

THE HIGH COURT

[2021] IEHC 852
[2021/2577 P]

BETWEEN

JOHNNY O'LOUGHLIN
AND
MOUNT PLEASANT DEVELOPMENT LIMITED

PLAINTIFFS

AND
MICHAEL MORAN
AND
SEABREN HOLDINGS LIMITED; SEABREN DEVELOPMENTS LIMITED; REFIT SEABREN
UNLIMITED COMPANY AND HITC PROPERTIES LIMITED

DEFENDANTS

Judgment of Mr. Justice Brian O'Moore delivered on the 5th day of October, 2021.

1. The Plaintiffs commenced these proceedings by Plenary Summons dated the 16th of April 2021. On that day, their solicitors lodged a *lis pendens* in respect of each of three properties. These properties are;
 1. The Former Europa Motors Premises at Newtown Avenue, Blackrock, County Dublin ('the Europa Site').
 2. Property at Annesley Gardens, Ranelagh, Dublin 6 ('Annesley').
 3. A development site at 'The Glebe', St Agnes Road, Crumlin, Dublin 12 ('The Glebe').
2. On the 10th of May 2021, the Defendants issued a motion seeking (inter alia) orders directing that each of the *lis pendens* be vacated. This is my judgment on this motion. It is arranged in the following sections;
 1. The Plaintiffs' claim.
 2. An Overview of the Evidence.
 3. The Core of The Dispute
 4. The Law
 5. The Defendants' alternative argument.
 6. Subsidiary submissions.
 7. Summary of Decision.
1. **THE PLAINTIFFS' CLAIM**
3. The Plaintiffs' claim is set out in the Statement of Claim dated the 17th of May 2021. It is to this effect. In 2016 the first Plaintiff and the first Defendant agreed to enter into a joint venture agreement "where they and their nominated corporate entities, which were to be part of the Joint Venture Agreement, would identify and purchase sites for property development, carry out all necessary works to enhance the value of any such properties

and thereafter market and sell such properties. It was agreed that the third Defendant would purchase the properties and/or sites in trust on behalf of the parties to the joint venture agreement"; paragraph 8. It will immediately be seen that the business model, as pleaded by the Plaintiffs, did not involve holding any property for any longer than it took to improve them and sell it.

4. The Plaintiffs claim that an agreement of the 11th of April 2016 was entered into between certain of the parties, providing (inter alia) for a split of profits, payment to the second Plaintiff for carrying out refurbishment and development works, and the payment of an "equity stake" of 200,000 euro by the Plaintiffs. During what is described as "the pendency" of the 2016 agreement, an initial four sites were developed and sold on, and others were identified for similar treatment. It is pleaded that a new joint venture agreement was drawn up by the Defendants' accountants, agreed between the parties, and registered with the Revenue Commissioners. In all, a total of eleven sites were identified, developed, marketed and/or sold under the joint venture agreements between the two sides (though not all of the parties to this action were parties to the joint venture agreements). To be more precise, it is pleaded that a total of nine properties were acquired, developed and sold, and that a further two properties were acquired but were yet to be developed and sold; these two properties are Annesley and The Glebe. It is further pleaded that sales proceeds from sites and/or from profits of sales in respect of the nine developed properties were used by the Third Defendant to acquire Annesley and The Glebe, The Plaintiffs make the case that these two properties "were purchased in furtherance of the Joint Venture Agreement and whereby the first named Plaintiff in respect of same has again provided the services as pleaded...herein"; paragraph 18.
5. With regard to the Europa Site, the Plaintiffs expressly disavow any involvement in this development (paragraph 20) but say that the fifth named Defendant has purchased this site using profits due to the Plaintiffs from the other developments which came within the joint venture.
6. The Plaintiffs say that they have been given no visibility or details on the exact profits achieved on the joint venture developments, that the first Defendant has wrongly asserted that there were no profits "arising" but nonetheless believe that they have suffered losses just under 5 million euro (including the non-repayment of the original equity stake).
7. The Plaintiffs seek a wide range of reliefs, including damages, judgment for a liquidated sum, accounts and enquiries and (in respect of the Europa Site, Annesley and The Glebe) the following type of orders;

"A declaration that the Plaintiffs and each of them have an interest in [the relevant lands] purportedly owned by [the relevant] Defendant.

"A declaration that [the relevant] Defendant holds [the relevant lands] in trust for the Plaintiffs and each of them."

The nature of the trust, or the interest claimed in the lands, are not specified.

8. The Defence is a full one. However, in accordance with the authorities, I have considered the Plaintiffs' case at its height, as it is pleaded in the Statement of Claim. In doing so, I have considered a specific submission made by the Defendants. They say that paragraph 9 of the Statement of Claim wrongly describes the terms of the 2016 joint venture agreement, and that I should proceed on the basis of the agreement and its terms rather than on the basis of the characterisation of the agreement that appears in the Statement of Claim. The Plaintiffs say that the agreement is correctly described in the Statement of Claim, and that I should consider the 2016 agreement in the manner it appears in the pleadings.
9. In a case where a claim is (either in whole or in part) grounded on a written agreement, it should be open to the court to consider whether the agreement is correctly described in the Statement of Claim (or other relevant pleading). In those circumstances, the court cannot be bound to the interpretation of the document advanced in the pleaded case. Of course, if there is any ambiguity about the meaning of the contract the court should give the benefit of any doubt to the Plaintiff in applications such as this. However, if the meaning of the relevant contractual term is clearly misdescribed in the Statement of Claim, and the claimant thereby advances a claim which in truth is simply unsustainable, the court must be able to take this into account.
10. My preliminary view is that the Plaintiffs' pleadings do not accurately reflect the terms of the 2016 written agreement. However, as this issue may well feature at the trial of this action I do not intend to go further into it. In any event, in this case I have decided the application without determining in any detail the issue about paragraph 9 of the Statement of Claim raised by the Defendants. Before coming to this decision and my reasons for it, I will now give a broad summary of the evidence in the motion.

