading "*lis pendens*" over the "For Sale" sign outside the house. The fourth property is not subject to the receivership. However, No. 40A Kerrymount Rise is subject to Circuit Court repossession proceedings seeking to recover possession for the purposes of sale.

Defendants' Motion

22. In light of this history, the defendants' application is unsurprising and the basis for it is relatively straightforward. The application to strike out the proceedings is made under both O. 19, r. 28 and the court's inherent jurisdiction and is based on an overlapping combination of abuse of process, *res judicata*, the rule in *Henderson v. Henderson* and delay. Although the motion was issued before the plaintiffs embarked upon the personal insolvency process, the most salient feature of the defendants' argument now is the fact that the prosecution of this case is completely contrary to the assurances given by the plaintiffs in the personal insolvency process that the proceedings would be discontinued. In relation to delay, the defendants also rely on the plaintiffs' failure to prosecute the proceedings under O. 122, r. 11 in that no step had been taken by them for more than two years before the defendants' motion issued. The defendants argue that the progression of the receivership and the sale of the third property has been stymied by the plaintiffs' behaviour as a result of which significant additional costs are being incurred.
23. Counsel for the defendant took the court through the plaintiff's plenary summons and statement of claim, notwithstanding that the latter had been filed after the motion was issued. For the most part, he characterised the grounds concerning the validity of the cross-border merger and the consequent transfer of the plaintiff's loan from BOSI to BOS and the grounds concerning the validity of the appointment of the receiver as being ones already raised in the 2012 proceedings and comprehensively determined against the plaintiffs in both the High Court and the Supreme Court. The plaintiffs were legally represented throughout those proceedings and the pleading and ventilation of the issues was very comprehensive.
24. Insofar as particular details now pleaded by the plaintiffs in the 2016 proceedings were not pleaded by them in their defence and counterclaim to the 2012 proceedings, the defendants argue that these are matters which could and should have been raised by them in the earlier proceedings. As the grounds now pleaded relate to the essentially same matters the subject of the earlier litigation, the plaintiffs are precluded from issuing fresh proceedings to have them determined after the conclusion of the earlier

proceedings. This flows from the rule in *Henderson v. Henderson* (1843) 3 Hare 100 the application of which is well established in this jurisdiction. The underlying rationale of the rule is to prevent an abuse of the court's processes and to protect parties from successive litigation dealing with the same subject matter (see Fennelly J. in *McFarlane v. DPP* [2008] 4 IR 117 and Kearns J. in *S.M. v. Ireland* [2007] 3 IR 283).

25. Counsel for the defendants acknowledged that the strict application of the rule in *Henderson v. Henderson* must be balanced against the litigant's right of access to the court especially having regard to Article 6 of the European Convention on Human Rights (see Hardiman J. in *AA v. Medical Council* [2003] 4 IR 302). He pointed to the application of the rule in *Henderson v. Henderson* in circumstances not dissimilar to these in *Vico Ltd v. Bank of Ireland* [2016] IECA 273 in which it was argued both that the limited liability company had not been party to the earlier proceedings and that the subsequent proceedings included claims which had not been made in the earlier proceedings. In rejecting an appeal against the order of the High Court that the claims be struck out and the related *lis pendens* vacated, Finlay Geoghegan J. held (at para. 31 of her judgment) that "*all of the claims which [the plaintiffs] now wish to pursue in these proceedings were claims which either were made and pursued or ought to have been made and pursued*" in the earlier proceedings. She noted that the object of both sets of proceedings was the same, although she accepted that this of itself was not determinative and that the court had to consider all relevant facts.
26. Apart from the more generic abuse of process that serial litigation in respect of the same subject matter entails, the defendants' abuse of process argument focused more specifically on the assurance that they would discontinue these proceedings given by the plaintiffs through their solicitor to the Circuit Court for the purposes of obtaining a protective certificate and the fact they immediately resiled from this assurance. The defendants point to the duty on a debtor under s. 50(3) of the Act of 2012 to make full and honest disclosure and the requirement under s. 91(1)(e) of the same Act that a debtor have completed a prescribed financial statement and made a statutory declaration as to its completeness and accuracy including, *inter alia*, as to the debtor's liabilities, in order to be eligible for personal insolvency arrangement. The powers available under the 2012 Act are wide ranging and significant in that, apart from the restraint imposed on creditors by the issuing of a protective certificate, a debtor can petition the court to accept an arrangement which creditors have rejected and, if successful, can have that arrangement mandatorily imposed on creditors. Consequently, the process under the 2012 Act requires a debtor to commit to a position. It is not, however, a mandatory process. If a debtor wishes to dispute a debt, it remains open to that debtor not to avail of the processes under the 2012 Act and to continue to dispute the debt in court or otherwise.
27. Finally, the defendants linked their argument concerning failure to prosecute under O. 122, r. 11 with their application to vacate the *lis pendens* under s. 123 of the Land and Conveyancing Law Reform Act, 2009 on the basis of an unreasonable delay in prosecuting the action or a failure to prosecute the action *bona fide*. They relied on the judgment of

