

THE HIGH COURT

[2018 No. 2431 P]

BETWEEN

DECLAN KEHOE AND UNA KEHOE

PLAINTIFFS

AND

PROMONTORIA (ARAN) LIMITED AND KEN FENNEL

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 11th day of August, 2021

Summary

1. This case considers whether the plaintiffs' proceedings ought to be struck out on the grounds of inordinate and inexcusable delay. The proceedings concern borrowings of over €3 million to the plaintiffs in relation to the acquisition of commercial and residential property in Dublin, which proceedings facilitated the registration of a *lis pendens* by the plaintiffs seeking to prevent the sale of their property in Tralee, Co. Kerry by a receiver.
2. The within proceedings were issued by way of plenary summons on 20th March, 2018 and six days later, on the 26th March, 2018, the plaintiffs registered a *lis pendens* on the subject lands. However, for whatever reason, the plaintiffs never served the plenary summons on the defendants, or progressed the proceedings in any way, and in fact, as will be seen, the defendants never knew *anything* of the proceedings until 10th September, 2020 – some two and a half years after the proceedings had issued. The plaintiffs took no steps to progress the proceedings in the intervening period (aside from filing a Notice of Change of Solicitor and a Notice of Intention to Proceed) and the total period of delay in this case amounts to a period of three years.
3. This judgment considers the defendants' application to have the plaintiffs' proceedings struck out for want of prosecution on the grounds of delay pursuant to O. 122, r. 11 of the RSC and/or pursuant to the inherent jurisdiction of the court. The defendants also seek an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act, 2009 (as amended) vacating a *lis pendens* registered over the property in Tralee, Co. Kerry the subject matter of these proceedings.
4. For completeness, it should be noted that the plaintiffs have an application to renew the plenary summons and this application was made by way of *ex parte* docket filed on 7th May, 2021. However, when that application was initially made *ex parte* on 17th May, 2021, the court on that occasion directed that the plaintiffs' application be made on notice to the defendants. The motion to renew the plenary summons was subsequently listed for hearing on 20th July, 2021 as along with this motion to strike-out.
5. The application to strike out the proceedings is made primarily on the basis that there have been no steps taken by the plaintiffs to prosecute the proceedings for more than two years. On that basis, the defendants say that the plaintiffs are guilty of inordinate and inexcusable delay and further say that the delay illustrates that the proceedings are not being prosecuted in a *bona fide* manner and therefore constitute an abuse of process.

6. For the reasons set out below this Court strikes-out the proceedings.

Summary of timeline

7. As already noted, the within proceedings were issued on 20th March, 2018. Six days later, on 26th March, 2018, a *lis pendens* was registered over the property at 9 Beenoskee, Cloghers, Tralee, Co. Kerry, contained in Folio KY47619F. The defendants say that they were never served with the plenary summons, nor were they informed at all that the proceedings had been issued and that a *lis pendens* had been registered over the property. The nature of the plaintiffs' proceedings is somewhat difficult to summarise, however, the plaintiffs' core claim is that the first defendant ("Promontoria") had no lawful authority to make final demand of the loan facilities, as well as a claim that the appointment of the second defendant (the "Receiver") as receiver is invalid.
8. No steps were taken to progress these proceedings until the *ex parte* docket seeking to renew the plenary summons was filed on 7th May, 2021. (Save that on 10th August, 2020, the plaintiffs served a Notice of Change of Solicitor and a Notice of Intention to Proceed.)
9. Following an exchange of correspondence between the parties, wherein the plaintiffs' repeatedly indicated their intention to renew the plenary summons, an appearance was entered in the proceedings on behalf of the defendants on 5th February, 2021 for the purpose of bringing a strike out motion. On that same date, the defendants issued the present motion seeking an order striking out the proceedings and an order vacating the *lis pendens*. In the affidavit sworn on behalf of Promontoria and in the affidavit sworn by the Receiver in support of this motion, it is averred that these reliefs are sought in circumstances where Promontoria seeks to exercise its entitlement to realise the security in respect of sums due on foot of loan agreements made with the first named plaintiff.
10. In response, it seems, to the defendants' motion, an application was made by way of *ex parte* docket on 7th May, 2021 seeking to extend the time in which to seek leave to renew the plenary summons. That application was made *ex parte*, however, the judge hearing that application on 17th May, 2021 (Murphy J.) directed that the plaintiffs put the defendants on notice. On that basis, the plaintiffs' motion to extend time was listed for hearing before this Court on the same day as the defendants' motion to strike out.
11. While the defendants seek to have the proceedings struck out for delay, in the alternative, they seek to strike out the proceedings on the grounds that the proceedings constitute an abuse of process. However, as will be seen, the core issue considered in this judgment is the delay of the plaintiffs in prosecuting the proceedings and for the reasons set out herein, this Court will grant the reliefs sought by the defendants and will strike out the plaintiffs' proceedings.