2. OVERVIEW OF THE EVIDENCE

11. The motion was grounded on an affidavit of the first Defendant, Michael Moran. This affidavit, like much of the others before me, dealt in large measure with the merits of the action as opposed to relevant evidence on the application. In addition, much of this affidavit (like the others) constituted argument as opposed to evidence. The affidavit covered (1) the background, meaning and effect of the 2016 joint venture agreement; (2) the projects not covered by the 2016 agreement, which nonetheless involved the O'Loughlin interests and the Moran interests; (3) The Glebe, Europa and Annesley projects; (4) the contacts and dealings between Mr. O'Loughlin and Mr. Moran in the lead up to the issuing of these proceedings; (5) the purpose of the Plaintiffs in registering the *lites pendentes*, and the adverse effect of these instruments on the Defendants and their business.
12. The Plaintiffs replied by means of an affidavit of the first Plaintiff, Johnny O'Loughlin. That affidavit shared many of the characteristics of Mr. Moran's first affidavit. It covered (1) the nature of the interest claimed in the three properties subject to the *lites pendentes*; (2) the background, meaning and effect of the 2016 joint venture agreement; (3) the role

of the second Plaintiff as contractor on the various projects, and the terms on which it was retained or to be retained; (4) the extension of the joint venture beyond the original four projects; (5) the use of what I might describe as joint venture monies, or monies generated by the joint venture to which the O'Loughlin interests were entitled, to acquire other properties; (6) the extension of the joint venture in 2019, and the arrangements entered into at that time; (7) the involvement of Mr. O'Loughlin in a series of properties, including in the acquisition of these properties, other than the original four properties. Mr. O'Loughlin gives a very detailed account of his dealings in these properties, in particular The Glebe and Annesley; (8) the refusal of Mr. O'Loughlin to become involved in The Europa Site, and the use by the Moran interests of profits from the joint venture portfolio (due to the O'Loughlin interests) to acquire Europa notwithstanding the fact that the O'Loughlin interests were not taking part in the Blackrock development; (9) the potential mingling/confusion of the development costs of The Glebe with the Europa development; (10) the lack of transparency on the part of Mr. Moran with regard to the costs, proceeds and profits of joint venture developments; (11) the contacts between the parties leading to the issuing of proceedings; (12) the registration of the *lites pendentes*.

13. Two affidavits followed on behalf of the Defendants. One was sworn by Tony Kelly, an accountant retained by the corporate Defendants. This affidavit provided details of the financing of the purchase of The Glebe, the Europa Site and Annesley. It also gives an account of the 2019 discussions in respect of the continuation of the joint venture arrangements. This affidavit, in conjunction with the other evidence, resulted in a document presented to me at the hearing by Counsel for the Defendants. It was submitted, relying on the calculations contained in the document, that no monies from the joint venture developments could have been applied to the acquisition of the disputed properties. However, it is not open to me to accept this analysis. Firstly, doing so would involve not taking the Plaintiffs' case at its height, as I am obliged to do. Secondly, it would involve accepting evidence which the Plaintiffs are simply not in a position to challenge or contradict;. It may well be the case that Mr. Kelly's evidence is correct, and that the workings presented to me at the hearing are right, but the court cannot decide an application such as this by accepting the contents of an affidavit which the Plaintiffs cannot even begin to meet. Thirdly, the workings presented to me contain certain assumptions (for example, with regard to the application of interest) which make their conclusions subject to doubt. Finally, and very importantly, Mr. O'Loughlin has given evidence that Mr. Moran had acknowledged that "monies due and owing and profits accrued to the Plaintiffs were interwoven with the acquisition costs of [the Europa Site]." Mr. O'Loughlin also averred that Mr. Moran had stated that it was impossible to unravel the amounts due to the Plaintiffs from the admitted joint venture sites. The fact that this evidence is supported by an email from Mr. Moran, and not denied by him, is very significant. Even if I were assessing the strength of the case by reference to the evidence (which I am not), it is by no means certain that I would conclude that joint venture profits due to the Plaintiffs had not been utilised in the acquisition of any of the three disputed properties.

