THE HIGH COURT

[2023] IEHC 546

[2021/116 SP]

BETWEEN:-

JOHN COULSTON

PLAINTIFF

-AND-

PATRICK DOYLE

DEFENDANT

JUDGMENT of Mr. Justice Cregan delivered on the 10 day of August, 2023

Introduction

1. This is an application by the plaintiff seeking:-

(i) an order vacating a *lis pendens* pursuant to the inherent jurisdiction of the court and/or pursuant to s. 123 of the Land and Conveyancing Law Reform Act, 2009 and

(ii) an order restraining the defendant from registering a further *lis pendens* in relation to the said Folio.

2. The application is grounded upon the affidavit of Mr. John Coulston, who is the receiver appointed in respect of the said lands under a deed of appointment dated 5th October, 2015.

The background to the current application

3. On or about 12th March, 2009, the defendant and Ms. Margaret O'Neill borrowed a sum of €689,000 approximately from Allied Irish Banks Plc ("AIB") and AIB Mortgage Bank ("AIBMB").

4. The security for the said loan included the execution of an all sums mortgage/charge over the property set out in Folio 29063F which said mortgage/charge permitted AIB to appoint a receiver over the charged property after the occurrence of any event of default.

5. On 3rd December, 2009, AIB and AIBMB procured the registration of the charge as a burden over the property in Folio 21063F of the Register of Freeholders, County Carlow.

6. The borrowers defaulted on their loan and by letter of demand dated 20th May, 2013 AIB demanded payment of the balance of the loan which, as at 20th May, 2013, was in the sum of €836,000 approximately.

7. The defendant failed, refused and/or neglected to pay the sum demanded or any part of it.

8. On 28th July, 2014, AIB, having issued summary proceedings, obtained a judgment against the defendant and Ms. O'Neill in the sum of €903,000.

9. This judgment was subsequently appealed by the defendant but, as he failed to comply with directions of the Court of Appeal in respect of the filing of legal submissions, his appeal was struck out.

10. On 16th August, 2016, AIB and AIBMB transferred its interest in the loan and the mortgage/charge to Allied Irish Bank by way of deed of transfer and assignment. Thus the loan and mortgage were transferred to AIB on that date. The folio was subsequently updated on or about 23rd August, 2016 to reflect the sole ownership of the mortgage/charge by AIB.

11. AIB then, on 5th October, 2016, by deed of appointment, appointed the plaintiff as receiver in respect of the property. This appointment was confirmed by the plaintiff receiver on 7th October, 2016.

The 2016 proceedings

12. Shortly after the appointment of a receiver, on 3rd November, 2016, Mr. Doyle, the defendant in these proceedings, issued plenary proceedings (Record No. 2016/9774P) ("the 2016 proceedings") against AIB and the receiver. However, these plenary proceedings were not at any stage served on either AIB, or its successor in title, or on the receiver. As a result no appearance was entered by any defendant to these proceedings.

13. On 28th November, 2016 (i.e. 25 days after the issuing of the 2016 proceedings) a *lis pendens* was registered by Mr. Doyle over Folio 21063F of the Register of Freeholders in County Carlow. No notification of the registration of the *lis pendens* – or Mr. Doyle's intention to do so – was received by the plaintiff. Moreover, Mr. Doyle did not give any notice to AIB or the receiver of the fact that he had registered the *lis pendens*.

14. The receiver stated on affidavit that the *lis pendens* only came to his attention when he was endeavouring to find a purchaser for the property. As a result of the registration of the *lis pendens* he avers that he has "been unable to complete any contract for sale".

The transfer of the loan/mortgage to Everyday Finance

15. By a global deed of transfer dated 14th June, 2019 between AIB and Everyday Finance DAC ("Everyday"), Everyday acquired the right, title and interest of AIB in the loan facility and in the related mortgage/charge.

16. On 20th June, 2019 AIB wrote to the borrowers and informed them that their loans and the mortgage/charge had been transferred to Everyday Finance.

17. On 28th June, 2019 Everyday wrote to the borrowers to inform them that AIB had transferred the loan and the mortgage/charge to Everyday.

18. As such it is clear that there has been a legal assignment to Everyday Finance of the loan facility and the mortgage.