BACKGROUND

12. By Deed of Mortgage and Charge dated 22nd February, 2008, the first named plaintiff ("Mr. Kehoe") agreed to mortgage and charge the property at 9 Beenoskee, Cloghers, Tralee, Co. Kerry contained in Folio KY47619 (the "Property") in favour of the Bank as

security for borrowings, including future borrowings. The Property is owned by Mr. Kehoe. His wife, the second named plaintiff ("Ms. Kehoe") has no title to it.

13. Under the terms of the Mortgage, Mr. Kehoe consented to its terms and conditions, which terms included, *inter alia*, the right of the Bank to sell the Property, as well as the right of the Bank to appoint a receiver and the right of the Bank to transfer the Mortgage.
14. By way of loan facility letters dated between 2008 and 2011, Ulster Bank Ireland DAC (the "Bank") advanced separate loan facilities to Mr. Kehoe and Ms. Kehoe (the "loan agreements"). These loan facilities can be briefly summarised as follows:
 - On 24th January, 2008, the Bank advanced to Ms. Kehoe a loan in the sum of €1,150,000 for the purpose of purchasing a commercial property at 101 Upper Dorset Street, Dublin.
 - On 14th May, 2010, the Bank advanced to Mr. Kehoe a number of loan facilities consisting of an overdraft facility and several demand loan facilities amounting to a sum in excess of €3.4 million. The purpose of these facilities was to assist with the purchase of two properties located at 30 Lower Dorset Street, Dublin 1 and 56 Grove Park, Rathmines, Dublin 6, respectively, as well as for the purpose of assisting with the refurbishment of one of those properties.
 - On 14th May, 2010, the Bank advanced to Ms. Kehoe an overdraft facility along with two demand loan facilities in the total sum of €1.15 million. The purpose of these facilities was to assist with the purchase and refurbishment of a property at 101 Lower Dorset Street, Dublin 1.
 - On 22nd February, 2011, the Bank advanced to Mr. Kehoe a loan facility in the sum of €235,000 for the purpose of renewing an existing loan facility.
15. Under the terms of the loan agreements, the foregoing facilities were repayable on demand. The loans were also subject to the Bank's '*Standard Terms and Conditions Governing Business Lending to Individuals*'.
16. On 12th February, 2015, by Global Deed of Transfer, the Bank transferred to Promontoria all rights, title, interest, benefits and obligations in respect of the loan agreements and related security documentation, including the Mortgage dated 22nd February, 2008.
17. It is common case that the plaintiffs failed to repay the loans. On 8th October, 2015, Promontoria sent letters of demand to the plaintiffs seeking repayment of the sums then due and owing. As of 1st December, 2020, the amount due from Mr. Kehoe on foot of the loan agreements entered by him is €2,176,799.78. As of 6th December, 2020, the amount due on foot of the loan facilities extended to Ms. Kehoe is €1,088,033.92. The total amount due from the plaintiffs therefore is a sum in excess of €3.2 million.
18. By Instrument of Appointment dated 28th October, 2015, the Receiver was appointed over various properties, including the Property located in Tralee, Co. Kerry.

The '2016 Receivership Proceedings' and related correspondence

19. For completeness and because counsel for the plaintiffs placed some focus on them, reference should be made to a separate set of proceedings instituted by Mr. Kehoe against the Receiver (see *Kehoe v. Fennell* (Record No. 2016/500 SP) (the "2016 Receivership Proceedings")). In those proceedings, Mr. Kehoe sought, *inter alia*, declaratory relief to the effect that the Instrument of Appointment appointing Mr. Ken Fennell as receiver over the Property was invalid. However, when that case came on for hearing on 29th May, 2017, the solicitor then acting for Mr. Kehoe indicated that Mr. Kehoe would not be proceeding with the case and an Order was therefore made by the Court (White J.) on that date striking out those proceedings.
20. As will be seen from the correspondence set out later in the judgment, over three years after the 2016 Receivership Proceedings were struck out, on 9th September, 2020, Mr. Kehoe's solicitor wrote to the Receiver claiming that the proceedings were withdrawn without the knowledge or consent of Mr. Kehoe and that the plaintiffs still do not accept the validity of the Receiver's appointment.
21. Importantly, in the affidavit sworn by the Receiver on 8th January, 2021 in support of the present motion, the Receiver avers to the aforementioned details of the 2016 Receivership Proceedings and refers to a letter sent by his solicitor on 10th September, 2020, in response to the plaintiffs' aforementioned letter of the previous day. In his affidavit, the Receiver avers that it was only on the 10th September, 2020, when his solicitor conducted a High Court Search on the courts website, that he first became aware of the within proceedings (which had been issued, some two and a half years previously, on 20th March, 2018).
22. In this letter dated 10th September, 2020, the solicitors for the defendants note that the Order striking out the 2016 Receivership Proceedings was made in the presence of the then solicitor for Mr. Kehoe and they seek confirmation as to why the 2016 Receivership Proceedings were withdrawn by Mr. Kehoe and/or his solicitor. In respect of the 2018 proceedings, this letter queries why those proceedings have not progressed and warns that an application to renew the plenary summons will have to be brought if the proceedings are to continue. Furthermore, concern is expressed in this letter at the possibility of the plaintiffs issuing further proceedings, and that letter concludes as follows:

