APPROVED **[2022] IEHC 527**

THE HIGH COURT

2020 No. 300 SP

BETWEEN

JANE ROBINSON
EAMONN ROBINSON
ROBINSON FAMILY INVESTMENTS LIMITED

PLAINTIFFS

AND

BALLINLAW LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 October 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to vacate the registration of a *lis pendens*. The application is made pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009. The procedural history is convoluted: there was an initial delay in the service of the underlying proceedings, and this necessitated an application to renew the plenary summons. Thereafter, the dispute between the parties was referred to arbitration and an order made staying the court proceedings pending the determination of the arbitral proceedings.

2. The application to vacate the registration of the *lis pendens* presents a number of novel points of law which have not yet been the subject of a written judgment. The first issue is whether any application to vacate the registration of the *lis pendens* must await the outcome of the arbitral proceedings. The second issue is whether the earlier order renewing the plenary summons gives rise to an estoppel by way of *res judicata*. The third issue is whether the (alleged) delay in prosecuting the arbitral proceedings is cognisable for the purposes of an application to vacate the registration of a *lis pendens*.

STATUTORY FRAMEWORK

3. Section 123 of the Land and Conveyancing Law Reform Act 2009 provides that the court may vacate a *lis pendens* where it is satisfied that there has been an unreasonable delay in prosecuting the action or that the action is not being prosecuted *bona fide*.

4. An application to vacate may be brought by any person affected by the *lis pendens*, and must be made on notice to the person at whose instance the *lis pendens* had been registered.

5. The considerations to be taken into account on an application to vacate the registration of a *lis pendens* have been summarised as follows by the Court of Appeal in *Carthy v. Harrington* [2018] IECA 321 (at paragraphs 28 to 31):

> "The court is entitled to make an order to vacate a *lis pendens* at the behest of a '*person affected*' by, it *inter alia*, '(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action.'
>
> The considerations as to what constitutes '*unreasonable delay*' in this statutory context are, accordingly, quite distinct from the principles and the complex jurisprudence which has developed in regard to litigation delay where a party to

> litigation can seek to stay or dismiss proceedings on grounds of delay and for want of prosecution.
>
> It must be emphasised that the vacating of a lis pendens pursuant to s. 123 of the 2009 Act does not affect the pleadings in this suit and they continue in being as between the parties thereto. […]
>
> It behoves a litigant who asserts a beneficial interest in or over encumbered property and who institutes proceedings in relation to same to prosecute such a claim with reasonable expedition, particularly in circumstances where the registered legal owners of the property are substantially indebted and where the rights and interests of third parties including a chargeholder who has validly appointed a receiver stand to be adversely impacted by delays in litigation."

6. The principles governing the exercise of the statutory discretion have been elaborated upon by the High Court (Barniville J.) in *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611 (at paragraphs 81 and 82) as follows:

> "Having included a new jurisdiction to vacate a *lis pendens* (in the case of '*unreasonable delay*' in the prosecution of the action) it is clear that the Oireachtas intended to impose an obligation on a litigant who has registered a *lis pendens* to prosecute the proceedings expeditiously. 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 I.R. 459 ('*Primor*'). In my view, therefore, the consideration as to whether a person who has registered a *lis pendens* has been responsible for an '*unreasonable delay*' in the prosecution of the proceedings for the purposes of s. 123(b)(ii) of the 2009 Act does not require the sort of assessment which a court must undertake in deciding whether to dismiss proceedings in accordance with the test in *Primor* which requires not only a consideration as to whether the delay in the prosecution of proceedings has been inordinate and inexcusable but also, critically, involves the court undertaking a complex assessment of the balance of justice, including issues such as prejudice to the defendant and Constitutional principles of basic fairness of procedures. I do not believe that such considerations arise in the context of the court's assessment as to whether there has been '*unreasonable delay*' in the

> prosecution of an action for the purpose of s. 123(b)(ii) of the 2009 Act. Rather, that section was intended to counterbalance the statutory entitlement conferred on a person in certain circumstances to register as of right a *lis pendens* and to impose a corresponding obligation on that person to expeditiously prosecute the proceedings in respect of which the *lis pendens* was registered. While the purpose of a registration of a *lis pendens* is, as Clarke J. explained in *Morrissey*, to bring to the attention of third parties who might be interested in acquiring the particular property or a charge over it the fact that there are proceedings in existence in relation to the property which might affect their interests, the registration of a *lis pendens* can adversely affect or hinder the ability of a person to sell his or her property or otherwise affect that person's ability to deal with the property. […]
>
> It seems to me, correctly construed, the provisions of s.123(b)(ii) of the 2009 Act impose a particular obligation on a person who has commenced proceedings and registered a *lis pendens* to move with greater expedition than would normally be required or than is required under the Rules of Superior Courts. Such a person would, in my view, be required to act with particular '*expedition and vigour*' (to adopt the words used by Haughton J. [in] *Togher*) in the prosecution of the proceedings."

