[2020] IEHC 685

THE HIGH COURT

[2018 No. 1748P]

BETWEEN

BILL CULLEN AND GLENCULLEN HOLDINGS LIMITED

PLAINTIFFS

AND

GLENCULLEN HOLDINGS LIMITED (IN RECEIVERSHIP), CITYGATE MOTOR GROUP LIMITED (IN RECEIVERSHIP), GLENCULLEN PROPERTIES LIMITED (IN RECEIVERSHIP), GLENCULLEN MOTOR PROPERTIES LIMITED (IN RECEIVERSHIP), ULSTER BANK IRELAND DESIGNATED ACTIVITY COMPANY, KAVANAGH FENNELL AND SEACONVIEW LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 21st day of December, 2020

Introduction

1. The first plaintiff, Mr. Bill Cullen, is a businessman in the motor industry and is the sole shareholder in the first defendant, Glencullen Holdings Limited (In receivership), which, in turn, is the sole shareholder in the second, third and fourth defendant, who were motor vehicle retailers and property holding companies, as well as a number of other companies. The fifth defendant ("*Ulster Bank*") was the group's bank. The sixth defendant is a firm of insolvency practitioners which is said to have been appointed as receiver over the Glencullen companies. Strictly speaking it was Mr. Tom Kavanagh and Mr. Ken Fennell rather than the firm who were appointed as joint receivers and managers over all of the property, assets and undertaking of the companies but no point has been made as to use of the firm name.

2. The seventh defendant is the assignee of the loans made by Ulster Bank to the Glencullen companies and of the security given for those loans. It is since 2nd February, 2016 the registered owner of a charge over the property comprised in Folio 22824, County Kerry, which was originally registered by Ulster Bank on 4th February, 2011.

3. By this action, which was commenced by plenary summons issued on 26th February, 2018, Mr. Cullen claims a variety of declarations and damages under a number of headings. In the plenary summons Glencullen Holdings Limited was named both as plaintiff and defendant but the statement of claim which was delivered on 9th January, 2019 was delivered on behalf of Mr. Cullen only.

4. The prayer to the statement of claim claims damages, including aggravated and exemplary damages, for a range of alleged wrongs by the defendants and a number of declarations, but the focus (although, as will appear, not the exclusive focus) of the application now before the court was on Mr. Cullen's claim to be entitled to a beneficial interest in the property comprised in Folio 22824, County Kerry, known as Killegy House, Muckross, Killarney, County Kerry.

5. On foot of his claims for declaratory relief Mr. Cullen registered this action as a lis pendens against each of the defendants.

6. This is an application on behalf of the first, third, fourth, sixth and seventh defendants for an order vacating the *lites pendentes* registered by Mr. Cullen against them on the grounds that the *lites pendentes* were not properly registered in accordance with the requirements of s. 121(2)(a) of the Land and Conveyancing Law Reform Act, 2009, and for an order pursuant to s. 123(b)(ii) of the Act of 2009 vacating the *lites pendentes* on the ground that the action is not being prosecuted bona fide.

Background

7. To explain the issues now before the court and the arguments made on behalf of the moving defendants and Mr. Cullen, respectively, it is necessary to set out the background in some detail.

8. In late 2009 and early 2010 the first defendant ("*Glencullen Holdings*") was in negotiation with Ulster Bank for the renewal of its facilities. Ulster Bank was unwilling to do so unless the overall indebtedness of the group was reduced by €1 million. At about that time Mr. Cullen and his partner Ms. Jackie Lavin sold a property which they owned in Isleworth, Florida, in which there was significant equity. Ms. Lavin agreed to loan to Mr. Cullen €1 million from her share of the proceeds of sale of the Florida property, which Mr. Cullen agreed to loan to Glencullen Holdings, and which was to be paid to Ulster Bank.

9. The refinancing of the facilities was formalised in a letter dated 9th December, 2010 addressed to Glencullen Holdings and all companies in the group and accepted on the same date by Mr. Cullen on behalf of 30 companies, including the first, second, third and fourth defendants, and on his own behalf as guarantor of the liabilities of the companies.

10. The facility letter extended five facilities to five named companies, subject to Ulster Bank's standard terms and conditions, a number of conditions precedent, and a number of special conditions.

11. Facility B was a demand loan facility of €4.9 million for the second defendant, Citygate Motor Group Limited. The terms as to repayment provided that:-

> *"Without prejudice to the Bank's rights under this Clause, Facility B is to be partially repaid on or before 31st December 2010 by €1,000,000 (one million euro) from a subordinated loan to be provided to Glencullen Holdings Limited by Mr William Cullen, the funds for which will come from the sale proceeds of a property at Isleworth, Orange County, Florida, United States of America ('Isleworth')."*

12. The facility letter set out thirteen conditions precedent, two of which are relevant:-

> *"2. Receipt by the Bank of a repayment in the amount of €1,000,000 (one million euro) in cleared funds from Glencullen Holdings Limited, which is to be funded by a loan in the amount of €1,000,000 (one million euro) from Mr. William Cullen to Glencullen Holdings Limited (the 'WC Loan');*
>
> *3. The Bank to receive in a form and content acceptable to it, a certificate from the solicitors for Jackie Lavin confirming that she has received independent legal advice*

in relation to a gift or loan in the amount of €1,000,000 (one million euro) made from Jackie Lavin to Mr. William Cullen, in order to fund the provision by Mr. Cullen of the WC Loan and the consequences of the entry by Mr. William Cullen into the Subordination Agreement."

