THE HIGH COURT

[2023] IEHC 517

[Record No.] 2016 6977P

Between

PAT HAYES

Plaintiff

And

DECLAN GEARY AND MARIE GEARY

Defendants

Judgment of Mr. Justice Dignam delivered on the 24th day of August 2023.

Introduction

1. This judgment concerns an application by Seaconview DAC and Mr. Declan Taite for the following reliefs:

> *"1. An Order pursuant to Order 15, Rule 13 of the Rules of the Superior Courts and/or the inherent jurisdiction of the Court joining the Applicants as Notice Parties to the proceedings for the sole and limited purpose of applying for an order vacating the lites pendentes registered by the Plaintiff on 25 January 2017 in respect of the properties comprised in Folios (i) LK2575F, (ii) LK2637F, (iii) LK51611F, (v) LK2698F, (v) LK769, (vi) LK59725F, (vii) LK2745F, (viii) LK20694, (ix) LK17989 and (x) LK2695F.*
>
> *2. An Order pursuant to Section 123 of the Land and Conveyancing Law Reform Act, 2009 and/or the inherent jurisdiction of the Court vacating lites pendentes registered by the Plaintiff on 25 January 2017 in respect of the properties comprised in Folios (i) LK2575F, (ii) LK2637F, (iii) LK51611F, (v) LK2698F, (v) LK769, (vi) LK59725F, (vii) LK2745F, (viii) LK20694, (ix) LK17989 and (x) LK2695F."*

2. Seaconview DAC ("Seaconview") is registered on some of these Folios (LK2575F, LK2637F, LK51611F, LK769, LK59725F, and LK2698F) as the owner of a charge over the lands in the Folios. Seaconview's interest in liens pursuant to section 73(3) of the Registration of Deeds and Title Act is noted on the other Folios (LK20694, LK2745F, LK17989, and LK2695F). Mr. Taite is a receiver appointed by Seaconview in respect of the lands over which Seaconview is registered as having a charge other than the lands in Folio LK2698F.

3. As noted in the relief sought, the lites pendentes were all registered by the plaintiff on the 25th January 2017. This was done on foot of proceedings which were issued by the plaintiff by Plenary Summons of the 29th July 2016. The nature and background of these proceedings are important and I will have to return to them in detail.

4. As is clear from the relief set out above, Seaconview and Mr. Taite ("the applicants") seek to be joined as notice parties to the proceedings solely for the purpose of applying pursuant to section 123 of the Land and Conveyancing Act 2009 to have the lites pendentes vacated and also seek an order vacating the lites pendentes. The application is opposed by the plaintiff (who registered the lites pendentes) and, in what is a very unusual feature of the case, by the defendants. In fact, the only appearance at the hearing before me and, I understand, at an earlier hearing, was by the first-named defendant.

Background

5. By a facility letter of the 5th August 2009 Ulster Bank Ireland Limited ("Ulster Bank") agreed to advance to the defendants three loan facilities in the total sum of €973,000.

6. On the 5th November 2008 Ulster Bank agreed to loan the defendants' daughter the sum of €260,000 and a further sum of €40,000. By written guarantee dated the 29th May 2008 the defendants agreed to discharge, on demand, their daughters' liabilities on foot of these loans, up to a maximum sum of €295,000.

7. The defendants executed a number of legal mortgages over six parcels of land in favour of Ulster Bank and deposited the land certificates with Ulster Bank in respect of

the remaining four properties as security for their liabilities to Ulster Bank. The parcels of lands in respect of which mortgages were executed were Folios LK2575F, LK2637F, LK51611F, LK769, LK59725F, and LK2698F and the lands in respect of which the land certificates were deposited were those in Folios LK20694, LK2745F, LK17989 and LK 2695F.

8. It is not entirely clear whether these matters are disputed by the defendants but I do not need to resolve this in light of the arguments that were pursued.

9. Ulster Bank's ownership of the mortgages was registered on the respective folios on the following dates:

(i) LK2575F – 18th October 2004
(ii) LK2637F – 18th October 2004
(iii) LK51611F – 30th June 2008
(iv) LK769 – 16th October 2006
(v) LK59725F – 8th January 2008
(vi) LK2698F – 25th April 2008

10. Ulster Bank's liens pursuant to 73(3) of the Registration of Deeds and Title Act 2006 on foot of the deposit of the land certificates were registered on the relevant folios as follows:

(i) LK20694 – 7th May 2009
(ii) LK2745F – 7th May 2009
(iii) LK17989 – 7th May 2009
(iv) LK2695F – 7th May 2009

11. It is deposed in the grounding affidavit sworn on behalf of the applicants that by Irish Law Deed of Transfer dated the 23rd October 2015, Ulster Bank transferred the benefit of the loans (including the loans advanced to the defendants' daughter) and the guarantee to Seaconview and by a Land Registry Form 56 (Transfer of Charges) Ulster Bank transferred to Seaconview all *"its rights, title, interest, benefit and obligations (both present and future) (in the charges, particulars of which are set out in the Schedule hereto*." Seaconview's ownership of the charges was registered on the 2nd February 2016 and their interest in the various liens was noted on the 18th September 2017. An issue subsequently arose about whether the loans were in fact transferred to Seaconview at a hearing before Egan J when it emerged that, while the relevant charges were identified in the Deed of Transfer, the loan agreement which had been relied upon by Seaconview (the loan of the 6th August 2009) was not identified in the relevant part of the Deed of Transfer. This issue now forms a core part of the dispute between the parties. I explain this further in the section dealing with the procedural history.

12. By letter of the 4th November 2015, a servicing agent on behalf of Seaconview wrote to the defendants, referring to their "*loan facilities with Seaconview Limited (formerly your loan facilities with Ulster Bank Limited)…"* and went on to state *"Ulster Bank wrote to you recently to inform you that the Facilities noted above including the facility letter(s), guarantee(s), security documents and rights relating to the Facilities (the "Finance Documents") have been sold to Seaconview Limited. This transfer has now taken place and the purpose of this letter is tell you what has happened since the transfer and how this affects you."* A similar letter was sent to the defendants' daughter in respect of her loans.

13. It seems that demand for payment was made on behalf of Seaconview by letters from their solicitors of the 11th October 2018 and it is claimed that no payments were made.