7. On the facts of the case before him, Barniville J. held that a delay of some six months between the issuance of the proceedings and the service of same constituted an "*unreasonable delay*" in prosecuting the proceedings for the purposes of the statutory test. The court went on to find that a further delay of some three months in the delivery of the statement of claim compounded and reinforced the initial delay, and rendered still more unreasonable the delay in prosecuting the case.

8. The rationale for the imposition of an enhanced obligation for expedition on a plaintiff who has registered a *lis pendens* has been summarised as follows by the High Court (Butler J.) in *Ellis v. Boley View Owners Management CLG* [2022] IEHC 103. Having expressed her agreement with the judgments in *Hurley Property ICAV v. Charleen Ltd* (above) and *Togher Management*

Company Ltd v. Coolnaleen Developments Ltd [2014] IEHC 596, Butler J. continued as follows (at paragraph 48):

> "[…] 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."

9. On the facts of the case before Butler J., there had been an acknowledged ongoing delay in serving the plenary summons. The motion to vacate the *lis pendens* had been heard some sixteen months after the proceedings were issued, yet service had still not been effected at the time of the hearing. This delay was held to be unreasonable.

10. In *McLaughlin v. Ennis Property Finance Ltd* [2022] IEHC 286, the High Court (Butler J.) held that a delay of two years in the service of a plenary summons would be more than sufficient to justify the making of an order vacating a *lis pendens*. In *Boyle v. Ulster Bank Ireland DAC* [2022] IEHC 332, the High Court (Dignam J.) held that a delay of over four years in taking any steps post-service of the proceedings was unreasonable.

11. The most recent authoritative statement of the principles governing an application to vacate the registration of a *lis pendens* is provided by the judgment of the High Court (Butler J.) in *Fay v. Promontoria (Oyster) DAC* [2022] IEHC 483. The following three aspects of that judgment are of immediate relevance to the present proceedings, having regard to the arguments advanced on behalf of the party seeking to maintain the *lis pendens*. First, a

litigant, who has registered a *lis pendens*, is under an obligation to act expeditiously which goes beyond the general obligation on litigants to comply with the time-limits set down in the Rules of the Superior Courts. Secondly, the principles governing an application to dismiss proceedings on the grounds of inordinate and inexcusable delay are different from those governing an application to vacate the registration of a *lis pendens*. Thirdly, the judgment addresses the question of whether a party, who has registered a *lis pendens*, is entitled to rely, as justification for an allegedly unreasonable delay, on the fact that some or all of the delay in the prosecution of the proceedings is referable to time spent in an attempt to compromise the claim. I will return to this last point at paragraph 59 below.

PROCEDURAL HISTORY

Three sets of proceedings

12. Before summarising the procedural history, it may be helpful to explain that reference will be made throughout this judgment to three related sets of proceedings, as follows. The first in time are proceedings brought by Ballinlaw Ltd. These proceedings are entitled "*Ballinlaw Ltd v. Jane Robinson and Robinson Family Investments Ltd*" and bear the High Court record number 2018 No. 7 P. The reliefs sought in the plenary summons include, relevantly, a declaration that Ballinlaw Ltd is the legal and beneficial owner of the lands comprised within Folio 18671 of the Register County Dublin ("***the Property***").

13. The second set of proceedings are the within proceedings. The plaintiffs are the registered owners of the Property. The principal relief sought is an order vacating the *lis pendens* registered in respect of the Property. The within proceedings have been taken by way of special summons. This procedural route

appears to be broadly consistent with the approach endorsed by the High Court (Humphreys J.) in *Harrington v. O'Brien* [2017] IEHC 506. At all events, no objection has been raised to the bringing of the application to vacate by way of parallel proceedings, as opposed to by way of a motion within the first set of proceedings.

