

APPROVED

[2022] IEHC 400



THE HIGH COURT

2020 No. 250 SP

BETWEEN

CONOR SHEERAN

PLAINTIFF

AND

PATRICK BUCKLEY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 July 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to vacate the registration of a *lis pendens*. The application is made pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009. The application is brought before the court by a person who has been appointed as receiver over the relevant lands pursuant to a deed of mortgage and charge. The receiver has explained on affidavit that his ability to realise the value of the mortgaged property by way of sale has been frustrated because of the existence of the *lis pendens*.

NO REDACTION REQUIRED

STATUTORY FRAMEWORK

2. Insofar as relevant to these proceedings, Section 123 of the Land and Conveyancing Law Reform Act 2009 provides that the court may vacate a *lis pendens* where it is satisfied that there has been an unreasonable delay in prosecuting the action or that the action is not being prosecuted *bona fide*.
3. An application to vacate may be brought by any person affected by the *lis pendens*, and must be made on notice to the person at whose instance the *lis pendens* had been registered.
4. The application to vacate in the present case has been brought by a receiver appointed over the relevant lands. The judgment of the Court of Appeal in *Carthy v. Harrington* [2018] IECA 321 confirms (at paragraphs 25 and 26) that a receiver may, in principle, constitute a “*person affected by*” a *lis pendens* and thus have standing to bring an application pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009.
5. The Court of Appeal addressed the nature of the statutory jurisdiction at paragraphs 28 to 31 of the same judgment as follows:

“The court is entitled to make an order to vacate a *lis pendens* at the behest of a ‘*person affected*’ by, it *inter alia*, ‘(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action.’

The considerations as to what constitutes ‘*unreasonable delay*’ in this statutory context are, accordingly, quite distinct from the principles and the complex jurisprudence which has developed in regard to litigation delay where a party to litigation can seek to stay or dismiss proceedings on grounds of delay and for want of prosecution.

It must be emphasised that the vacating of a *lis pendens* pursuant to s. 123 of the 2009 Act does not affect the pleadings in this suit and they continue in being as between the parties thereto. [...]

It behoves a litigant who asserts a beneficial interest in or over encumbered property and who institutes proceedings in relation to same to prosecute such a claim with reasonable expedition, particularly in circumstances where the registered legal owners of the property are substantially indebted and where the rights and interests of third parties including a chargeholder who has validly appointed a receiver stand to be adversely impacted by delays in litigation.”

6. The principles governing the exercise of the statutory discretion have been elaborated upon by the High Court (Barniville J.) in *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611 (at paragraphs 81 and 82) as follows:

“Having included a new jurisdiction to vacate a *lis pendens* (in the case of ‘*unreasonable delay*’ in the prosecution of the action) it is clear that the Oireachtas intended to impose an obligation on a litigant who has registered a *lis pendens* to prosecute the proceedings expeditiously. This is an obligation over and above the obligation which already exists under the Rules of Superior Courts prescribing time limits for the delivery of pleadings and for the taking of steps in the proceedings and over and above the jurisdiction which already inheres in the court to dismiss proceedings in the circumstances outlined by the Supreme Court in *Primor plc. v Stokes Kennedy Crowley* [1996] 2 I.R. 459 (‘*Primor*’). 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 purpose 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. [...]

It seems to me, correctly construed, the provisions of s.123(b)(ii) of the 2009 Act impose a particular obligation on a person who has commenced proceedings and registered a *lis pendens* to move with greater expedition than would normally be required or than is required under the Rules of Superior Courts. Such a person would, in my view, be required to act with particular '*expedition and vigour*' (to adopt the words used by Haughton J. [in] *Togher*) in the prosecution of the proceedings."