14. Mr. Taite was appointed receiver in respect of the lands in Folios LK2575F, LK2637F, LK51611F, LK769 and LK59725F (ie. all the lands in respect of which mortgages had been executed and registered save for the lands in Folio 2698F) by instrument dated the 21st November 2018. Recital B of that instrument stated the date of the Deed of Transfer as being the 29th September 2015 and a Deed of Rectification of Instrument of Appointment of Receiver was executed on the 23rd January 2019, to rectify Recital B in the original instrument to refer to the Deed of Transfer of the 23rd October 2015 (rather than the 29th September 2015).

15. Mr. Taite is the applicant in respect of these five properties. Seaconview is the applicant in respect of the remaining five properties. These are the properties over which they claim to have a lien (Folios LK206948, LK2745F, LK17989 and LK2695F) and the lands in respect of which they are the registered owner of the charge but over which Mr. Taite has not been appointed receiver (Folio 2698F).

16. As noted above, the plaintiff applied to register a lis pendens against each of the properties and a lis pendens was registered on each of the Folios on the 25th January 2017. Lites pendentes were registered in the Central Office on the 5th September 2016. These registrations were on foot of a Plenary Summons of the 29th July 2016 in these proceedings. This is the date of the Plenary Summons that is referred to in the High Court Application for the Registration of a Lis Pendens, though the plaintiff refers in his

replying affidavit to having entered a Plenary Summons on the 27th July 2016. The General Indorsement of Claim sought, inter alia:

> *"1. A declaration that 33% of the Defendant's interest in the land/property comprised in folios LK20694, LK17989, LK2754F, LK2695F, LK2698F, LK51611F, LK2637F, LK2575F, LK769 is legally and beneficially owned by the Plaintiff.*
>
> *2. A declaration that 51% of the land/property comprised in folio LK28064F and LK6565F is legally and beneficially owned by the Plaintiff.*
> *3. That 70% of the land/property comprised of in folio LK47201F and LK39758F is legally and beneficially owned by the Plaintiff.*
> *4. A declaration that 60% of the land/property comprised of in folio LK21783F, LK35115F and LK41823F is legally and beneficially owned by the Plaintiff*
> *5. An order prohibiting the Defendants from holding themselves as the full owners of all the land/property comprised in paragraph numbered 1-4 of this Indorsement of Claim.*
> *6. An order prohibiting any agent of the Defendants holding themselves as agents of the owners of all the land/property comprised in paragraphs numbered 1-4 of this Indorsement of Claim.*
> *7. An order prohibiting the Defendants and their agents from entering into any contracts for the sale of any of the land/property comprised in paragraphs numbered 1-4 of this Indorsement of Claim.*
> *8. An order compelling the Defendant's their agents and all persons acting in concert with them from interfering with and/or attempting to frustrate, harass or intimidate the Plaintiff's interest in the land/property comprised in paragraphs numbered 1-4 of this Indorsement of Claim."*

17. Naturally, no particulars of the basis of the claim were contained in the General Indorsement of Claim. However, in correspondence with Mr. Taite after Mr Taite queried the basis of the registration of the lites pendentes and observed that no step had been taken since the proceedings had been issued over two and a half years earlier, the plaintiff explained in a letter of the 29th May 2019:

> *"I am somewhat astonished by your letter in relation to these High Court proceedings and your client's position they are potentially 'frivolous and vexatious' I assure you that these legal proceedings are anything but vexatious and I'm not sure why it is any of your client's business as to the nature of a*

private dispute between private parties, nor am I compelled to explain myself to your client. This is a private matter between parties and there will be no interference by any third party with my fundamental constitutional right to litigate for monies owed.

…

Furthermore, while I take the view I am not required to explain my position, this case is in relation to cattle purchased by Mr Geary. We were family friends for most of our lives and it turned out Mr Geary could not pay for stock some time after he took possession. The Geary's have run into substantial financial difficulty since the financial crisis and it was a very difficult decision indeed to put such a burden on their land. The Geary's however, recognise I am owed considerable amounts for stock and informed me they will not defend the case as they fully recognise they received the stock and were unable to pay. I intend to apply for a Judgement in default in due course.

Simply put, I had no appetite to advance legal proceedings given our personal circumstances and to give the Geary's opportunity to recover their position. My delay was being merciful. However, this has been a very slow process and I am now of the view I must proceed with Judgement in any case. Your recent letter has settled my mind and I'm fully satisfied to provide all evidence of these transactions to the High Court in relation to the stock not paid for by the Gearys.

On that basis, I ***do not*** *consent to the cancellation of my legal proceedings"* [emphasis in original]

18. This is also reflected in the affidavits filed on behalf of plaintiff and the defendants. At paragraph 7 of his first replying affidavit, the plaintiff said:

"7. I say that on 27th July 2016 I did enter a Plenary Summons to the High Court in relation to a matter and claim over certain private property of the Defendants. By way of background, the Court is fully entitled and obliged to understand the situation as it arises. I am a lifelong friend of the Defendants and fortunately we remain good friends up to the writing of this Affidavit, despite debt owed and litigation pending. I gave the Defendants capital stock for farming to assist in escalating financial crisis on the defendants. I did not expect immediate payment in light of the Defendant's financial difficulties. However, arising from future farming activities in relation to said stock, payments were to

be honoured in due course. Unfortunately, the financial crisis did not pass as expected and I was advised and informed that the Defendants would be unable to pay for stock as expected. I say the Defendants took the view I was entitled to peace of mind and security in relation to said stock. The Defendants, as lawfully entitled registered owners of the land consented to the registration of a 'lis pendens' as burden and security on their private property. The matter would be progressed in due course where necessary. The Defendants agreed not to contest litigation if agreed repayments had not yet settled in due course." [emphasis in original]

19. The defendants filed an affidavit containing very similar (almost identical) averments to those contained in the plaintiff's affidavit. In relation to how the lites pendentes came to be registered they explained at paragraph 5 of their replying affidavit:

> "*5… We are friends and neighbours of the Plaintiff and we remain good friends despite debt owed and the within proceedings. The plaintiff offered us cattle stock for farming to assist in our financial difficulties. The plaintiff did not expect immediate payment, however, as arising from farming activities payments were to be honoured in due course. Unfortunately, our financial difficulties remain and we informed the Plaintiff that we would not be able to make the payments as expected. We took the view that the Plaintiff was entitled to some form of security in relation to the debt. As lawfully entitled registered owners of private property, we consented to the registration of a 'lis pendens' as burden on the said private property and the matter would be progressed in due course. We agreed with the Plaintiff not to contest the Court proceedings if we were unable to settle the debt due course."* [emphasis in original]

20. It appears that no steps at all were taken in the proceedings following the registration of the lites pendentes and this motion then issued on the 5th September 2019. Mr. Taite states at paragraph 23 of his grounding affidavit that he was not aware whether the plaintiff had delivered a Statement of Claim but confirmed that at that stage the courts.ie website showed that no formal steps had been taken in the proceedings. It was confirmed in written legal submissions filed on behalf of the plaintiff and the first-named defendant that a Statement of Claim has not been delivered.

