

THE HIGH COURT

[2022] IEHC 332

Record No. 2016/9863P

Between

JOHN JOSEPH BOYLE

Plaintiff

And

ULSTER BANK IRELAND DAC

Defendant

THE HIGH COURT

Record No. 2017/763P

Between

JOHN JOSEPH BOYLE

Plaintiff

And

**EVAN O'DWYER AND JOHN O'DWYER PRACTISING UNDER THE STYLE AND
TITLE OF O'DWYER SOLICITORS**

Defendants

THE HIGH COURT

Record No. 2017/764P

Between

JOHN JOSEPH BOYLE

Plaintiff

And

**ULSTER BANK DAC, PROMONTORIA (OYSTER) DAC and CAPITA ASSET
SERVICES (IRELAND) LIMITED**

Defendants

Judgment of Mr. Justice Dignam delivered on the 31st day of May 2022.

Introduction

1. The Applicant (“Promontoria”) has brought motions in each of the above three separate sets of proceedings. There was significant confusion between the different Notices of Motion and, indeed, reliefs were sought in some of the motions which clearly could not properly be sought by Promontoria. Matters were clarified by Counsel at the beginning of the hearing.

2. In each of the motions, Promontoria seeks Orders pursuant to section 123 of the Land and Conveyancing Reform Act 2009 vacating a number of lis pendens that the Plaintiff (“Mr. Boyle”) has registered against the same parcel of land.

3. As is apparent from the title to the proceedings, Promontoria is not a party to the first two sets of proceedings (2016/9863P and 2017/763P) and therefore first applies to be joined as a notice party for the sole purpose of applying to have the lis pendens registered by Mr. Boyle in those proceedings vacated. I will therefore first consider whether or not Promontoria should be joined.

4. Promontoria is already a defendant in the third set of proceedings (2017/764P) and therefore does not apply to be joined. In those proceedings, in addition to seeking an Order vacating the lis pendens, Promontoria also seeks an Order dismissing the proceedings pursuant to the court’s inherent jurisdiction. Counsel explained during the course of the hearing that this was sought on the basis of want of prosecution or delay. However, Counsel for Promontoria describes the relief sought under section 123 of the 2009 Act as the primary relief and there was little or no discussion during the course of the hearing in relation to the question of

dismissing the proceedings for want of prosecution. I will, therefore, deal very briefly with this relief at the end of this judgment.

5. The other reliefs in the various motions were not pursued.

6. The motions were run together and it is therefore convenient and appropriate to deal with them in one judgment.

7. Before addressing the reliefs it may be helpful to set out the background in summary.

Summary of the Background

8. The applications relate to ten acres of land at Brownsgrove, Tuam in County Galway, encompassed in Folio 31087 of the Register of Freeholders and described as situate in the townland of Queensfort, barony of Dunmore. Mr. Boyle was registered as the full owner of the property, titled 'Brownsgrove House', on the 7th January 2009.

9. According to the grounding affidavits sworn by Mr. Brendan Campbell on behalf of Promontoria a loan facility was extended by Ulster Bank to the Plaintiff along with Mr. Edward Boyle and Mrs Úna Boyle (the Plaintiff's parents) as partners (referred to by Mr. Boyle as the "Brownsgrove Partnership") by letter dated the 1st September 2010 which was secured by way of mortgage dated the 15th January 2010 (signed by the Plaintiff). The mortgage was registered as a burden on the Folio on the 17th February 2010.

10. Mr. Campbell states that Promontoria is the successor in title to Ulster Bank in relation to its interest in the facility letter and mortgage pursuant to a Global Deed of Transfer dated 19th December 2016, in which Promontoria acquired from Ulster Bank all its rights, interest, title and interest in a number of its loan facilities and related security, including those the subject of the within application. The transfer of interest in the mortgage from Ulster Bank to Promontoria was recorded on the Folio on 9th March 2017.

11. Mr Campbell deposes that the Plaintiff defaulted in making repayments on foot of the Mortgage and that by Deed of Appointment dated 20th March 2019 Promontoria appointed a Receiver over the property.