13. The facility letter set out the security already held by Ulster Bank and stipulated for four additional items of security, including:-

> *"First fixed and legal mortgages and charges over all the rights, title and interest of Glencullen Properties Limited and Glencullen Motor Properties Limited in and to the properties known as Killegy House and guest cottage, Killegy Upper, Muckcross, Killarney (the 'Killegy Property') County Kerry (folio KY22824), Newlands Cross, County Dublin (folios DN4306 and DN146036F), Brown's Barn, Citywest, Dublin (folios DN18933F and DN938F) and Rosslare, County Wexford (folio WX7269F)."*

14. Of the eight special conditions set out in the facility letter, one is relevant:-

> *"2. None of the Borrowers or Guarantors may sell, lease, transfer, assign or otherwise dispose of any interest in any of its properties or assets (including, without limitation, the Properties) and for the avoidance of doubt, any funds realised from the sale of any Property shall be applied in full discharge of the Indebtedness of the Borrowers and Guarantors to the Bank (unless otherwise agreed in writing by the Bank), save that:*
>
> *a) In the event of a disposal of the Killegy Property (which, for the avoidance of doubt, may not occur without the prior written consent of the Bank), an amount equal to no more than 50 per cent of the net sale proceeds may be retained by Glencullen Holdings Limited; and*
>
> *b) In the event of a disposal of any of the other Properties (which, for the avoidance of doubt, may not occur without the prior written consent of the Bank), an amount equal to no more than 25 per cent of the net sale proceeds may be retained by Glencullen Holdings Limited,*
>
> *In each case to be applied only in reduction of the WC Loan, provided strictly that the total of the amounts that may be retained by Glencullen Holdings Limited from the sale proceeds of the Properties referred to in paragraphs (a) and (b) above shall not exceed the aggregate maximum amount of €1,000,000 (one million euro)."*

15. By deed made on 10th October, 2012 Messrs. Kavanagh and Fennell were appointed joint receivers and managers of all of the property, assets and undertaking of twelve Glencullen companies, including Glencullen Properties Limited, which is the registered owner of Killegy House.

16. It appears that at the time of the appointment of the receivers Ms. Lavin was in possession of Killegy House. Ms. Lavin first asserted that she was a tenant and on 13th

March, 2012 she was given notice of termination. Ms. Lavin brought a claim to the Private Residential Tenancies Board challenging the validity of the notice of termination. She was successful in that regard before the adjudicator, but on appeal by Glencullen Properties that decision was reversed by the Adjudication Tribunal. By a determination dated 17th January, 2014 Ms. Lavin was directed to vacate the property within 112 days; and to pay arrears of rent from 1st September, 2012 and further rent until she should vacate the property. On foot of the determination, a determination order was made on 7th February, 2014. Ms. Lavin did not comply with the determination order and in May, 2014 the receivers commenced Circuit Court proceedings for its enforcement.

17. In the meantime, on 15th January, 2014, two days before the determination, Ms. Lavin had issued a plenary summons against Glencullen Properties Limited and Mr. Cullen claiming a declaration that she was the sole legal and beneficial owner of Killegy House and ancillary relief. Ms. Lavin issued the summons *pro se* but later a firm of solicitors came on record and a statement of claim was delivered on 22nd July, 2014. The statement of claim was not settled by counsel.

18. In her action Ms. Lavin claimed that she had been employed by Glencullen Properties and that she had occupied the property as a benefit in kind until 10th February, 2009 when she took a lease for twelve months, which was later extended for a further period of three years. She claimed that she had agreed to the sale of the property in Florida and to provide €1 million from the proceeds of sale to Glencullen Properties "*on the basis that [Glencullen Properties] as the legal owner and Ulster Bank as the charge holder would sell the property to her as a private sale*." She claimed that in April, 2010 she had agreed to advance €1 million to Mr. Cullen for the purpose of paying down the liabilities of Glencullen Properties on condition, variously, that Ulster Bank would consent to the sale of the property to her for €1 million and that Ulster Bank would refund 50% of the "*open market value of the sale*" to Glencullen Properties. Ms. Lavin claimed, variously, to have advanced two sums amounting in total to €757,000 to Glencullen Properties and to have paid those monies to Glencullen Properties "*by way of advancing that sum*" to Mr. Cullen, and, against legal advice which Ulster Bank insisted she should take, to have signed a waiver which, she claimed, might or might not have referred to Killegy House, stating that she had no legal or equitable interest in the property.

19. Mr. Cullen took no part in Ms. Lavin's proceedings. On 23rd February, 2015 a defence was delivered on behalf of the company and on 25th October, 2017 the action was settled upon terms which disposed of all of Ms. Lavin's claims against Killegy House.

20. At some time presumably shortly before 10th May, 2018 Killegy House was put on the market for sale by auction which was to take place on 6th July, 2018. By letter of that date, Gary Matthews, solicitors, wrote to the receivers purportedly on behalf of Glencullen Holdings Limited, as well as Mr. Cullen. They gave notice that a lis pendens had been registered in the High Court and called for the auction to be abandoned.

The claims the subject of the proceedings

21. This action, as I have said, was commenced by plenary summons issued on 26th January, 2018. An appearance was entered on behalf of the first, third, fourth, sixth and seventh defendants on 13th March, 2018. Those defendants called for delivery of a statement of claim which was eventually delivered on 9th January, 2019, on behalf of Mr. Cullen only.

22. The statement of claim summarises the negotiations for the refinancing of the facilities and quotes from the facility letter the provision as to the partial repayment of the Citygate Motor Group Limited facility, clause 2 of the conditions precedent, and clause 2 of the special conditions. It also quotes from three e-mails sent by the bank manager who was dealing with the refinancing of the Glencullen facilities. The first, sent on 23rd February, 2010 to the Bank's solicitors said:-

> *"BC is putting forward the case that these monies are JL's and whilst she is willing to make the funds available to BC to inject into the group this is subject to her getting priority over the Bank in terms of repayment ranking. Our thinking is that we're likely to go along with this on the basis that repayment is linked to future group property asset disposals – the proceeds of which would be shared out in a pro-rata fashion between the Bank and JC. We'd look to cover this off in our facility letter documentation if possible.*
>
> *Ideally we'd like JC to lend the money to BC (we don't want to get involved in a direct arrangement with JL if at all possible) who would then inject them as a director's loan."*