"We anticipate the Courts will take a dim view of Mr Kehoe taking a case every two years and ventilating the same issue on the validity of the appointment of the receiver but never bringing the cases to hearing. In the event that you commence a third set of proceedings against [the defendants], we will use this letter as a basis to defend the case and seek our clients' full costs."
23. The fact that the within proceedings only came to the attention of the defendants following a courts' website search of same does raise the question as to when exactly the plaintiffs proposed to inform the defendants of the existence of the proceedings. (This point is particularly relevant when one considers that the institution of the proceedings

enabled the plaintiffs to register a *lis pendens* and when one considers the caselaw set out below, which makes it clear that the expeditious prosecution of proceedings, where a *lis pendens* is registered, is essential). It should also be noted that it was only when the matter of renewing the plenary summons was drawn to the plaintiffs' attention in the Receiver's letter of 10th September, 2020, that their solicitors in their reply dated 17th September, 2020 stated it was the plaintiffs' intention to renew the plenary summons.

24. In that reply dated 17th September, 2020, the plaintiffs' solicitors stated, insofar as relevant, as follows:

"In respect of the previous proceedings [the 2016 Receivership Proceedings] issued by [the plaintiffs], we are instructed that same were withdrawn without [the plaintiffs'] knowledge or consent by the solicitor acting at the time.

[...]

The proceedings entitled "Declan Kehoe and Una Kehoe -v- Promontoria (Aran) Limited and Ken Fennell" (High Court Record No. 2018/2431/P) were issued by Carter Anhold & Co. Solicitors however we have now been instructed to take over these proceedings and to progress same. Similarly, there are proceedings entitled "Declan Kehoe -v- Ulster Bank Ireland Limited" (High Court Record No. 2016/3359/P) and we have similarly been instructed to come on record in relation to those proceedings.

These proceedings will both be subject to an application to renew and which will be immediately served on the respective Defendants. We intend to progress these expeditiously thereafter. These are the proceedings to which we refer in previous correspondence and for the avoidance of doubt we will issue a motion seeking interlocutory injunctive relief if we do not receive satisfactory replies to our letter dated 9th September last. We again repeat requests for the documentation and undertakings sought in that letter and if we do not receive same in early course we will proceed to issue the said motion and produce this letter and previous correspondence in seeking our costs. We will consent to extending the deadline for receipt to 5pm, Friday, 25th September 2020 next.

[...]

Our client wholly disputes the validity of the sale of the loans to your client and the subsequent appointment of [Mr. Ken Fennell] as Receiver. [...]" (Emphasis added)

25. By letter dated 7th October, 2020, the solicitors for the defendants responded, *inter alia*, as follows:

"Your letter dated 17 September 2020 concerns *inter alia* the proceedings Declan Kehoe and Una Kehoe v Promontoria Aran Limited & Ken Fennell High Court Record No 2018/2431P (the "2018/2431P Proceedings"). [The plaintiffs] registered a *lis pendens* (filed in the Central Office on 26 March 2019 and registered on folio

KY47619F (the "Folio") under dealing number D2018LR068181X on 10 May 2018) (the "Lis Pendens") and have since failed to expeditiously progress or progress at all, their claim. It is clear that there has been an unreasonable delay in prosecuting that action. Our clients believe the proceedings are not being prosecuted *bona fide* and that the registration of the Lis Pendens is designed to frustrate our clients' efforts to realise Promontoria's security.

Further, the said proceedings as against the Receiver specifically, are not proceedings which may properly be registered as a *lis pendens* in accordance with section 121 of the Land and Conveyancing Law Reform Act 2009 (the "2009 Act") because as receiver, he does not have a sufficient estate or interest in the lands at issue. The lands are still owned by Mr. Kehoe. Therefore, the proceedings as against the Receiver do not concern any claim to an estate or interest in land, as required by the said section 121.

Accordingly, this is an improper use of the Court's resources and our clients do not consent to your clients' application to renew the proceedings after a delay of two year. However, we will accept service on behalf of our clients if required.

Your clients' Lis Pendens has impacted on our clients' ability to realise the asset and we call upon you to adequately explain:-

1. Why the proceedings were never served on our clients;
2. Why your clients failed to progress the proceedings;
3. If there is any connection between the proceedings and the property the Lis Pendens is registered against.

We call upon you to confirm within 14 days from the date hereof that your clients will voluntarily vacate the Lis Pendens (as defined and detailed above). Please note that if you fail to agree to vacate the Lis Pendens, our clients intend to issue a motion to vacate the Lis Pendens and we will use this letter to fix your clients with the costs thereof." (Emphasis added)

26. Quite apart from the issue of delay, two matters are clear from the foregoing. First, it is clear from the letter sent by the defendants' solicitors on 10th September, 2020, that the defendants seek information as to why the 2016 Receivership Proceedings were withdrawn, in circumstances where the current (2018) proceedings also seek to challenge the receivership. Secondly, in respect of the current case made as against the Receiver, the defendants take issue with the registering by the plaintiffs of a *lis pendens* over the Property in circumstances where they claim that the Receiver does not have sufficient interest in the Property such as to justify the registering of a *lis pendens* pursuant to s. 121 of the Land and Conveyancing Law Reform Act, 2009.