Barniville J. in *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611 and, in particular, para. 81 of that judgment which emphasises that “*unreasonable delay*” under s. 123 does not require the sort of exercise a court must undertake in deciding whether to dismiss proceedings for inordinate and inexcusable delay under the *Primor* test which entails an assessment of the balance of justice as between the parties. Instead, s. 123 operates as a counter-balance in that, in certain circumstances, a person is entitled as of right to register a *lis pendens* which carries with it a corresponding obligation on that person to expeditiously prosecute the action in respect of which the *lis pendens* has been registered. In this case, the plaintiffs registered the *lis pendens* immediately after they issued the proceedings and then failed to serve the proceedings on the defendants for a period of nineteen months. There was a delay of over four years from the issuing of the plenary summons to the service of the statement of claim. The defendants argue that by any standards this is an unreasonable delay and it is one in respect of which the plaintiffs have offered no explanation or justification.

The Plaintiffs’ Response

28. The solicitor acting for the plaintiffs made a detailed argument on their behalf. As a matter of general principle, he stated that the court should be very slow to exercise its inherent jurisdiction to strike out proceedings for being an abuse of process, a proposition which counsel for the defendants accepted. He stated categorically that the proceedings were not frivolous and vexatious nor bound to fail. However, this argument avoids the real issue, namely the contention that the proceedings constitute an abuse of process both because the issues were raised or could and should have been raised in the earlier proceedings which raised similar, if not identical, grounds and because of the conduct of the plaintiffs in the personal insolvency process. Further, the solicitor contended that the court should take the plaintiff’s case at its height and must assume that the facts relied on by the plaintiffs will be provable at trial. Whilst this latter proposition is correct as a matter of principle, when the court moves from examining an application under O. 19, r. 28, to a consideration of whether it should exercise its inherent jurisdiction, the court is entitled to look outside the pleadings and to form a more general view as to whether the facts relied on by the plaintiffs are capable of being sustained. In this regard, the application of the general rule, that the court should assume the facts relied on by the plaintiff, becomes problematic in this case for the reasons discussed below.
29. The first plaintiff swore a relatively short affidavit in response to the defendants’ motion. Most of the material relied on by the plaintiffs’ solicitor in his oral argument was neither referred to nor exhibited in that affidavit. Instead, it was contained in a separate affidavit and set of exhibits sworn by the first plaintiff in support of the plaintiffs’ own motion against the Official Assignee. Although this motion was not opened to the court, I allowed the plaintiffs’ solicitor to refer to it in making his argument and to open the exhibits extensively. There are, nonetheless, three issues which potentially reduce the probative value of this evidence. Firstly, the affidavit in question was sworn on 19th July, 2021, after the plaintiffs had been adjudicated bankrupt and at a time when the first plaintiff technically lacked any *locus standi* in these proceedings. Secondly, although the defendants were put on notice of the plaintiffs’ motion against the Official Assignee, the

affidavit now relied on was sworn in the context of an application against the Official Assignee and not one against the defendants. Consequently, I have difficulty affording any weight to the emphasis placed by the plaintiffs' solicitor on the fact that no reply had been received this affidavit. Thirdly, much of what is averred to in this affidavit and, consequently, what was argued by the solicitor in court, is not related to the pleadings filed by the plaintiffs. Subject to these important provisos, I propose to examine the case made on behalf of the plaintiffs.

30. The first of the two main arguments made by the plaintiffs concerns the interrelationship between the personal insolvency process and these proceedings. The importance of this was twofold as issue was taken by the defendants with the plaintiffs' attempt to dispute a debt in these proceedings which had been acknowledged by them in the personal insolvency process and because of the assurance provided by the plaintiffs in the personal insolvency process that these proceedings would be discontinued. To a very large extent these two issues are discrete. Even if the plaintiffs were to establish an entitlement to dispute a debt in these proceedings which they had acknowledged in the personal insolvency process, the fact that they formally assured the Circuit Court that they would discontinue these proceedings and then failed to do so remains a serious issue. The solicitor emphasised the description of the personal insolvency process as a non-judicial debt resolution process to such an extent that I initially, but wrongly, assumed that this was a statutory description used in the 2012 Act itself. Instead, it seems to derive from the fact that the three principal processes provided by the 2012 Act for the resolution of debt do not involve court applications or require court approval. Notwithstanding this, there is still extensive potential for court involvement in the process, even more so since the 2012 Act was amended in 2015. For present purposes, the most important of these are the possibility that has been part of the statutory scheme since 2012 for a debtor to apply to court for a protective certificate providing an initial period of 70 days for the preparation of a proposal during which creditors cannot take steps to recover the debt or to enforce the security. In 2015, an additional feature under which a debtor may apply to court for confirmation of a personal insolvency arrangement which has been rejected by creditors was introduced by s. 115A. Consequently I do not accept that as a matter of principle that the 2012 Act was intended to establish an extra-judicial process which would be hermetically sealed from any court proceedings in respect of the same debts to the extent that reference can not be made in court to the contents of a personal insolvency application and particularly not where that material has been relied on in an application to court under the 2012 Act. I note that the same conclusion was reached by Haughton J. in the Court of Appeal in the context of the plaintiffs' appeal against their adjudication in bankruptcy. He concluded at para. 57 of his judgment:-