23. The second e-mail relied on was sent on 25th May, 2010 by the bank manager to an executive in Glencullen Holdings. It said:-

> *"… Our paper is with Credit and we are proposing that the €1 m injection of the remaining Isleworth sale proceeds get repaid from the 50/50 splitting of Killegy sale proceeds and then a 75 (Bank)/25 (BC/JC) split in other group property asset disposals.*
>
> *I assume this is 'green light' from your end?? Can you confirm please."*

24. The third e-mail relied on is an internal bank e-mail sent on 13th July, 2010. This read:-

> *"Tom,*
>
> *You will no doubt recall from the recent AR paper that we agreed on the basis that BC inject the final €1m from the sale proceeds of Isleworth (which were being loaned to him by Jackie Lavin), that these funds would be repaid from the sale of group property assets, on the pro-rata basis outlined below:*
>
> *Killegy House – sale proceeds to be shared on a 50%/50% basis between the Bank and BC.*

Other property assets – sale proceeds to be shared on a 75%/25% basis with the Bank receiving the 75% share."

25. Having set out the terms of the e-mails and the "*lending agreement*" of December, 2010, the statement of claim goes on to say that in accordance with the agreement and in reliance on the Bank's representations the €1 million was lodged to the bank account of Glencullen Holdings by Mr. Cullen, but that in breach of the agreement and "*as a result of the [Bank's] misrepresentations*" the defendants have not split the net proceeds of sale of any of the properties with Mr. Cullen. The defendants are said to have already received the proceeds of the sale of unidentified properties and/or to be purporting to sell additional unidentified properties that belong to Mr. Cullen or Glencullen Holdings "*such as the Killegy property*" without agreeing to apportion the net sales proceeds appropriately as per the loan agreement.

26. The statement of claim goes on to make a variety of allegations against Ulster Bank and in relation to the receivers' management of a property at Airways Industrial Estate – said to be owned by Mr. Cullen personally – which are not material to the present application. The case is also made that the defendants have operated the first, second, third and fourth defendants in disregard of Mr. Cullen's interests as a member of those companies, including the repayment – presumably what is meant is the failure to repay – the €1 million "*WC Loan*".

The application

27. The application on behalf of the first, third, fourth and sixth defendants is grounded on an affidavit of Mr. Tom Kavanagh which identifies, and offers a number of observations on, those paragraphs of the statement of claim which are relevant to the claim made in relation to Killegy House. He points out that it is incorrect to assert that either Mr. Cullen or Glencullen Holdings owns Killegy House, which is owned by Glencullen Properties Limited (In receivership). He suggests that those provisions of the facility letter which set out a split of the proceeds of sale "*do not appear to apply in the context of a receivership*" but that even if Mr. Cullen could maintain a claim by reference to the special conditions, the extent of that claim is that 50% of the proceeds of sale might be retained by Glencullen Holdings and applied in reduction of the WC Loan. It is plain from the facility letter, he says, that it was not agreed that Mr. Cullen would acquire any interest in Killegy House. The statement of claim, it is said, does not disclose any sustainable basis for the claim for the reliefs sought.

28. Mr. Kavanagh sets out separately his case that the action is not being prosecuted *bona fide.* He suggests that the issues raised by Mr. Cullen in these proceedings are the same as those raised by Ms. Lavin her action. The claims now made by Mr. Cullen, it is said, arise out of the same credit facility arrangements as were the basis of Ms. Lavin's action. Mr. Kavanagh complains that Mr. Cullen took no part in Ms. Lavin's action; that Mr. Cullen did not dispute her claim that Ulster Bank had agreed to the sale of the property to her and to refund 50% of the value of the sale to Glencullen Properties; and that Mr. Cullen allowed Ms. Lavin to advance a claim which was of benefit to her. Significantly, it is said, Mr. Cullen did not advance in Ms. Lavin's proceedings the claim which he advances in

these proceedings and only instituted these proceedings after Ms. Lavin's proceedings had been compromised. It is suggested that this action has been brought as part of an ongoing campaign to prevent the receivers from disposing of Killegy House.

29. The application on behalf of the seventh defendant is grounded on an affidavit of Mr. Shane Coman, a director of Seaconview DAC, who expresses a belief that Mr. Kavanagh's affidavit is accurate. Mr. Coman points to the *lis pendens* registered against Seaconview which does not identify any specific property but states that Seaconview is the person whose estate is to be affected by the registration. He suggests that the only property in which Mr. Cullen claims to have an interest in Killegy House and makes more or less the same points as were made in Mr. Kavanagh's affidavit.

30. In response to the motion Mr. Cullen swore quite a long affidavit. He suggests that Messrs. Kavanagh and Coman tacitly accept that the action concerns a dispute over an estate or interest in land but ask the court to resolve that dispute in a summary manner. He suggests that the facility letter made provision as to how "*the beneficial interest (or sale proceeds) of the Glencullen Group properties were to be dealt with*" and that it is clear that the receivers and/or Ulster Bank and/or Seaconview are refusing to abide by the terms of the agreement and are asking the court to determine the issue in their favour as part of this application. He protests that the defendants have not delivered their defence and that if they had the action could by now have been determined.

31. Mr. Cullen then goes on to replicate the statement of claim, exhibiting copies of the e-mails which were quoted. The e-mails, he says, clearly show that it was the intention of Ulster Bank that the €1 million loan would be repaid from the proceeds of sale of the properties without conditions "*and definitely without the conditions which the Receiver and Seaconview now seek to retrospectively create*." Mr. Cullen asserts that the dispute is very much one in which a claim is made to an estate or interest in land and that he has a 50% beneficial interest in the Killegy House property and a 25% beneficial interest in all other properties, up to a limit of €1 million.