14. The third set of proceedings are the arbitral proceedings. The underlying dispute between the parties—and the claim to a beneficial interest in the Property—arises out of a building agreement which contains an arbitration clause. The underlying dispute has been referred to arbitration. It appears, however, that the arbitration has stalled as a result of the failure of the parties to agree the terms of appointment of the arbitrator.

15. In ease of exposition, the first set of proceedings will be referred to in this judgment as "***the proprietary action***" and the within proceedings will be referred to as "***the application to vacate***". The arbitration will be referred to as "***the arbitral proceedings***". The parties will be described by reference to their status in the proprietary action, i.e. Ballinlaw Ltd will be referred to as "***the claimant***" and the Robinson interests as "***the respondents***".

Chronology of events

16. The chronology commences with the institution of the proprietary action. Those proceedings were issued out of the Central Office of the High Court on 2 January 2018. An application was made to register a *lis pendens* in respect of the Property. On 10 January 2018, the particulars were duly entered in the register of *lis pendens* maintained in the Central Office of the High Court. This register is maintained in accordance with Section 121 of the Land and Conveyancing Law Reform Act 2009. The *lis pendens* was subsequently registered as a burden

on the relevant folio at the Land Registry on 1 May 2018 in accordance with the provisions of Section 69 of the Registration of Title Act 1964.

17. The practical effect of these procedural steps is that any potential purchaser of the Property is on constructive notice of the fact that there are legal proceedings in being in respect of the ownership of the lands. See, generally, *Fay v. Promontoria (Oyster) DAC* [2022] IEHC 483 (at paragraphs 13 to 18).

18. The plenary summons in the proprietary action was not served within the twelve-month period prescribed under Order 8 of the Rules of the Superior Courts. Accordingly, the plenary summons lapsed on 2 January 2019. It should be explained that the summons did not become a "*nullity*" after that date, but it would not be in force for the purpose of service after that date unless renewed by leave of the court: see, by analogy, *Baulk v. Irish National Insurance Company Ltd* [1969] I.R. 66 at 71.

19. By letter dated 25 September 2020, the respondents' solicitors wrote to the claimant's solicitors and requested that the registration of the *lis pendens* be vacated. The letter cited the fact that the plenary summons had not been served as evidence that the claimant had delayed unreasonably in progressing the proprietary action. The letter stated that, unless confirmation was received that the registration of the *lis pendens* would be vacated, an application would be brought pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009.

20. It does not appear that any substantive response was ever made to the letter of 25 September 2020. At all events, the respondents instituted an application to vacate the registration of the *lis pendens* by way of these special summons proceedings on 24 November 2020.

21. A number of months later, the claimant made an *ex parte* application on 22 February 2021 to renew the plenary summons in the proprietary action. The High Court (O'Connor J.) made an order extending the time for leave to renew the plenary summons. The "*special circumstances*" justifying the extension of time are stated in the order as follows: "*the parties have been engaged in talks which have led to the deferral of the service of the Plenary Summons*".

22. Order 8, rule 2 of the Rules of the Superior Courts provides that in any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty to serve notice of motion to set aside the renewal. No such application was brought in the present case. Instead, the respondents brought an application pursuant to the Arbitration Act 2010 to refer the underlying dispute between the parties to arbitration. The underlying dispute arises out of a building agreement providing for the construction of a number of dwelling houses on the Property. On 18 October 2021, the High Court (Allen J.) made an order staying the proceedings and referring the dispute to arbitration. The order recites that it had been made with the consent of the parties. A named senior counsel is identified in the order as the intended arbitrator.

23. The intended arbitrator had written to the parties on 27 October 2021 setting out the terms of his appointment, including his proposed fees. In the event, the claimant failed to confirm its agreement to the terms of appointment. The intended arbitrator, by email dated 17 December 2021, stated that he could not act in the circumstances.

24. There is a controversy on the affidavits as to what has occurred in relation to the arbitral proceedings since December 2021. One of the directors of the claimant company, Siobhan O'Donovan, has stated on affidavit that she had met with

representatives of the respondents and an intermediary on numerous occasions in the intervening period. In reply, Eamon Robinson has stated on affidavit that no such meetings occurred.