12. Mr. Boyle does not dispute the loan facility, the security or indeed the transfer to Promontoria. Indeed, in his affidavits he accepts that “*the Applicant, Promontoria (Oyster) Designated Activity Company is the successor to Ulster Bank*” but during the course of the hearing he did raise a point as to whether there had in fact been an “Event of Default” within the meaning of Ulster Bank’s “General Terms and Conditions for Business Lending to Partnerships.” This was not dealt with on affidavit and, it seems to me that while it may possibly be relevant to an underlying dispute, it is not directly relevant to the matters which I have to determine in these motions, particularly under section 123 of the 2009 Act. Mr. Boyle relied on clause 8.2(e) of those terms and conditions which states that:

“...any of the Partners transfers or reduces in any way his/her interest in the Partnership without the consent of the Bank, provided always that where another person (in respect of whom the Bank has given its consent) has been substituted for such Partner in the Partnership and assumes the obligations of such Partner under this Agreement or if any one or more of the remaining Partners take up the share of the first named Partner in the Partnership and assumes all the obligations of the first named Partner under this Agreement, in either case within such reasonable period as the Bank may agree, no Event of Default shall have occurred or be deemed to have occurred...”

13. Mr. Boyle contends that Ulster Bank, along with his parents, removed him from the joint business account. He stated that he was removed as a priority signatory from the account by his mother and that he was not made aware of this by Ulster Bank until a manager called him a significant period of time after the matter to inform him that he needed to lodge payments for the loan and that the effect of this is (i) there was no event of default and (ii) he should not be involved in these proceedings, rather it should be the estate of his deceased parents. As noted above, none of this is on affidavit and was only raised by Mr. Boyle during the course of the hearing. Given that Mr. Boyle is a litigant in person I have taken this into account notwithstanding that it is not on affidavit. However, it seems to me that while it may be relevant to one or more of the sets of proceedings referred to below (in which the lis pendens have been registered) or indeed to the question of the validity of the appointment of the receiver, it is not directly relevant to the instant applications in particular the applications made under section 123..

14. Mr. Boyle commenced a number of sets of proceedings between the date of the said mortgage and the transfer to Promontoria and it is in these proceedings that the various lis pendens have been registered. The Court is unaware of the substance of any of these proceedings. Promontoria maintains that the Plenary Summonses have not been served and Mr. Boyle states that they have been. Neither party has exhibited any Plenary Summons. Of course, if they have not been served, Promontoria could not be expected to be in a position to exhibit them. Those proceedings are (as reflected in the title above): *John Joseph Boyle v Ulster Bank DAC [2016/ 9863P]*, *John Joseph Boyle v Ulster Bank DAC, Promontoria (Oyster) DAC and Capita Asset Services (Ireland) Limited [2017/ 764P]*, and *John Joseph Boyle v Evan O’Dwyer and John Dwyer practising under the style and title of O’Dwyer Solicitors [2017/763P]*. The dates on which these proceedings were commenced are 4th November 2016 and 27th January 2017 respectively.

15. According to Mr. Campbell, Mr Boyle registered a lis pendens in the Central Office in respect of the lands in Folio 31087 in the first set of proceedings (2016/9863P) on the 4th November 2016, a lis pendens in the third set of proceedings (2017/764P) on the 27th January 2017 and two lis pendens in the second set of proceedings (2017/763P) (I was not given the date on which these lis pendens were registered in the Central Office). The Land Folio that is exhibited discloses that these were registered on the Folio on the 2nd December 2016, 2nd February 2017 and 13th February 2017 respectively. The lis pendens in the first set of proceedings is stated to be in respect of proceedings affecting the interest of Ulster Bank, the two lis pendens in respect of the 2017/763P proceedings is stated to be in respect of proceedings affecting the interests of Evan O’Dwyer and John O’Dwyer respectively and the one in the 2017/764P proceedings is stated to be in respect of proceedings affecting the interests of Promontoria.

16. It is clear that no steps other than the issuing of the summons on the dates set out above, the registration of the lis pendens and, possibly, service of the summonses have been taken in the various proceedings.

17. It is in that context that Promontoria brings these applications.

Joinder of Promontoria

18. It seems to me that it is appropriate that Promontoria should be joined to proceedings 2016/9863P and 2017/763P for the purpose of making applications to vacate the lis pendens in each case.