LAW RELATING TO VACATING A LIS PENDENS

27. Section 121(2) of the Land and Conveyancing Law Reform Act 2009 states that:

"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." (Emphasis added)

28. Section 123 of the Land and Conveyancing Law Reform Act 2009 provides a statutory basis for vacating 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*." (Emphasis added)

29. In *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611, Barniville J. considered the meanings of '*unreasonable delay*' and '*bona fide*' in the context of s. 123(b)(ii). Having reviewed the relevant authorities, Barniville J. considered at para. 82 that:

"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."

30. In considering what is '*unreasonable*' in respect of delay, Barniville J. concluded at para. 83 as follows:

"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." (Emphasis added)

31. As to the meaning of '*bona fide*' in respect of the prosecution of proceedings, Barniville J. considered at para. 90 that:

"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'." (Emphasis added)

LAW RELATING TO STRIKE OUT MOTIONS

32. In seeking to strike out the proceedings, the defendants rely on Order 122, rule 11 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court.

33. O. 122, r. 11 of the RSC states that:

"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule." (Emphasis added)

34. The Court also has an inherent jurisdiction to dismiss proceedings for want of prosecution on the grounds of delay. The law in this regard is well-established and does not need to be restated at any great length. It is clear that this jurisdiction exists in order to prevent an abuse of the court's processes. As stated by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at 475:

"[T]he courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so."

35. It is clear from *Primor* that in considering whether to strike out proceedings on the grounds of delay, a court should embark on a three step test. First, the court should consider whether the delay in question is inordinate. Secondly, if the delay is inordinate then the court should consider whether that inordinate delay is excusable. Thirdly and finally, if the delay is both inordinate and inexcusable, the court should then consider whether the balance of justice favours the dismissal of the proceedings.

ANALYSIS

Is the delay in this case inordinate?

36. It appears to this Court that the starting point in considering the delay in this case must be the date on which the proceedings issued (20th March, 2018), and not any date thereafter. This is because there is no evidence that the plenary summons was ever served on the defendants and the evidence is that the first time the defendants became aware of the existence of the proceedings was on 10th September, 2020. This is not a case therefore where the proceedings were served on the defendants who then entered an appearance shortly thereafter, and where any delay would then be calculated from that date. Instead, this is a case where the plaintiffs never effected service of the plenary summons and so the defendants had no opportunity to enter an appearance at an early stage. The delay therefore is to be calculated from the date of the issue of the proceedings.
37. In considering the total period of delay, it seems to this Court that there are two relevant periods:
- the period between the date on which the proceedings issued and the date on which the Notice of Intention to Proceed was filed, and,
 - the period between the letter in which the plaintiffs first stated that it was their intention to renew the proceedings and the date that the plaintiffs issued their motion to extend the time in which to renew the plenary summons.
38. The first period of delay therefore is calculated from 20th March, 2018 up to 10th August, 2020, the date upon which the Notice of Intention to Proceed was filed. This is a delay of 2 years, 4 months and 3 weeks. The second period of delay is from 17th September, 2020 up to 17th May, 2021, a delay of 8 months. The total delay in this case therefore is a period of 37 months.
39. In considering whether this is an inordinate delay, this Court has regard to the decision in *The Governor and Company of Bank of Ireland v. Wilson* [2020] IEHC 646 where a delay of 18 months from the date of issuing the summary summons to the date of the renewal and service of the amended summons was considered inordinate. This Court also has regard to the Court of Appeal decision in *Kenny v. Motor Network Ltd* [2020] IECA 114 where a delay of 26 months in delivering Replies to Particulars was regarded as inordinate.
40. There can be no doubt therefore that the delay in this case of 37 months is inordinate.

Is the delay inexcusable?

41. Despite the inordinate delay in the prosecution of these proceedings, there is very little in the way of explanation for this delay put forward by the plaintiffs.
42. In order to consider therefore whether the delay is excusable, this Court has regard to the correspondence exchanged between the parties and the reasons offered therein for the delay in progressing the proceedings.