25. Had it been necessary to resolve this factual dispute for the purposes of determining the application to vacate the registration of the *lis pendens*, I had intended to permit cross-examination of the two deponents. Order 38 of the Rules of the Superior Courts expressly contemplates that, where a factual controversy arises in proceedings by way of special summons, the court may direct that there be cross-examination and that evidence in respect of the disputed facts may be given either orally or by affidavit or partly orally and partly by affidavit. A full day had been set aside for the hearing of the application to vacate on 4 October 2022 so as to allow sufficient time for any such cross-examination. However, one of the deponents failed to attend and any cross-examination had to be deferred. As explained presently, it has not been necessary to resolve this factual dispute in order to dispose of these proceedings.

Key dates in chronology

26. The key dates in the chronology are summarised in tabular form below:

2 January 2018	Plenary Summons issued in proprietary action
10 January 2018	*Lis pendens* registered in Central Office, High Court
1 May 2018	*Lis pendens* registered as burden on folio
24 November 2020	Application to vacate *lis pendens* instituted
22 February 2021	Plenary summons in proprietary action renewed
18 October 2021	Order made referring underlying dispute to arbitration
17 December 2021	Parties fail to agree arbitrator's terms of appointment
4 October 2022	Hearing of application to vacate *lis pendens*

DISCUSSION AND DECISION

WHETHER APPLICATION MUST AWAIT ARBITRAL PROCEEDINGS

27. The proprietary action before the High Court has been stayed by order made pursuant to the Arbitration Act 2010. More specifically, the order was made pursuant to Article 8 of the Model Law which has been given force of law in the State, and applied to domestic arbitrations, by Section 6 of the Arbitration Act 2010. Article 8 of the Model Law provides as follows:

> "(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

28. The Arbitration Act 2010 does not expressly address the status of court proceedings, which have been taken in breach of an arbitration agreement, once the dispute has been referred to arbitration. In principle, it would be open to the court, in a case where the arbitration agreement relates to all of the matters in dispute, to direct that the court proceedings be discontinued. (See, by analogy, the provisions of Section 32 of the Arbitration Act 2010 which address the contingency of an arbitration agreement being entered into *subsequent* to the commencement of the court proceedings).

29. On the facts of the present case, the High Court made an order staying the proceedings rather than an order striking out the proceedings. The proceedings thus remain in being, albeit in a state of suspended animation. The stay on the

proceedings only applies to the extent necessary to give effect to the arbitration agreement. The High Court retains jurisdiction to make further orders in the proceedings, such as, relevantly, an order vacating the registration of the *lis pendens*. The High Court would also have jurisdiction to resume seisin over the substance of the underlying dispute in the event, for example, that the arbitration agreement became inoperative.

30. In the present case, the claimant has raised a jurisdictional objection to the effect that an application to vacate the registration of the *lis pendens* cannot be entertained until the arbitral proceedings have been determined. This jurisdictional objection is advanced on a number of related grounds as follows. First, it is said that the respondents, by dint of their having sought a reference to arbitration pursuant to the Arbitration Act 2010, must be taken as having intended to refer *all* disputes between the parties to arbitration. This includes, or so it is said, the controversy as to whether the *lis pendens* should be vacated. It is suggested that had the claimant known that the respondents would be pursuing an application to vacate the registration of the *lis pendens*, then the claimant would have resisted the reference to arbitration on the basis that there was not going to be resolution of the totality of the issues between the parties. It is said to follow, therefore, that the respondents are now estopped from pursuing the application to vacate.

31. Secondly, it is submitted that the interpretation of an arbitration agreement should start from the presumption that the parties are likely to have intended that any dispute arising out of the relationship which they entered into would be decided by the same body or tribunal. The presumption being that the parties

intended that arbitration would represent a "*one stop*" method of adjudication for their disputes.

32. The practical implications of this presumption for the present case are summarised as follows in the claimant's written legal submissions:

> "There has been nothing to indicate that the dispute giving rise to the Lis Pendens sought to be removed on this application is excluded from the Arbitration. The presumption is therefore that it forms part of the Arbitration and the parties intended this as the methodology to resolve their dispute and as it forms part of that dispute the Court should not seek to interfere with it pending the completion of the Arbitration."

33. Thirdly, reliance is placed on the judgment in *Kelly v. Lennon* [2009] IEHC 320, [2009] 3 I.R. 794 as providing useful guidance as to how parallel arbitral proceedings and court proceedings might be sequenced.