7. On the facts of the case before him, Barniville J. held that a delay of some six months between the issuance of the proceedings and the service of same constituted an "*unreasonable delay*" in prosecuting the proceedings for the purposes of the statutory test. The court went on to find that a further delay of some three months in the delivery of the statement of claim compounded and reinforced the initial delay, and rendered still more unreasonable the delay in prosecuting the case.
8. The rationale for the imposition of an enhanced obligation for expedition on a plaintiff who has registered a *lis pendens* has been summarised as follows by the High Court (Butler J.) in *Ellis v. Boley View Owners Management clg* [2022] IEHC 103. Having expressed her agreement with the judgments in *Hurley Property ICAV v. Charleen Ltd* (above) and *Togher Management Company Ltd v. Coolnaleen Developments Ltd* [2014] IEHC 596, Butler J. continued as follows (at paragraph 48):

"I agree with the views expressed by those judges to the effect that s. 123(b)(ii) of the 2009 Act imposes an obligation on a litigant who has registered a *lis pendens* to prosecute their proceedings with an element of expedition and vigour

that goes beyond mere compliance with the time limits laid down in the rules or by statute. The person against whose property the *lis pendens* has been registered is prejudiced in dealing in the property by the mere fact of registration of the *lis pendens*. That prejudice to a person in the exercise of their constitutionally protected property rights justifies the imposition of a higher duty of expedition on the party whose *lis pendens* has created the prejudice.”

9. On the facts of the case before Butler J., there had been an acknowledged ongoing delay in serving the plenary summons. The motion to vacate the *lis pendens* had been heard some sixteen months after the proceedings were issued, yet service had still not been effected at the time of the hearing. This delay was held to be unreasonable.

PROCEDURAL HISTORY

Two sets of proceedings

10. Before summarising the procedural history, it may be helpful to explain that reference will be made throughout this judgment to two related sets of proceedings, as follows. The first in time are proceedings brought by Mr. Patrick Buckley. These proceedings are entitled “*Patrick Buckley v. Anthony Buckley and Sharon Mullarkey*” and bear the High Court record number 2019 No. 3034 P. The principal relief sought in the plenary summons is a declaration that Mr. Patrick Buckley is entitled to claim rights of possession in respect of three specified properties. Insofar as this judgment is concerned, it is the claim in respect of one of these three properties, namely the lands contained in Folio 18240L, Land Registry, County Cork, which is of immediate relevance. This property will be referred to as “**35 Ivy Court**” where convenient. As explained presently, the *lis pendens* in respect of the other two of the three properties have since been vacated by order of the High Court (Dignam J.).

11. The second set of proceedings are the within proceedings. These proceedings are brought by Mr. Conor Sheeran against Mr. Patrick Buckley. Mr. Sheeran asserts that he has been appointed as receiver pursuant to a mortgage and deed of charge executed in respect of the property at 35 Ivy Court. The within proceedings have been taken by way of special summons. The principal relief sought is an order vacating the *lis pendens* registered in respect of the property at 35 Ivy Court.

Chronology of events

12. The chronology commences with the institution of the first set of proceedings. These proceedings were issued out of the Central Office of the High Court on 12 April 2019. Shortly thereafter, the plaintiff, Mr. Patrick Buckley, applied to register a *lis pendens* in respect of the property at 35 Ivy Court. On 24 April 2019, the particulars were duly entered in the register of *lis pendens* maintained in the Central Office of the High Court. This register is maintained in accordance with Section 121 of the Land and Conveyancing Law Reform Act 2009. The *lis pendens* was subsequently registered as a burden on the relevant folio at the Land Registry on 6 June 2019.
13. The practical effect of these procedural steps is that any potential purchaser of the property at 35 Ivy Court is on constructive notice of the fact that there are legal proceedings in being in respect of the ownership of the property.
14. It is unclear whether the plenary summons in the first set of proceedings has ever been served. Certainly, no appearance to the proceedings has been entered on behalf of either of the two defendants. It does not seem that a statement of claim has been delivered in respect of the proceedings.