32. Mr. Cullen asserts that the agreement between him, the Glencullen Group, and Ulster Bank which, he says, he has set out, was that he was to receive "*50% of the beneficial interest i.e. the sale proceeds*" of Killegy House and "*25% of the beneficial interest i.e. the sale proceeds*" in the event of a disposal of any of the other properties. He says that he has been advised that a charge is also considered to be an estate or interest in land, but does not suggest that he has a charge, or that it was ever agreed that he would have a charge. Mr. Cullen suggests that if Mr. Kavanagh has an issue with the wording of the *lites pendentes* he should have written to Mr. Cullen's solicitors proposing amendments.

33. Mr. Cullen acknowledges that he was aware of other proceedings brought by his ex-wife, and by his current partner, and says that they had nothing to do with him, save that he was named as a defendant. He does not understand how Ms. Lavin's proceedings, or the settlement of those proceedings by Mr. Kavanagh, without reference to him, are relevant to this application.

34. Mr. Cullen's position is that he is not seeking to prevent the receivers from realising the security and he suggests that if Mr. Kavanagh were willing to give an undertaking that he would abide the terms of the agreement contained in the facility letter and that he would "*divide the beneficial interest (i.e. the sales proceeds)"* he would remove the lites pendentes as there would no longer be a dispute over the beneficial interest in the land.

35. Mr. Kavanagh's grounding affidavit was sworn on 6th December, 2019. Mr. Cullen's replying affidavit was sworn on 3rd February, 2020. On 16th April, 2020 Mr. Kavanagh swore a further affidavit which was largely argumentative but did offer as a reason why no defence had been delivered that a notice for particulars had been served on 4th April, 2019 which had not been replied to.

36. On 29th June, 2020 Mr. Cullen swore a further affidavit in which he largely repeated what he had previously said but in which he expressly disclaimed any suggestion that he had a charge over Killegy House.

The progress of the proceedings

37. The notice of motion now before the court was issued on 6th December, 2019. In his replying affidavit sworn on 3rd February, 2020 Mr. Cullen protested that he had delivered a statement of claim upwards of a year previously and that the defendants had not delivered a defence. He asked that this delay on the part of the defendants should be taken into account in assessing their *bona fides*. Mr. Kavanagh, in response, pointed to the delay on the part of Mr. Cullen in delivering his statement of claim, and to a notice for particulars which had been served on 4th April, 2019, which had not been answered. In a second replying affidavit sworn on 29th June, 2020 Mr. Cullen confessed that he had been unaware of the outstanding notice for particulars and said that he had instructed his solicitors to reply to it without further delay.

38. Eventually, on 7th September, 2020, Mr. Cullen's solicitors served a form of replies to particulars by which they firstly protested generally that the request was more properly a matter for evidence or discovery or interrogatories or legal submission or entirely within the knowledge of the moving defendants; secondly protested that the notice was oppressive, unnecessary, vexatious and an abuse of process; and thirdly addressed the particulars sought seriatim asserting that the claim had been fully pleaded in the statement of claim. It is of some significance to note that at para. 7(k) Mr. Cullen was asked to specify each alleged misrepresentation, to which the answer was that this allegation had been fully pleaded.

39. There was a long delay between the issuing of the summons and delivery of the statement of claim, but the plaintiff was not pressed to do so. There has been a long delay in the delivery of the defence, but the defendants were not pressed to do so. If the defendants' position is that they needed the replies to particulars before delivering their defence, they are no further on. The outstanding notice for particulars was obviously no impediment to the issuing of the motion now before the court but I cannot see how the timing of the motion might be thought to have strategically advantaged the defendants or disadvantaged the plaintiff.

40. Mr. Cullen protests that the defendants are asking the court to summarily determine and dismiss his claim. In fact they are not. Contrary to Mr. Cullen's apprehension I am not on this application asked to decide whether the special condition is or is not applicable in the events as they have unfolded but rather to determine the nature of his claim to the proceeds of sale of the properties. The object of the motion is only to have the *lites pendentes* vacated, not to have the action dismissed as being bound to fail. But if the defendants had moved to have the action summarily dismissed I cannot see why they would not have been entitled to do so.

41. In my view, while the action has progressed – to the extent that it has progressed – at a leisurely pace on both sides, there is no warrant to condemn either side for undue delay, still less – as far as the progress of the action is concerned – to question the *bona fides* of either side.

Estate or interest in land

42. The core issue on this application is whether Mr. Cullen's action is one in which a claim is made to an estate or interest in land. Plainly the prayer in the statement of claim seeks a declaration that he is entitled to a 50% beneficial interest in Killegy House, but the real question is whether the ground has been laid in the body of the statement of claim for such an order.

43. Section 121 of the Land and Conveyancing Law Reform Act, 2009 provides:

> *"121.- (1) A register of lis pendens affecting land shall be maintained in the prescribed manner in the Central Office of the High Court.*
>
> *(2) The following may be registered as a lis pendens:*
>
> *(a) any action in the Circuit Court or the High Court in which a claim is made to an estate or interest in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action; and*
>
> *(b) any proceedings to have a conveyance of an estate or interest in land declared void.*
>
> *(3) Such particulars as may be prescribed shall be entered in the register."*

44. Section 123 of the Act of 2009 provides:-

> *"123. - Subject to section 124, [which deals with lites pendentes registered under the Judgments (Ireland) Act, 1844] 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."

45. In *Tola Capital Management LLC v. Linders (No. 2)* [2014] IEHC 324 Cregan J. observed that the nature of a *lis pendens* is an elusive concept. In practical terms, it operates as a mechanism to give notice to potential purchasers of land of a claim to that land but in legal theory it is based on the policy of the law that a litigant may not, where there is pending litigation, give to others rights in the property in dispute to the prejudice of the opposing party.

