THE HIGH COURT

[2023] IEHC 681

[Record No. 2022/4787P]

BETWEEN

MARIA DOLORES FERNANDEZ SANCHEZ

PLAINTIFF

AND

SANTIAGO CAPITAL DAC, MYLES KIRBY, OSH VENTURES LTD, TERRY KELLY, JOHN MITCHELL, PAUL MCGRATTAN

DEFENDANTS

JUDGMENT of Mr Justice Liam Kennedy delivered on the 18th day of December 2023.

1. The First Defendant seeks orders pursuant to s. 123 of the Land & Conveyancing Law Reform Act 2009 (the 'Act') and/or the Court's inherent jurisdiction, vacating three *lis pendens* registered by the Plaintiff over a property known as the Old Schoolhouse, Clonsilla (the 'Property'). The relief is sought on grounds of unreasonable delay and/or on the basis that the action was not being prosecuted *bona fide*. This judgment is directed towards that application. It does not determine the merits of any substantive claim which the Plaintiff may ultimately advance against any party.

Chronology

2. The evidence as to the chronology of the litigation, which was largely undisputed save for the question of service, is as follows:

20 May 2019	The First Defendant agreed to lend €3 million to the Third Named Defendant. A Deed of Mortgage was signed by the Plaintiff and her co-investors, creating a first fixed charge over the property in the First Defendant's favour. The loan was drawn down.
19 July 2019	The loan went into default.
12 November 2021	The Plaintiff issued proceedings against her co-investors (Record Number 2021/6269P). The First Defendant in these proceedings is not a party to those proceedings (the "First Proceedings").
17 June 2022	The First Defendant appointed the Second Named Defendant as receiver, but the latter subsequently stepped down, leaving the First Defendant in sole possession of the property (as a mortgagee in possession).
16 November 2021	The Plaintiff delivered a Statement of Claim in the First Proceedings.
14 July 2022	The Plaintiff issued further proceedings (Record Number 2022/3086P) against each of the co-investors but adding the First and Second Named Defendants in these proceedings as parties to those proceedings (the "Second Proceedings"). The Second Proceedings are identical to the current proceedings save that the latter contain an additional plea to ground the *lis pendens*.
8 September 2022	The Plaintiff allegedly served the Second Proceedings on the First Defendant.
16 September 2022	The Plenary Summons was issued in these proceedings (the "Third Proceedings") – essentially identical to the Second Proceedings save for the additional plea to ground the *lis pendens*. The first *lis pendens* was registered, and the other *lis pendens* were registered 4 days later.
22 September 2022	The Plaintiff's solicitor allegedly served the Plenary Summons in these proceedings on Mr Cawley personally - this is disputed
11 November 2022	The Plaintiff was advised that the Second Named Defendant had resigned as receiver two days earlier.
30 May 2023	The First Defendant's incoming solicitors wrote to the Plaintiff's solicitors in respect of both the Second and Third Proceedings, noting that they were coming

	on record and intended to apply for the *lis pendens* to be vacated. The letter noted that the Plenary Summons in these proceedings had not been served and requested a copy.
13 June 2023	The Plaintiff's solicitors responded to the First Defendant referencing the Second Proceedings. The letter did not respond in respect of the Third Proceedings. It did not address the request for a copy of the Plenary Summons in those proceedings or the observation that they had not been served.
4 July 2023	The current application was served on the Plaintiff. The grounding affidavits state that the Plenary Summons was not served on the First Defendant.
23 June 2023	The application to vacate the *lis pendens* was served on the Plaintiff.
26 September 2023	The Plaintiff's affidavit, sworn on 26 September 2023, stated that the Plenary Summons in these proceedings had in fact been served on the First Defendant.
6 October 2023	Mr Cawley's second affidavit reiterated that the Plenary Summons had not been served, noting that no proper affidavit of service had been provided and the letter exhibited by the Plaintiff was incorrectly addressed.
10 October 2023	The Plaintiff's solicitor's Affidavit of Service stated that the Plenary Summons was served at the offices of the First Defendant's solicitor the previous day.
11 October 2023	The Plaintiff's second affidavit reiterated that the proceedings were originally served on Mr Cawley on 22 September 2022 at the fourth floor, Grattan House, Mount Street Lower, Dublin 2 D02 H638.
16 October 2023	The Plaintiff's solicitor swore an affidavit stating that he had served the Plenary Summons on Mr Cawley personally on 22 September 2022.