15. Without sight of a statement of claim, it is difficult to know the precise basis upon which Mr. Patrick Buckley asserts a claim for a right of possession in respect of the property at 35 Ivy Court. There is a vague reference in the plenary summons to contractual obligations having been entered into in or about May or June 2006.
16. An application has recently been made within the first set of proceedings for an order vacating the *lites pendentes* registered in respect of the two *other* properties the subject-matter of those proceedings. (It will be recalled that the first set of proceedings are not confined to the property at 35 Ivy Court but implicate two other properties). The High Court (Dignam J.) made in order to this effect on 7 February 2022. The application had been made on behalf of the person appointed as receiver over the two relevant properties pursuant to a deed of mortgage and charge. There was no appearance on behalf of Mr. Patrick Buckley at the hearing of that application to vacate the *lites pendentes*.
17. In contrast to the approach adopted by the person acting as receiver in respect of the two other properties implicated in the first set of proceedings, the application to vacate the *lis pendens* in respect of 35 Ivy Court has been pursued by instituting parallel proceedings. This is consistent with the approach endorsed by the High Court (Humphreys J.) in *Harrington v. O'Brien* [2017] IEHC 506. The second set of proceedings, i.e. the within proceedings, were instituted by way of special summons on 25 September 2020. The principal relief sought is an order vacating the *lis pendens* registered in respect of the property at 35 Ivy Court.
18. Mr. Sheeran has averred on affidavit that he has been appointed as receiver over the property at 35 Ivy Court. His appointment had initially been made by

Permanent TSB plc pursuant to a deed of mortgage and charge (“*the charge*”) entered into between that financial institution and Mr. Anthony Buckley. Mr. Sheeran goes on then to explain that Start Mortgages DAC has since succeeded to Permanent TSB plc’s interest in the charge and the underlying loan facilities. Mr. Sheeran has exhibited an extract from the global deed of transfer of 1 February 2019. He has also exhibited a copy of the folio which indicates, first, the existence of a charge for present and future advances repayable with interest in favour of Irish Life & Permanent PLC; and, secondly, the transfer of the ownership of the charge to Start Mortgages DAC on 15 March 2019.

19. Mr. Sheeran has also exhibited correspondence wherein his solicitors had called upon Mr. Patrick Buckley to voluntarily vacate the *lis pendens*. Mr. Patrick Buckley, in a letter dated 7 January 2020, has summarised the background to the dispute between him and his brother Mr. Anthony Buckley. The letter concludes by Mr. Patrick Buckley describing himself as “*only a lay litigant*” and stating that he would prefer to come to an agreement with Mr. Anthony Buckley; that negotiations were ongoing but that the latter does not seem to want any accommodation.
20. The application to vacate the *lis pendens* came on for hearing before me on 27 June 2022. Mr. Sheeran was represented by solicitor and counsel. There was no appearance on behalf of Mr. Patrick Buckley. Counsel on behalf of Mr. Sheeran took me through the relevant court orders and affidavits in respect of service. The High Court (Ferriter J.) had made an order on 21 February 2022 renewing the special summons and directing that the pleadings be served on Mr. Patrick Buckley by way of ordinary prepaid post at his address at [details redacted]. A further order was made by the High Court (O’Connor J.) on

7 March 2022 providing that a *copy* of the special summons be a replacement for the *original* special summons, and that reference to the original in previous orders should constitute reference to the copy.

21. I am satisfied on the basis of the affidavits of service that service, in accordance with the High Court orders, has been properly effected. I am satisfied, therefore, that Mr. Patrick Buckley had been given proper notice of the hearing date in respect of the application to vacate the *lis pendens*.

DISCUSSION AND DECISION

22. The principal issue for determination on this application is whether there has been an unreasonable delay in prosecuting the proceedings brought by Mr. Patrick Buckley. The key events in those proceedings are summarised in tabular form below.