19. The interest of Everyday in the mortgage was noted on Folio 21063F of the Register of Freeholders, County Carlow on 15th August, 2019.

20. On the same day that AIB transferred the loan to Everyday Finance, AIB, Everyday Finance and the receiver purportedly entered into a deed of novation dated 14th June, 2019 to continue the appointment of the plaintiff as receiver over the said property. I will come back to this later in my judgment.

Conduct of Mr. Doyle in relation to the 2016 proceedings

21. The plaintiff receiver in his grounding affidavit states that the 2016 proceedings have never been served on him or on any of the parties to the proceedings, including AIB.

22. The plaintiff also states that the failure to serve the plenary summons within one year (or any period of renewal) means that the plenary summons has now long since expired.

23. The plaintiff also states that:-

> *"In the absence of any attempt to serve the plenary summons or a statement of claim I believe that the plenary summons were issued for the sole purpose of frustrating any attempt to sell the property".*

24. There was no denial of this averment by Mr. Doyle.

25. The plaintiff also states in his affidavit that Mr. Doyle has been significantly in default in prosecuting the proceedings and no steps have been taken in the proceedings now for over seven years since the issuing of the plenary summons.

26. The plaintiff also states on affidavit that the registration of the *lis pendens* amounts to an attempt by the defendant to obtain the benefit of an interlocutory injunction without fulfilling the criteria required to obtain an interlocutory injunction or without having to provide any appropriate undertaking as to damages.

27. The plaintiff states that the person who registers a *lis pendens* is under an obligation to prosecute proceedings expeditiously but the defendant has taken no steps in the 2016 proceedings whatsoever - not even serving the proceedings on the parties.

28. The plaintiff also says that he is "a person affected by" the *lis pendens* because he wants to sell the property in order to reduce the sums due and owing to Everyday Finance. He says

> *"However my ability to sell or otherwise deal with the property is hindered by the existence of the lis pendens registered by the plaintiff since November 2016. Offers to sell the property have fallen through due to the existence of the lis pendens".*

29. Therefore, he states that it is just and equitable that the *lis pendens* should be vacated pursuant to the inherent jurisdiction of the court and/or pursuant to s. 123 of the Land and Conveyancing Law Reform Act, 2009.

Inherent jurisdiction of the court

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

31. In *Tola Capital Management v. Linders (No. 2)* [2014] IEHC 324 I considered this matter. At para. 136 of that judgement it was stated as follows:

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

pendentes on both of the above grounds pursuant to the inherent jurisdiction of the court."

32. I am of the view based on the authorities set out in *Tola* that the courts continue to have a separate and distinct jurisdiction, as part of its inherent jurisdiction, to vacate a *lis pendens* in circumstances where the court forms the view that the *lis pendens* was not registered in a *bona fide* manner or that the proceedings were not being issued or not being prosecuted in a *bona fide* manner.

33. The defendant swore a number of replying affidavits in these proceedings. In addition, the defendant who was a lay litigant appeared and represented himself at the first hearing of this matter. Subsequently, after that hearing was adjourned, the defendant appointed solicitors and counsel to act on his behalf in subsequent hearings of this matter.

34. However, at the first hearing I heard from the defendant personally and heard his submissions in respect of this matter. It was particularly striking that the defendant made absolutely no submissions whatsoever on the 2016 proceedings. He did not seek to explain – in any way – why the 2016 proceedings had not been served on any of the defendants, or why he had failed to take any steps in those proceedings since that time to prosecute those proceedings. He did not in any way seek to refute or reject the plaintiff's case that the 2016 proceedings were issued, and the *lis pendens* registered, purely as a tactical move to prevent the receiver or the Bank or their assignees from selling the property.

35. Instead, the defendant in his submissions before the court at the first hearing, and in his replying affidavit, focussed entirely on the right of the receiver to bring this application and submitted that the receiver was not validly appointed and was not a person "affected" by the *lis pendens* as required by the provisions of the Land and Conveyancing Law Reform Act, 2009. The defendant also argued that the plaintiff had no power of sale over the property concerned and his receivership, even if valid, was simply to collect rents.