46. Strictly speaking, I do not think that the essential nature of a *lis pendens* is that the person against whom it has been registered should not sell, but rather that the potential purchaser buys at his peril. Theoretically, a potential purchaser might investigate the claim against the land and form a view as to the prospects of it succeeding and then seek to negotiate a price which would reflect the prospects of the action succeeding and the delay, trouble and cost likely to be incurred in having the claim disposed of, but such a purchaser would be a rare bird indeed. As Cregan J. observed, at para. 60:-

> *"[T]he effect of a lis pendens and the registration of a lis pendens is effectively to freeze any further disposition of land until the proceedings are determined. It can, therefore, have the same effect as an interlocutory injunction restraining the disposition of land pending the hearing of the action without the necessity of the moving party having to establish that there is a serious issue to be tried, that damages are not an adequate remedy and that the balance of convenience is in favour of the application. Moreover, the moving party does not have to give an undertaking as to damages."*

47. The law as now set out in the Land and Conveyancing Law Reform Act, 2009 is not precisely the same as that which was developed by the authorities dealing with the Judgments (Ireland) Act, 1844, but as the purpose of the Act of 1844 was, so the purpose of the Act of 2009 is, to provide a system for registration and not to alter the nature of the *lis pendens*. See *A.S. v. G.S*. [1994] 1 I.R. 407.

48. In *Tola* Cregan J. undertook a comprehensive review of the development of the law which it is not necessary to repeat. At paras. 88 and 89 he said:-

> *88. In Cunnane v. Shannon Foynes Port Company (Unreported, Supreme Court, 8th July, 2002) Murphy J. (giving the decision of the unanimous court) considered an application by the defendant to vacate a lis pendens. Murphy J. reviewed the authorities in Ireland and in England and at p. 8 of his judgment stated as follows:-*
>
> > *'It would seem to me that what the authorities in both jurisdictions establish is that to be registerable as a lis pendens an action must claim an interest in land but that the interest claimed need not be in existence at the date in*

which the proceedings are instituted. If no such interest is claimed, the proceedings are not registerable.'

89. At p. 10 Murphy J. stated that the authorities also establish that if a claim is successful but would not result in an estate or interest in the land, then the lis could not be registerable."

49. Having chronicled the development of the law and examined and analysed the Act of 2009, Cregan J. concluded:-

"111. Therefore, in order to come within the relevant statutory section, a person seeking to register a lis pendens must show:-

(a) That there is an action in the High Court (or Circuit Court),

(b) in which a claim is made to an estate or interest in land,

(c) by way of claim in the action.

112. However, in the light of the authorities which I have set out above, in order to come within the statutory definition set out in s. 121(2)(a) a party seeking to register a lis pendens has to establish:-

(a) That the plaintiff is claiming a proprietary estate or interest in land.

(b) That the defendant has an estate or interest in the land in which the plaintiff is claiming an estate or interest.

(c) That the proceedings themselves make a claim to a proprietary estate or interest in the said lands."

Analysis

50. In support of the defendants' motion, Ms. Lorna Lynch refers to the decision of Clarke J. (as he then was) in *Moorview Developments Ltd. v. First Active plc* [2010] IEHC 35 which was a case in which, as in this case, the court was concerned with one set of proceedings in which a number of claims were made against a number of defendants, but not all of the claims were being pursued against all of the defendants. Specifically, as in this case, a *lis pendens* had been registered against a receiver as well as the owner of a charge on land. Clarke J. said, starting at para. 4.1:-

4.1. It seems to me that, as a matter of first principle, it could never be the case that a defendant who happened to be properly joined in a set of proceedings in relation to some relief that did not relate directly to land in which the relevant defendant had an interest, could properly be the subject of a lis pendens. There would, in those circumstances, be no lis pending in relation to the ownership of land or an interest in land in respect of the person concerned. The underlying rationale behind the registration of a lis pendens is as was noted by Geoghegan J. in A.S. v. G.S. [1994] 1 I.R. 407. In the course of his judgment in that case Geoghegan J. noted with

approval the explanation by Lord Cranworth in Bellamy v. Sabine (1957) 1 De. G. & J. 566. The relevant passage speaks of 'litigation…pending between a plaintiff and a defendant as to the right to a particular estate…'.

4.2 That quote seems to me to express the fundamental proposition. The issue between the parties must relate to the ownership of some interest in land. Where there is more than one defendant in the proceedings, then in order that a lis pendens be validly registered in respect of a particular defendant, then the issues which arise on the pleadings and which are being bona fide pursued by the plaintiff insofar as the relevant defendant is concerned, must relate to the ownership of some interest in land.

4.3 In those circumstances, it does not seem to me that the position of a receiver or agent is captured. A receiver does not own any interest in lands which are properly described as being owned by the company to which the receiver has been appointed. The lands remain owned by the company (in receivership). The fact that the receiver may well be entitled, provided that all necessary formalities are complied with, to execute a deed of transfer of a relevant interest in property in the name of the company does not alter that fact. It is the company which transfers the property. The receiver is simply entitled, by virtue of the debenture in favour of the relevant lender, and his appointment, to cause the company to effect the transfer. …"

51. The judgment of Clarke J. in *Moorview* was the basis of the requirement identified by Cregan J. at para. 112(b) of his judgment in *Tola* that to come within the statutory definition, a plaintiff who registers a *lis pendens* must be able to establish that the defendant has an estate of interest in the land in which the plaintiff is claiming an estate or interest.

52. Mr. Paul O'Grady, for the plaintiff, accepts, as he must, that the receivers have no interest in any of the lands – whether Killegy House or any other property of any of the defendants. He argues, however, this was not the "*specific basis*" on which the application was brought. He submits that as the defendants chose to bring one motion, grounded on one affidavit sworn on behalf of the first, third, fourth, and sixth defendants. Besides, he adds, it is the receivers who are causing all the trouble by refusing to admit Mr. Cullen's claims.

53. I cannot accept this argument. The motion is clearly brought on behalf of all of the moving defendants. To have brought separate motions on behalf of each of the defendants would have been a waste of paper, ink, and stamp duty. The grounding affidavit of Mr. Kavanagh makes the point that neither the first nor the fourth defendants, nor the receivers' former firm, hold any estate or interest in Killegy House.