34. With respect, none of these submissions is well founded. Rather, they are all predicated on a misunderstanding of the limits of an arbitrator's jurisdiction. The decision on whether or not to vacate the registration of a *lis pendens* under Part 12 of the Land and Conveyancing Law Reform Act 2009 is exclusively a matter for the court. This follows from the literal wording of the legislative provisions and, more generally, from the purpose that they serve. The ability to vacate the registration of a *lis pendens* represents an important safeguard against an abuse of the court process. It ensures that a litigant cannot frustrate the sale of lands for a prolonged period of time by failing to prosecute a proprietary action expeditiously. Where there has been unreasonable delay, it is open to a person affected by a *lis pendens* to apply to have the registration vacated. The decision on whether or not to accede to such an application is for the court alone. It is a matter for the judicial power to regulate the court process.

35. It is incorrect, therefore, to suggest that a decision on whether or not to vacate the registration of the *lis pendens* could ever form any part of the dispute referred to arbitration. An arbitrator simply has no role in this regard.

36. The reliance which the claimant seeks to place on the case law on the interpretation of arbitration agreements is misplaced. The presumption in favour of a "*one stop*" method of adjudication actually tells against the claimant's argument. Here, the intention of the parties, as evidenced by the arbitration clause, is that all disputes arising out of the building agreement would be referred to arbitration. The parties cannot be said, therefore, to have intended that there would ever be court proceedings, still less to have intended that a *lis pendens* might be registered in such court proceedings. The *lis pendens* only arose because court proceedings were taken by the claimant *in defiance of* the arbitration agreement.

37. Whereas the existence of an arbitration agreement does not preclude the possibility of a party instituting court proceedings in defiance of the arbitration agreement, such court proceedings are liable to be stayed or struck out. The parties cannot be said to have intended that any decision on whether or not to vacate a *lis pendens*, which has been registered in the context of uncontemplated court proceedings, be determined in the context of arbitral proceedings.

38. For completeness, the claimant's argument is not advanced by reference to *Kelly v. Lennon* [2009] IEHC 320, [2009] 3 I.R. 794. On the facts of that case, the underlying dispute required the resolution of a number of issues, only some of which came within the arbitration agreement. The other issues could only be determined in court proceedings. One of the questions addressed in the judgment was whether the hearing of the court proceedings should be deferred pending the

outcome of the arbitral proceedings. The High Court (Clarke J.) summarised the general principles governing the court's discretion in such circumstances as follows:

> "In my view, in cases such as this, where some but not all of the issues necessary to determine a cause of action arising in proceedings are the subject of a valid and subsisting arbitration clause, the court has a discretion as to the proper course of action to adopt which should be exercised in the light of all the circumstances of the case with a view to ensuring, insofar as possible, a speedy resolution of all of the issues which arise, and a final determination of the cause of action concerned, while at the same time ensuring that the court does not trespass on determining any issue which has been properly made the subject of an arbitration agreement between the parties.
>
> I should emphasise that the discretion of which I speak does not, it seems to me, extend to the court taking over a jurisdiction to determine any issue properly referred to arbitration. Rather, the discretion is as to how the various elements of the case (being those properly within the jurisdiction of the court and those validly referred to arbitration) should be sequenced so as to maximise the likelihood of a speedy and just resolution of all issues between the parties."

39. Clarke J. went on then to apply these general principles to the particular circumstances of the case before him, and decided that it would be preferable for the arbitral proceedings to be determined first. This would ensure that the trial judge hearing the court proceedings would have the answer to the arbitrator's consideration of the issues before him. This sequence would allow the trial judge to have a "*full picture of all of the legal issues*" and to reach a single concluded determination.

40. The circumstances of the present case are very different. The court's consideration of the issues arising on the application to vacate the registration of the *lis pendens* will not be assisted by knowing the outcome of the underlying dispute in the arbitral proceedings. The narrow question before the court under

Section 123 of the Land and Conveyancing Law Reform Act 2009 is whether there has been unreasonable delay. The answer to this question is unaffected by the merits of the underlying claim: a claimant who delays unreasonably in prosecuting a proprietary action is at risk of having the registration of a *lis pendens* vacated irrespective of the strength of their case.