12 April 2019	Plenary Summons issued
24 April 2019	<i>Lis pendens</i> registered in Central Office, High Court
6 June 2019	<i>Lis pendens</i> registered as burden on folio
7 February 2022	Order vacating the <i>lites pendentes</i> affecting the two other properties

23. Notwithstanding that more than three years have elapsed since the date of their institution, no meaningful steps have been taken to progress those proceedings. It is doubtful whether the plenary summons has even been served on either of the two defendants. Certainly, no appearances have been entered on their behalf, yet no application for judgment in default of appearance has been brought by the plaintiff. This strongly suggests that the plenary summons has not been served. It does not seem that a statement of claim has been delivered.

24. As explained in the case law discussed at paragraphs 4 to 9 above, there is an enhanced obligation on a plaintiff who has registered a *lis pendens* to prosecute their proceedings with expedition. It is not sufficient for such a plaintiff simply to comply with the time-limits prescribed under the rules of court. In the present case, far from fulfilling this enhanced obligation, Mr. Patrick Buckley has failed even to comply with the timescale envisaged under the rules of court for the exchange of pleadings. Indeed, it seems likely that the plenary summons has lapsed because of a failure to serve same within the twelve month period prescribed under Order 8. Even if the plenary summons has been served, no other steps have been taken to progress the proceedings.
25. The High Court (Barniville J.) in *Hurley Property ICAV v. Charleen Ltd* [2018] IEHC 611 held that a failure to serve a plenary summons within six months, and a failure to deliver a statement of claim within three months, both entailed unreasonable delay. In *McLaughlin v. Ennis Property Finance Ltd* [2022] IEHC 286, the High Court (Butler J.) held that a delay of two years in the service of a plenary summons would be more than sufficient to justify the making of an order vacating a *lis pendens*. In *Boyle v. Ulster Bank Ireland DAC* [2022] IEHC 332, the High Court (Dignam J.) held that a delay of over four years in taking any steps post-service of the proceedings was unreasonable.
26. Of course, the question of whether or not there has been unreasonable delay must be assessed on a case-by-case basis, by reference to the specific circumstances of the particular proceedings. There is no bright line rule which stipulates that delay beyond a prescribed period of time must always be characterised as unreasonable for the purposes of Section 123 of the Land and Conveyancing Law Reform Act 2009. Nevertheless, in circumstances where, as in the present

case, no excuse has been proffered for the delay, it is legitimate to have some regard to the length of delay which has resulted in a *lis pendens* being vacated in other proceedings.

27. I am satisfied that the *lis pendens* in the present case should be vacated in circumstances where some three years after the date of their institution, the proceedings have not progressed beyond, at best, the service of the plenary summons.

CONCLUSION AND FORM OF ORDER

28. For the reasons set out herein, I am satisfied that the *lis pendens* should be vacated in circumstances where the proceedings in aid of which the *lis pendens* has been registered have not progressed beyond, at best, the service of the plenary summons. No appearances have been entered and it does not seem that a statement of claim has been delivered. This is so notwithstanding that more than three years have lapsed since the date of the institution of those proceedings.
29. Accordingly, an order will be made, pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009, vacating the *lis pendens* in respect of the lands contained in Folio 18240L, Land Registry, County Cork. This will result in the cancellation of the entry made in the register of *lis pendens* maintained in accordance with Section 122 of the Land and Conveyancing Law Reform Act 2009.
30. It is not necessary to make any consequential order directed specifically to the Property Registration Authority (“*PRAI*”) in respect of the entry on the folio. Rather, the plaintiff’s solicitor can arrange to have the *lis pendens* cancelled by lodging a certificate as provided for under Order 72A, rule 5 of the Rules of the

Superior Courts. Lest there be any difficulty in this regard, however, the parties have liberty to apply.

31. As to costs, my *provisional* view is that having regard to Section 169 of the Legal Services Regulation Act 2015, the plaintiff, having been entirely successful in his application, is entitled to recover his costs as against the defendant. If either party wishes to contend for a different form of costs order, then a short written submission to this effect should be filed within 14 days of this judgment.

Appearances

Edward Murray for the plaintiff instructed by O'Brien Lynam
No appearance on behalf of the defendant

Approved
Gemma S. Mans