19. Promontoria has taken ownership of the charge and the interests in the lands under the mortgage of the 15th January 2010 pursuant to the Global Deed of Transfer. They are therefore directly affected by the registration of the various lis pendens and their continuance on the Folio. The reality is that, having become Ulster Bank's successor (as accepted by Mr. Boyle), the lis pendens in the 2016/9863P proceedings is in fact in respect of Promontoria's interest in the lands. While the lis pendens in 2017/763P is stated to be against Mr Evan and Mr. John O'Dwyer's respective interests in the lands there is no evidence at all given as to what this interest might be. Of course, this is exacerbated by the omission to exhibit the Plenary Summons and, more importantly, the absence of a Statement of Claim in those proceedings. It is not necessary for me to make any finding on these points at this stage other than to note that it is difficult to see what O'Dwyer interest in these lands the lis pendens is registered against (O'Dwyer Solicitors having previously acted as Mr. Boyle's solicitor) and that in any event the lis pendens must have a direct effect on Promontoria given its ownership of the mortgage pursuant to the Global Deed of Transfer.

20. I have no hesitation in concluding that it is appropriate to join Promontoria as a notice party to the proceedings for the purpose of making applications to vacate the lis pendens in circumstances where they are the owner of the charge and where their interest in the lands and their ability to deal with them are adversely affected by the registration of the lis pendens. I am reinforced in this view by Mr. Boyle having taken a neutral position in respect of this part of the application, as clearly stated in his affidavits sworn in both sets of proceedings, though he disputes Promontoria's locus standi to make the application to vacate the lis pendens.

Orders under section 123

21. Promontoria claims that it is entitled to the relief sought under section 123 of the 2009 Act on the basis that there has been an unreasonable delay in prosecuting the proceedings or the actions are not being prosecuted bona fide.

22. Section 123 provides:

“Subject to section 124, a court may make an order to vacate a lis pendens on application by –

(a) The person on whose application it was registered, or

(b) Any person affected by it, on notice to the person on whose application it was registered –

(i) where the action to which it relates has been discontinued or determined, or

(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide.”

23. As discussed above, Promontoria is a person “affected by” the various lis pendens registered on the Folio as, even if the lis is not expressly registered against Promontoria’s interest, the lis pendens may adversely affect Promontoria’s ability to deal with the property. I am satisfied, therefore, that Promontoria has locus standi.

24. Barniville J considered section 123 in *Hurley Property ICAV v Charleen Limited [2017] 350 MCA*. As discussed in that case the jurisdiction to vacate a lis pendens, prior to the 2009 Act, was contained in section 2 of the Lis Pendens Act and was limited to where the court was “*satisfied that the litigation [was] not prosecuted bona fide*”. The jurisdiction to vacate a lis pendens was extended by the 2009 Act to include the additional ground for vacating the lis of “*an unreasonable delay in prosecuting the action.*” The jurisdiction to vacate for an unreasonable delay in prosecuting the proceedings is therefore a relatively new jurisdiction and Counsel only referred the Court to one authority (Barniville J’s judgment). Butler J also considered the jurisdiction in *Ellis v Boley View Owners Management Co. Ltd [2022] IEHC*, largely following *Hurley*. Barniville J referred to a judgment of Haughton J (*Togher Management Company Ltd v Coolnaleen Developments Ltd (in receivership) [2014] IHEC 596*). While that case was more directly concerned with an allegation that the proceedings were not being prosecuted bona fide and Haughton J’s remarks in relation to the unreasonable delay ground were obiter, they were adopted by Barniville J.

25. In paragraph 82 of his judgment Barniville J stated that:

“It seems to me, correctly construed, the provisions of s.123(b)(ii) of the 2009 Act impose a particular obligation on a person who has commenced proceedings and registered a lis pendens to move with greater expedition than would normally be required or than is required under the Rules of Superior Courts. Such a person would, in my view, be required to act with particular ‘expedition and vigour’...in the prosecution of the proceedings.”

26. He went on to say that:

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

27. There are considerably more authorities (both prior to the enactment of the 2009 Act and since) dealing with the jurisdiction to vacate a lis pendens on the ground that the proceedings are not being prosecuted bona fide. Barniville J helpfully reviewed these authorities and summarised the jurisdiction in paragraph 90:

“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”. A lis pendens which has been registered on foot of proceedings which are bound to fail will be vacated under s.123(b)(ii) on the grounds that “the action is not being prosecuted bona fide”, even though there might not be a lack of bona fides, as that term is commonly understood. It is true that where an action is brought, and a lis pendens registered on foot of that action, in circumstances where the processes of the court are employed solely for the purpose of frustrating the exercise of legitimate rights, that would involve a lack of bona fides as the term is commonly understood. Both situations are encompassed by this part of the jurisdiction contained in s.123(b)(ii).”