14. The second affidavit delivered by the Defendants in response to the affidavit of Mr. O'Loughlin was that of Mr. Moran. In his second affidavit, Mr. Moran makes some preliminary observations about the length of Mr. O'Loughlin's affidavit (26 pages, plus over 300 pages of exhibits), states that the 2019 agreement was never signed, asserts that the fifth Defendant (HITC) is not a party to the 2019 agreement, denies that any monies from the joint venture went into the acquisition of the three disputed properties, and relies on the lack of profits arising from the original four projects governed by the 2016 arrangements. He goes on, in the balance of his affidavit, to address certain of the evidence contained in Mr. O'Loughlin's first affidavit.
15. The final affidavit in the motion was sworn by Mr. O'Loughlin after delivery of the Defendants' legal submissions. The timing of the affidavit gave the Plaintiffs a significant tactical advantage; they were aware not only of the evidence put before the Court by the Defendants, but also the sort of arguments which the Defendants proposed to make based on the evidence.
16. Mr. O'Loughlin's second affidavit is, inevitably, somewhat fractured in structure as it deals with various points made by Mr. Kelly and Mr. Moran in their affidavits, often in the sequence they arise rather than thematically. Without downplaying the importance of any of his evidence, it can safely be said that Mr. O'Loughlin's affidavit continues to insist on the lack of information provided by Mr. Moran, the heavy level of involvement by Mr. O'Loughlin in a range of properties which Mr. Moran maintains are outside the joint venture, the movement of money by the Defendants and its intermingling with funds used to buy properties and the alleged conflict of interest on the part of the Defendants' solicitors. Mr. O'Loughlin also takes issue with the evidence of Mr. Kelly, pretty much in its entirety.
17. I have carefully considered all the evidence put before me on this motion. In the next section, I return in some greater detail to the evidence which requires close scrutiny. In doing so, I also consider the relevant submissions of the parties.

3. THE CORE OF THE DISPUTE

18. The Defendants expressly do not argue that these proceedings, as a whole, represent an abuse of process. They accept that there is a dispute about whether or not monies are owed by any of them to either of the Plaintiffs and, if so, how much. The Defendants do, however, claim that the Plaintiffs cannot establish an estate or interest in the relevant properties, namely the properties at Annesley, at The Glebe, or at The Europa Site. They therefore say that these proceedings are bound to fail in respect of this part of the claim, and consequently are not being prosecuted *bona fide*.
19. The Defendants make a wholly distinct second argument as to why the *lis pendens* registered in respect of each property should be vacated. They say that these proceedings are not being prosecuted *bona fide* as the registration of each *lis pendens* in itself is for the improper motive (on the part of the Plaintiffs) of applying pressure on the Defendants for commercial advantage in negotiation. They say that the registration of the *lis pendens* in respect of each property is extremely harmful, that the Plaintiffs are well aware of this,

and that the registration of these instruments is done with the motivation of piling pressure on the Defendants to settle with the Plaintiffs.

20. I will now deal with the second of these submissions, starting with the more relevant evidence.
21. In his grounding affidavit, Mr. Moran (giving evidence not only on his own behalf but also on behalf of the other Defendants) says the following.
22. At paragraph seven, he swears that:-

“This affidavit is being sworn in support of an order under Section 123 of the Land and Conveyancing Act, 2009 vacating a *Lis Pendens* that have been registered by the Plaintiff over property owned by the third and fifth named Defendant. For the reasons set out hereunder the registration or threatened registration of the *Lis Pendens* is an abuse of process in that the Plaintiffs are not entitled to register the *Lis Pendens* on the grounds that the Plaintiffs have no estate or interest in the lands in question and on the basis that the action is not being prosecuted *bona fide* by the Plaintiff.”

I would stress the two alternate grounds upon which the motion is brought, namely the stated lack of estate or interest in the lands and the *mala fide* prosecution of the action.

23. At paragraph 32 onwards, Mr. Moran describes an exchange of emails between himself and Mr. O’Loughlin (whose role in the proceedings I have already described). While the parties, both in the evidence and in the submissions of their counsel, emphasised different parts of this correspondence, in truth the emails speak for themselves with one exception. This exception is the evidence given by Mr. Moran at paragraph 40 of his affidavit. I will return to that evidence shortly.
24. The emails followed a meeting between Mr. Moran and Mr. O’Loughlin at the Red Cow Moran Hotel on the 24th of February 2021. In his email of the 5th of March 2021 Mr. Moran begins as follows:-

“Following our meeting in the Red Cow last Wed the 24th of Feb Damien, Martina and I went to task about trying to build a financial model that

- Firstly accurately applies our April 2016 agreement to the 4 relevant projects captured by that agreement
- Secondly applies my proposed offer with the 15% interest rate which I pitched in 2018 /19 with Annesley in mind.

I have realised that after 10 days of effort ball and headache this is a near on impossible and realistically a pointless task as it involves the unpicking of over

€50mill of spend since April 2016 and applying compound interest to each line item of spend as we go along.

What makes the above more difficult is that some projects that relates to the above spend relate to projects we are involved in and some relate to projects that you are not involved in the likes of Blackrock for example. [...]"

25. The email concludes with a proposed new agreement being put in place.
26. The suggestion that Mr. Moran cannot produce a model that accurately applies an acknowledged agreement to projects which (he accepts) fall within that agreement is surprising, to put it mildly. Given that this is a matter which may well feature at the trial, I will put it no further. Mr. O'Loughlin's response on the 8th of March is understandable. He expresses disagreement with the stance taken by Mr. Moran. Mr. O'Loughlin then goes on to look for information from Mr. Moran, with a view to establishing "a true financial position of where things stand". He says that this must be done before any further proposals can be made.
27. Mr. Moran's response, that day, illustrates the declining relationship between the two men. Mr. Moran continues to insist on "a 2021 deal" being put in place, states that he has "absolutely no intention of meeting the demands set out by [Mr. O'Loughlin] in [his] email this morning [...]" and asserts that Mr. O'Loughlin already has "full visibility [...]" on the relevant construction costs.
28. The first email is timed at 09.23, the second at 12.35. At 15.00, Mr. O'Loughlin replied, restating his requirements and concluding:-

"I also would prefer this not to be an exchange of techy [sic] emails but I don't believe my request to be unreasonable."