41. There would be no practical benefit, therefore, in deferring consideration of the application to vacate until such time as the arbitral proceedings are determined. Indeed, far from conferring a practical benefit, a deferral would have negative consequences. The purpose of the legislative provisions is to guard against unreasonable delay. This purpose is achieved by allowing for a form of interlocutory application whereby an affected person can apply, in a summary manner, to have a *lis pendens* vacated. It would defeat this purpose if the determination of the interlocutory application were to be deferred. The moving party would, in effect, have to endure *further* delay before their complaint as to unreasonable delay would be heard and determined. On the facts of the present case, for example, the respondents complain that a period of delay which would justify the vacation of the registration of the *lis pendens* had accrued as long ago as January 2019. It would be perverse were the respondents to have to wait a number of years before having this complaint adjudicated upon.

RENEWAL OF SUMMONS AND RES JUDICATA

42. For the reasons explained under the previous heading, I have concluded that—notwithstanding that the dispute under the building agreement has been referred to arbitration—this court retains jurisdiction to determine the application to vacate the registration of the *lis pendens*.

43. The claimant seeks to resist this application on the basis that the issue of whether there has been "*unreasonable delay*" in the period between the institution of the proprietary action and the application to renew the plenary summons has been conclusively determined. Specifically, it is said that the "*same issue*" has already been determined by the High Court (O'Connor J.) in granting leave to renew the plenary summons. The argument is summarised as follows in the claimant's written legal submissions:

> "The substance of the issue between the parties on the within application is whether or not there has been an unreasonable delay in the prosecution of the Ballinlaw proceedings sufficient to justify vacating the Lis Pendens. This same issue has already been determined in the context of the Ballinlaw proceedings for the period between 2 January 2018 and 22 February 2021 by Mr. Justice O'Connor in respect of the Application to renew the Summons."

44. It is further submitted that both the substance and the issue in each instance in respect of the period of renewal are the same and, as such, this court should not disturb or supplant the decision made on the application for leave to renew the plenary summons. The submission continues to the effect that the issue of unreasonable delay is now *res judicata* in circumstances where the respondents did not avail of their entitlement under Order 8, rule 2 of the Rules of the Superior Courts to apply to have the renewal set aside.

45. To assist the reader in understanding the discussion which follows, it is necessary to pause briefly to consider what the doctrine of *res judicata* entails. The term *res judicata* is often used as an umbrella term, embracing a number of related principles all of which seek to advance the public interest in the finality of litigation. The strictest form of *res judicata* is cause of action estoppel, whereby a party is precluded from pursuing a particular cause of action in consequence of a final judgment in earlier proceedings. The next form of *res judicata* is issue

estoppel, whereby a party will, generally, be precluded from relitigating an issue of fact or law which has previously been determined against them in earlier proceedings. The determination of that issue must have been necessary to the outcome of the earlier proceedings, i.e. the finding on the issue must have been fundamental rather than merely collateral or incidental.

46. There is a third species of *res judicata*, whereby a party will, generally, be precluded from litigating an issue in a second set of proceedings if that party should have—but failed—to raise the issue in an earlier set of proceedings. This principle is described as the rule in *Henderson v. Henderson*, but recent case law confirms that it too is grounded in the principle of *res judicata* (*Arklow Holidays Ltd v. An Bord Pleanála* [2011] IESC 29, [2012] 2 I.R. 99 (at paragraphs 46 and 57)).

47. To succeed in its arguments, therefore, the claimant would need to establish that the same issue which arises on the application to vacate the registration of the *lis pendens* has previously been determined as part of the earlier application to renew the plenary summons. In truth, the issues which fall for determination under Section 123 of the Land and Conveyancing Law Reform Act 2009 and under Order 8 of the Rules of the Superior Courts, respectively, are very different. As appears from the case law summarised at paragraphs 3 to 11 above, a litigant who has registered a *lis pendens* is under an obligation to prosecute their proceedings expeditiously. This is an obligation over and above the obligation which already exists under the Rules of the Superior Courts to comply with the time-limits prescribed for the delivery of pleadings and for the taking of steps in the proceedings. Relevantly, a party who has served a plenary summons within the twelve months allowed under the Rules of the Superior

Courts may nonetheless be held to have delayed unreasonably for the purposes of Section 123 of the Act. The High Court (Barniville J.) in *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611 held that a failure to serve a plenary summons within six months, and a failure to deliver a statement of claim within three months, both entailed unreasonable delay in the circumstances of that case.