43. On 9th September, 2020, following the Notice of Change of Solicitor and Notice of Intention to Proceed (both filed on 10th August, 2020), the solicitors for the plaintiffs wrote directly to the Receiver. It seems that this letter was written in response to a letter sent by the Receiver to the occupier of the Property on 10th August, 2020. Quite extraordinarily, nowhere in this letter do the solicitors for the plaintiffs (who had, at this stage, been on record for one month) make any reference at all to the within proceedings in which the validity of the receivership is challenged. Instead, that letter makes reference to the 2016 Receivership Proceedings which had by Order of the Court been struck out on 29th May, 2017:

“We are instructed by the above-named Mr. Declan Kehoe and Mrs. Una Kehoe in relation to the purported sale of their loans to Promontoria (Aran) Limited and your subsequent appointment as Receiver. You will be aware that our client issued proceedings against you bearing record number 2016/500/SP. We are instructed that these proceedings were withdrawn without our client’s knowledge or consent and as such your appointment as Receiver remains very much in dispute.

In particular, we refer to your letter of the 10th August 2020 addressed to “The Occupier” of the above property. Please note that our client wholly rejects the validity of your appointment as Receiver and we hereby formally request that you cease issuing any correspondence to this address and that all future correspondence be directed to this office pending resolution of the within matters.”
(Emphasis added)

44. The letter then makes a number of points regarding the sale of a number of properties and requests information as to an offer that was allegedly made by the plaintiffs in full and final settlement but rejected on behalf of the first defendant.

45. A number of demands are then set out in this letter as follows:

“The purpose of this letter is to formally demand that you immediately:

- (a) Furnish the original and unredacted Deed of Appointment of Receiver, Loan Sale Deed and Deed of Transfer/Assignment from Ulster Bank to Promontoria (Aran) Limited and upon which you seek to rely;
- (b) Irrevocably undertake not to take any further action in respect of our clients’ assets pending resolution of the dispute between our clients, Ulster Bank Ireland DAC, Promontoria (Aran) Limited and you;
- (c) Issue of Deed of Discharge of Receiver in respect of your appointment over our client’s assets;
- (d) Furnish a details breakdown of all monies received in respect of each of our clients’ properties and the allocation of same;
- (e) Furnish copy Insurance Bond.

Please note that if we do not receive same by 5pm on Friday next, 11th September 2020, we will immediately issue a motion seeking interlocutory injunctive relief and we will produce this letter in seeking our costs directly from you.

Finally, we refer to our letter of the 7th July last enclosing Subject Access Request on behalf of our client and to which we have not received a reply. Please note that if we do not receive a copy, wholly unredacted insofar as it relates to our client, of our clients' file by 5pm on Friday next, 11th September 2020 we will be lodging a complaint with the Data Protection Commission.

We trust that this will not be necessary."

46. The response on behalf of the defendants is by letter the following day, dated 10th September, 2020. That letter notes that the within proceedings were commenced on 20th March, 2018 and a *lis pendens* registered six days later and makes the following requests:

"Please confirm within 7 days from the date hereof, why these proceedings have not progressed, other than a recent change of solicitor and notice of intention to proceed, in the two years since the proceedings were issued. It is not for your clients to commence proceedings, register a *lis pendens* and then fail to progress the proceedings in an expeditious manner. This is a waste of the Court's resources.

We anticipate your clients will have to bring an application to renew the plenary summons and we call upon you to immediately attend to this. Alternatively, if the plenary summons has not expired, we call upon you to immediately serve the plenary summons at the business addresses of our clients." (Emphasis added)

47. The solicitors for the plaintiffs respond by letter one week later, on 17th September, 2020. Despite an explicit request having been made by the defendants as to why the proceedings had not been progressed for over two years, the most that the plaintiffs' solicitors say in response regarding the delay is the following:

"The proceedings entitled "Declan Kehoe and Una Kehoe -v- Promontoria (Aran) Limited and Ken Fennell" (High Court Record No.2018/2431/P) were issued by Carter Anhold & Co. Solicitors however we have now been instructed to take over these proceedings and to progress same. Similarly, there are proceedings entitled "Declan Kehoe -v- Ulster Bank Ireland Limited" (High Court Record No.2016/3359/P) and we have similarly been instructed to come on record in relation to those proceedings.

These proceedings will both be subject to an application to renew and which will be immediately served on the respective Defendants. We intend to progress these expeditiously thereafter. [...]" (Emphasis added)

48. The above represents the extent of the reasons for the delay on the part of the plaintiffs. Of note however is that although the letter refers to the proceedings having been issued

by a separate solicitors' firm, it is not suggested in this letter that this was a reason for the delay or that the delay is due to any action or inaction on the part of their former solicitors. However, it seems clear that just as inactivity on the part of a solicitor does not excuse delay by a plaintiff (see the statement of Hamilton C.J. at p. 468 of *Primor* that 'the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor'), so too a change of a solicitor does not excuse delay, since otherwise, as noted in *Diamrem Limited v. Clare County Council* [2021] IEHC 408, it would be an easy matter for a plaintiff to avoid the consequences of delay by changing his legal representation at some point during the proceedings.

49. The issue of delay was once again raised by the solicitors for the defendants in their letter dated 7th October, 2020:

"[The plaintiffs] registered a *lis pendens* (filed in the Central Office on 26 March 2019 and registered on folio KY47619F [...]) and have since failed to expeditiously progress or progress at all, their claim. It is clear that there has been an unreasonable delay in prosecuting that action. Our clients believe the proceedings are not being prosecuted *bona fide* and that the registration of the Lis Pendens is designed to frustrate our clients' efforts to realise Promontoria's security."