28. Barniville J highlighted that when it came to the registration of a *lis pendens*, the Respondent had a responsibility to further the proceedings as soon as reasonably possible, stating at paragraph 96 of his judgment that:

“ the respondent... was not entitled to ‘sit on’ the proceedings while further attempts were made to negotiate a resolution of the issues which remained between the parties.”

Unreasonable Delay

29. As noted above, proceedings were instituted on the 4th November 2016 and the 27th January 2017 respectively and the *lis pendens* were registered on the Folio on the 2nd December 2016, the 2nd February 2017 and the 13th February 2017 respectively.

30. There is a dispute about whether the Plenary Summonses were served. Promontoria is a defendant in the 2017/764P proceedings and claims that it has not been served with the summons. Mr. Boyle states in his affidavit that he served the summons on Promontoria by post at its registered address by letter of the 15th February 2017 and that he also served it on Promontoria on the 22nd June 2017 and on the 14th September 2017. Mr. Boyle does not address the question of service of the summons on the defendants in the 2017/763P proceedings. Mr. Evan O’Dwyer, one of the defendants in that case, swore that *“neither [he] nor [his] partner nor [his] firm been served at any point with the originating summons nor any subsequent pleadings. This appears to be borne out by the filings records with the Central Office where no*

Affidavit of Service has ever been filed.” In the 2016/9863P proceedings Mr. Boyle swears that he served the summons on Ulster Bank by post at its registered address on the 28th November 2016 and again on the 15th April and 22nd September 2017. There is no evidence to the contrary in respect of the 2016/9863P proceedings. While Mr. Boyle exhibits the covering letters, he does not exhibit the Plenary Summonses themselves. Furthermore, notwithstanding that Promontoria stated in a letter in May 2019 that the proceedings had not been served on the defendants and during May and June 2019 repeatedly called for the proceedings to be served, Mr. Boyle did not state at any stage (in correspondence, for example) until delivering his replying affidavits to these motions that he had previously served the summonses on the appropriate parties. Both of these facts are suggestive of the summonses not having been served.

31. However, notwithstanding this, for the purpose of considering these applications I propose to proceed on the basis that the summonses in both 2017 proceedings were served, as claimed by Mr. Boyle. Of course, in the absence of any evidence to the contrary in the 2016/9863P proceedings I must accept that the summons was served.

32. On that basis, it is clear that no further steps were taken in any of the proceedings other than the issuing and service of the summonses. Thus the last step that was taken in the 2016/9863P proceedings was service of the summons on the 28th November 2016, in the 2017/764P proceedings service was on the 15th February 2017 and, while no date for service of the 2017/763P proceedings is given, I am taking it as having been shortly after the 15th February 2017. That amounts to a period of between 4 and 4^{1/4} years between the last step taken by Mr. Boyle and the issue of these motions. Even if one calculates the period from the dates of registration of the *lis pendens* its duration is not materially affected. A period of that length without any step in the proceedings by the Plaintiff is by any measure a very significant delay in the prosecution of the proceedings and, it seems to me, unless there is good reason for that delay, I would be forced to conclude that the delay has been unreasonable for the purpose of the section. It seems to me that the court must be entitled and, indeed, required to consider the explanations or reasons for a delay in order to determine whether that delay is reasonable or unreasonable. It is clear from Barniville J’s judgment that the court is not engaging in the same process as when considering an application to dismiss an action for want of prosecution. As he put it at paragraph 81:

“In my view, therefore, the consideration as to whether a person who has registered a lis pendens has been responsible for an “unreasonable delay” in the prosecution of the proceedings for the purposes of s.123(b)(ii) of the 2009 Act does not require the sort of assessment which a court must undertake in deciding whether to dismiss proceedings in accordance with the test in Primor which requires not only a consideration as to whether the delay in the prosecution of proceedings has been inordinate and inexcusable but also, critically, involves the court undertaking a complex assessment of the balance of justice, including issues such as prejudice to the defendant and Constitutional principles of basic fairness of procedures. I do not believe that such considerations arise in the context of the court’s assessment as to whether there has been “unreasonable delay” in the prosecution of an action for the purposes of s.123(b)(ii) of the 2009 Act. Rather, that section was intended to counterbalance the statutory entitlement conferred on a person in certain circumstances to register as of right a lis pendens and to impose a corresponding obligation on that person to expeditiously prosecute the proceedings in respect of which the lis pendens was registered. While the purpose of a registration of a lis pendens is, as Clarke J explained in Morrissey, to bring to the attention of third parties who might be interested in acquiring the particular property or a charge over it the fact that there are proceedings in existence in relation to the property which might affect their interests, the registration of a lis pendens can adversely affect or hinder the ability of a person to sell his or her property or otherwise affect that person’s ability to deal with the property.”

33. Nonetheless, the question of whether a delay is unreasonable must depend on the particular context and facts and, in particular, on the reasons for that delay.

34. Three reasons are offered for the delay in this case (though only one of them is on affidavit).

35. Mr. Boyle states in his affidavits in each of the cases that he has engaged the services of forensic accountants to prepare a detailed Forensic Report on the financial and business transactions for the period 1999 to 2013 (the period relevant to the partnership and the loans advanced to the partnership). The same letter from the accountants is exhibited in each of the sets of proceedings. It is dated the 16th June 2021 and states:

“We refer to the above mutual clients. As you are aware we are in the process of preparing a detailed forensic Report on the financial and business transactions of Mr. Boyle covering the period 1999 to 2013 inclusive. In order to complete our report we are awaiting documentation etc from Financial Institutions.

We believe that there is a very large body of financial transactions and it will take us a period of time to assemble, collate, and analyse the relevant materials into a detailed and comprehensive report and until such time as we are in receipt of all the relevant documents it would not be possible for us to compile the report.

We would suggest that you would seek an adjournment to the next term to allow a sufficient time to complete our task and furnish the report as grounding for the Statement of Claim.”

36. Mr. Boyle relies on the necessity to obtain the forensic accountants’ report and the fact that he has engaged their services as a reason for the delay. No indication whatsoever is given in Mr. Boyle’s affidavits or, indeed, in this letter as to when the accountants were engaged, what steps had been taken to secure the documentation which is said to be necessary (other than that Mr. Boyle said during the hearing that he first made a request for documentation in April 2021 which is also reflected in correspondence), where those efforts currently lie or indeed, when the report might be likely to be ready. In the context of the passage of between 4¼ and 4½ years between the institution of the proceedings and this letter and Mr. Boyle’s affidavit the absence of even the basic information of when the accountants were engaged undermines this as an explanation which might render the delay reasonable. If, for example, the accountants were only engaged shortly before June 2021 then there would have been a delay of 4½ years before even this step was taken. If, on the other hand, they were engaged earlier than that, there is no explanation as to what steps have been taken or efforts made to obtain the information referred to in the letter since then.

37. Furthermore, no basis is set out for suggesting that it was not possible to deliver a Statement of Claim without the accountants’ report. Mr. Boyle must know what case he is making, at least in broad outline, and must know the broad facts upon which he will be relying; otherwise he could not have issued proceedings in the first place. A Statement of Claim can,

of course, be delivered with further particulars to be delivered at a later stage, possibly after discovery has been sought and made, if necessary.

38. Thus, I do not accept that the engagement of the accountants is a good reason for the very significant delay in taking any steps since the commencement of the proceedings.

39. The second explanation that is offered is that Mr. Boyle has had health difficulties. This is not set out on affidavit by Mr. Boyle but Mr. Boyle dealt with it during the course of the hearing and solicitors who have had some involvement on his behalf explained in correspondence which was accompanied by a very short GP's report that he has had health difficulties. These documents were exhibited to Promontoria's affidavits. By letter of the 2nd May 2019, solicitors for Promontoria wrote to Mr Boyle seeking certain information in relation to the *lis pendens*. A letter from a General Practitioner was sent to Promontoria's solicitors on behalf of Mr. Boyle which stated on the 9th May 2019 that "*with all the stress with his recent health he isn't in a position to adequately instruct his solicitor at this moment in time.*" On the 4th June 2019 Mr. Boyle's solicitor stated, *inter alia* "[o]ur client has had serious health problems and is not yet in a position to deal with legal matters with us...". Then on the 5th July 2019 Mr. Boyle's solicitors stated "*Our client has been seriously ill and hospitalised recently and is unable to give instructions to us.*" Mr. Boyle said during the hearing that he had been hospitalised in 2018 and spent 14 days in accident and emergency. As is apparent from the dates of these letters, they gave some limited information about Mr. Boyle's health since early summer 2019 but, notwithstanding that Mr. Boyle's affidavits were not sworn until June 2021 (and the motion was not heard until 2022), no information at all was given, either by way of evidence, information or submissions as to Mr. Boyle's current state of health. Mr. Boyle also said that his brother's death had "knocked him sideways".