36. Having heard Mr. Doyle in person, and on the facts of this case, I am of the view that this is a paradigmatic example of a case where proceedings were not issued in a *bona fide* manner, and/or are not being prosecuted in a *bona fide* manner and where the registration of a *lis pendens* was not done in a *bona fide* manner for the reasons set out below.

37. First, it is clear that the 2016 proceedings were issued in response to the appointment of a receiver, shortly after the defendant became aware of the appointment of the receiver; secondly, the proceedings were issued against AIB and the receiver but were never served upon them; thirdly, no attempt was made to renew the plenary summons after a year; fourthly, a statement of claim has never been served; fifthly, not a single step has been taken in the proceedings between 3rd November, 2016 and today's date – a period of almost seven years. In these circumstances, it is absolutely clear that the proceedings are not being prosecuted in a *bona fide* manner or at all.

38. I note that nowhere in Mr. Doyle's replying affidavits or in his personal submissions before the court, did he make any attempt to defend the reasons why he had brought the 2016 proceedings or offer any explanation to the Court as to why he had not served those proceedings on the defendant or sought to pursue them in any way. In my view therefore, the inescapable inference is that Mr. Doyle issued the 2016 proceedings and registered the *lis pendens* in a deliberate attempt to interfere with the bank's and receiver's ability to take steps in relation to his property. There is no other explanation and none was offered by the defendant.

39. In the circumstances I will make an order, pursuant to the inherent jurisdiction of the court, vacating the *lis pendens* over the said property on the grounds that the 2016 proceedings were not instituted in a *bona fide* manner, that the proceedings are not being prosecuted in a *bona fide* manner and the *lis pendens* was not registered for a *bona fide*

purpose but instead for a *male fide* purpose to interfere with the ability of the bank and the receiver to deal with the defendant's property.

The application under the Land and Conveyancing Law Reform Act, 2009

40. Section 123 of the Land and Conveyancing Law Reform Act 2009 provides the statutory basis for the vacating of a *lis pendens*:

> ***"****Subject to section 124, a court may make an order to vacate a lis pendens on application by—*
>
> *(a) the person on whose application it was registered, or*
>
> *(b) any person affected by it, on notice to the person on whose application it was registered—*
>
> *(i) where the action to which it relates has been discontinued or determined, or*
>
> *(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide."*

41. The Plaintiff makes this application under subparagraphs (b)(i) and (ii).

Unreasonable delay and lack of *bona fides*

42. Much of the relevant case law and principles in respect of s. 123(b) –unreasonable delay or the failure to prosecute the proceedings *bona fide* – have recently been set out by Simons J in his judgment in *Robinson v Ballinlaw Ltd* [2022] IEHC 527 at paras 3-10 where he states:-

> *"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)*

> *'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."

43. It is clear in the present case that the defendant in these proceedings, being the plaintiff in the 2016 proceedings, has failed to even serve the proceedings on the defendants

or to file a statement of claim or to take any further steps in the proceedings for a period in excess of six years. It is clear therefore that this amounts to an unreasonable delay in prosecuting the action within the meaning of the statutory section.

44. In *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611 Barniville J. considered the meaning of the phrase "or the action has not been prosecuted *bona fide*". He stated:

> *"This aspect of the court's jurisdiction to vacate a lis pendens under s.123(b)(ii) encompasses a situation where the bringing of the proceedings (and the registration of a lis pendens on foot of those proceedings) amounts to an abuse of the process of the court (such as where the proceedings are brought for an improper purpose such as to frustrate a sale or to seek to exert improper pressure on an opposing party) (as outlined by Ryan J. in Kelly and McGovern J. in Bennett) as well as a situation where the proceedings themselves are bound to fail or, as Laffoy J. said in Gannon, ' doomed to failure'."*

45. Counsel for the plaintiff submitted that six years of default, the failure to serve proceedings before they expired and the lack of any explanation in any of the affidavits means that the court can infer the proceedings have not been prosecuted *bona fide* within the meaning of the statutory section and amount to an abuse of process.