50. In a lengthy response, sent some seven weeks later, on 27th November, 2020, the solicitors for the plaintiffs offer a similar response regarding the delay as they had in their letter of 17th September, 2020, some two months previously:

"As previously indicated, we are instructed to come on record in respect of these proceedings and to progress same. We are in the process of taking up the files from the previous solicitors on record and will be making an application to renew the Plenary Summons herein in early course. We will arrange to serve same formally on the Defendants as soon as possible and we note that you have authority to accept service of same on behalf of the Defendants.

[...]

Our client will furnish a Statement of Claim in early course. We will be requesting that the matter be case managed in order to progress same expeditiously.

With regard to the purported delay, our client, continually throughout 2018 and 2019, engaged with both Ulster Bank in order to resolve matters. In particular, during late 2018 and early 2019, our client engaged with the Ulster Bank GRG Complaints process which is specifically designed to avoid protracted litigation. However, this did not deal with the substantive issues including the validity of the alleged transfer of the loans to [Promontoria] and the tracker issue. [...]"

51. Once again, this letter claims that the plaintiffs will renew the plenary summons in early course and serve same on the defendants. However, the solicitors for the plaintiffs also

offer a new reason for the delay in progressing the case – that the plaintiffs 'engaged' with the Bank during 2018 and 2019 to resolve matters.

52. This letter offers few details of this 'engagement' however and it is therefore unclear why exactly the plaintiffs could not have progressed the proceedings during this period. In that regard, it must be remembered that the plaintiffs did not serve the plenary summons on the defendants after issuing the proceedings, despite registering a *lis pendens* over the Property. Furthermore, this explanation for the delay fails to address the onus which was upon them, once they had issued proceedings, to progress the proceedings expeditiously. This is particularly so where the plaintiff has registered a *lis pendens* over the subject land, thereby preventing the defendants from exercising their rights over the land pending determination of the litigation. It is not for a plaintiff to issue proceedings and then 'sit on their hands'. The fact that a plaintiff might be engaging with a non-party to the proceedings does not excuse delay in litigation.
53. In any case, in the aforementioned letter of 27th November, 2020 the plaintiffs' solicitors state that their clients engaged with Ulster Bank in 2018 and 2019 but that this engagement 'did not deal with the substantive issues'. In those circumstances, it is unclear why the plaintiffs did not seek to progress the within proceedings during that period or indeed at any point during the following year and a half.
54. Although other brief correspondence was exchanged, the next relevant piece of correspondence in the case in respect of the issue of delay is the letter dated 7th May, 2021 sent by the plaintiffs' solicitors in response to the issue of the strike out motion by the defendants on 5th February, 2021. In this letter it is stated as follows:
- "Please note that we have recently received the file from our client's previous solicitors and will require additional time in order to finalise and file our replying affidavit. In the circumstances, we will be applying for a short adjournment in respect of this matter."
55. In a follow-up letter sent five days later, the plaintiffs' solicitors state:
- "As previously indicated, we have now received the file from our client's previous solicitors and enclose herewith certified copy Plenary Summons by way of service on you."
56. It should be recalled that the plaintiffs' solicitors had by the date of this letter in May 2021 been on record since 10th August, 2020, yet it is only some nine months later, in response to the defendants' motion to strike-out the proceedings, that for the first time they serve the original (expired) plenary summons on the defendants. This is despite noting in their letter of 17th September, 2020, several months previously, that they would be making an application to renew the plenary summons and that the renewed plenary summons would be 'immediately served' on the defendants and the proceedings progressed 'expediently thereafter'. Similarly, in their letter of 27th November, 2020, the plaintiffs' solicitors stated that they would be 'making an application to renew the Plenary

Summons herein in early course' and would 'arrange to serve same formally on the Defendants as soon as possible'.

57. Yet, when the plaintiffs' solicitors purport to serve the plenary summons on the defendants on 12th May, 2021, it is not a renewed plenary summons but rather the original plenary summons which had by this stage expired. This is despite the plaintiffs' solicitors stating on two separate occasions – two months apart – that it was their intention to make an application to renew the plenary summon and to serve same on the defendants *'as soon as possible'*.
58. In a replying letter dated 14th May, 2021, the solicitors for the defendants express surprise at having learned that the plaintiffs *'intend to bring an ex parte application to renew the plenary summons after a significant three year delay, to serve or progress the Proceedings'*. Importantly, the defendants request that the plaintiffs put them on notice of any application to renew the Plenary Summons. They also request (as they had in their letter dated 7th October, 2020) that the plaintiffs explain:
1. "Why the Proceedings were never served on [the defendants];
 2. Why [the plaintiffs] failed to progress the Proceedings;
 3. If there is any connection between the Proceedings and the property the Lis Pendens is registered against."
59. In a letter of the same date, the plaintiffs' solicitors respond, *inter alia*, as follows:
- "You have failed to refer to our substantive replies of the 17th September, 2020 wherein we outlined that the within proceedings were to be the subject of an application to renew and again on 27th November 2020 wherein we stated that we were in the process of taking up the files from our client's previous solicitor and we would be making an application to renew. It is unusual therefore that you express any surprise at this course of action and the history of the proceedings given the detailed exchange of correspondence to date.
- [...]
- By way of background, our client instructed the previous firm on record in respect of the matter who issued the within proceedings on the 20th March 2018 and registered the lis pendens on the Kerry property. A dispute arose in respect of another matter which related to conveyancing work. Unfortunately for our client, no further action was taken in respect of this matter and the aforementioned complaint has been deemed admissible by the LSRA and is being investigated.
- As outlined in our letter of the 27th November, our client had engaged with the Ulster Bank GRG Complaints Process however it transpired that same did not deal with the issues of the validity of the transfer of our client's loans to your client or the tracker issues. [...]