29. Mr. Moran's response, at 16.47, reads:-

"Johnny,

the only reason why you have become so interested in my finances suddenly is when I told you that I was not interested in funding you on an ad hoc basis as and when you run dry for cash.

I paid you over €1mill in 2020 on that basis and €100k last week. I feel like I'm being abused and have been used like someone's sugar daddy / rich uncle.

You are a good man to Huggle and to introduce dramatic effect every time you are in need for cash, bigger fool me as I'm am left pick up the pieces.

You have a rose-tinted view of our arrangement , maybe I have you, spoilt bigger fool me.

My finances are my business , if you want to propose a 2021 deal, I'm attentive but I'm not going to continuously field emails where you choose not to accept your reality.

Johnny, I like you, I consider myself loyal to you , we have many common acquaintances, and I am keen to award you with an appropriate payment at an appropriate time, but a 2021 deal must accurately reflect the various inputs, performance, time and risks that each of us have took on over the years.

Regards Michael"

30. At 18.33, Mr. O'Loughlin emailed:-

"Michael

To be clear I'm "all interested in our finances" because I have caught you telling me lies.

Our original agreement and any subsequent agreement put forward by yourself set out that MPD be paid project costs (you seem to confuse these with payments to me) plus a margin of 10%. In practice despite various commitments to do so this has never been paid up to date and MPD is currently owed circa 500 k not withstanding the latest 100 k paid last week.

As an equity partner I am well within my rights to want to understand the extent to which our assets have been leveraged as security in other transactions as it impacts the timing of my ability to liquidate my equity position.

If you do not believe me to be an equity partner please let me know and I will pursue a different course of action.

Regards,

Johnny."

31. Mr. Moran's reply, at 21.05, contains the following paragraphs towards its conclusion:-

"I'm not exactly sure what you were intimating re the pursuit of a different course of action but I'd like to put you on notice that it feels like a threat, if it is, you will find that I will be proficient in defending myself in whatever manor it is that you are alluding to.

You decide how to proceed next, I am happy to withdraw from these email exchanges if you prefer but I'll not reengage if you do."

32. This is how the day ended. The two men are clearly at loggerheads, and feelings are running high. After a break of one day, during which there was some attempted contact

from Mr. O'Loughlin to Mr. Moran, Mr. O'Loughlin wrote at 07.44 on the 10th of March 2021:-

"Michael,

I'm really disappointed that after 4 nearly 5 years of working together you will not even take a phone call from me.

Perhaps you're aware I agreed the sale of another house in Annesley yesterday and am confident will yield a signed contract on same in a few weeks.

If you don't make contact with me today and commit to meaningful engagement. That is to say let the accountants talk and set out a road map for me to recoup project cost which are owed to MPD and agree our profit share.

I will discontinue to render my services at no cost providing value for Seabren.

I will instruct legal proceedings against you with a view to applying *Lis Pendens* to the Glebe site, Annesley Gardens and Europa site.

It is with a heavy heart that I would even make such a threat but I feel you have left me no choice.

Ultimately this situation will resolved by agreement between us and I hope for both our sakes you take the path of least resistance. That's now your call to make.

Regards,

Johnny"

33. Mr. Moran responded at 16.11, by an email which included this passage:-

"This is a threat that I take very seriously and I will take action to protect against.

I infer from your mail that you consider applying a *Lis pendens* against 3 of my assets. This, have no doubt is a "nuclear" approach. I just hope that you know and understand how to use such a weapon. I would caution you that improper use carries risk, it can create a liability for you and yours the party asserting the interest. Overzealous use of *Lis pendens* can constitute slander of title and in Ireland it will expose you personally for all the loss created. I really recommend you familiarise yourself with our agreement ,you will find you have no *Lis pendens* case to make , take legal advice before you act and run the risk and lose all as you are met with satisfying the cost of such an action.

Can I say as time goes on the "appreciation curve" that I have for all the good work you have done is diminishing?"

34. In his first affidavit, Mr. Moran elaborates upon the reference by Mr. O'Loughlin to the registration of a *lis pendens*. He says (at paragraph 40):-

"[Mr. O'Loughlin] had learned from dealings that we both had from the previous development at Highfield where he was initially the contractor about the problems that the registration of a *Lis Pendens* could create. He knew that in this case the registration of *Lis Pendens* would have a devastating effect on Seabren Developments and HITC and would prevent and frustrate their efforts to either develop the properties, sell completed properties in Annesley Gardens and would stymie their business."

35. This evidence is not directly addressed anywhere by Mr. O'Loughlin, notwithstanding the fact that he subsequently swore two very lengthy affidavits.

36. Mr. Moran's grounding affidavit goes on to describe the issuing of correspondence on the 31st of March 2021 from the Plaintiffs' solicitors, and the issuing of proceedings on the 16th of April (together with the registration of *lis pendens* in respect of each of the three properties on the same day). At paragraph 49, Mr. Moran says:-

"It is clear from the foregoing that the primary objective of the Plaintiffs is to falsely register a *Lis Pendens* to frustrate the third and fourth named Defendants herein in its dealing with its properties as a lever to extract money rather than for the *bona fide* purpose of putting prospective buyers on notice of genuine claim for a proprietary interest in the properties concerned. The Plaintiffs are abusing the *Lis Pendens* procedure by alleging a bogus proprietary interest in land which has been purchased at a combined total cost of €20,409,144.00 in the last five years by the third and fifth Defendant herein of which he is neither a director or shareholder which companies are the legal and equitable owners of the land in question."