46. I have no doubt that this is the case. Mr. Doyle represented himself at the first hearing of this matter and made various submissions to the court in respect of the legality of the appointment of the receiver and various other matters. To my surprise, he made absolutely no submissions, good bad or indifferent, in relation to the 2016 proceedings or the registration of the *lis pendens.* He offered no explanation to the court as to why he issued the proceedings or why he registered the *lis pendens* or why he failed to serve the proceedings on the defendant within a period of twelve months or why he has not taken any steps in the proceedings over the last seven years. His silence on this issue spoke volumes. I have no doubt that Mr. Doyle

instituted the 2016 proceedings in order to obstruct the ability of the bank and the receiver to repossess his property and/or to manage his property as they saw fit and/or to sell his property. It is absolutely clear the proceedings were not issued in a *bona fide* manner and the action is not being prosecuted in a *bona fide* manner.

47. I am satisfied therefore that the plaintiff has established that there has been an unreasonable delay in prosecuting the action and/or that the action has not been prosecuted in a *bona fide* manner.

Is the receiver "a person affected" by the *lis pendens*?

48. One of the key issues raised by the defendant in these proceedings is that the receiver is not a person "*affected*" by the *lis pendens* and therefore cannot bring an application to strike out the *lis pendens* under the Act because he has only the power to collect rent and no power of sale. It is an agreed fact that the Receiver in this case has no power of sale.

49. In *Carthy v. Harrington & Ors* [2018] IECA 321 the Court of Appeal (Whelan J.) stated as follows:

> *"The consequence of registration of a lis pendens is well established. The registration of pending litigation was originally governed by the Judgments (Ireland) Act of 1844 and subsequently by the provisions of the Chancery (Ireland) Act 1867. The authorities clearly show that pendente litem, neither party to the litigation in question can alienate or effect any disposition of the property in dispute in such a manner as to adversely affect the other party to the suit. I am satisfied that the receiver has established that he is a person affected by the lites pendentes registered against the two folios to a limited but very real extent. He meets the test as being a 'person affected' within the meaning of s. 123(b) of the Act."*

50. I am of the view that the phrase a person "affected" by a *lis* must be given a broader interpretation than merely a person who can "alienate or effect any disposition of the property

in dispute" – otherwise the legislature would have used such wording or words to that effect. The use of the words "affected by" clearly connotes a broader category of persons who have *locus standi* to seek to set aside a *lis pendens* than persons "who can alienate or effect any disposition of the property".

51. Indeed, in *Carthy v. Harrington*, the Court held that the receiver in question was *"affected"* by the *lis pendens* even though he had not been appointed over the lands in question and therefore had no right of sale or even a right to collect rent in respect of those lands. It is clear therefore that the Court of Appeal was of the view that a receiver could be "affected" by a *lis pendens* even where he had no right of sale or even a right to collect rent over the said premises or indeed where he had not been appointed receiver over the said lands. In my view therefore, it follows *a fortiori* that the plaintiff in this case, as a receiver with a right to collect rents, is clearly affected by the *lis*.

52. Moreover, apart from the principle set out above, it is clear as a matter of fact, in the present case that the receiver is clearly a person affected by the *lis pendens* within the meaning of s. 123 of the Land and Conveyancing Law Reform Act, 2009. The plaintiff has indicated that the *lis* does affect his ability to deal with the property. As he states at para. 13 of his affidavit:

> *"In addition my ability to deal with the property as a receiver has been affected due to the existence of the lis pendens. As para. 8 of Mr. Doyle's affidavit notes, I have had difficulties with a past tenant who did not initially accept that I have authority to collect rents over the property or the property or otherwise deal with it. Contrary to Mr. Doyle's averment, I did in fact collect rents from a previous tenant. However the existence of the lis pendens did affect the timely collection of said rents.*
>
> *The property has been vacant since spring 2019 and my attempts to rent or otherwise deal with the property continued to be affected by the existence of the lis pendens.*

53. This evidence, that the plaintiff is indeed affected by the *lis pendens* within the meaning of s. 123 of the 2009 Act, is uncontroverted.

54. In response, Mr. Doyle states that the receiver is not affected by the *lis pendens* because it will only affect a potential sale of the property and as the receiver has no power of sale he could not thereby be affected by the *lis pendens.* Mr. Doyle also stated on affidavit that it was "complete nonsense" to suggest that the *lis pendens* affected the receiver's ability to collect rents. Mr. Doyle stated *"if tenants refuse to pay rent to him then that can only be a decision for the tenants to take, it certainly would not be affected by the* lis pendens *which the tenants were likely completely unaware of".* However, this assertion is merely a bald assertion and does not controvert Mr. Coulston's evidence.