3. Although no Statement of Claim has been delivered in these proceedings, the Plaintiff's claim is described to some extent in her affidavits and her counsel's oral submissions. In addition, the Plaintiff has delivered a Statement of Claim in related proceedings. Her affidavits do not actually claim that she was an owner of the Property but that her husband, John McGrattan, bought it with the Third, Fourth and Fifth Defendants (the "Co-Investors") and that it was her intention that he would be her "*proxy*" in its management and development and as a partner in the partnership known as the "*Old School House Partnership*". However, it is common case that the Plaintiff or her husband was one of the group of investors who sought to

develop the Property with finance provided by the First Defendant and secured by a mortgage on the Property. She was a signatory to the Deed of Mortgage and a guarantor of the Facilities Agreement. Her claim against all Defendants alleges negligence and other wrongful or oppressive conduct in respect of the management of the development in broad-brush but unparticularised terms. Her affidavits also criticise (in sweeping terms): (a) the First Defendant's servants or agents and its exercise of its power under the Facilities Agreement to appoint a project monitor and the latter's actions (which, she says, promoted oppressive conduct); (b) the selection of Mr Cawley's father as project monitor; (c) decisions taken and oppressive conduct by the Co-Investors, allegedly with the First Defendant's encouragement, which contributed to the project failure (these allegedly included changing architects, unsuccessful planning applications and a change in commercial strategy from "*buy to sell*" to "*buy to let*"); (d) her wrongful exclusion from decision making; and (e) the First Defendant's engagement, following its appointment of a receiver, with a potential buyer without her knowledge, in an attempt to sell the Property. The Plaintiff cites the personal involvement of Mr Cawley, the First Defendant's Chief Executive Officer, who, she alleges, was also a *de facto* director of the Third Named Defendant, although no particulars are provided in respect of this allegation. She says that the First Defendant and the Co-Investors conspired and lied and collectively caused the project to collapse, leading to the security being called and causing financial and emotional damage to her and her family.

4. Many of the Plaintiff's assertions are difficult to follow. The Plaintiff has not exhibited documents which explain or substantiate them to any great extent, particularly insofar as they concern the First Defendant. Since she did not exhibit or explain a foundation for contractual claims against the First Defendant, the Court must assume that any claim would be in tort. Her affidavits do reference the Partnership Agreement (which she exhibited) and a Shareholders and/or Joint Venture Agreement (which were not exhibited) but:

a. The Partnership Agreement is a strange document. It does not seem to have benefitted from legal input. Neither the Plaintiff nor the First Defendant were parties. It has no obvious relevance to any claim against the First Defendant.

b. The Plaintiff did not exhibit the Shareholders or Joint Venture Agreements. There is no documentary evidence as to their terms or even as to their parties.

5. The Plaintiff's affidavits advance broad-brush, largely unparticularised, claims that the First Defendant was aware of and party to the Co-Investors' breach of her rights (through its own alleged breaches of contract and oppressive and dishonest actions). Her broad allegations against the Co-Investors have been ventilated in similar terms both in the 16 November 2021 Statement of Claim in earlier proceedings and in lengthy correspondence. Significantly, her assertions against the First Defendant are of more recent origin, following the Receiver's appointment. Until then, her complaints focussed on the Co-Investors. After the First Defendant appointed the Receiver, her claims were extended to assert that the First Defendant was party to or responsible for their wrongdoing. However, her basis for her claim against the First Defendant is never adequately explained or substantiated in the material before the Court in the manner which would be required, for instance, to show an arguable case for an injunction (while this is of course an entirely different application, the evidential lacuna is mentioned because it is relevant to one of the grounds of the current application, that the proceedings are not being pursued *bona fide*). The lengthy correspondence which is exhibited, such as the Plaintiff's letters of 11 & 13 December 2019 and 29 June 2020 were largely directed to the Co-Investors, rather than to the First Defendant. It appears that her complaints over the years were focused how they managed (or, according to her, mismanaged) the joint investment. However, such correspondence does not appear to blame the First Defendant, which does not even seem to have been copied on such pre-receivership correspondence. Likewise, her letter to Mr Cawley dated 11 November 2019 gives no indication of her current concerns. One point was

raised (post-receivership) by the Plaintiff in a letter to the Receiver dated 14 November 2022, which complained of damage to the site entrance and to badger sets. The letter blamed the Receiver for that specific issue, but her affidavits now go much further, citing Mr Cawley's alleged actions, claiming that he stepped in for his father as Project Monitor in 2019, extending that role to control the project, authorising entry to the site which led to a bulldozer destroying the site entrance. Her affidavit asserts (without explaining why) that this significantly impacted the overall outcome. The significance of this issue is not obvious since, irrespective of any damage to the site entrance and the environs, the loan had fallen into arrears three years earlier and the Receiver had also already been appointed. The Rubicon had been long crossed.

6. In any event the Plaintiff's correspondence and affidavits do not establish any basis for a claim that she retains any interest in the Property. Paragraph 3 (ix) of her first affidavit alleges "*gross negligence, material intervention and illegal conduct*" on the First Defendant's part (and by Mr Cawley), saying that it was necessary to file the *lis pendens* to protect her interest in the property and to prevent its sale. However, while such averments reveal her determination to obstruct any sale, her affidavits consistently fail to demonstrate any interest to justify the *lis pendens*. Even if her claim against the First Defendant has any substance, it would sound in damages; it does not provide a basis for the *lis pendens*.