Procedural history

21. This matter has a particular procedural history which has led to a focusing of the issues between the parties. As noted, the application was made by Notice of Motion dated the 5th September 2019. It was grounded on an affidavit of Mr. Taite in respect of the lands the subject of the receivership and an affidavit of Mr. Shane Coman of Seaconview in relation to the other properties. The plaintiff swore a replying affidavit and the defendants swore a joint replying affidavit in opposition to the application. As noted above, it is an unusual feature of this application that it is resisted by the owners of the lands, the defendants, and I return to this. These two affidavits were in very similar and, in some respects, identical terms. Mr. Taite filed a replying affidavit and the plaintiff filed a further replying affidavit. The matter came on for hearing before Egan J on the 29th October 2021. As referred to in paragraph 11 above, during that hearing it emerged that the loan agreement of the 6th August 2009 that was relied upon in the grounding affidavits was not identified in the relevant part of the Deed of Transfer. The matter was then adjourned to allow Seaconview to ascertain whether the loan could be identified in a theretofore redacted column in the schedule to the Deed of Transfer and whether the applicants wished to adduce further evidence in support of the application. The applicants decided not to adduce further evidence and the matter was adjourned to allow the applicants to deliver supplemental submissions to address the implications for the application of the fact that the loan is not identified in the schedule to the Deed of Transfer. Those submissions were delivered and submissions entitled "*Legal Submissions of Declan Geary and Pat Hayes*". A significant number of points had been raised in the affidavits sworn by the plaintiff and the defendants. However, those written submissions and the oral submissions made by the first-named defendant at the hearing before me focused on a much more limited number of points.

22. This judgment is concerned with the points that were actually argued by the parties in the written and oral submissions.

23. It must be noted that while I have been referring to the arguments made on behalf of the plaintiff and the defendants, in fact only the first-named defendant attended at the hearing. In short, the plaintiff, who is in fact the legitimus contradictor, did not attend to make any arguments. This is an extremely unusual situation where the person who registered the lis pendens did not attend and one of the people against whose interest the lites pendentes were registered attended to argue against the vacating of the lites pendentes. Humphreys J held in *Pinfold v Kane [2019] IEHC 678* that the appropriate opposing party is the person who registered the lis pendens. He said at paragraph 6 of his judgment:

"However, the problem for the defendant is that he is not a necessary or proper party to the present application. A lis pendens is not meant to improve the position of the party against whom it is registered; and nor should removal of it be a procedure that, in principle, worsens the position of that party or leaves him or her any worse off than they would have been if the lis pendens was never registered. The language of s. 123 of the 2009 Act confirms the irrelevance of the defendant to an application to discharge a lis pendens that was originally entered against such a defendant. It is only the person who registered the lis pendens that must be on notice of the application to vacate".

24. It is clear from this that I could (and perhaps should) have concluded that the defendants (or in this case the first-named defendant) had no right to participate and that the matter was therefore essentially unopposed and simply determined the application on an unopposed basis. The applicants made the point that the defendants are not the proper party to oppose the application and have no right to participate. However, I have decided to deal with the arguments in circumstances where written submissions were delivered where the arguments made at the hearing by the first-named defendant, for the most part, reflected in very summary form the written submissions which were stated to be delivered on behalf of both the first-named defendant and the plaintiff (the party who undoubtedly has the right to participate). I do so without prejudice to a party's right to argue in a future case that the Court should not entertain opposition by the person against whose interest the lis pendens was registered or that the application should be treated as unopposed when the party who registered the lis pendens does not attend. I should also note that I have serious doubts about the plaintiff's entitlement to rely on the defendants' rights or interactions with Ulster Bank or with the applicants to oppose the relief. They are matters for the defendants to assert at the proper time. However, where the submissions were also made by the defendants and I have already decided to deal with the arguments notwithstanding the argument that the defendants do not have a right to participate, it follows that I must deal with the arguments based on the defendants' rights and interactions with Ulster Bank and the applicants.

Section 123 of the Act

25. Section 123 of the Land and Conveyancing Law Reform Act 2009 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.*"

26. Order 15 Rule 13 states:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

27. While the plaintiff and the first-named defendant suggested in their written submissions that there is no provision or procedure providing for a person to apply in "*others' proceedings*" to vacate a lis pendens, the real argument centred on whether, on the facts, the applicants had standing to seek to be joined as notice parties to apply to vacate the lites pendentes. In any event, in relation to the procedural question, Humphreys J in paragraph 5 of his judgment in *Pinfold v Kane [2019] IEHC 678* said:

"*Section 5 of the Land and Conveyancing Law Reform Act 2009 provides that the court may vacate a lis pendens on the application of any person affected by it on notice to the person on whose application it was registered, inter alia where the court is satisfied that the action to which the lis pendens relates is not being prosecuted bona fide. I noted that previously in Harrington v O'Brien [2017] IEHC 506…that the 2009 Act had repealed the legislation providing for the procedure by which this this was to be done but did not expressly set out a replacement procedure. That omission does not allow applicants to apply in any proceedings whatsoever that they wish. The simplest procedure is to apply by motion in the very proceedings in which the lis pendens was registered and, commendably, the receiver has done that here…*".