"That is a correct summary of the intent of the legislature insofar as it sets forth strict criteria requiring full and honest disclosure by a debtor as a pre-condition to entry into the PIA process. It cannot have been the intention of the legislature that a debtor minded to successively deceive his or her creditors, the PIP, ISI and the Circuit Court, should be entitled to the benefit of a PC and subsequently, when unsuccessful in the PIA process, to then deny the debt admitted in the statutory

declaration/PFS in the context of bankruptcy proceedings. Such an intention would fly in the face of the express provision in s. 50(3) of the 2012 Act that places a legal obligation on a debtor seeking a PC/PIA to make a full and honest disclosure of their financial affairs.”

31. The second aspect of this argument concerned the role of the Insolvency Service of Ireland (established by the 2012 Act) and the personal insolvency practitioner who acted in the plaintiffs’ application. The plaintiffs’ solicitor contended that the personal insolvency practitioner is an independent person who was not acting on the plaintiffs’ behalf and that the application to court for the protective certificate was made by the ISI and not by the plaintiffs as a result of which the assurances given by the plaintiffs could not be relied on in these proceedings. Some of this argument was difficult to follow but seemed to center on the fact that the assurances were given by the plaintiffs to the ISI and not to the Circuit Court. Of course, as pointed out by the defendants, these assurances were given to the ISI for the purposes of onward communication to the Circuit Court Judge in circumstances where the Judge had already refused a protective certificate with a view to her reconsidering that decision. It is also significant that when the second application for a protective certificate was moved before the Circuit Court the plaintiffs were represented by counsel independently from the ISI. In this context, I might observe that I do not accept the plaintiffs’ characterisation of the Circuit Court Judge as having attached conditions to the grant of a protective certificate beyond the scope of her powers under the 2012 Act. The terms of the order made by the Circuit Court Judge reflect the assurances given to the court on behalf of the plaintiffs in order to secure the grant of that certificate. In circumstances where the same judge had refused the plaintiffs’ application a number of days earlier, it was entirely appropriate for the order to reflect the different circumstances which enabled her to grant the certificate a few days after having previously refused it.
32. Further, even if the personal insolvency practitioner who acted as an intermediary between the plaintiffs and the ISI is not properly characterised as acting on their behalf, there is no doubt that the solicitor who wrote to the ISI was acting as their agent. The solicitor’s letter of 12th December, 2019 opens with the words “*we act on behalf of the above named Patrick McLaughlin and Roseann McLaughlin*”. Further, I note that s. 49 of the 2012 Act deals with the appointment of a personal insolvency practitioner by a debtor to act on their behalf for the purposes of Chapters 3 and 4 of the Act. Apart from the fact that the plaintiffs were represented by solicitor and counsel both before the Circuit Court and the High Court on 13th December, 2019, I have difficulty accepting their presentation of the personal insolvency process as one in which they are almost only peripherally involved.
33. Thirdly, the plaintiff argues that the listing of the defendants’ debt in the personal financial statement was not an admission of liability for that debt, but rather just an identification of it is a claim being made against them. Again, I have some difficulty with that argument. Section 50(1) of the 2012 Act requires the debtor to provide information “*that fully discloses his or her financial affairs to the personal insolvency practitioner*” with

a view to the preparation and completion of a prescribed financial statements. Under s. 50(3), when completing the prescribed financial statement, the debtor "*is under an obligation to make a full and honest disclosure of his or her financial affairs and to ensure that, to the best of his or her knowledge, the prescribed financial statement is true, accurate and complete*". It is difficult to see how the disclosure of a debt as a liability in a prescribed financial statement could be regarded as accurate and complete if the debtor is actively disputing that debt and does not disclose the fact of the dispute. I note that Article 7(e) of the Personal Insolvency Act, 2012 (Written Statement Disclosing all of the Debtors Financial Affairs) Regulations, 2015 (SI 416 of 2015) prescribes the information to be provided by the debtor to the personal insolvency practitioner as including "*any contingent and prospective debts or other liabilities of the debtor*". Counsel for the defendants advised the court that this would usually cover items such as guarantees given by the debtor. However, the distinction between debts and liabilities *simpliciter* and contingent and prospective debts and liabilities does indicate the importance within the personal insolvency process of knowing whether a debt is acknowledged by the debtor.