7. The omissions from the Plaintiff's affidavits are more revealing than their contents. Although the Plenary Summons in the Third Proceedings claims (for the first time) a 50% interest in the property, this claim is not referenced in her affidavits or in the correspondence. There is no evidence to support it. Nor does she explain how any interest in the Property could have survived the undisputed facts of the appointment of the Receiver and the First Defendant becoming a mortgagee in possession. Although her affidavits assert that it was necessary to issue these proceedings in order to register the *lis pendens,* they fail to explain the basis for a subsisting interest in the Property to justify the registration of a *lis pendens*. The Plenary

Summons in these proceedings is also inconsistent with the only Statement of Claim served by the Plaintiff (in the First Proceedings). That pleading did not assert a 50% interest, merely that she was one of the owners. Accordingly, the Court is not satisfied that there is any basis for the plea, a plea acknowledged to have been added for the sole purpose of grounding the three *lis pendens*. The Plaintiff did not dispute the facts that: (a) she and the other owners entered into the mortgage and she was aware of its nature; (b) she had been advised to obtain independent legal advice before entering into the mortgage and guaranteeing the Facilities Agreement; (c) it fell into arrears leading to enforcement action; and (d) the First Defendant is now the mortgagee in possession.

The Law

Land and Conveyancing Law Reform Act 2009

8. In brief, the key provisions are as follows:

a. Section 121 provides that any action in the Circuit or High Court in which a claim is made to an estate or interest in land may be registered as a *lis pendens*.

b. Section 123 provides that a court may make an order to vacate a *lis pendens* on application, on notice, 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*.

Service of Documents

9. Section 51 of the Companies Act 2014 provides that a document may be served on a company by leaving it at or sending it by post to the company's registered office. Section 51(2) stipulates that any document left at or sent by post "*to the place for the time being recorded by*

the Registrar as the situation of the registered office of a company shall be deemed to have been left at or sent by post to the registered office of the company notwithstanding that the situation of its registered office may have changed" (section 51(2) does not apply here, because the registered office changed before service).

The Jurisprudence

10. The seminal decision of Mr Justice Barniville (as he was) in *Hurley Property ICAV v. Charleen Limited* [2017] IEHC 611 ("*Hurley*") is a helpful summary of the relevant principles. The facts of that case resemble the present situation:

a. The proceedings were only served six months after the proceedings issued. A statement of claim was delivered nine months later (a week before the hearing). Accordingly, delay was one ground on which the applicant sought to vacate the *lis pendens*. The applicant also contended that the action had not been prosecuted *bona fide* because the proceedings were issued and the *lis pendens* registered to obtain a commercial advantage in the negotiations by preventing the sale of the property, thus improperly deploying the court process solely to obtain a commercial benefit. The plaintiff justified the delayed service on the basis of ongoing negotiations. Apparently the plaintiff had agreed to refrain from injunctive proceedings during the negotiations.

b. The judgment surveyed the authorities, including the decision of Mr Justice Clarke (as he then was) in *Dan Morrissey (Irl) Limited & Anor. v. Donal Morrissey & Ors.* [2008] 3 IR 752 ('*Morrissey*'), in which the Court explained that the test as to whether proceedings were not *bona fide* as meaning that "*[i]n other words it is asserted that the proceedings are bound to fail at least insofar as they relate to any claim in respect of an interest in the lands in dispute*". Subsequent decisions have expanded on the interpretation of the relevant statutory ground.

c. Mr Justice Barniville considered the additional ground for vacating a *lis pendens* added by the 2009 Act - unreasonable delay, citing Mr Justice Haughton in *Togher Management Company Limited & Anor. v. Coolnaleen Developments Limited (in receivership)* [2014] IEHC 596 ('*Togher*') and observing at paras 80 – 83 that:

> "*80. ... it is clear from the observations of Haughton J. set out above that, having regard to the provisions of s. 123 of the 2009 Act, a particular onus lay on the plaintiffs to progress the proceedings 'without undue delay' and that if the plaintiffs did not exercise 'expedition and vigour' in prosecuting the proceedings and if there was 'unreasonable delay' in prosecuting them, an order could be made under s. 123 vacating the lis pendens at that stage.*
> *81…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… 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, which involves a court undertaking a complex assessment of the balance of justice, including issues such as prejudice to the defendant and Constitutional principles of basic fairness of procedures. I do not believe that such considerations arise in the context of the court's assessment as to whether there has been 'unreasonable delay' in the prosecution of an action for the purposes of s. 123(b)(ii) of the 2009 Act. Rather, that section was intended to counterbalance the statutory entitlement conferred on a person in certain circumstances to register as of right a lis pendens and to impose a corresponding obligation on that person to expeditiously prosecute the proceedings in respect of which the lis pendens was registered. While the purpose of a lis pendens is, as Clarke J. explained in Morrissey, to bring to the attention of third parties who might be interested in acquiring a 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 that property…

82. … 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. Togher [sic]) in the prosecution of the proceedings.