37. At paragraph 53, he says:-

"I say the Respondents hereto are using these Proceedings for the purpose of obtaining a *Lis Pendens* in order to apply pressure on your Deponent and the Defendant companies for commercial advantage in negotiation. It is clear from the above background that there is no genuine dispute between the parties in respect of the ownership of the property that is the subject of the Proceedings. The Plaintiffs have not put forward any credible basis on which they can assert to have any interest in the Glebe, Annesley Gardens or the Europa Motors Site.

38. Mr. O'Loughlin's replying affidavit is important, as much for what it does not say on this issue as for what it does say.

39. At paragraph seven, Mr. O'Loughlin swears:-

"Further, I am advised that the Statement of Claim now affords more than sufficient detail as to the factual and legal basis on which the Plaintiffs have an interest in the three properties which are the subject of the *lis pendens*. I say that

the Plaintiffs were left with no option but to register the *lis pendens* in circumstances where the Defendants, and in particular the first named Defendant, despite the nature of the joint venture between him and your deponent, engaged in an ongoing failure to provide any details as to the profits inuring to date, nor as to the profits to accrue in the future. This abject refusal of the first named Defendant is epitomised in the email correspondence referred to by him in the latter part of his Affidavit, to which I shall turn in due course, as in the first named Defendant's Affidavit itself. In any event, I say, believe, and I am advised that the Plaintiffs in the circumstances and in the light of the claims being made which are being *bona fide* prosecuted are fully entitled to register and maintain the said *lis pendens*."

40. At paragraph 57, Mr. O'Loughlin similarly refers to the alleged entitlement to register *lis pendens* in these terms:-

"Next, and in dealing with what are essentially legal arguments, though set out by the first named Defendant in his Affidavit from paragraph 49 onwards, I say and I am advised that where the Statement of Claim and this Affidavit clearly set out first that the parties have at all material times operated on the basis of a Joint Venture Agreement, secondly where agreed profits which have already inured from developments of the joint venture have not been remitted to the Plaintiffs, thirdly where the three properties over which the *lis pendens* have been registered were purchased subsequent to disposals made by the joint venture a clear case can be and is being made that there has been a substantial misappropriation of the Plaintiff's monies and which were substantially used to purchase the three said properties, the Plaintiffs are entitled to register their *lis pendens*. Further, it is the case that there has been absolutely no delay by the Plaintiffs in either registering these *lis pendens* nor in having these proceedings prosecuted."

41. Towards the conclusion of his 26 page affidavit, Mr. O'Loughlin states (at paragraph 63):-

"Hence, in conclusion, I say and believe that I am advised that the Plaintiffs in light of the nature of their claims were not only entitled to register the *lis pendens* but are also entitled to maintain same until such time as the correctness of same has been dealt with at trial."

42. Notably, nowhere does Mr. O'Loughlin address the stinging evidence of Mr. Moran set out at paragraphs 49 and 53 of the latter's affidavit. When I asked counsel for the Plaintiffs about the need for cross examination of Mr. O'Loughlin on the question of his motivation in having the *lis pendens* registered, the answer was illuminating.

"MR. JUSTICE O'MOORE: And just on that argument, Mr. Fitzpatrick, can I come to the view, do you think, on a motion determined on affidavit that Mr. O'Loughlin and Mount Pleasant have in fact lodged the *lis pendens* in the three sites for an ulterior motive as described by Mr. Moran? Can I come to a view about that without their cross-examination?"

MR. FITZPATRICK: No, Judge, you can't. That's a finding of fact, it's an allegation of fact, which is fundamentally disputed by the affidavits and the Court will have seen that each side have sworn 50 pages affidavits or 48 page affidavits in the case. It is a hotly contested allegation and the Court, I respectfully suggest, can't make a finding of fact based on a case on the affidavits. But also, Judge, the allegation simply isn't made out because here, for example, Europa isn't going to be sold before this case is determined. We have agreed very abridged directions for an exchange of pleadings. We are waiting for Mr. McCarthy's defence and for the exchange of Discovery correspondence. And on current, we haven't sought a date from Judge Barniville yet, but on a current analysis, you would say that this case would be ready to be tried in January. There is no way that any interests in the property, in Europa, for example, would be capable of being sold before January."

43. In fact, Mr. Moran's account of the motivation of Mr. O'Loughlin is simply not disputed. Mr. Moran's views in this regard are consistent with the shared experience of the two men with regard to the registration of a *lis pendens* by a third party at Highfield (again not disputed), with the escalating emails of the 8th of March 2021 culminating with the threat by Mr. O'Loughlin to register *lis pendens* in respect of the three properties, and the undoubtedly negative effects that the registration of these instruments would have on the Defendants (again not disputed in any real way by the Plaintiffs in their evidence). Taken together, or even considered individually, these facts support my finding that the act of registering the *lis pendens* in each case was done for the purpose of obtaining monies from the Defendants, and not for any proper purpose.
44. It is worth recalling the vivid language employed by Mr. Moran in his first affidavit - that the Plaintiffs were registering the three *lites pendentes* "to frustrate the third and fifth Defendants... as a lever to extract money rather than for the *bona fide* purpose of putting prospective purchasers on notice of genuine claim for a proprietary interest in the properties concerned." The failure to address this stark assertion, either in the two lengthy affidavits of Mr. O'Loughlin or in the (written or oral) submissions of the Plaintiffs' counsel is striking. It is not evidence which is addressed adequately by the bland assertions that the Plaintiffs were entitled to register the instruments. The evidence of Mr. Moran went to motivation as well as entitlement. Of all people, Mr. O'Loughlin was in a position to give evidence about the motivation behind the registration of these instruments. He did not do so. The submission that there is a conflict on the evidence in this respect is not a well-founded one.
45. The second affidavits of Mr. Moran and Mr. O'Loughlin do not major on the motivation in having the *lis pendens* registered. Indeed, the tenor of these affidavits can be discerned from the statement by Mr. Moran (at paragraph 16 of his second affidavit) that, while the first 15 paragraphs of that affidavit are sufficient to deal with the Plaintiffs' claim, he is nonetheless 'not prepared to leave the averments made in the Affidavit of Johnny O'Loughlin unanswered...' and he therefore proceeds to give a further 13 pages of evidence comprising 54 paragraphs. In the entire affidavit, there is 1 paragraph to which I will refer. Paragraph 18 reads:-