34. The arguments made by the plaintiffs under these headings are singularly unattractive. No issue is taken by the plaintiffs with the fact that they confirmed to their personal insolvency practitioner that they would discontinue the 2016 proceedings immediately and instructed their solicitor to provide confirmation of that assurance. No issue was taken with the fact that this was done to secure the grant of a protective certificate which had been previously refused in face of a peremptorily fixed hearing date for the bankruptcy petition. The effect of the grant of the protective certificate was to delay both the hearing of this motion and the adjudication in bankruptcy for over a year. The plaintiffs immediately reneged on the assurances they had given and now make technical arguments as to why they should not be bound by either the statutory declarations they made or the assurances they gave in the personal insolvency process. At its height, their argument seems to be that, no matter what they said or did in the personal insolvency process, they have a constitutional right to say the opposite for the purpose of defending themselves in the bankruptcy process and, presumably, for the purpose of prosecuting these proceedings. I note that the plaintiffs have not brought any constitutional challenge to the 2012 Act nor have they joined the Attorney General to any of the proceedings in which they have been involved in order to canvass the contention that acknowledgement of their debts in the processes provided under the 2012 Act unconstitutionally deprives them of the ability to dispute those debts in other court proceedings. The 2012 Act benefits from a presumption of constitutionality and if the plaintiffs wish to contend that its processes operate in an unconstitutional manner then they bear the onus of establishing this in proceedings brought for that purpose. They cannot simply expect this court to accept an asserted unconstitutionality as if the making of the assertion somehow negated the obligation to actually establish the unconstitutionality alleged.
35. The second main strand of the plaintiffs' argument arises from the fact that Lloyds Banking Group to which BOS belongs claimed a tax write-down in respect of losses sustained by their Irish operation (BOSI) of an amount variously claimed to be between 40% and 53%. The plaintiffs argue that this means that only 60% to 47% of the value of

BOSI's loans was transferred to BOS and, consequently, that only 60% (or 47%) of their loan was acquired by BOS and is enforceable by BOS and its successors against them. This is characterised either as a *nemo dat quod non habet* argument (a person cannot transfer ownership of something they do not themselves own) or as a case of unjust enrichment.

36. It is contended not only that this is a new argument which was not determined by the Supreme Court in the 2012 proceedings but that it could not have been part of that determination because it is based on material which was not available to the plaintiffs at the time the 2012 proceedings were instituted. The precise basis on which it is claimed that this argument could not have been made in 2012 is unclear. The plaintiffs complain that BOSI's 2010 accounts either never existed or have not been published. The information on which they rely is taken from notes to BOS's accounts for 2010 which the court was informed have been relied on by a forensic accountant instructed by the plaintiffs to reconstruct BOSI's 2010 accounts. What is exhibited (in the affidavit sworn by the first plaintiff in the motion against the Official Assignee) is a five-page report dated 15th August, 2016 from an accountant instructed by the first plaintiff to which a summarised balance sheet as of 31st December, 2010 was apparently attached. Most of the report deals with the securitisation of BOSI loans *via* special purpose vehicles in 2008 and 2009 and the fact the accountant had been unable to trace the transfer of the notes issued by the securitisation vehicles. As a result, the accountant concludes that the Cross-Border Merger Directive "*may not have been fully complied with*". Thus, the first defendant's affidavit in the motion against the Official Assignee appears to refer to a report from the forensic accountant which is not the one exhibited in that affidavit. At para.13 of his affidavit, he refers to pp. 15 and 16 of the forensic accountant's report dealing with a tax write off of 53% of the impaired loans of BOSI as a result of which he argues that only 47% of the plaintiffs' loan validly transferred from BOSI to BOS. The exhibited letter (which does not run to 15 or 16 pages) does not deal with the tax write down issue which was the subject of the plaintiffs' solicitor's argument to the court. If there is another report from the forensic accountant dealing with the tax write down issue, it has not been exhibited and is not before the court. Further, although the letter from the forensic accountant which has been exhibited is dated August, 2016, the submissions made by the plaintiff's solicitor suggests that the forensic accountant had in fact been instructed sometime earlier. He complained that the forensic accountant's report had been prepared and shared with Ennis in the understanding that Ennis would then enter into talks about the plaintiffs' indebtedness. He complained that Ennis held the report for over ten months and then refused to enter into talks as a result of which the plaintiffs instituted these proceedings in November, 2016. All of this would suggest that the forensic accountant had been instructed and had reported by, at the latest, the end of 2015.
37. Notwithstanding the emphasis placed by the plaintiffs' solicitor on this argument, I have difficulty accepting that it warrants allowing the proceedings to continue for two reasons. Firstly, it seems that the evidence on which the plaintiffs are relying (which is not before the court) is evidence commissioned by them. Even accepting that they were not in