28. Humphreys J said in the earlier judgment of *Harrington v O' Brien [2017] IEHC 506:*

"The 2009 Act does not include provision for an originating motion procedure so one is brought back to the general law that such an application should be brought by summons, unless it is properly an interlocutory motion. The general savings provisions of s. 26 of the Interpretation Act, 2005 do not assist the defendant. So the appropriate procedure to set aside a lis pendens or by analogy a caution, is normally by special summons although a plenary summons is also possible, where the relief is sought as a substantive relief. Where sought as an interlocutory relief, that application could only be brought by motion in proceedings which properly relate to that issue, classically the proceedings in which the lis pendens was entered. That application can be made returnable before the Master under O. 63 r. 29."

29. In *Carthy v Harrington [2018] IECA 321* a receiver was also joined as a notice party for the purpose of an application that lites pendentes be vacated.

30. That is the procedure that has been adopted by the applicants in this case.

31. In any event Order 15 rule 13 of the Rules of the Superior Courts does provide for the joinder of a person as a party or notice party where their presence "*may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions in the cause or matter…*" I would be satisfied that this provides a procedural basis for the application.

32. I am satisfied for the purpose of this application that the appropriate procedure is for the applicant to be joined provided I am satisfied that they are persons "*affected*" by the lites pendentes.

33. Thus, the first question is whether the applicants have standing to make this application, i.e., whether they are persons "*affected by*" the lites pendentes. The second question is whether there has been an unreasonable delay in prosecuting the action or whether it is not being prosecuted bona fide. There is then a possible third question in relation to a possible discretion of the Court.

34. I propose to address each of these in turn. First, I will summarise the arguments made by the parties.

Positions of the parties re standing - whether the applicants are persons "*affected*"

35. It is the applicants' case that Seaconview, by virtue of being the registered owner of security (in the form of legal charges over six of the folios and equitable liens over the other four folios), and Mr Taite as the receiver over five of the properties, are persons affected by the lites pendentes.

36. Alternatively, it is submitted that if the Court is of the view that the applicants have to rely on the transfer of the loan to establish that they are persons "*affected*" by the lites pendentes, the standard of proof on this application on the question of whether the loan was transferred is (by analogy with the established case law on substitution applications following the assignment of a portfolio of loans) that of a prima facie case and that standard is satisfied. It is also submitted that even if the standard of proof is on the balance of probabilities the applicants have satisfied that and they rely on *Promontoria (Oak) Ltd v Emanuel [2020] EWHC 104.*

37. Very detailed written legal submissions were filed on behalf of the first-named defendant and the plaintiff. I have considered these carefully together with the oral submissions made by the first-named defendant. The first-named defendant's oral submissions simply made the points that there is no evidence of the loan being transferred and that an assignment can not separate out the loans and the security and, therefore, the security can not be enforced by the applicants, that liens are not transferable, and the mortgages could not be transferred to Seaconview because it was not a subsidiary or associate company of Ulster Bank. A significant number of points are

interwoven with each other but the core point made is that the applicants do not have standing because there is no evidence of the loan having been transferred and therefore the applicants could not enforce the alleged security. This point is made and emphasised in a number of different ways and there are a number of different nuances to it. For example, it is submitted that the defendants have an entitlement that the applicants would establish that there is *"a debt owned and owed prior to interfering with the attached security and private property rights. There is no explanation in fact or law why the applicant in such circumstances should be permitted to interject into private proceedings prior to proof of the position"*; it was also submitted that the applicant in such circumstances would not be granted summary judgment for the debt and that it is difficult to follow therefore, legal reasoning that the defendants should lose private property to satisfy a debt. As part of this overall core point the plaintiff and defendants argue that the notice of assignment given to the defendants is defective and therefore invalid because it states that the loan was assigned to Seaconview but that is not the case. The plaintiff and the first-named defendant also rely on a number of different authorities and statutory provisions in making these arguments, including *AIB Mortgage Bank v Thompson [2017] IEHC 515*, *Promontoria (Oyster) DAC v Lynn [2022] IEHC 99*, *Promontoria (Oyster) DAC v Fox [2022] IEHC 97*, *Start Mortgages Ltd v Gunn [2011] IEHC 275*, *Dellway v NAMA*, section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 and the Registration of Title Act 1964. It is not necessary for me to set out in detail all of the different ways in which this point is argued or nuances of the point or all of the authorities.

38. Essentially the point is that the registered security can not be enforced without proof of the debt having transferred and that as it can not be enforced, the applicants are not affected by the lis pendens.

39. The plaintiff and the defendants also rely on their private property rights.

40. The plaintiff and the defendants also submitted that the liens are not assignable or transferable and there is no provision dealing with the assignability in the Registration of Deeds Act 2006 or the Registration of Title Act 1964. It was also submitted that the noting of the applicants' interest in the lien conveys no legal interest. It is therefore submitted that Seaconview is not "*affected*" because it can not enforce the liens.

41. It was also submitted that even if the liens were assignable or transferrable the lands which are the subject of those liens can not be sold without a Court Order and therefore the lites pendentes do not affect the parties who hold those liens at this stage.

42. A somewhat similar point was made in relation to the charges to the effect that the properties could not be sold with vacant possession unless the applicants secured peaceable possession or a Court Order for possession and as they did not have either, they were not affected yet by the lites pendentes. Separately, of course it is argued that they could not get an Order for Possession in circumstances where they can not prove the transfer of the debt.

43. It was also argued that Ulster Bank was not entitled to assign the loan and/or the mortgage to Seaconview because the latter was not a "*subsidiary or associated company of the Bank*" and therefore, as Seaconview is not the owner of the charges, they are not affected by the lites pendentes. They rely on Clause 17 of the relevant mortgage to make this argument.

44. Some of the other points made in the written submissions were replying to arguments in the applicants' submissions which, for the reasons explained below, is not necessary for me to decide.

Discussion and conclusion on whether the applicants are affected by the lites pendentes

45. The question in relation to the applicant's locus standi is whether the applicants are "*affected*" by the lites pendentes.

46. I am satisfied that the applicants are persons affected by the lites pendentes by virtue of being the registered owner of the charges (or the receiver appointed by the registered owner under the provisions of the charge) or as the holder of the liens (whose interest in the liens is noted on the relevant folios).