"Despite what Johnny O'Loughlin says at paragraph 7 of his affidavit, the statement of claim does not set out the factual or legal basis of interest that he claims to have. Further it is not at all clear why he was left with "no option" but to register the *Lis Pendens*. Johnny O'Loughlin is aware of the consequences of the registration of the *Lis Pendens*. He is aware that the filing of *Lis Pendens* and the bogus claim that he or Mount Pleasant Developments have some form of interest in the properties have and continue to have very damaging effect on the further development of the three properties. Save for the sum of €200,000.00 equity that he invested in 2016, he has never been out of pocket in respect of his involvement. He and Mount Pleasant have paid very significant monies since 2016. He has never had to give any personal guarantees or pledge any of his assets in respect of any of the projects. I have had to give a personal guarantee and a charge on my property at 42 Morehampton Road, Dublin 4. He has taken no financial risk whatsoever, yet he claims that he has an interest in three properties, while at the same time accepting that he has no involvement in the Europa Garage. The registration of *Lis Pendens* only required the filing of a plenary summons and the lodging of a *Lis Pendens*, which he knew was what I described as the "nuclear option" in the emails exchanged prior to his solicitors becoming involved in the dispute. He never has had to give an undertaking as to damages, despite the fact that the wrongful filing of a *Lis Pendens* has the capacity to sterilise three projects that I have an involvement in."

46. In his first affidavit, Mr. Moran had also set out not only the motivation of Mr. O'Loughlin but also the difficulties which the registration of the three *lis pendens* would cause the Defendants. These are to be found at paragraph 51 onwards
- "51. The letter of claim exhibited at 'MM6' admits that the Plaintiffs have '*no involvement*' in the Europa Motors site. Yet by way of the within Proceedings a bald claim is advanced to a proprietary interest in the Europa Motors site. The proprietary claim is an artifice designed to prevent HITC from commencing building on that site and to interfere with my relationship with my lender where its security is adversely affected by the registration. Therefore, I say, believe and am advised that where the *Lis Pendens* registered in relation to the Europa Motors site is clearly not in compliance with Section 121(2)(a) not emanating from a genuine claim for a proprietary interest in the Europa Motor site it ought immediately be vacated.
52. By its letter of claim exhibited at 'MM6' herein it is expressly stated that the Plaintiffs seek '*share of final profit*' of €1,708.011.00 in respect of Annesley Gardens. Yet by way of the Proceedings a claim is advanced to a proprietary interest in Annesley Gardens. The proprietary claim over Annesley Gardens advanced in the proceedings is an artifice designed to prevent Seabren Developments hereto from successfully completing sales and to interfere with my relationship with my lender where its security is adversely affected by the registration. Therefore, I say, believe and am advised that where the *Lis Pendens* registered in relation to Annesley Gardens is clearly not in compliance with Section

121(2)(a) not emanating from a genuine claim for a proprietary interest in Annesley Gardens it ought immediately be vacated. In addition, the registration has caused significant difficulties with the financing of Annesley Gardens where development finance from Castlehaven Finance from the agreed facility are predicated on the ability to sell units and these sales are now imperilled by the registering the *Lis Pendens*. At present the lenders are now refusing to release the development finance which was due for drawdown on Monday the 19 April 2021 which did not occur due to the registration of the *Lis Pendens*....

54. Castlehaven are also the lenders for the purchase of the Europa Motors site. The Europa Motors site also provides additional security for the purchase facilities for Annesley Gardens. Similar difficulties are now arising in respect of that development where the Applicants are prejudiced in their capacity to obtain additional finance to develop at Europa Motors Site where that property is the subject of *Lis Pendens*.
55. Insofar as the Glebe is concerned, negotiations in respect of a joint venture with an adjoining landowner are at an advanced stage which will involve the sale of those lands by Seabren Developments. These negotiations are not concluded but are at an advanced and sensitive stage it is proposed to develop 152 apartments on the site (subject to planning) and funding is required by the Seabren Developments to develop those 152 apartments pursuant to a development agreement with an adjoining landholder. The Applicants are prejudiced in the completion of this sale and, also, in obtaining development finance where the Glebe is the subject of *Lis Pendens*.
56. It is clear that there is no genuine dispute between the parties in respect of an estate or interest in lands. The registration of the *Lis Pendens* is made for a purely improper and/or vexatious commercial or tactical advantage amounting to an abuse of process."
47. While Mr. O'Loughlin cavils at the lack of documentary evidence supporting one of these alleged problems, there is in truth no real denial in the evidence that the registration of the *lis pendens* seriously interferes with the development of the three sites, just as there is no denial of the assertion that this interference was Mr. O'Loughlin's intention in registering the *lis pendens* in the first place.