possession of the forensic accountant's report before 2015, it does not follow that the information upon which that report is based was not available to them at the time the 2012 proceedings were before the courts. In other words, the ruling in *Henderson v. Henderson* suggests that a party involved in serious litigation is obliged to take the steps necessary to put all of the relevant arguments and evidence before the court whilst that litigation is in being. The fact that the party subsequently instructs an expert to consider material does not afford that party the entitlement to issue fresh proceedings if the material considered by the expert was available at the time of the earlier proceedings. The plaintiffs' argument did not suggest that the BOS 2010 accounts on which the reconstruction of the BOSI accounts is based were not available to them during the currency of the 2012 proceedings.

38. The second difficulty is that the argument itself appears to be misconceived. Where a financial institution transfers its loan book, whether by way of a merger or sale, it is implicit in that transaction that the recoverable value of the loan book may well be less than its face value. In other words, when a block of loans is taken over from a financial institution, the body which acquires them undertakes the expense of recovering the loans and accepts that some of the loans might not be fully recoverable. Therefore, writing down the value of a loan book for tax purposes does not equate with a waiver of the debts or any portion of the debts of the individual borrowers, rather it is an accounting exercise in which a potential value is placed on an asset which may take many years to realise. It is open to the acquiring body to seek to recover the full value of the loan although, in a commercial sense, it is anticipated that they will not in fact, be able to do so. It is presumably a matter of the UK tax authorities to deal with the tax implications that might arise if in fact the realised value of the BOSI loan book subsequently transpires to be greater than the written down value.
39. The other arguments made by the plaintiffs assumed less importance during the course of the hearing than these two main ones. These included a contention that the plaintiffs had been misled as regards the Latona clause to an extent which amounted to misrepresentation based on Clarke J.'s finding in the Supreme Court that the Latona clause had not formed part of the original agreement between BOSI and the plaintiffs in 2005 rather than having been deliberately excluded from the 2008 agreement. In my view, the plaintiffs are mistaken in their belief that a judgment delivered in 2015 marks a point from which it can be said that they are entitled to re-litigate their indebtedness on the basis of arguments derived from that judgment. In addition, I think the construction the plaintiffs seek to place on this aspect of Clarke J.'s judgment is incorrect. Clarke J. held that although it was envisaged that the loans could be repaid out of the proceeds of sale of Latona and a solicitor's undertaking was provided to that effect, the agreement asserted by the plaintiffs did not form part of the terms of the written agreements between the parties either in 2005 or in 2008. As each loan was a term loan, it was repayable on the expiration of the term and nothing in the agreements restricted BOSI's right to seek repayment after expiration of the term regardless of whether Latona had been sold or whether the proceeds of sale were sufficient to repay the amounts due. Clarke J. pointed out that the plaintiffs had not pleaded that the loan was not due because

Latona had not been sold. However, he proceeded to deal with the issue on the basis of the evidence on the point which had been adduced before the High Court. He concluded, at para. 41 of his judgment:-

“The height of the evidence was, therefore, to the effect that there might have been some sort of vague understanding or acceptance by the parties that some latitude might be given to the McLaughlins in the event that there was difficulty in selling ‘Latona’. However, it must be emphasised that the sort of evidence which would have been needed to establish a legal obligation on the part of the bank to refrain from calling in the loan until ‘Latona’ had been sold would have been altogether different from the evidence presented in this case. Vague assertions would have been a long way short of sufficient. The Court would need to have been satisfied of precise commitments given on behalf of the lender, on the basis of which the Court could assess whether those commitments amounted to an alteration in the legally binding rights and obligations of the parties appearing in the facility letters. Vague assumptions or “understandings” cannot displace the effect of written terms signed up to by the parties. A lot more is required to alter the legal effect of a written contract.”

It seems to me that the case the plaintiffs now seek to make is really just a variation on this theme. Instead of contending that the plaintiffs’ understanding reflects a legal agreement between the parties, it is asserted that the plaintiffs were of that understanding because BOSI had misrepresented the position to them. Apart from the fact that the plaintiffs were legally advised in respect of these loans (*per* Clarke J.’s judgment) and so should have appreciated the legal nature of the formal terms of the loan, this is a case so closely linked to the arguments already made and the evidence already given in the 2012 proceedings that, if it is not *res judicata*, it is certainly caught by the rule in *Henderson v. Henderson*.