83. … in considering whether a delay in the prosecution of the action has been 'unreasonable' for the purposes of s.123(b)(ii) of the 2009 Act, the court must focus on the period after the commencement of proceedings rather than on any period of time prior to commencement... 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."

d. The judgment also considered the alternative ground for an application, namely that the action was not being pursued in a *bona fide* manner:

"*86. … The High Court considered this part of the test in s.123(b)(ii) in Tola Management LLC v. Joseph Linders & Anor. (No. 2) [2014] IEHC 324 ('Tola'). In that case, Cregan J. noted that the relevant provisions of s.123(b)(ii) do not refer to a situation where the claim is not being brought bona fide but rather 'where the action is not being prosecuted bona fide'. He*

considered that that phrase should be interpreted as meaning both where the action as a whole was not being prosecuted in a bona fide manner and where specific steps in the action were not being prosecuted in a bona fide manner (at para. 131, p. 44). He concluded that 'the meaning of the section is that a court may make an order vacating a lis pendens if it is satisfied that the action as a whole is not being prosecuted in a bona fide manner or if particular steps in the prosecution of the action are not being taken in a bona fide manner.' (per Cregan J. at para. 132, p. 44). On the facts of that case, Cregan J. concluded that the plaintiff's action was not being prosecuted in a bona fide manner as the specific steps of registering and maintaining the lis pendens were not being pursued in a bona fide manner for various reasons. Cregan J. vacated the lis pendens on that basis."

e. The Court noted the authorities which suggested that, where facts were in dispute, it could not be said that an action was doomed to failure or was not being prosecuted *bona fide*. However, Mr Justice Barniville added at para. 88 that:

"*Where, however, the relevant facts are not in dispute or where the court takes the case of the person who has registered the lis pendens at its height and on the assumption that any factual issues in the case are decided in its favour, orders have been made vacating lis pendens under this part of s.123(b)(ii) of the 2009 Act.*"

f. The Court cited *Kelly & O'Kelly v. Irish Bank Resolution Corporation Ltd* [2012] IEHC 401 ('*Kelly'*) noting that Ryan J. found that:

"*the particular claim made by the plaintiffs in the proceedings (on foot of which they registered a lis pendens was introduced 'for the sole purpose of providing a colourable justification for registering a lis pendens in the hope of frustrating a sale of the property' (per Ryan J. at p.5). He held, therefore, that there was no legitimate basis for registering the lis pendens and that it would be a 'clear injustice to permit the processes of the court to be employed for the purpose and only for the purpose of frustrating the exercise of legitimate rights' (per Ryan J. at p.5). He, therefore, vacated the lis pendens under s.123(b)(ii) of the 2009 Act*."

g. The Court noted a similar outcome in *Bennett v. Earlsfort Centre (Developments) Unlimited Company* [2018] IEHC 61 ('*Bennett*'), in which Mr Justice McGovern held that the claim was, in essence, a claim for specific performance or damages. The proceedings did not, in reality, amount to a claim being made by the plaintiffs to an estate or interest in the land and so did not come within section 121(2)(b). He refused leave to amend the statement of claim, stating (at para. 26):

h. "*... the amendments sought are for the purpose of trying to give legitimacy to the registration of the lis pendens. Considering the true nature of the proceedings, the action is not being prosecuted bona fide in so far as it is being used to justify the registration of the lis pendens, but is an attempt to exert the maximum pressure on the defendant to meet the demands of the plaintiffs arising out of the agreement of 13th April 2007. The issues in dispute will be resolved in due course at the hearing. These issues involve the construction of a contract and a determination as to whether or not the plaintiffs are entitled to damages. The issues do not involve a bona fide claim to an estate or interest in land.*" Mr Justice Barniville J summed up his conclusions at paras. 90 and 91:

"*90. This aspect of the court's jurisdiction to vacate a lis pendens under s.123(b)(ii) encompasses a situation where the bringing of the proceedings (and the registration of a lis pendens on foot of those proceedings) amounts to an abuse of the process of the court (such as where the proceedings are brought for an improper purpose such as to frustrate a sale or to seek to exert improper pressure on an opposing party) (as outlined by Ryan J. in Kelly and McGovern J. in Bennett) as well as a situation where the proceedings themselves are bound to fail or, as Laffoy J. said in Gannon, 'doomed to failure'. A lis pendens which has been registered on foot of proceedings which are bound to fail will be vacated under s. 123(b)(ii) on the grounds that 'the action is not being prosecuted bona fide', even though there might not be a lack of bona fides, as that term is commonly understood. It is true that where an action is brought, and a lis*

pendens registered on foot of that action, in circumstances where the processes of the court are employed solely for the purpose of frustrating the exercise of legitimate rights, that would involve a lack of bona fides as the term is commonly understood. Both situations are encompassed by this part of the jurisdiction contained s.123(b)(ii)."

i. The Court rejected the attempt to explain the delay in prosecuting the claim on the basis of ongoing negotiations, concluding at para. 96:

"*having regard to the obligation implicit in s.123(b)(ii) to prosecute the proceedings without 'unreasonable delay' or risk an order vacating the lis pendens, I conclude that the respondent had an obligation to serve and bring the proceedings as soon as possible and was not entitled to 'sit on' the proceedings while further attempts were made to negotiate a resolution of the issues which remained between the parties.*"

j. Likewise, at para. 103, the Court dismissed the possibility of an amicable resolution as a justification for the delay in serving the proceedings:

"*Having regard to the potential consequences for an unreasonable delay in the prosecution of an action in terms of the lis pendens registered and having regard to the provisions of s.123(b)(ii), there was an obligation on the respondent to serve the proceedings as soon as reasonably possible after the commencement of the proceedings notwithstanding any stated desire to resolve the dispute amicably. The failure to serve the proceedings as soon as reasonable [sic] possible after they were commenced ran the risk that the lis pendens registered would be vacated under s.123(b)(ii). Moreover, the respondent has provided no explanation whatsoever, whether in correspondence or on affidavit, for the failure to serve the proceedings when requested by the applicant's solicitors on 16 August, 2017 or following the four requests for service of the proceedings made in the period between that date and 27 September 2017*."

k. The Court expressed surprise at the fact that, in addition to the delay in serving the proceedings, there was a further delay in serving the statement of claim. Para. 107 noted that the further delay "*compounded the delay which had already occurred*" and that "*the further delay (between November 2017 and February 2018) in the delivery of*

the statement of claim compounded and reinforced that delay and rendered still more unreasonable the delay on the part of the respondent in prosecuting the case."

l. At para. 109, the Court noted that "*the respondent had not served the proceedings on the other defendants and had not sought leave to serve the proceedings outside the jurisdiction on the eighth named defendant*", affording further support for the conclusion that the respondent unreasonably delayed in the prosecution of the proceedings.

11. In *Carthy v. Harrington* [2018] IECA 321, the Court of Appeal also considered the jurisdiction to vacate a *lis pendens* for unreasonable delay at para. 29:

"*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*."

12. The Court of Appeal also observed, at para. 31, that:

"*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.*"

13. Mr Justice Simons reviewed recent authorities in *Sheeran v. Buckley* [2022] IEHC 400:

a. noting the observations of Ms Justice Butler in *Ellis v. Boley View Owners Management clg* [2022] IEHC 103, at para. 48, that:

"*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."

b. observing at para. 26 that:

"*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 particular prescribed period of time must always be characterised as unreasonable for the purposes of Section 123 of the Land and Conveyancing Reform Act 2009. Nevertheless, in circumstances where, as in the presence 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*".

Findings

Service of Proceedings

14. There is a dispute as to whether or when the Plaintiff served these proceedings. The key dates are outlined above. The First Defendant's position was confirmed in its grounding affidavits in June 2023 and previously in correspondence. A letter from the First Defendant's solicitors to the Plaintiff's solicitors dated 30 May 2023 explicitly referenced both the Second and the Third Proceedings (2022/3086P and 2022/4787P respectively) stating:

"*... your client commenced proceedings bearing record number 2022/4787P on 16th September 2022 and registered three lites pendentes almost immediately thereafter on 16th September 2022 and 20th September 2022. No plenary summons has been served on our client to date. Having registered the lites pendentes your client is under a duty to prosecute her claim bona fide and with expedition. Please note that we intend to apply to have the lites pendentes vacated on foot of your clients [sic] delay in serving the summons. Please serve the plenary summons on us immediately*."

The Plaintiff's solicitors responded by letter dated 13 June 2023, but that letter was directed exclusively at the Second Proceedings. There was no response in respect of the Third

Proceedings. The Plaintiff's position as to the service of the Plenary Summons was eventually set out in her replying affidavit dated 26 September 2023 and subsequently amplified by three affidavits belatedly delivered (without leave) on 10, 11 and 16 October 2023 just before the (specially fixed) hearing on 16 October 2023. The First Defendant objected to the admission of such affidavits, but it was agreed that they would be opened *de bene esse*, without prejudice to this objection (which the Court would deal with in the context of the application as a whole). The late delivery of the three affidavits is unsatisfactory, particularly since they concerned what should have been a straightforward issue which arose from the grounding affidavit. The point should have been comprehensively addressed in the first replying affidavit. The Court is reluctant to accept such late service, especially the last affidavit which was delivered on the morning of the hearing. However, even if the belated affidavits were to be admitted and the Plaintiff's evidence was to be taken at its height, the Plaintiff has still failed to resolve the issue. The evidence does not satisfy the Court that service was validly effected:

a. The First Defendant's Chief Executive Officer twice confirmed on oath his belief that service was never effected. Its current solicitor's affidavit was to similar effect and its former solicitors had provided a similar confirmation.

b. The First Defendant acted appropriately and professionally in dealing with the issue. Its solicitors raised the matter in correspondence. They requested a copy of the Plenary Summons. In fact, to protect its position, the First Defendant took the unusual step of entering an appearance *prior to being served* (whereas some defendants might have waited for the summons to expire). Its actions demonstrate a *bona fide* concern to progress the proceedings and an evident belief that the proceedings had not been served.