40. Of course, one can only have sympathy for Mr. Boyle's health difficulties and, of course, on the death of his brother and some allowance must be made for these in examining the reasonableness of the delay. However, in the context of *lis pendens* having been registered, the obligations on a person who registered a *lis pendens* as set out by Barniville J, and no steps having been taken for a period of over 4 years prior to issue of the motion and 5 years prior to the hearing, these periods of ill health and personal loss cannot amount to a good reason for the complete inaction in the prosecution of the proceedings, at least in the context of section 123 of the 2009 Act.

41. Mr. Boyle also relies on the fact that he was trying to conclude negotiations with other banks to refinance his Ulster Bank loan, waiting for grants from the Department of Agriculture which had been delayed and payment from another court case in order to “*finalise [his] situation with [Promontoria]*”. This is contained in a written note from Mr. Boyle which was sent to Promontoria’s solicitor on the 4th June 2019. However, in the absence of even the most basic of details in relation to each of these matters and as to where each of the matters currently stand, it seems to me that they can not constitute a proper reason for the delay, particularly where there is no evidence that the defendants or the parties affected by the lis pendens had agreed that the proceedings should not be advanced on the basis of these possibilities. This must also be considered in relation to the question of whether the proceedings are being prosecuted bona fide.

42. Mr. Boyle also said at the hearing that a payment plan was agreed with Promontoria in which they agreed upon a fixed sum which would be paid each month and when things began to “get better” for Mr. Boyle on the farm, the payments would increase. He said that he sent cheques to Promontoria in accordance with the payment plan but these were returned (to the wrong address). None of this was on affidavit. Such a payment plan was not referred to at all in Mr. Boyle’s affidavits or indeed in any of the letters sent on his behalf. In those circumstances I can not find that there was any such payment plan or agreement or that cheques were sent. In any event, however, it would seem to me that in order for this to be a good reason for not taking any steps in the prosecution of the proceedings there would have to be an express agreement between the parties that no steps would have to be taken while such a payment plan was in place and being complied with. There is no evidence of any such agreement or understanding with any of the defendants or Promontoria.

43. It seems to me that while each of these matters may explain certain distinct periods of inaction since the commencement of the various sets of proceedings they can not, either separately or cumulatively, offer a good reason for the complete inaction since 2016. Mr. Boyle has not even taken the relatively modest steps of serving a motion for judgment in default of appearance or seeking to renew the summonses. In my view no conclusion is open other than that the delay in prosecuting the proceedings has been unreasonable.

Prosecuting bona fide

44. As noted by Barniville J in reviewing the authorities in relation to the jurisdiction to vacate a *lis pendens* on the ground that the proceedings are not being prosecuted *bona fide*, this jurisdiction may be exercised where there are no disputes of fact and where the proceedings are doomed to failure or where the proceedings are being prosecuted or maintained for improper purposes. It is impossible, on the basis of the information before the court to assess whether there are disputes of fact or whether any of the various sets of proceedings are doomed to failure. This is because (i) the Plenary Summonses have not been exhibited, (ii) no Statements of Claim have been delivered, and (iii) Mr. Boyle does not even set out in brief form in his affidavits what any of the cases are about. Of course, the absence of any of these documents or information is largely, if not exclusively, the responsibility of Mr. Boyle and, if it were necessary to, I would have to consider whether he should in effect get the benefit of me being unable to assess whether there are disputes of fact or that the proceedings are doomed to failure where that inability stems from his default. However, I do not need to resolve this because in reality Promontoria's point about the proceedings not being prosecuted *bona fide* was exclusively focused on the proceedings being an abuse of process as being brought or maintained for an improper purpose. As noted above, such improper purposes include attempting to frustrate a sale or to seek to exert improper pressure on an opposing party, of attempting to frustrate the exercise of legitimate rights.