40. Other arguments were made about the beneficial ownership of loans and the identity of Ennis, which was not a party to the 2012 proceedings, and the fact that, since the 2016 proceedings were instituted, Ennis has transferred the plaintiffs’ loan to Pepper. I think the arguments about the status of Ennis *viz-a-viz* BOS are ones which are bound to fail. Ennis is a successor in title to BOS’s interest in the plaintiffs’ loans. To hold that the plaintiffs can re-run a case against Ennis, which they have run and lost against BOS, would be to lose sight of all commercial reality. The sale of the loans and the related security to Ennis took place very shortly after the Supreme Court decision in 2015 granting judgment to BOS and confirming the validity of the appointment of the receiver. The sale carried with it the benefit of that judgment. The legal system would become unworkable if the resolution of issues between parties to litigation were not to bind the successors-in-title of those parties when they transfer their interest in the assets the subject of the litigation.
41. Insofar as complaints are made that the correct defendant is now Pepper, I accept the argument made on behalf of the defendant to the effect that this is largely a technical

issue. Substitution orders have already been made by the High Court to allow Pepper execute the judgment obtained in the 2012 proceedings and to replace BOS with Pepper as the petitioner in the bankruptcy proceedings. If these proceedings are not struck out and the plaintiffs were permitted to pursue them, then an appropriate application will have to be made to add or substitute Pepper as the defendant. In addition, I note that the authority on which the plaintiffs rely, namely *Pepper Finance Corporation (Ireland) DAC v. Byron Jenkins* [2018] IEHC 485 deals with the question of whether the owner of a loan who has divested itself of the entire beneficial interest in the loan and its related security can issue proceedings in its sole name against the borrowers for recovery of the debt or possession of the secured property without disclosing in the proceedings its status as trustee on behalf of a third party (see para. 9 of the judgment of Binchy J.). The defendants have not brought these proceedings against the plaintiff and are not seeking through these proceedings either to enforce the loan or to recover the security. Rather, they have been sued by the plaintiffs as a result of which, in my view, the position is materially different, certainly insofar as the defendants' standing to seek to have the proceedings struck out is concerned.

42. Insofar as the plaintiffs argue that their debt is less than that now asserted by the defendants (although, of course, it is not a debt which is claimed in these proceedings), the allegation that the receiver should have collected more rent than he did is simply not pleaded. Whilst the jurisprudence under O.19, r.28 on striking out claims as being frivolous and vexatious or disclosing no reasonable cause of action allows a court to consider whether the pleaded claim could be amended so as to disclose a stateable case, I am not convinced that it would be appropriate to do this in this case. This is for two reasons. Firstly, the plaintiffs' claim is already very extensive with some 88 reliefs being sought in the plenary summons. When an already problematic claim is so obviously over-pleaded it does not seem to me that it would serve the interests of justice to add additional pleas in the hope of salvaging something from the wreckage. If there is any substance to the plaintiffs' claim that the receiver should have conducted the receivership differently (and I make no comment as to whether the claim has substance in circumstances where that issue is not pleaded and there is no evidence adduced on the point in this application) then that is a matter which is open to the plaintiffs to pursue separately in litigation unrelated to the validity of the receivership, the validity and/or effect of the cross border merger and the transfer of their loans and the "*Latona clause*". Secondly and perhaps more significantly, the real issue in this application is not whether the claim is frivolous and vexatious or even unstateable but whether it is *res judicata*, caught by the rule in *Henderson v Henderson* or an abuse of process by reason of the plaintiffs' conduct.
43. The identification of a different alleged flaw in the appointment of the receiver is, in my view, caught by the rule in *Henderson v. Henderson*. The plaintiffs argue that the document in which they allegedly identify an error was one executed in 2014 and, therefore, could not have been considered in the 2012 proceedings. However, in circumstances where the Supreme Court upheld the validity of the appointment of the

receiver in 2012 in the 2015 judgment, in my view any subsequent deed executed by BOS in 2014 cannot undermine that finding.

44. Finally, as the onus is on the plaintiffs to prosecute their proceedings, it is not open to them to rely on alleged delay on the part of the defendants in bringing this motion. For the most part, the defendants' delay argument has focused on the vacation of the *lis pendens* (see further below) in respect of which the onus on the plaintiffs to act expeditiously is heightened. In terms of general delay, there was an interval of thirteen months between the service of the plenary summons and the entry of an appearance on behalf of the first defendant. This was due in part to the fact that Ennis was incorrectly named by the plaintiffs on the plenary summons as it had converted into a DAC very shortly before the proceedings were issued (on 19th September, 2016) and, of course, long before the proceedings were served. After service of the proceedings, an application to substitute the correct Ennis entity into the proceedings was made in June, 2018 and a further application made under the slip rule in July, 2018. An appearance was entered, albeit after some delay, on 22nd July, 2019. This motion then issued in December, 2019 which predated the service of a statement of claim by the plaintiffs. It is difficult to see how defendants can be seriously accused of delay in taking a step in proceedings before they have even received the statement of claim. Any subsequent delay in the prosecution of the motion was due firstly to the plaintiffs' protective certificate which meant that the initial hearing date in 2020 had to be vacated and subsequently delays in the allocation of hearing dates resulting from the restrictions imposed on public health grounds due to the Covid-19 pandemic in 2020. In my view, there was no material today on the defendants' part and any argument in this respect is bound to fail.

