

THE HIGH COURT

[2023] IEHC 188

2021 No. 5486P

BETWEEN

JAMES MCQUAID

PLAINTIFF

AND

START MORTGAGES DESIGNATED ACTIVITY COMPANY and JOHN

COULSTON

DEFENDANTS

Ex Tempore Judgment of Ms. Justice Eileen Roberts delivered on 18 April 2023

1. This is the court’s ex tempore judgment in relation to the defendants’ motion to vacate a *lis pendens* registered by the plaintiff in respect of a property in Folio DN 78297L (under dealing number: D2021LR124701W), hereinafter “**the Property**”.
2. The relevant chronology is as follows:
 - (1) The plaintiff issued the within proceedings on 21 September 2021.
 - (2) The plaintiff registered the *lis pendens* with the Central Office on 23 September 2021.
 - (3) The *lis pendens* was registered on the folio for the Property on 8 October 2021.

- (4) An appearance was entered by solicitors for the first named defendant on 6 September 2022.
- (5) The within motion seeking an order pursuant to section 123(b)(ii) of the Land and Conveyancing Law Reform Act, 2009 (as amended) (“**the 2009 Act**”) was issued on behalf of the defendants on 30 August 2022 and was heard by this court yesterday, 17 April 2023.
3. The focus of the defendants’ challenge relates to their argument that this court should vacate the *lis pendens* as there has been an unreasonable delay by the plaintiff in prosecuting these proceedings. In that regard, the evidence before this court was that the proceedings which issued on 21 September 2021 have not, to date, been served on either defendant. This is a delay of almost 19 months to date. There was no evidence before the court as to whether the summons has been renewed or whether, if not, the plaintiff intends to apply to renew it prior to attempting to effect service.
4. Section 123 of the 2009 Act confirms that an application to vacate a *lis pendens* 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* was registered.
5. In the present case, the first named defendant is stated to be the successor in title to Irish Life & Permanent plc who advanced substantial loan facilities to the plaintiff and his late wife, which were secured by way of first legal charge on several properties owned by the plaintiff, including the Property. It is alleged that the plaintiff defaulted on agreed repayments and, following demand made on 13 February 2020, the first named defendant appointed the second named defendant as receiver over the Property by deed of appointment dated 31 August 2020.

6. On 27 March 2019, the first named defendant was registered as the owner of the former Irish Life & Permanent plc charge which had been registered on the Property on 2 July 2009. As the owner of this burden on the Property the first named defendant is clearly a party with sufficient standing to seek to vacate the *lis pendens* on the Property as it is a party directly affected by the *lis pendens*.
7. 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* registered over property in respect of which he is appointed and may thus also have standing to bring an application pursuant to section 123 of the 2009 Act. A preliminary question arose as to the entitlement of the second named defendant to bring this application on the basis that no appearance had been entered on behalf of the second named defendant, although the same firm of solicitors issued the present motion on behalf of both defendants.
8. In circumstances where the first named defendant is clearly a party with standing to bring an application under section 123 of the 2009 Act, and where the first named defendant has entered an appearance through solicitors, I will deal with this application as though it was advanced solely on behalf of the first named defendant. The practical reality of this will be insignificant as if the *lis pendens* is vacated on the application of the first named defendant, the order to vacate will constitute a stand-alone order binding on the plaintiff.
9. Being satisfied that the first named defendant has standing to bring this application, I am also satisfied that the plaintiff has been properly put on notice of the application and indeed was represented by counsel at the hearing.

The legal principles governing the exercise of the court’s discretion to vacate a lis pendens for delay.