4. THE LAW.

48. Counsel for the Plaintiffs place great reliance on the judgment of Clarke J (in this court) in *Dan Morrissey (Ireland) Ltd v. Donal Morrissey* [2008] 3 I.R. 752. The conclusion of Clarke J, cited in the Plaintiffs' written submissions, is to this effect:-

"19 5.1 I am not, therefore, satisfied that this Court has any jurisdiction to vacate a *lis pendens* by virtue of the manner in which the *lis pendens* is filed, having regard to whether the defendant is put on notice or the timing of the registration of the *lis pendens*. Subject only to the overriding requirement that the *lis* which is said

to be pending must be *bona fide*, it seems to me that a plaintiff is entitled to register the *lis pendens* as of right and at any time that he chooses. It is not, in my view, appropriate for the court to exercise any discretion which might be analogous to the considerations which a court would apply in granting an interlocutory court order. A *lis pendens* can be registered without reference to the court. Such registration clearly does not, therefore, involve the exercise by the court of any consideration or discretion as to whether the *lis pendens* should be registered. Likewise, it does not seem to me that the court has any general discretion to order the vacation of a *lis pendens* save in circumstances where it can be determined that the underlying proceedings are not *bona fide*.”

49. After the decision in *Morrissey*, the Land and Conveyancing Law Reform Act 2009 was enacted. Section 123 provides:-

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

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

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

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

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

50. The phrase “where [...] the action is not being prosecuted *bona fide*” was considered by Cregan J. in *Tola Capital Management v. Linders (No.2)* [2014] IEHC 324. In the course of his judgment, Cregan J. reviewed a range of authorities including the judgment of Clarke J in *Morrissey* (at paragraph 90 of the decision). I will set out in full the conclusions of Cregan J. on the issue relevant to what I must decide.

“129. The defendants submit that, even if they are wrong in relation to the first argument, the *lis pendens* should be vacated because the action is not being prosecuted *bona fide*.

130. I turn to an assessment of the wording of s. 123(b)(ii). This section provides that a court may make an order vacating a *lis pendens* where the court is satisfied that the action is not being prosecuted *bona fide*. The subsection does not refer to a situation where a claim is not being brought *bona fide*, but rather “where the action is not being prosecuted *bona fide*”.

131. In those circumstances, one must consider what is meant by the phrase “the action is not being prosecuted *bona fide*”. In my view this phrase can be interpreted as meaning either:-

A That the action as a whole is not being prosecuted in a *bona fide* manner, or

B. That specific steps in the action are not being prosecuted in a *bona fide* manner.

132. In my view both interpretations are valid and 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.

133. I am of the view that the plaintiff's action is not being prosecuted in a *bona fide* manner because the specific steps of registering and maintaining the *lites pendentes* are not being pursued in a *bona fide* manner. I say so for the following reasons:-

1. At the commencement of the proceedings the plaintiff issued a plenary summons, sought injunctive relief and also registered a *lis pendens*. This, at the time, might have seemed a reasonable course of action to take in circumstances where it was not clear whether the properties in dispute were owned by the individual defendants or by companies.
2. However, once the second affidavit of Mr. Joseph Linders was sworn where it was stated by the defendants that the relevant Tola properties were all owned by companies and were not owned by the personal defendants, it then became incumbent upon the plaintiff to consider the position anew.
3. The plaintiff had registered *lites pendentes* against two individual defendants and against their estates. However, it was now clear that the property over which the plaintiff was claiming was not owned by the defendants personally but was owned by companies of which they were directors and shareholders. It should then have been clear to the plaintiff that it was not appropriate to maintain a *lis pendens* against the two personal defendants.
4. As time went on and as the defendants brought an application to vacate the *lites pendentes* registered against the individual directors, and as further affidavits were exchanged between the parties clarifying the position, it became abundantly clear to the plaintiff that the properties over which the plaintiff was claiming an interest were owned not by the defendants personally, but by companies in which they had a shareholding and in which they were directors. Indeed, the plaintiff's statement of claim and amended statement of claim plead precisely this point.
5. In circumstances where the plaintiff specifically pleaded that the properties were owned by the third, fourth and fifth named defendants being companies, and in circumstances where the defendants had given uncontroverted affidavit evidence that the properties were owned by the companies it was then incumbent upon the plaintiff to vacate the *lis pendens* which they had registered against the defendants personally.
6. However, despite the knowledge which the plaintiff gleaned from the replying affidavits of the defendants, and despite the specific pleadings in the plaintiff's statement of claim, the plaintiff persisted in maintaining the *lites*

pendentes against the two individual defendants. It also insisted on contesting in full the defendants' application to vacate the *lites pendentes*. This is not explicable in the normal course of events and, therefore, gives substance to the defendants' contention that the registration and maintenance of the *lis pendens* by the plaintiff is a cynical and opportunistic attempt to destroy the defendants' refinancing agreement with Ulster Bank, to destroy the defendants' refinancing agreement with a third party financier and to extract the maximum commercial advantage using the registration of a *lis pendens* as a tactic.

