

THE HIGH COURT

**[2024] IEHC 201
[Record No. 2022/153 MCA]**

Between

Promontoria (Finn) Limited

Applicant

and

Thomas Markham

Respondent

Judgment of Mr. Justice Dignam delivered on the 12th day of April 2024.

Introduction

1. This is my judgment in respect of the applicant's application pursuant to section 123(b)(ii) of the Land and Conveyancing Law Reform Act 2009 and/or the Court's inherent jurisdiction for an Order vacating a lis pendens registered by the respondent on Folio 56271F of the Register of Freeholders, County Dublin ("the property") and ancillary relief.

2. This was one of two applications heard by me on the same day; the other being an application for an interlocutory injunction brought by the applicant herein and a receiver appointed by it in separate proceedings entitled "*Tom O'Brien & Promontoria (Finn) Limited v Thomas Markham & Persons Unknown Occupying the Premises at 12 Woodford View, Clondalkin, Dublin 22 Record No. 2022/5534P*". That application is the subject of a separate judgment.

Background

3. The immediate background to the current application is that on the 15th July 2020, the respondent (“Mr. Markham”) commenced plenary proceedings against the applicant (“Promontoria”) and the receiver, Mr. O’Brien, in proceedings entitled and bearing record number “*Thomas Markham v Promontoria (Finn) Limited & Tom O’Brien Record number 2020/5097P*”. On the same day, Mr. Markham filed a *lis pendens* in the Central Office of the High Court and subsequently lodged an application with the Property Registration Authority to have the *lis pendens* registered on Folio 65271F. It was registered on the 22nd July 2020.

4. The plenary summons was not served on the defendants to those proceedings despite requests and Promontoria then issued this motion on the 9th June 2022. The application is made by way of Originating Notice of Motion in circumstances where it could not have been brought in the proceedings issued by Mr. Markham in respect of which the *lis pendens* was registered because those proceedings had not been served. This was the procedure adopted in *Hurley Property ICAV v Charleen Limited [2018] IEHC 611*, the only authority to which I was referred. In any event, no issue has been raised to the bringing of the application by this procedural route. I deal with Mr. Markham’s grounds of opposition below.

Legal Framework

5. Section 123 of the Land and Conveyancing Law Reform Act 2009 (“the 2009 Act”) provides:

*“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.”

6. Section 123(b)(i) is not relevant in the current application. Thus, Promontoria must establish that it is a person affected by the *lis pendens*, that the application is on notice to the person on whose application it was registered and that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted *bona fide*.

7. In reality, while Promontoria relies on the contention that the action launched by Mr. Markham is not being *bona fide* prosecuted, the main emphasis was on Mr. Markham's alleged unreasonable delay in prosecuting the action. Barniville J considered the question of delay in the context of an application under section 123 of the 2009 Act in *Hurley Property ICAV v Charleen Limited [2018] IEHC 611*. He said at paragraph 81:

"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."

8. He went on to say that this is an obligation over and above the obligations under the Rules of the Superior Courts in relation to the taking of steps in the proceedings and over and above the jurisdiction of the Court to dismiss proceedings for delay, and that when considering an application under section 123(b)(ii) on the grounds of delay the Court does not have to engage in the sort of assessment which a court must conduct in deciding whether to dismiss proceedings for delay. He said (also in paragraph 81) that section 123:

"...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..."

9. He went on at paragraph 82 to say:

"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 the 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."

10. He made clear that the focus of the Court must be the period after the commencement of the proceedings and said at paragraph 83:

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

11. These principles have been adopted in several cases since.

Evidence

12. Mr. Markham did not make any submissions at the hearing, saying that the arguments were set out in his affidavit and he did not have any further arguments. It is unclear from this affidavit whether he was opposing the application solely on the ground that there was no delay or that any delay was not unreasonable or whether he was also opposing it on the basis that Promontoria is not a person affected by the lis pendens. I have proceeded on the basis that Mr. Markham opposes the application on all of these grounds.