55. Indeed, I am of the view that it is clear, as a matter of principle, that a receiver who is appointed to collect rents only (even if he does not have a power of sale) is a person who is "affected" by a *lis pendens* registered over the property in respect of which he has been appointed a receiver. There are a number of ways in which this could be so. First, a tenant could refuse to pay rent to a receiver on the grounds that there is a challenge to the receivership over the said lands as illustrated by the registration of a *lis pendens*; secondly, a tenant could seek to challenge the entitlement of a receiver to do any other acts in relation to a tenancy by virtue of a *lis pendens;* thirdly, a *lis pendens* registered over land in respect of which a receiver has been appointed as receiver, casts a doubt over the receivership's ability to deal with that land in whatever capacity he is entitled to do under the deed appointing him as receiver. In such cases he is clearly affected by the *lis pendens.*

56. The plaintiff also submits that the mere mention of the plaintiff on the folio six years after proceedings have been issued negatively affects the plaintiff's reputation. I agree with that submission also. The plaintiff also submits that the folio misrepresents the position by suggesting that there are active proceedings against the plaintiff when in fact the proceedings

themselves have never been served, have expired and have never been prosecuted in a *bona fide* manner. I agree with this submission also.

Challenges to the deed of novation

57. As set out above, the plaintiff avers on affidavit that his appointment as receiver was confirmed by a deed of novation dated 14th June, 2019 made between AIB, Everyday Finance and himself as receiver. The parties to that purported novation agreement were AIB Plc, AIB Mortgage Bank, EBS DAC, Haven Mortgages Ltd (as transferors), Everyday Finance DAC (as transferee) and John Coulston (as receiver/continuing party). The document is entitled "Receiver Novation Deed". It is a novation of receivership contract in a standard form.

58. The effective date of this novation is stated to be the "completion date as defined in the MSA". The MSA is the mortgage sale agreement which was dated 29th March, 2019 pursuant to which the transferors, AIB UK and the transferee entered into a mortgage sale agreement.

59. An issue arose in relation to this novation deed because, although the deed is signed by the plaintiff, it was not countersigned by any of the other parties. Moreover it appeared from evidence before the court that none of the other parties to the agreement (or indeed the receiver) had a copy of the novation agreement which was signed by all parties. Whilst there are emails sent by the receiver (or persons on his behalf) enclosing the copy of the novation deed (signed by the receiver) to the various other parties to the agreement for their counter signatures, it is not clear whether in fact these counter-parties ever signed such an agreement. Likewise there is no evidence that the parties objected to such an agreement or that they did not wish to sign it. Indeed as will be seen below, there is evidence that they did consent to it.

60. The fact that this novation agreement was not countersigned by all relevant parties is a matter which came to light during the first hearing of the application. In the circumstances I

adjourned the matter to allow the plaintiff to investigate this matter further and to see if he could find a copy of that completed novation agreement. However he was unable to do so.

61. However, it emerged that on 10th March, 2022, a new deed of novation had been signed. This Receiver Novation Deed is dated 10th March, 2022. It is stated to be between Allied Irish Banks, AIB Mortgage Bank, EBS DAC, Haven Mortgages Ltd (as transferors), Everyday Finance DAC (as transferees) and John Coulston (as continuing party and receiver).In other words the parties to the novation agreement dated 10th March, 2022 are exactly the same parties as the parties to the proposed novation agreement of 14th June, 2019. This novation agreement is signed by all parties to the agreement. This novation agreement of March 2022 is in the exact same format as the novation agreement dated 14th June, 2019.

62. The recitals to the said novation agreement provide that the transferors have agreed to novate the receiver agreements to the transferee and the transferee has agreed to assume the obligations of the transferors under the receiver agreements with effect from the effective date. The recitals also provide that the receiver consents to the substitution of the transferee for the transferors as a party under the receiver agreements.