47. In respect of the properties which are the subject of a charge, the applicants are persons who are entitled under the terms of the mortgages to seek to sell the properties and in relation to the liens Seaconview is entitled to apply to the Court for a well-charging order and an Order for sale. In relation to the charges, clause 8 of one of the mortgages provides:

> "*Sections 17 and 20 of the Conveyance Act 1881 shall not apply to this Mortgage and the statutory power of sale and other powers shall be exercisable at any time after demand.*"

This is reflected in the other mortgages.

48. As noted above, the plaintiff and the defendants' core point in relation to standing is that there is no evidence of a transfer of the loans/debt and therefore the applicants will not be able to enforce the security and therefore should not be allowed intervene in these proceedings or to apply to have the lites pendentes vacated.

49. For the purpose of this part of the discussion, I will proceed on the basis that there is no evidence at this stage of the transfer of the loans/debt (the applicants obviously do not accept this). Even assuming that the plaintiff and the defendants are correct that the legal effect of the loan not being transferred is that the chargeholders will not be able to enforce their security, it seems to me that this core argument conflates the question of whether the applicants hold the security and have rights under that security with the question of whether they will be able to successfully exercise those rights. As the register maintained under the Registration of Title Act 1964 is conclusive (see for example Simons J in paragraphs 37 and 38 of *Promontoria (Oyster) DAC v Lynn [2022] IEHC 99*) Seaconview must clearly be treated as the holder of the security as its ownership of that security is registered or noted in the Register. They have the rights provided for under the security which includes a right to sell or to apply for an Order for Sale. That, in my view, is sufficient to establish that they are persons affected by the registration of the lites pendentes (because the ability to sell is affected by a lis pendens). The plaintiff and first-named defendant refer in their written submissions to the provision in the Registration of Title Act for the Register to be rectified. No such application has been made and therefore Seaconview's ownership of and interest in the security must be treated as conclusively established. The plaintiff and defendants argue that even if the register is conclusive, Seaconview has failed to establish that it is the affected mortgagee. I do not accept this. They are the affected mortgagee by virtue of being the registered owner of the mortgage.

50. To put it another way, as the owner of the charges Seaconview (or the receiver) is entitled to seek to sell the properties. If they wish to do so with vacant possession and can not otherwise peaceably obtain possession, they are entitled to apply to Court for an Order for Possession. As the holder of the liens, Seaconview is entitled to apply for a well-charging order with a view to selling those properties. If they seek to sell the lands, the defendants (not the plaintiff) would be entitled to seek to prevent same on the basis that the applicants can not exercise the right to sell if the loans/debt has not been transferred. If they apply to Court for an Order for Possession, or for a well-charging order, the defendants (not the plaintiff) will be entitled to oppose those applications on the basis that the loans/debt have not transferred. But this does not go to the question

of whether or not they have those entitlements in the first place. Rather it goes to whether they can, in the particular circumstances, exercise those entitlements.

51. The outcome of such proceedings can not be predicted at this stage. The applicants may produce evidence at that stage that the debt was in fact transferred or, they may be unable to do so and the Court will have to decide how that affects the power of sale or the entitlement to a well-charging order. It may be that the Court will conclude that the applicants do not have a power of sale. They are issues to be tried in the event that the applicants seek to enforce the security.

52. I am reinforced in my view by the authorities relating to the joinder of parties under Order 15 Rule 13. Section 123 is a stand-alone position but it seems to me that this jurisprudence is of some assistance, including *BUPA Ireland Ltd v The Insurance Authority & Ors [2006] 1 IR 201.* Kearns J on behalf of the Supreme Court held that the fact that a party's "*proprietary or pecuniary rights are or may be directly affected by the proceedings either legally or financially*" is a relevant consideration in determining whether a party should be joined to the proceedings.

53. Of course, it must be acknowledged that a lis pendens does not prevent a sale. It simply acts as a notification to a possible purchaser that there is a dispute about ownership of the land. However, practically speaking, it clearly and indisputably has an adverse impact on the ability to sell (indeed, in very many cases that is the purpose of registering a lis pendens) or on the value of a sale and it follows from this that the registered owner of the security which carries with it a right to sell or seek to sell or to apply for an Order for sale and his proprietary or pecuniary rights must be affected by the lis pendens

54. I am also reinforced in my view by the decision of the Court of Appeal (Whelan J) in *Carty v Harrington [2018] IECA 321.* In that case the receiver of property was held to be affected (for the purpose of s. 123) by lites pendentes over two adjoining properties in circumstances involving various easements, rights, grants, way-leaves and other interests. In my view, this clearly establishes that the consideration of whether a person is a person "affected" must not be overly restrictive. As Whelan J put it "*I am satisfied that the receiver has established that the receiver is a person affected by the lites pendentes registered against the two folios to a limited but very real extent*". For the reasons set out above, I am satisfied that the applicants in this case are affected by the lites pendentes to a very real extent.

55. As noted above, the plaintiff and the defendants also raise a number of other points.

56. I do not accept the argument that the applicants are not persons "*affected*" by the lites pendentes because they do not have possession of the properties and do not have a well-charging order in respect of the properties which are the subject of the liens. The whole purpose of a lis pendens is to notify the public or proposed purchasers that a party claims an interest in the land. It is not a legal impediment to sale but the Court operates in the real world. A lis pendens operates at the very least as a practical impediment to many sales and even if it does not fully impede a sale, it is extremely likely to adversely affect the purchase price. It is completely artificial to suggest that the applicants are not affected by the lis pendens because they are not at the precise point of selling or seeking to sell the property. The existence of a lis pendens impacts on the decision whether to seek to sell the property and therefore whether to even take the necessary preparatory steps such as applying for a well-charging order or an Order for Possession.

57. Nor do I accept the argument that because the liens do not confer a direct power of sale the noting of Seaconview's interest in the liens does not mean that they are affected by the lites pendentes. While the liens do not confer a power of sale absent a Court order, they do confer the entitlement to apply to court for such an order.

58. The argument was also made that the liens are not assignable or transferrable. This obviously goes to the question of Seaconview's standing to apply to vacate the lites pendentes on the properties which are subject to the liens rather than the charges because, if they can not be assigned/transferred, Seaconview could not have taken the benefit of them. No authority for the proposition that a lien (or the interest in the lien) can not be assigned/transferred was referred to by the plaintiff and defendants. I am satisfied that this proposition is inconsistent with the long-established understanding in respect of liens (for example see para 3 and 5 of Simons J's judgment in *Promontoria (Oyster) DAC v Fox [2022] IEHC 97*) and in those circumstances I cannot accept that it is correct. Furthermore and more fundamentally, as discussed in *Promonotoria v Lynn*, Seaconview is entitled to rely on the conclusiveness of the register. Their interest in the liens is registered on the register. That, in itself, must dispose of this point for the purpose of this application.