13. It is therefore necessary to set out the background and the evidence in some detail. I propose to set out the evidence which is deposed to on behalf of Promontoria. I am doing so because, while Mr. Markham puts the applicant on proof and makes a number of complaints and points in his affidavit, he does not specifically deny much of the content of Mr. Burke's affidavit. The only specific denial is his denial that he owes Promontoria a debt. There is in fact no other real conflict of fact.

14. Mr. Burke's evidence, as contained in his grounding affidavit of the 25th May 2022, is as follows.

15. Pursuant to a letter of loan offer dated the 17th November 2005, which was accepted by Mr. Markham on the 10th December 2005, First Active plc advanced to Mr. Markham a loan facility of €260,000. The security was to be a mortgage over the property. By a Deed of Mortgage dated the 18th December 2006, Mr. Markham charged the property in favour of First Active as security for all sums which were then or might thereafter become due and owing by Mr. Markham to First Active.

16. On the 15th February 2010, Ulster Bank Ireland Limited acquired all rights accruing to First Active on foot of any existing loan or security instruments pursuant to the terms of the Central Bank Act 1971 (Approval of Scheme of First Active plc and Ulster Bank Ireland Limited) Order 2009 [SI 481/2009].

17. The mortgage was registered as a burden in favour of Ulster Bank Ireland Limited on Folio DN65271F on the 24th January 2011.

18. Pursuant to a Global Deed of Transfer dated the 29th September 2015 between Ulster Bank and Promontoria, Ulster Bank conveyed, assigned, transferred and assured to Promontoria all of its right, title, interest, benefit and obligation (past, present and future) in and under the loans and related security identified in the schedule thereto. The schedule to the Deed of Transfer, exhibited to Mr. Burke's affidavit, though heavily redacted, identified the loan offer and acceptance and the mortgage of the 18th December 2006 between First Active plc and Promontoria referred to above.

19. By a letter dated the 5th November 2015, Capita Asset Services wrote to Mr. Markham on behalf of Promontoria to advise him that this loan facilities and security with Ulster Bank had been transferred to Promontoria.

20. Promontoria went into default under the loan facility and, following an unsatisfied demand for payment (which seems from Mr Markham's affidavit to have been dated the 25th

April 2018), Promontoria appointed Mr. Tom O'Brien as receiver over the property by Instrument of Appointment dated the 25th May 2018.

21. On the 25th June 2020, Mr. O'Brien, as receiver, entered into a contract for sale in respect of the property. The sale was due to close within four weeks of the contract for sale. Prior to completion, however, the purchaser's solicitors informed the receiver of the existence of a pending application before the Property Registration Authority for the registration of a lis pendens. The solicitors acting for the receiver made inquiries and discovered that Mr. Markham had issued proceedings on the 15th July 2020 and had, on the same day, filed a lis pendens in the Central Office and subsequently applied to the Property Registration Authority to have the lis pendens registered as a burden on the folio. This was registered on the 22nd July 2020.

22. By letter of the 25th September, solicitors for the receiver and Promontoria wrote to Mr. Markham noting that it appeared that he had issued proceedings and filed an application for registration of a lis pendens, indicating that they had authority to accept service of the proceedings, and requesting that he serve a copy of them immediately.

23. No response was received to that letter and the solicitors wrote again on the 30th November 2020 requesting that he deliver the Plenary Summons within ten days, failing which an application would be brought to have the lis pendens vacated. The letter stated that it was Promontoria's view that there was no bona fide intention to prosecute the proceedings.

24. On the 9th December 2020, Mr. Markham wrote to the Managing Partner of the solicitors acting for the applicant and the receiver by letter entitled "Notice of Demand" stating, inter alia:

"I trust this Notice finds John White and the colleagues of John White, in fine form, good health and Fit-for-Purpose. I say it is a conclusive fact that this Notice with its several points is written in "event continuum" format to bring clarity to the various points, displaying the fact that one point leads to another, and the end point leads to another, and the end issue is connected to the beginning issue. Certain points are "set off" in brackets "[]"().