c. By contrast, the Plaintiff's response to this issue has been unsatisfactory, both in correspondence and in its series of affidavits. The First Defendant's solicitor's letter of 30 May 2023 informed the Plaintiff that the First Defendant did not consider that

these proceedings had been served (despite being issued almost nine months earlier). However, the Plaintiff still failed to serve the summons until 9 October 2023.

d. On 23 June 2023, the First Defendant had served this application on the Plaintiff, including affidavits which reiterated that the Plenary Summons had still not been served. The Plaintiff still failed to address the issue immediately.

e. The Plaintiff swore a replying affidavit on 26 September 2023, stating that the Plenary Summons was served on Mr Cawley on 22 September 2022 and exhibiting a copy of a covering letter to Mr Cawley in supposed support of that assertion. However, it did not serve an affidavit of service despite the Plaintiff being on notice of the issue. Furthermore, the covering letter exhibited by the Plaintiff (without enclosures) was wrongly addressed, and thus failed to support the Plaintiff's assertion as to service. The Plaintiff's confusion as to the address of the registered office is perplexing not only because it is a matter of public record but because the Plaintiff used the correct (more recent) address in the Plenary Summons.

f. Mr Cawley's second affidavit, sworn 6 October 2023, challenged the suggestion that service had been effected, reiterating his earlier averment to the opposite effect and noting the incorrect address in the said exhibited letter. The affidavit queried why, if the Plaintiff believed that she had served the Plenary Summons, she failed to call for an appearance or to seek judgment in default, particularly having regard to obligation to expeditiously pursue the litigation. The Plaintiff never responded to this observation. The explanation in the Plaintiff's second affidavit, that she and her solicitors expected Philip Lee to come on record for the First Defendant and were awaiting the entry of an appearance, does not explain their inaction, particularly in view of the obligation to progress these proceedings.

g. On 10 October 2023, the Plaintiff's solicitor swore an affidavit which stated that the Plenary Summons had been served at the offices of the First Defendant's solicitor the previous day, 9 October 2023. Although the First Defendant did not make an issue of these points, the affidavit did not confirm whether the First Defendant's solicitors had confirmed that they were instructed to accept service on their client's behalf. More significantly, the affidavit did not explain the basis on which the Plenary Summons was being served at that point, on 9 October 2023, notwithstanding that the Plaintiff had previously averred that it had already been served more than a year earlier. It also ignored the fact that a year had elapsed since the Plenary Summons was issued, meaning that, in the absence of an application to extend the time for service of the Plenary Summons, it was deemed to have lapsed.

h. The next day, 11 October 2023, the Plaintiff swore another affidavit stating that:

> "*Proceedings were served on Mr Graham Cawley of Santiago Capital DAC on the 22 September 2022 and your deponent exhibited the letter serving the said proceedings on Mr Graham Cawley at the 4th floor, Grattan House, Mount Street Lower, Dublin 2 D02 H638. I say that this was the premised [sic] where Mr Graham Cawley conducted the business of the First Named Defendant and I am satisfied that he received the Plenary Summons but failed to instruct solicitors*".

15. This was the third affidavit on the Plaintiff's behalf dealing with service. It rehashed an earlier, inadequate averment and still failed to address the lacunae left by its predecessors. Since service was disputed, it was not appropriate to deal with the matter on the basis of hearsay evidence. However, even leaving that aside, the averment and the previous affidavit and exhibit still failed to show that service was duly effected either at the correct registered office or on a director of the First Defendant.

16. In a fourth response in respect of service, the Plaintiff's solicitor, James Flynn, swore another affidavit on 16 October 2023, the day the current application had been specially fixed for hearing. The affidavit stated that the deponent had served the Plenary Summons on Mr

Cawley personally on 22 September 2022. Even leaving aside the inappropriateness of additional affidavit so late in the day when the issue could and should have been addressed earlier, the affidavit failed to show a *prima facie* case that service was effected. The deficiencies with the affidavit (in addition to its belatedness) include that: (a) it did not exhibit the document actually served. No copy of the Plenary Summons was exhibited, endorsed or otherwise; (b) as noted above, the Plaintiff had twice previously sought to confirm service by reference to a wrongly addressed letter to the First Defendant. The affidavit did not explain this discrepancy; (c) no details were provided as to where service was effected and such details were clearly required in view of the confusion – generated by the Plaintiff; (d) it did not confirm whether the document was handed to Mr Cawley personally or left at the premises (and, if so, which premises); (e) it did not explain the basis on which it was contended that service on Mr Cawley would constitute service on the First Defendant; (f) there was no suggestion that the documents were served in accordance with section 51 of the Companies Act 2014; (g) nor, if it was suggested that service was validly effected on Mr Cawley as a director of the First Defendant, was there evidence that he was a director.