59. The plaintiff and the defendants also rely on their private property rights to contend that the applicant should not be entitled to apply to vacate the lites pendentes. The arguments in this regard are somewhat unclear. Firstly, it is impossible to see how

the plaintiff or defendants' property rights could be determinative of the specific question of whether the applicants are affected by the lites pendentes, so I do not see how they can be relevant to the question of standing. They could possibly be relevant to the question of whether the lites pendentes should be vacated. However, even if they could be relevant to the question of whether the applicants are affected by the lites pendentes, I am satisfied that they do not determine the question. The argument made by the first-named defendant appears to be that the application is in breach of the defendants' "*security*" and "*private property rights*". The registration of a lis pendens by a third party (the plaintiff) is not a private property right of the defendants. Thus, an order setting aside the lites pendentes registered by the plaintiff could not be an interference with the defendants' rights. The other alleged interference with private property rights is that the applicants plan to seek to sell the properties. However, even if the applicants were held to be entitled to apply to vacate the lites pendentes and I was to decide to vacate them, the defendant' rights to object or to seek to prevent any such sale or the taking of any other step or to oppose a well-charging order, remain entirely intact. Thus, I do not accept that the defendants' rights act as an impediment to the applicants' application.

60. The argument in relation to the plaintiff's property rights appear to centre on his right to litigate and his right to register a lis pendens. The application does not interfere with his right to litigate. Even if I accede to the application, the proceedings remain in being. In relation to the alleged right to register a lis pendens, it is far from clear that the right to register a lis pendens is a constitutional right. In any event, the Oireachtas has put section 123 in place as the proper balance between the right to register a lis pendens and the right of a party to seek to have it vacated. Whether it is a constitutional or a statutory right the price of the exercise of the right to register a lis pendens is that the proceedings underlying the lis pendens must be prosecuted bona fide and must be prosecuted without unreasonable delay. Thus, the balance drawn is that a person may register a lis pendens and a person affected by it may apply to have it vacated on those specified grounds. As noted above, that does not go to the question of whether the party applying is a person affected and whether the lis pendens should be vacated.

61. The plaintiff and the defendants also argue that Seaconview (and therefore the receiver) is not a person affected by the lites pendentes registered against the lands which are the subject of the charge because the charges could not be assigned or transferred to Seaconview by Ulster Bank because it was not a subsidiary or associated company of the Bank. They rely on a clause in the mortgages which provides inter alia:

> *"The Mortgagor hereby irrevocably and unconditionally consents to the Bank at any time or times thereafter transferring, assigning, disposing… this Mortgage*

and/or the benefit of the Mortgage… to any third party or body including without prejudice to the generality of the foregoing any subsidiary or associated company of the Bank…"

62. The argument must be that Ulster Bank could only assign or transfer the mortgage to a subsidiary or associated company.

63. There is no basis for this. The clause in its express terms clearly permits an assignment or transfer to "*any third party or body*". The reference to "*a subsidiary or associated company"* is expressly stated to be without prejudice to the generality of the bodies to whom the mortgage could be assigned or transferred and therefore does not act as a limitation in the way suggested.

64. Thus, I am satisfied, on the basis of Seaconview being registered as the owner of the charges and their interest in the liens being noted, that they are a person "*affected*" by the lis pendens, even if it turns out at a later stage that they can not exercise the powers relating to sale. It follows that Mr. Taite is also a person affected. The plaintiff and the defendant originally raised a point about the validity of Mr. Taite's appointment but this was not pursued.

65. In these circumstances it is not necessary for me to determine the applicants' fall-back arguments.

Whether there has been an unreasonable delay and whether the action is being prosecuted bona fide

66. I must then consider whether the lites pendentes should be vacated. The applicants contend that the underlying action is not being prosecuted bona fide but that they do not need to go as far as this because there has been an unreasonable delay by the plaintiff in prosecuting that action.

67. While s.123(6) provides for two separate and distinct bases upon which a Court may vacate a lis pendens, in the circumstances of this case, because of the reasons that are given by the plaintiff for the inactivity in the prosecution of the proceedings, these two bases must, at least to some extent, be considered together.

68. The question of unreasonable delay was considered by Barniville J in *Hurley Properties v Charleen Ltd* and by Butler J in *Ellis v Boley View Owners Management*

Company Ltd [2022] IEHC 103. Rather than quoting Barniville J it seems convenient and appropriate to refer to Butler J's decision as it refers extensively to Barniville J's judgment. At paragraphs 34 – 38 Butler J states:

> *"34. In moving his application to vacate the lis pendens, counsel for the defendant relied in large part on the judgment of Barniville J. in Hurley Property ICAV v. Charleen Ltd [2018] IEHC 611. This, along with the earlier decision of Cregan J. in Tola Capital Management LLC v. Linders [2014] IEHC 324 were among the first cases to consider the newly introduced jurisdiction to vacate a lis pendens for unreasonable delay in the prosecution of proceedings under s. 123(b)(ii) of the 2009 Act. At para. 76 of his judgment, Barniville J. notes that the jurisdiction to vacate a lis pendens where an action was not being prosecuted in a bona fide manner pre-existed the 2009 Act and was continued under s. 123(b)(ii). However, the jurisdiction to vacate where there has been an unreasonable delay in prosecuting an action did not exist prior to the 2009 Act and, consequently, is a new jurisdiction.*
>
> *35. At para. 81 of his judgment, Barniville J. noted that this new jurisdiction imposes an obligation on a litigant to prosecute the proceedings expeditiously and that 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 IR 459". The duty on the plaintiff has been characterised by Haughton J. in Togher Management Company Ltd v. Coolnaleen Developments Ltd (In Receivership) [2014] IEHC 596 as being one to exercise expedition and vigour in the prosecution of the proceedings.*
>
> *36. In my view, the distinction drawn by Barniville J. between the Primor line of jurisprudence and the statutory jurisdiction under s. 123(b)(ii) is a significant one. Under Primor, the party seeking to strike out proceedings must establish that the other party's delay is, firstly, inordinate (i.e. excessively long) and, secondly, inexcusable (i.e. there is no justification for it). In cases where it is established that the delay is both inordinate and inexcusable, the court then moves to conduct a balancing exercise in order to determine whether, notwithstanding inordinate and inexcusable delay, the plaintiff should be permitted to continue the proceedings. The statutory jurisdiction under s.123(b)(ii) requires only that it be shown that there has been an unreasonable delay in the prosecution of an action by a person who has registered a lis*

pendens. It is not necessary that this delay be inordinate, although there is obviously a significant overlap between delay that is unreasonable and delay that is inordinate, nor must it be shown that the delay is inexcusable. Therefore, the reason for the delay is less significant when it would be in a case under the Primor principles although it may still have a bearing on whether the delay is reasonable.