54. If it is not alleged that the sixth defendant has any interest in Killegy House (or any other property) the action ought not to have been registered as a *lis pendens* against it and the registration must be set aside.

55. I am satisfied that the *lis pendens* registered against the sixth defendant did not meet the requirements of s. 121(2)(a) of the Land and Conveyancing Law Reform Act, 2009 and that the sixth defendant is entitled to the order which it seeks.

56. The position of the other defendants is slightly more complicated.

57. The third defendant, Glencullen Properties, is the registered owner of the property comprised in Folio 22824, County Kerry, viz. Killegy House. None of the other defendants, bar the seventh, have any estate or interest in that property but they do have, or at least at one time had, an interest in other properties over which the receivers were appointed. The statement of claim does not identify these properties or say whether they have been sold but Mr. O'Grady argues that the plaintiff's claim for "*a declaration that 25% of the net sales proceeds received by the defendants from all other property sales are held on trust for the plaintiff*" is a claim for an estate or interest in such, if any, of the unidentified properties as may not have been sold. I cannot accept that argument.

58. Starting from first principles, a *lis* cannot be registrable unless the land the subject of the claim is identified. Otherwise the owner of two or more parcels of land would be effectively prevented from dealing with any of them by reason of a dispute in relation to any one of them. It is true that the form prescribed by the Rules of the Superior Courts (Land and Conveyancing Law Reform Act, 2009) 2010 (S.I. No. 149) does not require the land to be identified but this must be apparent from the proceedings: in an action commenced by plenary summons, if not in the general indorsement of claim, at the latest in the statement of claim. Insofar as any property other than Killegy House is concerned, if the premise of the claim is not that they have already been sold, the relief claimed is directed and confined to the proceeds of sale. That claim, if successful, would not result in an estate of interest in any land, so the *lis* is not registrable.

59. I am satisfied that the first and fourth defendants are entitled to the orders which they seek under s. 121(2)(a) of the Act of 2009.

60. As to the third and seventh defendants, the registered owner of the Killegy House and the registered owner of a charge on that land, Ms. Lynch makes two points. Firstly, she says, the terms of the facility letter on which Mr. Cullen relies cannot give rise to an estate or interest in Killegy House but only a claim against Glencullen Holdings for a share of such amount it might retain from the proceeds of sale of a property which it does not own. Secondly, she says, a claim for a share in the proceeds of sale of land is not a claim for an estate or interest in land.

61. In support of this second proposition Ms. Lynch relies on the decision of the Court of Appeal in England in *Taylor v. Taylor* [1968] 1 W.L.R. 378, which was cited with approval by Cregan J. in *Tola*. That was a claim by a wife under the Married Women's Property Act, 1882 for a declaration that she and her husband were beneficial owners in equal shares of what had been the matrimonial home; an order for sale; and the equal division of the net proceeds of sale. The Court of Appeal held that the wife's interest in the property was at most a share in the proceeds of sale of the house and not an interest in

land that would have supported a *lis pendens* and ordered that the *lis pendens* which had been registered by the wife should be vacated. The analysis of the legal nature of the wife's claim to a beneficial interest in property in the sole name of the husband turned on the effect of the Law of Property Act, 1925 which abolished tenancy in common at law in England, but having identified the wife's interest as a share in the proceeds of sale Danckwerts L.J. said:-

> *"…[T]he wife's interest at most was a share in the proceeds of sale of the property, and … there was, therefore, no interest which she possessed in the land at all, but merely in the proceeds of sale, and that to my mind is decisive and makes the entry of the lis pendens not a proper entry in the situation in which the matter stands."*

62. Russell L.J. (in the passage cited by Cregan J. in *Tola*) added:-

> *"The lis, the dispute, is not about any land, but about what is the entitlement to the beneficial interest in the land, and therefore the proceeds of such sale. The purpose of registration of a lis pendens is to prevent effective disposition of the land pendente lite. How can a suit which demands that the land be disposed of be properly registrable? … If one is going to find out what the lis is, one can only look to the formal document which contains the contention or claim of the claimant."*

63. The law in England in relation to ownership in common is significantly different to the law in Ireland. I am persuaded that as far as any properties other than Killegy House are concerned, the claim for a declaration that 25% of the net sale proceeds are held in trust is not a claim to an interest in land. I am not, however, persuaded that Mr. Cullen's claim for a declaration that he has a 50% beneficial interest in Killegy House is not a claim to an interest in land. As witness, for example, the decisions of Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268 and of Costello J. in *Tyrrell v. Wright* [2017] IEHC 92, in Ireland, an action claiming a beneficial or equitable interest in land may properly be registered as a lis pendens. That, however, is by no means the end of the matter. While the order claimed, if granted, would amount to an interest in land, the question remains whether the case pleaded, if made out, could lead to the making of such an order.

64. The statement of claim makes a number of complaints as to the conduct of Ulster Bank and the receivers which are plainly not material to the *lis pendens*. The pleas in relation to Killegy House and the unidentified other properties are to be found at paras. 9 to 18, under the heading "*Working Capital Loan Issue*." Mr. Cullen rehearses the circumstances in which Glencullen Holdings sought to renew its credit facilities with Ulster Bank; the agreement that Ms. Lavin would loan €1 million to him, which he would loan to Glencullen Holdings to reduce Glencullen Holding's debt to the Bank; the three e-mails to which I have referred; the terms of the facility letter of 9th December, 2010; and the lodgement of the €1 million to Glencullen Holdings' account. I am not on this application to express any view as to whether or how the e-mails (all of which predated the agreement comprised in the facility letter, and to two of which neither Mr. Cullen or any of the

defendants appear to have been privy) might be relevant to the construction of the loan agreement and I do not do so. Mr. Cullen's claim is that:-

> *"… in breach of the lending agreement and/or as a result of [Ulster Bank's] misrepresentations, the defendants have not split the net sale proceeds of any of the properties with [Mr. Cullen] in accordance with the terms of that agreement.*

65. And that:-

> *"The defendants have either already received these net sales proceeds from the sale of [Glencullen Holding's] properties, or are purporting to sell additional properties that belong to [Mr. Cullen] or [Glencullen Holdings] (such as the Killegy property) without agreeing to apportion the net sales proceeds appropriately as per the loan agreement."*

66. That is all. En passant, I have no idea how it might have been done, but the statement of claim does not attempt to explain by what alchemy a later failure to share the proceeds of sale of land might create an earlier interest in the land.