17. There was no request for cross-examination nor would the Court have entertained such a belated application in the circumstances. The Plaintiff did not dispute the deficiencies in the evidence with regard to service in the course of argument but, in the course of the hearing, sought leave to file yet another affidavit to address points raised. The Court did not consider that it was appropriate to grant leave for a fifth affidavit in respect of service. The issue was flagged from the outset (and in correspondence preceding the issuing of the motion). The Plaintiff had ample opportunity to file a comprehensive affidavit of service in the usual way. The hearing was specially fixed. No further delay could be justified to address such a straightforward issue. Accordingly, the Plaintiff failed to satisfy the Court that there is even a *prima facie* case that the Plenary Summons was properly served.

Unreasonable Delay

18. The *lis pendens* should be dismissed on the basis of the Plaintiff's unreasonable delay in prosecuting the action as a whole and also the way the Plaintiff has prosecuted individual steps. Instances of unreasonable delay include: (a) The failure to serve the Plenary Summons promptly, particularly egregious since the matter was raised in correspondence in May 2023 and in the grounding affidavit (the inappropriateness of such delay was noted in *Hurley*); (b) the failure to respond immediately and appropriately when the First Defendant's solicitor raised the question of service in correspondence or when the issue was raised in the grounding affidavit; (c) The failure to press for the delivery of an appearance and a Defence by all Defendants and to seek judgment in default against all such parties if the Plaintiff believed that the proceedings had been served – in fact there is no evidence that the other parties were served or that the Plaintiff has taken any meaningful steps to progress any of the three proceedings.

19. The Plaintiff's failure to progress the claim is all the more extraordinary in view of her 23 September 2022 email to Lisney, alleging that the appointment of the Receiver was illegal pending resolution of the legal actions and that Lisney's appointment was also illegal and premature. The email shows that the Plaintiff had been receiving legal advice since September 2022 at the latest, but still failed to progress the proceedings.

20. Although the Plaintiff's first affidavit referenced negotiations between the parties, there was no evidence to explain or justify her delay. A similar (but stronger) argument failed in *Hurley* - the Court rejected the suggestion that such negotiations excused the failure to serve the Plenary Summons or to progress the litigation.

Is the action being prosecuted bona fide?

21. An application to vacate a *lis pendens* on the grounds that the litigation is not being prosecuted *bona fide* does not require a determination that the claim is unstatable or an abuse

of process or that the bringing of the claim represents a lack of *bona fides* as that expression is normally understood. To the contrary, the Court is applying the test in the sense identified in cases such as *Tola, Hurley, Kelly and Bennett*, including the issuing of proceedings so as to gain a tactical advantage and prevent a sale. In that sense, the Court is satisfied that the action is not being prosecuted *bona fide*:

a. No letter before action was sent. Nor was there any explanation for this departure from basic professional practice. Such an omission would not necessarily, in isolation, establish a lack of *bona fides* (although it might go to costs or any judicial discretion). However, coupled with the other concerns noted below, such an approach is consistent with the proceedings not being pursued *bona fide*.

b. Many delay points also go to whether the action is being prosecuted *bona fide*. These include: (i) the failure to serve the proceedings without delay in September 2022 or when the matter was subsequently raised in correspondence or on affidavit; (ii) the failure to deliver a Statement of Claim in these proceedings; and (iii) the failure to progress the claim against all parties.

c. If there was a genuine confusion as to service, then – even though any such confusion seems to have been the Plaintiff's own responsibility - the issue might not go to *bona fides*. However, the Plaintiff's solicitor's unsatisfactory failure to respond to the First Defendant's solicitor's correspondence fell far short of the reasonable expectations of solicitors charged with the progress of litigation, particularly litigation involving *lis pendens*, reinforcing the concern as to *bona fides*.

d. If the Plaintiff believed that the Plenary Summons had been served, it is remarkable that: (i) she failed to press for entry of an appearance or delivery of a defence by all parties or to seek judgment in default; (ii) She failed to furnish a copy of the Plenary Summons to the First Defendant's new solicitors when they raised the issue.

This would have been the obvious and appropriate step to lay the issue to rest and to progress the action. Such a response would also have been consistent with normal professional practice.

22. The fact that the Plaintiff has issued three sets of proceedings goes to the bona fides of this litigation. As Lady Bracknell might have observed, to be forced to issue one legal claim arising from a failed investment is unfortunate. To issue three, requires an explanation. As the authorities cited note, the gratuitous proliferation of proceedings dealing with the same issue may itself call into question the bona fides of the way litigation is being pursued. No adequate explanation was advanced for three virtually identical proceedings dealing with the same subject matter in virtually identical terms (save for the additional plea and parties added to ground the *lis pendens*). The failure to join the First Defendant in the original proceedings is testament to the Plaintiff's original view as to the parties actually responsible for her predicament and thus also goes to bona fides. Furthermore, any claim against the First Defendant, would sound in damages, and would not give rise to an interest in the Property.