37. Whilst the analysis of whether there has been unreasonable delay for the purposes of s. 123(b)(ii) does not move through the same stages nor apply the same tests as the Primor jurisprudence, the concept of delay being "unreasonable" does import some consideration of the reason proffered for that delay. As Barniville J. put it in Hurley v. Charleen (at para. 83), the proffering of a good reason for the delay may be crucial:- "Further, 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."

38. Once it has been established that the delay is unreasonable, the court does not proceed to conduct a balancing exercise between the respective interests of and prejudice to the plaintiff and the defendant. This may be because the vacation of a lis pendens does not deprive the party who has registered the lis pendens of their right of action in the way that striking out the proceedings would. The proceedings may continue but the additional security obtained through the registration of the lis pendens is lost. In this case if the plaintiff were to establish the existence of an enforceable agreement in the terms he alleges, he might well be entitled to relief (although arguably not as against the company). That relief would take the form of declarations and perhaps monetary orders reflecting the plaintiff's entitlements in respect of the proceeds of sale of

the houses already sold. All of these reliefs remain available to the plaintiff even if the lis pendens is vacated."

69. Butler J also stated at paragraph 41:

"*The plaintiff accepted that there was a delay in the prosecution of the action. Indeed, he could hardly do otherwise since the motion was heard over sixteen months after the proceedings were issued and service still had not been effected at the time of the hearing. Whilst accepting that there was a delay, the plaintiff argued that it was not an inordinate or inexcusable delay and noted that the Statute of Limitations in property cases allowed a period of twelve years for the institution of proceedings. Without deciding whether the delay is actually inordinate and inexcusable, I do not think that this test is relevant to the discrete statutory test of "unreasonable delay" under s.123(b)(ii). Put simply, the standard which must be met by a defendant seeking to strike out proceedings under the Primor jurisprudence is higher than that which must be met by a defendant seeking to vacate a lis pendens under s.123(b)(ii). Therefore, even if I were satisfied that the plaintiff is correct in saying the delay was neither inordinate nor inexcusable, that would not be determinative of this application.*"

70. It is beyond dispute that there has been delay in the prosecution of this action. The plenary summons was issued in July 2016 (more than seven years ago). No Statement of Claim has been delivered and no further steps have been taken in the proceedings. Indeed, the plaintiff accepts that no steps have been taken to prosecute the proceedings. He says that he held off progressing the proceedings. Thus, nothing at all has been done to prosecute the action for a period of over seven years. This is the case even since the question of delay and the possibility of this application was first raised in correspondence by the solicitors for the applicants in a letter of the 23rd May 2019. In response to that letter, the plaintiff said in a letter of the 29th May 2019 "*...I had no appetite to advance legal proceedings given our personal circumstances and to give the Gearys the opportunity to recover their position. My delay has been a very slow process and I am now of the view I must proceed with judgment in any case. Your recent letter has settled my mind and I am currently satisfied to provide and all evidence of these transactions to the High Court in relation to the stock not paid for by the Gearys*." [emphasis added]. Notwithstanding this clear statement in May 2019 the plaintiff has done nothing to progress the proceedings since.

71. As Barniville J and Butler J make clear, the reasonableness or otherwise of a delay must be addressed in the context of the particular case and by reference to any reasons given by the plaintiff for the delay. In this case, this is, of course, related to the very purpose for which the proceedings were issued which itself goes to the question of whether the action is being prosecuted bona fide.

72. The plaintiff (and the defendants) explains that the purpose of the proceedings (and the registration of the lites pendentes) is to secure the repayment by the defendants of a sum of money in respect of cattle stock which the plaintiff gave to the defendants. The plaintiff states "*The lis pendens is to secure a debt*." The plaintiff explains that the plaintiffs and the defendants are life-long friends, that the plaintiff gave the defendants cattle stock when they were in financial difficulties on the understanding that they would pay for the stock in due course, that the defendants were unable to repay the debt and it was agreed that the plaintiff would register a lis pendens as a burden and security on the defendants' land to give the plaintiff peace of mind and security in relation to the money owed for the stock, and that ultimately the defendants would not oppose the relief sought in the proceedings on foot of which the lis pendens was to be registered. Of course, there was considerable benefit to the defendants in this arrangement because it meant that as long as the proceedings and the lis pendens were in being there was a very real impediment to anybody who held security in the lands from enforcing that security and seeking to sell the lands. This, of course, applies to Seaconview but also applies to other burdens on the folios, including the holder of judgment mortgages which are registered on the folios.

73. It is not explained anywhere why the defendants simply did not give the plaintiff a charge over the lands (or indeed why they did not simply convey an interest in the land in the percentages claimed in the proceedings if that is what was agreed). Of course, if a charge had been given that would have been subject to the earlier burdens on the land including those held by Seaconview.