45. In contending that Mr. Boyle is not prosecuting the proceedings *bona fide*, Promontoria relies on the written note from Mr. Boyle where he explained that he was waiting for a number of things to resolve which he believed would put him in funds to "*finalise [his] situation with [the] bank.*" It was urged on me that this shows that Mr. Boyle has deliberately attempted to delay matters in order to gain more time to arrange his financial affairs in order to deal with his debt. I am not satisfied that this note can be read in such a black-and-white manner or that it is sufficient evidence upon which I can conclude that he is not prosecuting the proceedings *bona fide*. The letter can be read as much as an *ad misericordiam* plea for Promontoria to hold off taking action because he will be able to finalise matters to their satisfaction at a point in the future as much as it can be read as an indication that he was deliberately and improperly trying to delay the proceedings.

46. I am not prepared to conclude on that basis that the proceedings are being maintained either as a way of putting pressure on the defendants or as a way of delaying the inevitable for as long as possible in the hope that Mr. Boyle will come into funds. It would seem to me that

if this were his real intention he would more likely not have mentioned negotiations with other institutions or the possibility of coming into funds and would simply have sought ways to drag out the prosecution of the proceedings in order to buy time in the hope that those discussions would continue in the background and hopefully bear fruit. I am therefore not satisfied that I can conclude that Mr. Boyle is not prosecuting the proceedings bona fide.

47. On the basis of my finding that there has been unreasonable delay in the prosecution of the proceedings it seems to me that it is open to me to vacate the lis pendens.

Discretion

48. A question arises as to whether section 123 provides for a discretion even where the court concludes that there has been unreasonable delay in the prosecution of the proceedings or that the proceedings are not being prosecuted bona fide or whether it simply confers a power on the court to vacate the lis pendens once satisfied that either of those two conditions are met. Barniville J seems to suggest that there may not be such a discretion where he says “...*the consideration as to whether a person who has registered a lis pendens has been responsible for an “unreasonable delay” in the prosecution of the proceedings for the purposes of s.123(b)(ii) of the 2009 Act does not require the sort of assessment which a court must undertake in deciding whether to dismiss proceedings in accordance with the test in Primor which requires not only a consideration as to whether the delay in the prosecution of proceedings has been inordinate and inexcusable but also, critically involves the court undertaking a complex assessment of the balance of justice, including issues such as prejudice to the defendant and Constitutional principles of basic fairness of procedures.*” It is worth noting that Butler J states in *Boley View* that there is no discretion. It is, of course, important to note, as Barniville J touches on, that there is a fundamental difference between vacating a lis pendens and dismissing proceedings under the *Primor* jurisprudence. The former does not involve the extinguishment of the plaintiff’s entitlement to sue and maintain the proceedings and thus does not involve the same consideration and balancing of constitutional rights. The right to register a lis pendens is a statutory right and the counterbalance is that the proceedings must be prosecuted without unreasonable delay and must be prosecuted bona fide. Thus, there is a logic to there not being a discretion once a ground under section 123(b) is satisfied. Even if there is such a discretion the matters which have to be considered are different to those under the *Primor* jurisprudence.

49. Notwithstanding this, for the purpose of this case, in circumstances where Mr. Boyle represented himself and where there was no argument as to the existence of any discretion, or its scope, if such a discretion exists, I have proceeded on the basis that the court has such a discretion. I have considered the evidence and the unsworn information provided to the Court and I do not see a basis for refusing the relief sought.

50. I will therefore make an Order in each of the cases vacating the relevant lis pendens.

Dismiss for want of prosecution

51. As noted above, no real submissions were made to me in relation to the relief at paragraph of the Notice of Motion in the 2017/764P proceedings, i.e to have those proceedings dismissed for want of prosecution. Such an Order is, of course, very significant because, subject to an appeal, it has the effect of extinguishing a plaintiff's ability to litigate the issue(s). While the exercise of the jurisdiction to dismiss for want of prosecution may have some common features with the exercise of the jurisdiction under section 123 of the 2009 Act to vacate a lis pendens, there are also very significant differences. It seems to me that it would be unfair and inappropriate to consider making such an Order in the absence of any real argument and I will, therefore, to the extent that it was even seriously sought, refuse that relief.