48. The case law also confirms that the statutory test is different to that which governs an application to dismiss proceedings on the grounds of inordinate and inexcusable delay in accordance with the principles outlined by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Relevantly, a court determining an application to vacate is not required to undertake a balance of justice assessment.

49. By contrast, a court determining an application for an extension of time for leave to renew a plenary summons must consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused (*Murphy v. Health Service Executive* [2021] IECA 3 at paragraphs 69 to 78).

50. It follows that the issue to be determined by the court in February 2021 in the context of the *ex parte* application for leave to renew the plenary summons is not the same as that presented by the application to vacate. In particular, the threshold to be met in the application to vacate is more exacting. The type of delay which might be tolerated on an application to renew a plenary summons is of a different magnitude to that which would be acceptable on an application to vacate. The range of matters to be considered is also narrower in an application to vacate.

51. It cannot be said, therefore, that the outcome of an application to renew a plenary summons is dispositive of a subsequent application to vacate the registration of a *lis pendens*. Indeed, counsel for the claimant, very properly, conceded that it would, in principle, be open to a judge to decide, on a given set of facts, that a renewal of a plenary summons was justified while at the same time deciding that the threshold for vacating the registration of a *lis pendens* had been met. This (unavoidable) concession serves to highlight that the issues arising on the two types of application are not the same and is fatal to the argument that the doctrine of *res judicata* applies.

52. For completeness, I should record that both sides drew my attention to the judgment of the High Court (Gilligan J.) in *ACC Loan Management Ltd v. Stephens* [2015] IEHC 717. One of the issues which arose for determination in that case had been whether a claim for specific performance was defeated by delay, i.e. the doctrine of laches. This defence was predicated, in part, on a delay in serving the plenary summons. The plenary summons had lapsed without having been served and an application to renew the summons was not made until some four years after the proceedings had first been instituted. The application for leave to renew was, by direction of the court, heard *inter partes* and the High Court (Laffoy J.) delivered a written judgment granting leave to renew: *ACC Loan Management Ltd v. Stephens* [2013] IEHC 264.

53. At the subsequent trial of the action, Gilligan J. held that the issue of whether there was good reason for the period of delay prior to the renewal of the summons was *res judicata*. More specifically, Gilligan J. stated that the court could not look behind the earlier judgment of Laffoy J. by re-examining the same issue.

54. This aspect of Gilligan J.'s judgment was later upheld by the Court of Appeal: *ACC Loan Management Ltd v. Stephens* [2017] IECA 229 (at paragraph 41).

55. The circumstances of the present case are distinguishable from those of *ACC Loan Management Ltd v. Stephens*. There, the High Court, and ultimately the Court of Appeal, had been satisfied that the *same issue* which arose for consideration in the context of the defence of laches had previously been decided in the context of the application to renew the plenary summons under the unamended version of Order 8 of the Rules of the Superior Courts. In each instance, the court was required to consider, *inter alia*, the balance of justice and the question of prejudice.

56. By contrast, in the present case the two applications give rise to different issues and therefore the condition precedent for the operation of *res judicata*, namely that the same issue has already been decided, is not fulfilled.

PRE-REFERENCE DELAY WAS UNREASONABLE

57. The claimant failed to serve the plenary summons in the proprietary action within the twelve-month period prescribed under the Rules of the Superior Courts. Thereafter, there was a further delay of two years before an application was made to renew the plenary summons. In the result, proceedings which were instituted in January 2018 were not ultimately served until March 2021, i.e. a period of in excess of three years.

58. The only justification offered for this delay is that the solicitor acting for the claimant had sent a number of "*without prejudice*" letters to the respondents' solicitors in the period January to April 2018. No substantive response was received to these letters.

59. The question of whether it might be considered reasonable, for the purposes of Section 123 of the Land and Conveyancing Law Reform Act 2009, to delay serving proceedings to allow the possibility of a settlement to be explored has been addressed as follows in *Fay v. Promontoria (Oyster) DAC* [2022] IEHC 483 (at paragraph 48):

> "As regards the solicitors' correspondence culminating in an offer of settlement, whilst I have held in *Primor*-type cases that where the costs of litigation outweigh the value of the dispute, it may be reasonable for a party not to take steps in the legal proceedings which would add to the costs whilst settlement proposals are under consideration (see *Campbell v. Geraghty* [2022] IEHC 241), I do not think that this necessarily applies when one of the parties to the litigation has registered a *lis pendens*. In those circumstances, there is an independent obligation to prosecute the proceedings expeditiously because of the existence of the *lis pendens* which cannot be disregarded in the hope that, from the plaintiffs' perspective, a more cost-effective solution might be achieved."