Our client would seek to agree a short timetable for the delivery of proceedings with the Defendants. It is unfortunate for our client that arising out of the foregoing, the within Plenary Summons was never in fact formally served on the Defendants within twelve months of issue.

[...]

In respect of your queries, we would respectfully reply as follows;

1. We have outlined in correspondence, that has not been exhibited to your letter received today, the background and circumstances of the within proceedings, the reason for the delay and the fact that we had always intended to bring an application to renew;
2. Again, this has been outlined above and in previous correspondence;
3. We are again surprised at this query where we responded to same in our letter of the 27th November last and in circumstances where you have brought an application to vacate the *lis pendens* registered on foot of these proceedings. Please clarify your query here.

We would respectfully suggest that it will not be necessary to bring either an Application to renew nor amend your client's Appearance in circumstances where you accept service of the within summons and we can proceed to file a Statement of Claim and deal with your extant motions in early course. We will be filing a replying affidavit in that regard shortly.

It appears from your letter today, that we are required to seek the renewal of the Plenary Summons, and we will attend to same if we do not hear from you to the contrary." (Emphasis added)

60. Insofar as this letter purports to explain the delay in progressing the proceedings, a number of the points made are worth looking at more closely. First, the plaintiffs suggest in this letter that it is unusual that the defendants should be surprised at the plaintiffs' intention to renew the plenary summons, '*given the detailed exchange of correspondence to date*'. However, it is disingenuous of the plaintiffs' solicitors to claim that the defendants should be surprised at this course of action given that the plaintiffs' solicitors had stated in correspondence several months earlier that the plenary summons would be renewed '*in early course*' and '*immediately served*' on the defendants. On any view of events, the plaintiffs failed to renew the plenary summons '*in early course*' (as their solicitors had promised in their letter of 27th November, 2020). Secondly, in this letter the plaintiffs' solicitors once again seek to explain the delay by reference to the plaintiffs' change of solicitors and by reference to the alleged engagement of the plaintiffs with the Bank's complaints process. However, for the reasons set out earlier in this judgment, neither of these explanations sufficiently excuse the delay of 37 months in this case. Furthermore, while this letter suggests that it was '*unfortunate*' for the plaintiffs that progress was never made in the proceedings and that the plenary summons was never served on the defendants, this is to ignore the fact that the plaintiffs are not to be held

blameless for their solicitors' actions and/or inactions (*per p. 468 of Primor*). This suggestion also completely ignores the fact that the defendants also have a right to a fair trial within a reasonable time and that the delay in this case has impacted upon their ability to exercise their rights in relation to the Property. Finally, this letter notes that '*it appears from your letter today*' that the plaintiffs '*are required to seek the renewal of the Plenary Summons*'. However, despite this attempt to frame this matter as a recent discovery on the part of the plaintiffs, it is important to highlight once again the fact that the plaintiffs were made aware as early as 10th September, 2020 that renewal of the plenary summons would be necessary and indeed this was accepted by their solicitors in subsequent correspondence thereafter. It is disingenuous therefore of the plaintiffs' solicitors to imply that this is a new issue.