Conclusions on the Strikeout Motion

45. It should be apparent from my analysis of the case made by the plaintiffs that I am satisfied that the defendants' application to strike out the proceedings should be allowed. I am satisfied that this relief should be granted on the basis of both main arguments advanced by the defendants. I note that the defendants' motion was issued prior to the events which occurred in the personal insolvency process in December, 2019 and, thus, was originally based on the contention that the issues raised in the case were either ones which had been argued and determined in the 2012 proceedings or were ones relating to the same subject matter and so closely connected to the original case as to be caught by the rule in *Henderson v. Henderson*. I am satisfied that this is the case. A detailed examination of the plaintiffs' pleadings in light of the judgments delivered by the High Court and the Supreme Court in the 2012 proceedings illustrates the extent to which the same issues are being revisited (including the validity of the appointment of the receiver, the "Latona clause", the validity of the cross-border merger and whether the plaintiffs' loans were validly transferred as part of that merger). Insofar as the arguments now made are asserted to constitute different grounds by reason of being based on documentation post-dating the institution of the 2012 proceedings, the documentation relied on is mainly material which, although generated on behalf of the plaintiffs in 2015 or 2016, could have been requested and prepared on their behalf prior to that. The failure to raise these issues when challenging their indebtedness and the transfer of that

indebtedness to BOS in the earlier proceedings comes within the rule in *Henderson v. Henderson*.

46. To a certain extent, the findings made in the preceding paragraph are overshadowed by events since the issuing of the motion. In my view, it is a very serious matter for the plaintiffs to make a statutory declaration confirming a prescribed statement of their financial affairs in which the debt the subject matter of these proceedings is acknowledged and then to turn around and attempt to deny that debt for the purposes of these proceedings. That is, as a matter of principle, simply unacceptable. It is no answer to say that they were required to make that statement in the personal insolvency process because they were not required to enter into the personal insolvency process. That was a choice which they made, and they made it fully aware of the statutory requirements of that process. Once they choose to avail of the personal insolvency process, then they assumed the obligation of making a truthful statement of their financial affairs in which they acknowledged their assets and their liabilities. If they wished to continue to dispute their liability for the loans in issue in these proceedings, then they should not have entered into the personal insolvency process under the 2012 Act.
47. It is clear from the documents which have been exhibited that the plaintiffs were keenly aware of this fact. They were initially refused a protective certificate because they were disputing this debt and it was only subsequent to consultations with their personal insolvency practitioner and their solicitor that they changed their stance and offered an assurance within the personal insolvency process that the 2016 proceedings would be withdrawn. That assurance was given to the Circuit Court in the expectation that the Circuit Court would accept it and act on foot of it - which is precisely what happened. Whatever about the question of whether the plaintiffs should be allowed to accept a debt in the personal insolvency process and dispute the same debt in other proceedings (and I agree with the views of Judge Haughton on this issue), the actions of the plaintiffs are in fact more reprehensible. They gave an assurance to the Circuit Court that these proceedings would be withdrawn and within weeks they were refusing to honour the assurance they had given.
48. In the meantime, the plaintiffs had, and retained the benefit of, a protective certificate granted on the basis of that assurance. The existence of the protective certificate impeded the progress of both the bankruptcy proceedings and the hearing of this motion. Although they did not achieve a resolution of their indebtedness through the personal insolvency process, they cannot now turn around and say that the assurance which they gave for the purposes of securing a Circuit Court order is one of which the High Court cannot take cognisance in these proceedings. I regard the behaviour of the plaintiffs as completely reprehensible in this regard. In addition to striking these proceedings for *res judicata/Henderson v. Henderson* type reasons, I am also striking them as an abuse of process due to the plaintiffs' conduct.