74. Thus, the proceedings themselves claim an interest in the lands but in fact it is clear from the correspondence and the affidavits that this arises because of a debt which the parties agree is due and owing. However, the plaintiff does not sue for the debt but rather jumps to claiming an interest in the land simply because a debt is owed in a matter which is legally unrelated to the lands. The only conclusion, which flows naturally and inescapably from the nature of the proceedings and what the plaintiff and the defendants say, including that the "*lis pendens is to secure a debt*", is that the

proceedings were instituted purely for the purpose of facilitating the registration of a lis pendens. A not dissimilar situation was considered by Whelan J on behalf of the Court of Appeal in *Carthy v Harrington [2018] IECA 321*. She stated at paragraphs 36 and 37 that:

> "*36. Furthermore, at the hearing of this appeal, the claim of the appellant at its height was articulated as being in the nature of a claim for payment for work done and for remuneration due in respect of his labour and effort on the sites and materials supplied. Nothing stated on behalf of the appellant in the course of the appeal identified a basis for the bare assertion advanced in the writ that the appellant was the sole beneficial owner of the property comprised in the two folios and that the defendants, who in each case are registered owners of same, had no beneficial interest in the said properties.*
>
> *37. At its highest the claim of the appellant sounds in quantum meruit or otherwise as a claim for work done and services rendered, and separately for goods and material supplied which, so far as one can ascertain from the transcripts before the High Court, may have been subject to a retention of title clause. None of these claims in and of themselves could constitute a stateable basis for a claim by Mr. Carthy for a declaration of a right to a beneficial interest in the properties or at least any interest that could rank in priority to the chargeholders' rights. It does not appear to be in contention but that the properties appear to be in significant negative equity.*
>
> *…*
>
> *40. Whilst there is a bare claim to an interest clearly disclosed from the writ sufficient to secure the registration of a lis pendens in the Central Office and in the Land Registry in the first instance, it has never been substantiated nor has it been articulated with any particularity such as would be required were a statement of claim to be delivered. Hence, as matters stand, Mr. Carthy has not identified any basis for a claim to any proprietary interest in the two folios.*
>
> *41. At its height, if he succeeded in a claim for monies due for labour and services rendered and goods supplied, he would have an entitlement to register any judgment as a judgment mortgage on the folios but the rights of Promontooria in each case would rank in priority.*"

75. The Court of Appeal vacated the lis pendens in that case.

76. It seems to me that the plaintiff and the defendants are entirely misconceived as to the purpose of a lis pendens. As noted above, they state that "[*T]he lis pendens is to secure a debt*." They refer to it as security and a burden on the land and appear to treat it as equivalent to a registered charge or a lien. For example, in paragraph 57 of the plaintiff's affidavit he makes the point that "*[I]f my entitled burden is to be removed and/or vacated due to likely restriction of sale on property, then all burdens must be removed*." This point is made in the same section as reference to Seaconview's charges and liens and a judgment mortgage held by a different financial institution. A lis pendens is not the same as these forms of security or execution. A lis pendens is a means of a party notifying prospective purchasers that the party is claiming a right or interest in lands, independent of the lis pendens.

77. In all of those circumstances, it seems to me that the action is not being prosecuted bona fide. One of the reasons given for the delay in taking any steps in the proceedings is that they were issued to secure a debt by registration of a lis pendens. Where I have concluded that this means that the action is not being prosecuted bona fide it must follow that it can not be a good reason for the delay. However, I should say for completeness that even if I am wrong that this amounts to the action not being prosecuted bona fide, it still does not amount to a good reason for the delay. Even assuming that the plaintiff (whether in concert with the defendants or not) is entitled to issue proceedings claiming an interest in lands in respect of an unproven debt, unrelated to the lands, and to register a lis pendens, he is not then entitled to simply allow the proceedings to sit in abeyance with the lis pendens sitting on the folio for an extended period (in this case more than seven years). That is clear from *Hurley* and *Ellis*. Such a situation would be entirely inconsistent with what Barniville J says at para 83 of *Hurley*:

> *"83 [A person who has issued proceedings and then registered a lis pendens] … 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…"*

78. The plaintiff also explains the delay on the basis of his illness and his reluctance to move against the defendants. While the Court has to have sympathy for any person fighting a serious illness, that can not be a proper explanation for not moving these proceedings on at all. The plaintiff has been able to swear two affidavits in relation to this motion and has been able to prepare very detailed written submissions. Thus, there is no reason offered as to why his illness could have prevented the action being moved

on. This is particularly so where it is clearly stated that the defendants would not oppose the relief sought. Thus, the plaintiff could have sought to bring these proceedings to a conclusion with very little effort through an application for a default judgment.

79. His reluctance to move against his friends and neighbours is understandable and commendable but underlines the inappropriateness of the mechanism which the parties have chosen. It is not acceptable for a plaintiff to issue proceedings with the underlying intention of not prosecuting those proceedings simply for the purpose of effecting some form of security for a debt which is claimed to be owed and then not to prosecute those proceedings. As noted above, there are other, well-established and more appropriate mechanisms by which security could be obtained which would not impact in the same way on the rights of third parties.

80. In all of the circumstances, I am satisfied that there has been unreasonable delay on the part of the plaintiff and that the action is not being prosecuted bona fide.

81. In their written submissions, the plaintiff and the first-named defendant appear to urge the court to exercise a discretion to refuse to vacate the lites pendentes even if satisfied that one or both of the grounds in section 123 are met. They refer to the property rights of the plaintiff and the defendants prevailing in "*the balance of convenience and justice*". It is far from clear that the Court has such a discretion. Butler J held in *Ellis v Boley View* that the Court does not have a discretion to refuse the relief once it is satisfied that there has been an unreasonable delay or that the action is not being prosecuted bona fide. She said at paragraph 23 of her judgment:

> "*Further, insofar as the defendant's application is a discrete application under s. 123 of the 2009 Act, I note that that section does not prescribe a "balance of convenience" test nor the exercise of a judicial discretion in relation to the vacation of a lis pendens. The test with which the court will be primarily concerned in this judgment is whether there has been an unreasonable delay on the part of the plaintiff in prosecuting the proceedings.*

82. She also said at paragraph 38 that "*once it has been established that the delay is unreasonable, the Court does not proceed to conduct a balancing exercise between the respective interests of and prejudice to the plaintiff and the defendant.*"

83. Indeed, the existence of such a discretion would appear incongruous with a finding that the action was not being prosecuted bona fide. I have previously addressed

the claimed property rights. Even if I had such a discretion, it does not seem to me that the circumstances are such as to call for or justify the exercise of that discretion to refuse to grant the relief sought.

84. I will therefore make an order joining the applicants as notice parties for the purpose of applying to vacate the lites pendentes and will make an Order vacating the lites pendentes in terms of the Notice of Motion.