As John White appears to act as a senior agent of/for the legal entity/fiction commonly known as "BEAUCHAMPS", (hereinafter Beauchamps) and is vicariously liable for the actions/inactions of people acting as colleagues and/or subordinates of

John White, I believe in the interests of justice and fair play, it is both necessary and proper that I bring the following to the attention of John White.

I wish to draw the attention of John White to a correspondence I received, regarding court proceedings which I have filed into the High Court. The correspondence I refer to is dated 30th November 2020.

You, John White, will take notice that I am living man and I reserve all rights without prejudice (UCC 1-308). You, John White and/or and/all people acting as agent(s) of/for Beauchamps are third-party interlopers who have no standing whatsoever to trespass upon my private affairs. Thus take notice, that I acknowledge the correspondence, referred to herein only to clarify my position. You John White are hereby on notice that whilst acknowledged, I do not legally and lawfully consent, to any and all correspondence received from people acting as agent(s) of/for Beauchamps. Please be advised:

Any further correspondence I receive from people acting as agent(s) of/for Beauchamps will be treated as a trespass most severe. I say trespass is billable."

[emphasis added]

25. While Mr. Markham referred to having filed proceedings in the High Court and this letter was in reply to the solicitor's letter of the 30th November (see section in emphasis) in which a copy of the Plenary Summons, the Summons was not enclosed.

26. At the time of swearing this affidavit, the Plenary Summons had not been served on the defendants in those proceedings, i.e., the proceedings in which the lis pendens was issued.

27. Mr. Markham swore a replying affidavit on the 26th January 2023. He states that he rejects the contents of Mr. Burke's affidavit. However, he does not specifically engage with the factual matters contained in that affidavit, other than to say that they are substantially based on hearsay, and to put Mr Burke on proof of matters. For example, while he states that he does not owe Promontoria a debt, he does not address whether this was on the basis that he had not accepted a loan from First Active in the first place, that he had not executed the mortgage, that he had not been notified of the transfer of the loan and security to Promontoria, that he had not fallen into arrears, or that he had not been notified of the appointment of the receiver. He refers to a Statement of Account exhibited by Mr. Burke and claims, inter alia, that there is no information given as to how the balance of

€427,083.71 was reached from an opening balance of €338,703.07 on the 24th October 2015

28. One of the core points made by Mr. Markham is that he has sought inspection of attested copies of documents including the loan application, loan offer agreement, deed of mortgage and deed of transfer and assignment and global deed of novation and that he has a right to inspect these documents pursuant to section 91 of the 2009 Act. In his affidavit, he refers to having written a number of letters which he describes as "Notice of Demand" or "Notice of Default" and "Second Notice of Default and Dishonour" in response to the letter of demand from the applicant of the 25th April 2018. He summarises these Notices in paragraphs 6 and 7 of his replying affidavit as follows:

*"6. I say that in the interest of clarity your deponent responded to this demand from the Plaintiff by serving by registered mail a **Notice of Demand** dated the 11th December 2018 seeking certain proofs of the claim made by the Plaintiff, no response was received to this demand. Again your deponent wrote to the Plaintiff by way of **Notice of Default** dated the 11th of February 2019 noting that the Plaintiff had received my earlier **Notice of Demand** and that he had failed and or refused to supply the sworn attested proofs sought therein enabling verification of their claim, again the Plaintiff failed and or refused to engage. In a final attempt to engage with the Plaintiff your deponent delivered by registered mail a **Second Notice of Default and Dishonour**, to this very day I have not received a reply confirming the existence of the proofs relating to their claim. I beg to refer to a copy of the **Notice of Demand, Notice of Default and Notice of Second Default**, upon which, marked with the letters and number "TM1", I have signed my name prior to the swearing hereof."*

*"7. I say that my **NOTICE OF DEMAND** dated the 11th December 2018 was in itself quite simple, it required the Plaintiff to make available for inspection and receipt of attested copies of same including but not limited to the original **Loan Application, Loan Offer Agreement, Deed of Mortgage and Deeds of Transfer and Assignment** and or **Global Deed of Novation**, from First Active plc to Ulster Bank Ireland to Promontoria (Finn) Limited, to date no response has been received from the Second Named Plaintiff."*

29. He acknowledges that Mr. Burke exhibits copies of documents (such as the loan offer and deed of mortgage) but states that Mr. Burke does not say that the copies are true

copies of the originals and that the exhibited copies are not attested to be true copies of the originals.