67. The moving defendants do not ask the court to wrestle with the issue as to how Glencullen Holdings might have retained part of the proceeds of sale of properties which it did not own; or with the issue as to what might be the net proceeds of sale of a property charged with repayment of a debt; or with the issue as to how Mr. Cullen, personally, might be entitled to be paid monies which it was agreed would be retained by, or perhaps paid to, Glencullen Holdings. The grounding affidavit of Mr. Kavanagh suggests that that the special conditions which provided for a split of the proceeds of sale do not appear to apply in the context of a receivership: but that is not an issue which the court was asked to decide. The premise of the application is that even if Mr. Cullen could maintain a claim on foot of the special conditions when the companies are in receivership, the extent of that claim was 50% of the proceeds of sale of Killegy House, owned by Glencullen Properties Limited, to be applied to reduce the WC loan, i.e. that it is a money claim.

68. I am satisfied that this is a correct submission. The claim is that Mr. Cullen has not been paid money which he claims he ought to have been paid from properties which have already been sold, and that the defendants have refused to confirm that he will be paid money from the proceeds of sale of properties that may be sold in the future. The right asserted is a right to be paid money which will and can only arise after sale. It is not alleged that pending sale Mr. Cullen was to have any interest in the properties, or any of them, and Mr. Cullen has expressly disclaimed any suggestion that he claims to be entitled to a charge on the lands. It is not suggested that the defendants threaten or intend to dissipate the proceeds of any sale so as to defeat Mr. Cullen's claim, or even that the defendants will be no mark for any decree that may be made against them. There is simply no connection between the complaint that Mr. Cullen has not been paid, and will not be paid, the money he says he should have been paid, and should be paid, and the claim for a 50% beneficial interest in the property.

69. "*How*", as Russell L.J. asked in *Taylor v. Taylor*, *"can a suit which demands that the land be disposed of be properly registrable?"*

70. On one view it might be said that in this case there are substantial issues of fact, or perhaps mixed issues of law and fact, to be resolved as to the meaning and effect of the lending agreement. On this application, however, Mr. Cullen's case must be taken at its high water mark and the motion dealt with on the premise that he will make out his case in fact and upon any and every sustainable proposition of law. I assume, therefore, for present purposes, that Mr. Cullen will make out his case that he is entitled to be paid the money he claims, but it is an impossible leap from that to say that he has, or can hope to establish that he has, a beneficial interest in Killegy House.

71. Mr. Cullen in his affidavit and Mr. O'Grady in his submissions seek to make a virtue of the plaintiff's declared position that if only the receivers capitulated to his claim, he would remove the *lites pendentes*. That position is unsustainable. Either the *lis pendens* was properly registered or it was not. The legitimate purpose of registering a *lis pendens* is to fix any purchaser with the outcome of the action, not to force the defendant to capitulate to a claim.

72. Mr. O'Grady submits that a *lis pendens* does not operate to prevent the sale of a property but rather to put a potential purchaser on notice of a dispute over an estate or interest in the property. Putting to one side the elusive nature of a *lis pendens*, there is no reality to this submission. No one in their right mind would buy a law suit.

73. I am satisfied that the third and seventh defendants are entitled to the orders which they seek under s. 121(2)(a) of the Act of 2009.

Abuse of process

74. Having come to the conclusion which I have on the moving defendants' applications under s. 121(2)(a) it is not necessary that I should deal with the alternative claim for an order pursuant to s. 123(b)(ii) but the argument was interesting and slightly novel.

75. Ms. Lynch submits that Mr. Cullen's claim in relation to Killegy House is not being prosecuted bona fide and constitutes a *Henderson v. Henderson* abuse of process. The argument is that the claim pleaded in this action that Mr. Cullen is entitled to a beneficial interest in Killegy House (if there was any merit in it) ought to have been made in the 2014 action in which Ms. Lavin was plaintiff and Mr. Cullen was a defendant. Mr. Cullen's claim in these proceedings, so the argument goes, is based on the same dealings with Ulster Bank and the same documents on which Ms. Lavin's claim was based. The claim in these proceedings to an interest in Killegy House, it is said, covers the same ground as Ms. Lavin's action and should have been raised then. The receivers and the charge holder, it is said, are facing significant additional costs in defending a fresh claim in relation to Killegy House. The court is invited to conclude that Mr. Cullen's action is part of a wider co-ordinated campaign to frustrate the receivership.

76. Mr. O'Grady challenges the defendants to produce authority in support of their argument. He makes five points: (1) Mr. Cullen was a defendant in the earlier proceedings; (2) Mr. Cullen filed no pleading in the earlier action; (3) Mr. Cullen took no step in the earlier action; (4) the earlier action was settled prior to judicial determination; and (5) Mr. Cullen was not party to that settlement. He relies on the judgment of the English Court of Appeal in *Aldi Stores Ltd. v. WSP Group plc* [2007] EWCA Civ. 1260, emphasising the public interest in allowing a party freedom to chose whom they sue in a complex commercial matter. Mr. Cullen has deposed to the view that the earlier action had absolutely nothing to do with him. He suggests that just because Ms. Lavin had a valid claim, which was settled by the receivers, this does not mean that he does not have a valid or *bona fide* claim.

77. In her judgment in *O'Connor v. Cotter* [2017] IECA 25, Finlay-Geoghegan J. recalled that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 had been recently considered by the Court of Appeal in *Vico Limited v. Bank of Ireland* [2016] IECA 273, in which the court had identified the underlying principle as being similar to that in *res judicata*, namely the public interest that those who resort to litigation should obtain a final and conclusive determination of their disputes.