10. There have been many reported cases dealing with the court’s jurisdiction to vacate a *lis pendens* in circumstances where it is alleged that the registering party has been guilty of “*unreasonable delay*” in the prosecution of the action on foot of which the *lis pendens* was registered. The core authority on this point is the decision of Barniville J in *Hurley Property ICAV v Charleen Ltd* [2018] IEHC 611 to which I was referred by counsel for the defendants. I do not intend to repeat the court’s comments in that case in any detail other than to summarise them by noting that s. 123 (b)(ii) of the 2009 Act imposes a particular obligation on a person who has commenced proceedings and registered a *lis pendens* to move with “*greater expedition than would normally be required or than is required under the Rules of the Superior Courts*” (para 82). The courts have regularly noted a requirement on such a party to act with particular “*expedition and vigour*” in the prosecution of their proceedings. This requirement is an important counterbalance to the ease with which a litigant can register a *lis pendens*, thereby affecting the property rights of any party with an interest in the property over which the *lis pendens* is registered.
11. Counsel for the plaintiff stressed that there is no definite time limit which in itself makes a delay unreasonable within the meaning of s123 of the 2009 Act. In that regard, I agree with him. Indeed, in the decision of Simons J in *Sheeran v Buckley* [2022] IEHC 400, he noted at para 26 of his judgment that “[T]here 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 2009 Act. The question as to whether or not there has been unreasonable delay must therefore be assessed on a case-by-case basis – although it is of course instructive to have regard to periods of delay which the courts have found to be “*unreasonable*” in other cases in which orders have been sought to vacate a *lis pendens*.

The Decision of this court

12. I am satisfied that the *lis pendens* in the present case should be vacated in circumstances where some 19 months after the institution of these proceedings, the evidence is that the summons has not even been served on the defendants. Indeed, it seems likely that the plenary summons has lapsed because of the failure to serve it within the 12 month period prescribed under Order 8, rule 1 RSC. Even if that summons has been renewed, or could be renewed if application were made, there is no evidence before this court as to when the proceedings might be served and thus the prospect of further ongoing delay is a very real one.
13. I have considered whether there is any excuse advanced by the plaintiff to explain or justify the delay to date. The only evidence of anything close to that is contained in para 5 of the plaintiff's affidavit sworn 22 March 2023 where he says that "*it is as a result of my inability to find a legal team to instruct that proceeding (sic) are not as well advanced as I would have wished*".
14. I do not believe that this justifies such a significant delay in serving the proceedings, particularly where there were solicitors on record who could have accepted service. I also note that even though solicitors are now on record for the plaintiff, the proceedings have still not been served and there is no evidence before the court as to when proceedings will be served.
15. I also do not accept that the plaintiff could not serve proceedings because he needed the debt "*particularised*" so that he could "*prepare an affidavit in order to serve proceedings*" as he stated in correspondence which is exhibited to the affidavit of Antoinette Roche at exhibit "AR16". Nothing of this nature was required for the plaintiff to serve his summons.

16. Finally, I wish to deal briefly with some matters raised by the plaintiff's counsel at the hearing. In summary he complained that (1) the affidavit of Antoinette Roche filed on behalf of the first named defendant should be inadmissible on the grounds of hearsay; (2) the fact that there is doubt as to which (if any) version of the banks terms and conditions were accepted by the plaintiff; and (3) what he described as a "*suspicious pattern of behaviour*" by the second named defendant in relation to engagement with tenants of the Property.
17. I am satisfied that in the context of the application before this court these matters are not relevant. While they may be relevant to questions such as the validity of the appointment of the second named defendant as receiver or the validity of the actions taken by him in that role, they are not relevant to determining whether the plaintiff has unreasonably delayed in advancing his proceedings, which I find on the evidence before me, that he has.
18. Accordingly, the order of this court is to vacate the plaintiff's *lis pendens* pursuant to the provisions of s. 123(b)(ii) of the 2009 Act in circumstances where the proceedings in aid of which the *lis pendens* was registered have not been progressed even to the service of the plenary summons, despite the passage of 19 months since proceedings issued. This will result in the cancellation of the entry made in the register of *lis pendens* maintained by the Central Office once an attested copy of the order of this Court is lodged with the Central Office. The proper officer shall then be in a position to lodge the certificate of the cancellation of the *lis pendens* as provided for under Order 72A, rule 5 RSC to cancel the *lis pendens* with the Property Registration Authority. I will however give liberty to apply in the event that there is any difficulty in relation to that matter.

19. I make no order regarding the strike out of the proceedings as sought in paragraph 2 of the defendant's notice of motion and note that this particular relief was not advanced at the hearing.
20. It appears to me that the first named defendant should be entitled to its costs as against the plaintiff having regard to s. 169 of the Legal Services Regulation Act 2015 on the basis that it was entirely successful in securing the vacation of the *lis pendens*. In that regard I am also mindful of the opportunity given to the plaintiff prior to the issue of the motion to voluntarily vacate the *lis pendens*, which he failed to do. I will however now hear the parties on costs and any other issues arising.