30. He also avers that Promontoria has not shown that it had the right to appoint a receiver and that the failure to produce the documents referred to above is a tacit acknowledgment that the appointment of the receiver was invalid and that he was a trespasser as set out in paragraph 53 of the judgment of Allen J in *Charleton v Hassett [2021] IEHC 746* and in section 91 of the 2009 Act.

31. He also refers to a C1 Charge which was created on the 29th September 2015 by Promontoria in favour of US Bank Trustees Limited and registered with the Companies Registration Office and claims that any rights that Mr. Burke claims passed from Ulster Bank to Promontoria, including the power to appoint a receiver, would have passed to this third party.

32. Crucially, in respect of the current application, Mr. Markham says that he could not pursue the proceedings in which the lis pendens was registered "*at that time as Covid 19 was rampant, Courts were difficult to access and I had underlying health issues*" (paragraph 16) and "*...I had every intention when filing proceedings under High Court Record 2020/5097P and the registration of a lis pendens with the Central Office of the High Court, I had every intention in prosecuting in a timely manner unfortunately circumstances conspired in preventing me in doing so.*"

Discussion and Conclusion

33. I have no hesitation in concluding that the lis pendens should be vacated.

34. I am satisfied that the applicant is a person effected by the registration of the lis pendens. As Barniville J said in *Hurley Properties v Charleen*

"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."

35. In any event, the uncontested evidence is that Promontoria has been affected by the registration of the lis pendens in that the sale by the receiver appointed by the applicant did not go through when the purchaser discovered that the lis pendens had been registered.

Even if it is subsequently determined that the proposed sale would have been unlawful for all or any of the reasons put forward by Mr. Markham, the fact is that it was frustrated by the registration of the lis pendens and therefore it follows that Promontoria is a person affected by the registration of the lis pendens.

36. While it is not expressly put in these terms by Mr. Markham, it may be his case that Promontoria is not a person affected by the registration of the lis pendens because they have not made documents available for inspection and have not provided attested true copies or exhibited same. In my view neither of these could lead to the conclusion that Promontoria are not affected by the lis pendens. Mr. Markham may have an entitlement to inspect the original documents but the alleged failure by Promontoria to provide inspection or true copies does not go to the question of whether they are a party affected by the lis pendens. They are separate issues.

37. The suggestion, if it is in fact being made, that Promontoria are not affected by the lis pendens because they have not proven the debt and have not proven that they were entitled to appoint a receiver seems to me to suggest the proposition that in order for a person to establish that they are affected by a lis pendens for the purpose of section 123 they have to fully prove their case. I do not accept that as a correct statement of the burden on an applicant. In any event, these suggestions are, in my view, for the purposes of this application answered by the fact that Promontoria is registered as the owner of the mortgage which was executed in favour of Ulster Bank on the folio and therefore may exercise any rights conferred on the mortgagee under that mortgage. This also applies to the point that Mr. Markham makes in relation to a C1 Charge which was created on the 29th September 2015 and registered with the Companies Registration Office. It seems likely that this a charge on the company but in any event the registration of Promontoria's ownership of the mortgage over the property on the Folio is conclusive evidence that Promontoria is the owner of that charge. As is clear from Condition 8 of the mortgage which is exhibited to Mr. Burke's affidavit, these rights include the power to enter into possession of the property, to appoint a receiver and to sell the property. It may be that Mr. Markham might be able to oppose or challenge the exercise of any such rights but that does not go the question of whether Promontoria is a person affected by the lis pendens. On the basis of the documents which are exhibited, Promontoria or its receiver have security over the property which includes the right to sell the property, that right is manifestly affected by the registration of the lis pendens, and therefore Promontoria is a person affected by the registration of the lis pendens.