23. The joinder of the First and Second Defendants to the otherwise identical second and Third Proceedings appears does not appear to be driven by a genuine desire to litigate against them. The Plaintiff stated at paragraph 3 (vii) of her first affidavit that the Second and Third Proceedings were identical in all respects *"with the exception of Clause No 1 in (these proceedings) which clause is required to register a lites pendentes"*. This acknowledgment suggests that the only reason the Third Proceedings was issued was an ulterior motivation – the desire to register the three *lis pendens.* Likewise, the Plaintiff's second affidavit states that *"the purpose of registration of the lis pendens was designed to bring to the attention of third parties, who may be interested in acquiring the property or a charge over it, the fact that there are proceedings in being in relation to the property which might affect their interest".* She failed to explain how the proceedings could affect the interests of a third-party purchaser or to

explain any basis to assert an ongoing interest in the property. Accordingly, the Plaintiff's own averments suggest that the proceedings were not prosecuted in good faith. It appears that they were a tactical response to the appointment of a Receiver and a desire to gain leverage through a *lis pendens* which could frustrate the sale of the property. As authorities such as *Hurley* (Mr Justice Barniville) and *Gannon* (Ms Justice Laffoy) show, issuing proceedings solely to obtain the benefit of a *lis pendens* would mean that the litigation was not being prosecuted bona fides. Accordingly, the Plaintiff's own justifications suggest that the proceedings were not being pursued bona fides.

24. Also suggesting that the litigation is not being prosecuted *bona fide* is the fact that, until the launch of the Second and Third Proceedings, the Plaintiff's own correspondence consistently presented the dispute as being between the Co-Investors (save for the complaint about the site entrance and the badger sets). The latter proceedings appeared to have been launched for tactical reasons. The understanding that the Plaintiff's claim was essentially between the Co-Investors rather than between her and the First Defendant appears to have been shared by other parties even after the Receiver was appointed. This appears from a letter from the Receiver to the Plaintiff dated 20 July 2022. The way the Plaintiff's allegations have evolved since her correspondence prior to launching the First Proceedings, the failure to name the First Defendant as a party to the First Proceedings, the terms of the Statement of Claim in the First Proceedings and the absence of a Statement of Claim in these proceedings are all consistent with the conclusion that the Plaintiff's true complaint is against the Co-Investors and that the extension of the litigation to encompass the First Defendant reflected a tactical concern to lodge the *lis pendens* and obtain leverage. This conclusion is fortified by the terms of the Statement of Claim in the First Proceedings and its references to a Joint Venture Agreement which is not exhibited in these proceedings and to which the First Defendant is not a party. The Plaintiff's counsel helpfully volunteered his client's undertaking to the Court that the First and

Second Proceedings would be discontinued irrespective of the outcome of this application. However, this commitment was only offered during the hearing. If the litigant was pursuing the litigation *bona fide*, she should not have needed such prompting. The Court welcomes the commitment to abandon the redundant proceedings and expects that the Plaintiff will honour that commitment forthwith. However, the need for such a volte-face reinforces the concerns about the way the litigation has been prosecuted from the outset.

25. The Plaintiff's actions to date across the three proceedings but particularly in the Third Proceedings give rise to the inexorable conclusion that the Third Proceedings are not being prosecuted in good faith but were rather issued for strategic reasons, to provide a platform for the *lis pendens*, to block the sale and, presumably, to obtain negotiating leverage. If the Plaintiff had been genuinely focussed on progressing a claim it would have proceeded differently and more expeditiously.

Prejudice

26. As appears from *Hurley,* prejudice is not a prerequisite to an application to vacate *a lis pendens*. However, to the extent it is relevant to any judicial discretion, the Court is satisfied that the *lis pendens* prejudice to the First Defendant. The Plaintiff's own affidavits reveal that that was exactly their *raison d'etre.* The evidence showed that they made it harder to sell the Property and reduced the price. The Plaintiff's claim that other factors could delay the sale were beside the point.

Conclusion

27. The Court will direct that all three *lis pendens* should be set aside due to the Plaintiff's unreasonable delay and because the proceedings are not being prosecuted *bona fide*. The Plaintiff remains entitled to continue to pursue these proceedings. If she elects to do so then

her legal advisors will doubtless warn her of her obligation to ensure that all parties are served forthwith and to progress such proceedings expeditiously, failing which she may have to deal with dismissal applications. She should also discontinue the two redundant proceedings forthwith, a step which will necessarily have further cost consequences under the Rules of the Superior Courts, as her solicitors will have advised her prior to commencing those proceedings (in accordance with their statutory obligations pursuant to section 150(4)(e)(iii) the Legal Services Regulation Act 2015.

28. As the First Defendant has been entirely successful, it would appear to follow that it should be entitled to its costs. If either party wishes to contend for an alternative form of order, they will have liberty to deliver a written submission not exceeding 1,000 words within 21 days of this judgment. In that event, the other party will have liberty to respond likewise within 14 days, following which a costs ruling will be issued electronically. In default of any such submissions an order in the terms proposed will be made.