60. Having regard to these principles, I am satisfied that a one-sided set of correspondence over a three-month period in 2018 cannot justify a delay of in excess of three years in serving proceedings.

POST-REFERENCE DELAY

61. Having regard to my findings above, it is not necessary to address the third issue flagged in the introduction to this judgment, namely whether the (alleged) delay in prosecuting the arbitral proceedings is cognisable for the purposes of an application to vacate the registration of a *lis pendens*.

62. This issue presents a question of statutory interpretation as follows. The fact that the court proceedings in the proprietary action have been stayed, rather than discontinued, has the practical consequence that the ultimate resolution of the

court proceedings is dependent on, and must await the outcome of, the arbitral proceedings. If, for example, the arbitral proceedings culminate in an award which disposes of the dispute between the parties then the court proceedings would, presumably, be struck out. Conversely, if for some reason the arbitrator's award does not address all issues in dispute, or if the arbitration agreement were to become inoperative prior to the making of an award, then the court might, in principle, be asked to resume seisin over the dispute.

63. The question of statutory interpretation which arises is whether this (indirect) relationship between the prosecution of the arbitral proceedings and the ultimate disposal of the court proceedings means that delay in prosecution of the arbitral proceedings represents "*an unreasonable delay in prosecuting the action*" within the meaning of Section 123 of the Land and Conveyancing Law Reform Act 2009. The answer to this is not clear-cut. It is preferable, therefore, that this potentially difficult question of statutory interpretation await a case where the resolution of same is necessary for the disposition of the application to vacate the registration of a *lis pendens*.

CONCLUSION AND FORM OF ORDER

64. The decision on whether or not to vacate the registration of a *lis pendens* pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009 is exclusively a matter for the court which has seisin of the proprietary action. This is so notwithstanding that the underlying dispute between the parties may have been referred to arbitration pursuant to the Arbitration Act 2010. It is neither necessary nor appropriate for the court to adjourn an application to vacate

the *lis pendens* to await the outcome of the arbitral proceedings. See paragraphs 27 to 41 above.

65. The issues which fall for determination on an application to vacate the registration of a *lis pendens* pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009, and those for determination on an application to renew a plenary summons pursuant to Order 8 of the Rules of the Superior Courts, respectively, are very different. It follows that the making of an order extending time for the renewal of the plenary summons in the proprietary action does not render *res judicata* the separate and distinct question of whether there has been "*an unreasonable delay in prosecuting the action*" for the purposes of Section 123. See paragraphs 42 to 56 above.

66. I am satisfied that the *lis pendens* should be vacated in circumstances where there has been unreasonable delay in prosecuting the proceedings in aid of which the *lis pendens* has been registered, namely, *Ballinlaw Ltd v. Jane Robinson and Robinson Family Investments Ltd* (High Court 2018 No. 7 P.).

67. Accordingly, an order will be made, pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009, vacating the *lis pendens* registered in respect of the lands contained in Folio 18671 of the Register County Dublin. This will result in the cancellation of the entry made in the register of *lis pendens* maintained in accordance with Section 122 of the same Act.

68. It is not necessary to make any consequential order directed specifically to the Property Registration Authority ("***PRAI***") in respect of the entry on the folio. Rather, the plaintiffs' solicitor can arrange to have the *lis pendens* cancelled by lodging a certificate as provided for under Order 72A, rule 5 of the Rules of the

Superior Courts. Lest there be any difficulty in this regard, however, the parties have liberty to apply.

69. As to costs, my *provisional* view is that having regard to Section 169 of the Legal Services Regulation Act 2015, the plaintiffs in these proceedings, having been entirely successful in their application, are entitled to recover their costs as against the defendant. If either side wishes to contend for a different form of costs order, then short written submissions to this effect should be filed within 14 days of this judgment. This matter will be listed for final orders on a date convenient to the parties.

Appearances

Eoghan Cole for the plaintiffs instructed by Orlaith J. Byrne & Company
Neil Rafter for the defendant instructed by Kenny Stephenson Chapman

Approved Garrett Simons