63. In a supplemental affidavit, the plaintiff explained that the second deed of novation was executed when it became apparent that an original document executed by all the parties could not be located. Importantly this deed of novation of 10th March, 2022 was executed by all parties to the transaction long in advance of the hearing of this application.

64. It is clear therefore that whatever infirmities there might be in relation to the receiver novation agreement dated 14th June, 2019, there are no infirmities in relation to the receiver novation deed dated 10th March, 2022. It is clearly a valid and binding novation agreement.

Validity of the receiver under novation agreement

65. Counsel for the defendant initially submitted that appointment of the plaintiff as receiver did not survive the transfer of the loan and mortgage from AIB to Everyday Finance. Counsel submitted that the novation of the receivership was invalid.

66. However, that submission did not take account of the Court of Appeal decision in *Healy v. McGreal* and in the circumstances I asked the parties to file supplemental submissions to address the issue of the decision of the Court of Appeal in *Healy v. McGreal* and the impact of that decision on the defendant's submissions.

67. It is clear that this matter was put beyond doubt by the Court of Appeal's decision in which Irvine J. (as she then was) stated at para. 33-38: –

> *"33. The essential point the plaintiffs make therefore is that, following the Loan Sale of the 28th March 2014, IBRC (in special liquidation) ceased to have any right or interest in the assets which it had transferred to Kenmare. Thus, it had no ability to execute the three Deeds of Novation or the Deed of Confirmation and Acknowledgement.*
>
> *34. In light of her other findings in my view it matters not whether the trial judge was or was not in error insofar as she relied upon s. 12(1)(b) of the IBRC Act 2013 to override what she considered might be the effect of s. 58(9) of the Asset Covered Securities Act 2001. She had, as is clear from paras 81 and 82 of her judgment, in any event concluded that the Deeds of Novation were in fact matters only material to IBRC (in special liquidation) and Kenmare and did not affect the relationship between the receiver and the plaintiffs.*
>
> *35. As was observed by the trial judge, Mr. McGreal had been appointed receiver prior to the Loan Sale to Kenmare. That receivership was valid and ongoing pursuant to the original deeds of Appointment. The*

fact that IBRC (in special liquidation) entered into the Loan Sale with Kenmare and was no longer a party to the loan did not affect the validity of the Receiver's appointment or the ongoing nature of the receivership. The only question arising as a result of the Loan Sale was to whom the Receiver would remit any sums recovered in the course of the receivership. However, that was a matter between the receiver, IBRC and Kenmare and had nothing to do with the plaintiffs. While the execution of the Deeds of Novation might have some potential bearing on when Kenmare succeeded to the position of IBRC in receivership they could have no bearing at all on the question of the continuing validity of the Receiver's appointment over the secured assets.

36. Accordingly, the provisions of s. 58(9) of the Asset Covered Securities Act 2001 afford the plaintiffs with no basis for their challenge to the lawfulness of the Receiver's appointment.

37. Whilst strictly speaking unnecessary in light of my aforementioned findings, I feel I should nonetheless also state that I reject the plaintiffs' submission that the Deeds of Novation are invalid because there is no provision in the Mortgage Deeds providing for novation. I agree with the High Court judge that in circumstances where the Mortgage Deed provides for the appointment of a receiver with the power of sale it is axiomatic that the lender would be entitled to enter into a novation agreement.

38. I would also observe that insofar as the plaintiffs seek to challenge the conclusion of the trial judge concerning the execution of the Deeds of

> *Novation she had more than ample evidence upon which she was entitled to conclude, notwithstanding the evidential difficulties to which she referred in her judgment, that the three Deeds of Novation had been properly executed. She referred in particular to the evidence of the Receiver, whom the plaintiffs' themselves had called to give evidence, and also to the evidence in chief of Ms. de Lacy Murphy who had produced the original two Deeds of Novation and a third deed that had been re-executed by all three parties. These were findings of fact which, it would appear, were supported by credible evidence. That being so, having regard to the principles advised in Hay v. O'Grady [1992] 1 I.R. 210) they cannot be disturbed by this court."* (emphasis added)

68. Despite the fact that the Court of Appeal decision in *Healy v. McGreal* clearly covers the validity of a receiver in a novation of receivership situation, counsel for the defendant then sought to argue that *Healy v. McGreal* was wrongly decided and that various dicta of Irvine J. "cannot be correct". However this court is bound by the decision in *Healy v. McGreal* and, in my view, the defendant's arguments in this regard are misconceived.