78. In her judgment in *Vico*, Finlay-Geoghegan J. adopted the explanation of the rule in *Henderson v. Henderson* given by Cooke J. in the High Court in Re: *Vantive Holdings* [2009] IEHC 408, at paras. 32 to 33, and cited with apparent approval by Murray C.J. in *Re: Vantive Holdings* [2010] 2 I.R. 118, at para. 21:-

> *"The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."*

79. In *Vico* Finlay-Geoghegan J. went on to cite the restatement of the rule by Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 at p. 31, which had been approved of by the Supreme Court in a number of cases, including *Re: Vantive Holdings*:-

> *"… Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the*

party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

80. It is acknowledged that the moving defendants carry the onus of satisfying the court that Mr. Cullen's claim against Killegy House is an abuse of process.

81. As I understand the argument advanced on behalf of the defendants, it is that the *lites pendentes* should be vacated both because the claim or claims do not fall within the provisions of s. 121(2)(a) and because it or they fall foul of section 123(b)(ii), but to my mind the arguments must be alternative. The premise of the argument under s. 121(2)(a) is that Mr. Cullen has no estate or interest in the land. If that is so (and the court has found that that is so) he can hardly be condemned for abusing process by not previously making a case which he does not and did not have.

82. I am not persuaded that *Aldi Stores Ltd. v. WSP Group plc* is relevant to this case. While it is true, as Mr. O'Grady argues, that this is an action against several defendants and that several causes of action have been pleaded, I do not believe that a claim in later proceedings covering the same ground as earlier proceedings could escape *Henderson v. Henderson* scrutiny merely by reference to the number of defendants or the number or breadth of the causes of action pleaded.

83. I think that it is relevant that Mr. Cullen was a defendant rather than a plaintiff in the earlier proceedings. He would, I think, have been within his rights to have simply defended Ms. Lavin's action without complicating it by pleading a counterclaim, to which – if it was to have been the same claim as he now makes – he would have had to have added several additional defendants to counterclaim. Ms. Lavin's action has been settled and I am not to express any view on the merits of her claim, but her statement of claim asserted, variously, that she agreed in April, 2020 to advance to Mr. Cullen, and that she did advance to Mr. Cullen, the sum of €1 million to allow him to pay down Glencullen Properties' liabilities to Ulster Bank; that in April, 2010 and October, 2010 – that is before the refinancing agreement was finalised and signed – in furtherance of her agreement to advance the €1 million to Mr. Cullen she paid two sums amounting in total to €757,000 to

Glencullen Properties; and that after the terms of the proposed refinancing agreement had been finalised, and against legal advice, she signed a waiver which may or may not have related to Killegy House. Ms. Lavin's case appears to have been that the €1 million which she was to advance to Mr. Cullen was to have been at the same time a loan to him and the purchase price of the property. For good measure, Ms. Lavin's claim was that of the €1 million which she was to have paid for Killegy House, Ulster Bank was to have refunded half to Glencullen Properties.

84. Ms. Lavin named Mr. Cullen as a defendant to her action, but it is by no means clear what relief she claimed against him. She asked first for an order for specific performance of a contract for the sale to her of Killegy House, to which Mr. Cullen was not alleged to have been party, and secondly an injunction restraining the sale of the property to anyone else. But since Mr. Cullen was not – and was not alleged to be – the owner of the house, I cannot see how he could have sold it or what justification there might have been for an order enjoining him from doing something which he simply could not do.

85. In Ms. Lavin's action Glencullen Properties – by the receivers – raised particulars and delivered a defence and then settled the action without reference to Mr. Cullen. Again without expressing any view on the merits of Ms. Lavin's case, the defence which was delivered was a robust defence which *inter alia* identified what the statement of claim had referred to as a waiver as a statutory declaration sworn by Ms. Lavin on 9th December, 2010 that she had no legal or equitable interest in the assets of Glencullen Properties. The terms of the settlement with Ms. Lavin are not disclosed. It is not said whether any money changed hands or, if it did, which way it passed. I can very well imagine that the receivers might not have dealt with Ms. Lavin's action in the way that they did if they had foreseen a follow on claim by Mr. Cullen, but I am not persuaded that Mr. Cullen – if he thought that the action against him was genuine – was not entitled to keep his head down and hope that it would go away.

86. It seems to me that the fundamental flaw in the defendants' reliance on *Henderson v. Henderson* is that Ms. Lavin's claim was never decided by the court. If, for the sake of argument, Ms. Lavin had stood up her claim for specific performance, Mr. Cullen might very well have been bound by the decision of the court and precluded from making any claim against the property but that never happened. All that happened was that the receivers took a commercial view to dispose of what they regarded – or at least what they pleaded was – an unmeritorious claim. Whatever terms were agreed with Ms. Lavin no doubt precluded any later claim by her, but I cannot see how they could have precluded a later claim by anyone else.

Conclusion

87. There will be an order in the terms of para. (a) of the notice of motion vacating the *lites pendentes* registered by the first plaintiff against the first, third, fourth, sixth and seventh defendants on the grounds that the said *lites pendentes* were not properly registered in accordance with the requirements of s. 121(2)(a) of the Land and Conveyancing Law reform Act, 2009.

88. Provisionally, while the moving defendants have succeeded on one but not the other of the two grounds advanced, it seems to me that they have been entirely successful and are entitled to an award of costs against the unsuccessful party. If Mr. Cullen wishes to make an argument otherwise, he may do so in writing within 28 days, in which event the defendants should file their response within 14 days.

89. Provisionally, if the proposed costs order is made, I would be inclined to stay execution on foot of that order pending the final determination of the action. If the moving defendants wish to argue otherwise, they may do so in writing within 28 days, in which event Mr. Cullen should file his response within 14 days.