61. As noted earlier, an *ex parte* application was made on 17th May, 2021 on behalf of the plaintiffs to renew the plenary summons. On that occasion, the Court directed that the application be made on notice to the defendants and the application was therefore listed for hearing with the motion to strike-out. It is relevant to note that the plaintiffs' application to renew the plenary summons was made on an *ex parte* basis, in circumstances where the defendants' solicitors had explicitly requested, in their letter of 14th May, 2021, only three days previously, that they be put on notice of any application to renew. Yet it appears that, for whatever reason, the plaintiffs' solicitors chose not to put the defendants on notice of the application to renew. Indeed, this exact point was made in the letter sent by the defendants' solicitors to the plaintiffs' solicitors on 2nd June, 2021. This Court was not advised by counsel on behalf of the plaintiffs whether, when making this *ex parte* application to Murphy J., this fact was brought to her attention before she directed on 17th May that the defendants be put on notice and the application to renew was listed together with the within motion to strike out. The fact is however that the defendants were not put on notice, despite requesting that the plaintiffs do so, and then Murphy J. refused to deal with the renewal on an *ex parte* basis.
62. It seems clear based on the foregoing correspondence that the plaintiffs were called upon, on multiple occasions, to explain why there had been significant delay on their behalf in progressing the proceedings. It is this Court's view that no real attempt was made by the plaintiffs to explain that delay. On the one hand, the plaintiffs say that the delay was in part due to the inaction of their former solicitors and the subsequent change of solicitor. However, on the other hand, the plaintiffs suggest that the delay, during 2018 and 2019 at least, was as a result of their engagement with Ulster Bank and its complaints process. In respect of the latter excuse, no evidence has been produced by the plaintiffs setting out the exact engagement with Ulster Bank such as to convince this Court that this engagement would excuse the delay nor is it explained anywhere what precisely amounts to '*engagement*'. What is also completely ignored by the plaintiffs in offering this excuse is the fact that by 2018, the loans and security in question had been transferred to Promontoria and the Receiver had been appointed over the Property. Ulster Bank is not a party to the within proceedings. On that basis therefore, any engagement to resolve the issues raised herein ought to have been with the defendants herein. Any engagement with Ulster Bank regarding these or other issues is therefore not an excuse for the delay

in progressing litigation commenced against separate parties. Furthermore, engagement with Ulster Bank, whatever exactly that is, does not explain any delay post-2019 (as the engagement with Ulster Bank is alleged to have occurred throughout 2018 and 2019).

63. Crucially, even when the plaintiffs' current solicitors came on record in August 2020, there was no progress made in the proceedings until an *ex parte* application was made to renew the plenary summons in May 2021. This is despite the plaintiffs' solicitors claiming in multiple letters, as set out above, that they intended to renew the plenary summons '*in early course*' and that this would then be '*immediately served*' on the defendants and the proceedings progressed '*expediently*' thereafter. However, no attempt to serve, yet alone renew, the plenary summons was made by the plaintiffs until May 2021, some three months after an appearance had been filed on behalf of the defendants and the motion to strike out issued.
64. It is the view of this Court therefore that the delay on the part of the plaintiffs in progressing these proceedings is inexcusable.

Does the balance of justice favour dismissal?

65. In considering where the balance of justice lies, it is worth recalling the statement of Irvine J. (as she then was) in *Leech v. Independent Newspapers (Ireland) Limited* [2017] IECA 8 that:

"even modest prejudice may tip the scales of justice in favour of a defendant when it comes to a consideration of the balance of justice."

66. In *Primor*, O'Flaherty J. agreed at p. 521 that:

"once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably."

67. In the present case, there has been inordinate and inexcusable delay amounting to a total period of over three years. There have been no steps taken by the plaintiffs to progress the proceedings during this period and the defendants have had the proceedings hanging over them without ever having been served with the plenary summons up until the *ex parte* application to renew in May 2021 (at which stage the plenary summons had expired). Furthermore, as the plaintiffs registered a *lis pendens* over the Property shortly after issuing the proceedings, the defendants have been unable to exercise their rights over the security, in particular they have been unable to realise the security by selling the Property, which is a significant prejudice.
68. The plaintiffs in this case do not deny that they were in default of their loan facilities, rather they deny that Ulster Bank had a right to transfer the facilities and security to Promontoria and further deny that the appointment of the Receiver is valid. However, the Mortgage has been exhibited by the defendants and it clear therein that the Mortgage gave Ulster Bank the right to transfer the Mortgage (Clause 14) and the right to appoint a receiver (Clause 11). This transfer was duly effected by Deed of Transfer dated 12th February, 2015 and the Receiver appointed by Instrument of Appointment dated 28th

October, 2015. No evidence has been adduced by the plaintiffs to suggest that there is any defect in the Mortgage or in the Deed of Transfer or in the Instrument of Appointment.

69. In those circumstances, it is this Court's view that the balance of justice lies in favour of striking out the proceedings. Since the proceedings are being struck out it follows that the *lis pendens* should be vacated. For good order, this Court would in any case note that, for the foregoing reasons, there has been an unreasonable delay in prosecuting the proceedings such as to justify the vacation of the *lis pendens* under s. 123(b)(ii) of the Land and Conveyancing Law Reform Act 2009.

CONCLUSION

70. On the basis of the foregoing, this Court concludes that the reliefs sought by the defendants should be granted. This Court will therefore grant the reliefs sought in the Notice of Motion dated 5th February, 2021 as follows:

- An Order vacating the *lis pendens* registered on the folio of property, folio 47619F of the Register of Ownership of Freehold Land of County Kerry under dealing number D2018LR068181X on 10 May 2018;
- An Order dismissing the Plaintiffs' claim for want of prosecution and by reason of delay.

71. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. If it is necessary for this Court to deal with final orders, this case will be put in for mention on 12th October, 2021 at 10.45 am.