Lis Pendens

49. The final aspect of this case is the defendants' application under s. 123 of the Land and Conveyancing Law Reform Act, 2009 to vacate the *lis pendens* which has been entered in

the Central Office. In circumstances where I am striking out the proceedings for the reasons expressed in the previous section of this judgment, it should follow that a *lis pendens*, the registration of which was based on the existence of these proceedings, should also be vacated. In principle, that should be sufficient to deal with the matter. However, the application to vacate the *lis pendens* is not dependant on my having decided that the proceedings should be struck out, so I propose to address the arguments made in respect of the plaintiffs' delay. I might note that have some slight hesitation in doing so in circumstances where the *lis pendens* itself has not been exhibited in any of the affidavits grounding the motion and thus is not before the court. I would normally regard this as an essential proof in an application under s. 123 of the 2009 Act.

50. Section 123 of the 2009 Act allows for the vacation of a *lis pendens* where there has been an unreasonable delay in prosecuting the action to which it relates. The delay to be considered does not take account of pre-commencement delay since it is a delay in the prosecution of an extant action rather than in the bringing of proceedings and, thus, is measured from the date on which the proceedings were instituted rather than the date on which the cause of action allegedly arose. This does not have a material effect in this case. The plaintiffs instituted proceedings in November, 2016 which were not served until June, 2018. The *lis pendens* was registered immediately after the institution of the proceedings. A statement of claim was not served until November 2020 over two years after the plenary summons was served and four years after the proceedings were instituted and the *lis pendens* registered. I have absolutely no hesitation in finding that both of these periods of delay, individually and cumulatively, amount to unreasonable delay. I note that Haughton J. regarded a litigant who had registered a *lis pendens* to be under an obligation to prosecute the proceedings with "*expedition and vigour*" (see *Togher Management Company Ltd. v Coolnaleen Developments Ltd (In Receivership)* [2014] IEHC 596). Barniville J. regarded a period of six months' delay between the issuing and service of a plenary summons with a further three months before service of a statement of claim as constituting unreasonable delay in *Hurley Property ICAV v Charleen Ltd.* [2018] IEHC 611. The total delay in this case is a period of four years but, in my view, even the delay between issuing and serving the plenary summons would be more than sufficient to justify the making of an order under s. 123(b)(ii) vacating the *lis pendens*.
51. The plaintiffs seem to make a number of arguments as to why the *lis pendens* should not be vacated, either because the existence of a *lis pendens* had not prevented the sale of some of the properties or because the defendants have delayed in bringing an application under s. 123. The former point is irrelevant as s. 123 does not import a *Primor* type balancing exercise where the potential prejudice to each party if the *lis pendens* is or is not vacated is assessed and a conclusion reached as to where the balance of justice might lie. The sub-section requires the court to consider only whether the plaintiffs, being the parties who have registered the *lis pendens*, are guilty of unreasonable delay. The court can look to any explanation offered by the plaintiffs for their delay as part of the assessment of whether it is unreasonable. No such explanation was proffered in this case so the only thing the court can look to is the length of the delay. Strictly speaking the effect of the delay on the defendants is not a matter coming within the scope of s. 123

save perhaps insofar as it might go to the reasonableness of the plaintiffs' actions. As it happens, the second defendant adduced evidence that the potential sale of No.12 Hawthorn Manor was frustrated by the conduct of the plaintiffs, including their pasting a notice reading "*lis pendens*" over the "*For Sale*" sign outside that property. Therefore, if prejudice were a factor, the only evidence of prejudice before the court weighs in favour of allowing the defendants' application.

52. The latter point arises in circumstances where the defendant contends the sale of No.12 Hawthorn Manor agreed in 2017 could not proceed due to the *lis pendens* but did not bring the motion until 2019. Of course, there can be a lapse of time before an agreement for the sale of a property and the completion of that sale, especially where the property in question is one under construction. However, as I have observed above the question of delay in the context of s. 123 is not one which requires the carrying out of a balance of justice exercise as between the parties. The statutory obligation is on the plaintiff who has registered the *lis pendens* to prosecute the action thereafter without unreasonable delay. This heightened obligation arises by virtue of the fact that the plaintiff has been able to register a *lis pendens*, almost as of right, once proceedings have been issued. The conduct of the defendant is largely immaterial unless it is such as to have impeded the plaintiff in the prosecution of the proceedings in which case the plaintiff's delay might no longer be characterised as "*unreasonable*".
53. In conclusion, if it is necessary to make an order under s. 123 after the proceedings have been struck out, I will make such an order on the basis of the plaintiffs' unreasonable delay. In light of the views which I have already expressed regarding the conduct of the plaintiffs in continuing to prosecute these proceedings despite the assurances given to the Circuit Court that they would discontinue them, I am also prepared to make that order on the grounds that the proceedings are not being prosecuted *bona fide*.
54. Finally, I noted that the outset of this judgment that I would deal with the plaintiffs' motion for judgment in default of defence at the conclusion of my consideration of the application to strike out their proceedings. As I have acceded to the defendants' motion in that regard, it follows that the plaintiffs' motion should also be struck out and I will do so with no further order.