69. In the present case, I am satisfied that the evidence discloses that the receiver was validly appointed. I am also satisfied that the evidence shows that his appointment continues, both as a matter of law and as a matter of fact, even after the bank transferred the loan and mortgage to Everyday. I am also satisfied that the novation of the receivership on 10th March, 2022 is a valid novation agreement and that the receiver therefore continued as receiver after the loan and mortgage were transferred from AIB to Everyday Finance and that he is therefore a validly appointed receiver as at the date of the hearing.

Notice of assignment

70. The defendant further challenges the appointment of the plaintiff as receiver on the basis that the defendant was not given an express notice of the assignment between AIB and AIBMB on or after 16th August, 2016 and up until the purported appointment of the plaintiff on 7th October, 2016.

71. However it is clear from the evidence before the court that the appointment of the plaintiff as receiver by AIB was communicated to the defendant by letter dated 12th October, 2016. It is also clear that on the 15th November, 2016 copies of the assignment dated 16th August, 2016 from AIB Mortgage Bank to AIB, were provided to the defendant by the plaintiff. Mr. Doyle acknowledged receipt of the various documents.

72. Indeed on the 28th November, 2016 – some four days after receipt of these letters Mr. Doyle caused the *lis pendens* to be registered on the folio.

The rule in *Henderson v. Henderson*

73. I am satisfied that many of the other arguments put forward by the defendant in his affidavits and in his submissions have already been adjudicated on in the summary proceedings. In the circumstances, it is not open to Mr. Doyle to seek to reopen any matter which was capable of being adjudicated on in those proceedings. Any arguments which he wished to make ought to have been made in those earlier proceedings. Any attempt by him to make those arguments now is contrary to the rule in *Henderson v. Henderson* and amounts to a collateral attack on a judgment of the High Court, the appeal in respect of which was struck out by the Court of Appeal for failure by the defendant to comply with the court's directions on the filing of legal submissions.

The issue of discretion

74. The defendant also submitted that even if the qualifying criteria under the statute are met, the court has a discretion to refuse the relief sought. However in my view, I would not exercise my discretion in favour of the defendant because of the defendant's abuse of process

in issuing these proceedings in 2016 and in taking no further steps in respect of them for the last six and a half years.

An order restraining the defendant from registering any further *lis pendens.*

75. I am also satisfied, on the facts of this case, that an order should be made restraining the defendant from registering any further *lis pendens* over this property. It is clear that Mr. Doyle chose not to proceed with the 2016 proceedings but effectively used them and the related *lis pendens* as a tactic to obstruct the sale of the property to another person.

76. I am satisfied that this abuse of process raises the distinct prospect that further proceedings could be brought by Mr. Doyle in relation to the property and be used for the purpose of registering a further *lis pendens.* In the circumstances, I am of the view that whilst Mr. Doyle should not be prevented from issuing new proceedings should he wish to do so, he should be prevented from registering a *lis pendens* over the said folio in respect of those proceedings.

Conclusion

77. I would therefore conclude as follows:-

1. The Court will vacate the *lis pendens* pursuant to its inherent jurisdiction on the grounds that the defendant issued his 2016 proceedings and registered a *lis pendens* in a manner which amounts to a clear abuse of process;
2. I am of the view that the receiver is “a person affected” by the *lis pendens* withing the meaning of s. 123 of the Land and Conveyancing Law Reform Act, 2009;
3. I am also of the view that there has been an unreasonable delay by the defendant in prosecuting his 2016 proceedings;
4. I am also of the view that the defendant’s 2016 proceedings are not being prosecuted *bona fide*;

5. In the circumstances I am satisfied that the various statutory requirements have been fulfilled and I will therefore make an order vacating the *lis pendens* under s. 123 of the 2009 Act also;

6. The receiver was validly appointed and the novation in the receivership was validly effected; and

7. The Court will grant an order restraining the defendant from registering a further *lis pendens* in respect of the said property.

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