38. There is no question but that the respondent, who registered the lis pendens, is on notice. He swore a replying affidavit and took full part in the hearing.

39. I am entirely satisfied that there has been unreasonable delay in the prosecution of the proceedings.

40. It appears that the proceedings were issued by Plenary Summons dated the 15th July 2020. The summons had not been served at the time of swearing of the grounding affidavit on the 25th May 2022, (a period of twenty-two months) or by the time the matter came on for hearing (a total period of thirty months). This delay is particularly significant in circumstances where solicitors acting for Promontoria and the receiver wrote on the 25th September 2020 requesting that the proceedings be served and indicating that they had authority to accept service and wrote again on the 30th November 2020 demanding service. Mr. Markham replied to this second letter on the 9th December 2020 and even then did not serve a copy of the summons.

41. In my view, in the absence of a good explanation, this delay could only be seen as unreasonable, particularly in the context of the obligation identified by Barniville J to not act with expedition and vigour. The only explanations offered by Mr. Markham are those quoted above, ie. that he could not pursue the proceedings at the time (July 2020) because "*Covid 19 was rampant, Courts were difficult to access and I had underlying health issues*" and "*unfortunately circumstance conspired in preventing me in*" prosecuting the proceedings in a timely manner. There is no merit to these explanations whatsoever. Firstly, they are inherently illogical. Mr. Markham was able to prepare and issue his Plenary Summons. Difficulties in the Court system or his own health difficulties did not preclude him from doing so and it is therefore illogical to say that they precluded him from taking the simple step of serving the summons, or even a courtesy copy of it, on the defendants. Secondly, while Covid and the related public health restrictions necessarily led to some delays in conducting court business, the Courts and court offices had, before July 2020, made arrangements for the conduct of Court business (indeed, the respondent was able to issue his Plenary Summons and was subsequently able to swear and file affidavits). However, even if it is accepted that these difficulties led to some delay, they can not explain a delay of thirty months. In truth, they can not explain any delay whatsoever in Mr. Markham serving a copy of the Plenary Summons on Promontoria or its solicitor at any stage after they were issued. They certainly can not explain Mr. Markham's failure to serve a copy of the summons or even a courtesy copy after it was requested by the solicitors acting on behalf of Promontoria and the receiver in September and November 2020 and their indication that they had authority to accept service. Mr. Markham was able to send a lengthy letter at that time but did not, even then, provide a copy of the Summons.

42. It is not at all clear from Mr. Markham's replying affidavit whether he is contending that Promontoria's failure to give inspection of documents is an explanation for his failure to prosecute the proceedings by serving the Plenary Summons. I would not be satisfied that this is a good explanation. It may be argued that such inspection might be necessary before, for example, a Statement of Claim could be drafted. I emphasise that I am expressing no view on the merits of such an argument. But there would simply be no basis whatsoever for suggesting that the need or even the right to inspect documents can hold up service of a Plenary Summons which had already been issued and upon which a *lis pendens* has been registered.

43. In my view, no good explanation has been given by Mr. Markham for his failure to prosecute the proceedings by taking the very simple step of serving the proceedings on the defendants to those proceedings for at least a period of thirty months. As noted by Barniville J in *Hurley v Charleen* "*[T]he absence of a good reason for a delay is likely to lead the court to conclude that the delay has been unreasonable for the purposes of the section.*" In the absence of any good explanation I am entirely satisfied that there has been an unreasonable delay in the prosecution of the proceedings.

44. In those circumstances, I do not need to consider whether or not the proceedings are being prosecuted *bona fide*.

45. In those circumstances, I will make an Order in terms of paragraph 1 of the Notice of Motion. I will hear from the parties in relation to whether or not I should make an Order vacating the *lis pendens* registered in the Central Office rather than making an Order in terms of paragraph 2 of the Notice of Motion, ie "*...an Order directing the Respondent to cancel the said lis pendens by lodging in the Central Office of the High Court a notice in the prescribed form*".