7. This claim by the defendants that the plaintiff is engaged in these tactics is also given some force by the fact that the plaintiff, having been unsuccessful in their application for an interlocutory injunction, is now seeking to obtain a similar result using the registration of a *lis pendens* as a tactic. The relevance of the injunction becomes more apparent, particularly when one considers that the plaintiff accepted in the application for injunctive relief that damages were an adequate remedy for the plaintiff.
8. No explanation was put forward to the court as to why the plaintiff sought to maintain the *lites pendentes* against the defendants personally in circumstances where it was also pleaded that the defendants did not personally own the properties, but the properties were owned by the companies.
9. Moreover, the plaintiff's pleaded case is that the properties were to be transferred to Hold Co. Thus, it should also have been fully apparent to the plaintiff that it had no direct proprietary claim to an estate or interest in the Tola properties.

134. In the light of above, I am satisfied that the registration of the *lites pendentes* could not have been maintained in a *bona fide* manner once the true facts were made known to the plaintiff."

51. I would emphasise three things about this judgment. Firstly, it decides that the registration of a *lis pendens* can in itself constitute the prosecution of an action in a manner that is not *bona fide*, even if the action as a whole is not one which is not being prosecuted in a *bona fide* manner. Secondly, it follows from this finding that the registration of a *lis pendens* can be challenged under section 123(b)(ii) even without a finding that underlying claim with regard to an interest or estate in land is not a *bona fide* one. This is somewhat different from the conclusions of Clarke J. in *Morrissey*, However, *Morrissey* was a truly unusual case. It involved a claim that a *lis pendens* should be vacated because it was registered late in the proceedings and without notice to the defendant. It did not involve an allegation, such as is made in this case, that the registration of the *lis pendens* was not made *bona fide*. The judgment of Clarke J must be seen in that context. The judgment of Cregan J in *Tola* does not establish "any general discretion to order the vacation of a *lis pendens*..." (para. 5.1 of *Morrissey*). It does however confirm a statutory jurisdiction to vacate a *lis pendens* where the court has

decided that its registration constitutes " a specific step in [an] action... not being [taken] in a *bona fide* manner" (para 132 of *Tola*).

52. *Tola* represents an acknowledgment of the fact that the registration of a *lis pendens* can harm a defendant in a way that the mere existence of the claim to an interest in land will not. As Clarke J. states in *Morrissey*, the "only thing that the registration of a *lis pendens* does is to bring to the attention of interested parties the fact that there are proceedings in being which affect land." However, bringing the dispute to the attention of potential purchasers of, say multi million euro homes in Ranelagh is likely in itself to be very harmful to the developer of such homes. The harm that can be caused by the continued registration of a *lis pendens* (above and beyond the existence of the underlying proceedings) is self-evident and supported by the evidence in this case. The added harm caused by the registration of a *lis pendens* is acknowledged by the very specific threat made by Mr. O'Loughlin to register *lites pendentes* against the properties, should he not be able to reach a deal with Mr. Moran in March 2021. It is therefore consistent with the purpose of section 123 that, even if the underlying claim is being prosecuted in a *bona fide* manner, a *lis pendens* may be vacated where the court is satisfied that its registration is not done for *bona fide* reasons or in a *bona fide* manner. Such circumstances will almost certainly be extremely rare, given the approach taken by courts towards the ascertainment of facts on such interlocutory applications. This does not mean that such a situation can never arise.
53. The third notable aspect of *Tola* is to be found at paragraph 133 (6), where Cregan J. concludes that the background facts support a claim by the defendants in that case that the registration and maintenance of the *lis pendens* was to interfere with the defendants' refinancing arrangements and to 'extract the maximum commercial advantage using the registration of a *lis pendens* as a tactic.' This finding bears more than a passing similarity to the motivation of the Plaintiffs in these proceedings in registering *lites pendentes* in respect of the sites at Ranelagh, Crumlin and Blackrock. Apart altogether from the uncontradicted evidence of Mr. Moran on this matter, there is the statement by Mr O'Loughlin (in his second affidavit, replying not to Mr. Moran but to Mr. Kelly) that the registration of the *Lis Pendens* in respect of the Europa Site was "required" so as "to avoid the cross utilisation of monies for construction and services between the Glebe and [The Europa Site]."
54. The judgment in *Tola* has been cited, without reservation, by Allen J. in *Cullen v Glencullen Holdings Ltd (in receivership)* [2020] IEHC 685 - where the judge notes the comprehensive review of the authorities by Cregan J. - and by Barniville J. in *Hurley Property v. Charleen Ltd.* [2018] IEHC 611. In *Charleen*, Barniville J. observed (at paragraph 90):-

"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)."

55. Barniville J. went on to conclude that he would not have vacated the *lis pendens* on the ground that the action was not being prosecuted *bona fide*. In doing so, he drew a distinction between the obtaining of commercial advantage and the obtaining of improper commercial advantage. He said (at paragraph 119):-

"119. Having considered the affidavit evidence and having reviewed the correspondence in some detail, and having regard to the relatively high burden which has to be met in order to establish abuse of process (as considered by Ryan J. in *Kelly* and as explained in *Sean Quinn and Dunnes Stores*), I would not have been persuaded that the respondent was guilty of an abuse of the process of the court in commencing the proceedings and in registering the *lis pendens*. I would not have been satisfied that the respondent did so in order to obtain an improper commercial or tactical advantage in the negotiations. There is significant dispute between the parties on affidavit as to what was or was not allegedly agreed at the meeting in September 2015 (now said to have taken place on 10th September) in the offices of Matheson. Having reviewed the affidavits and the correspondence, I would not have been persuaded that the respondent acted other than *bona fide* in the of abuse process sense of the term in commencing the proceedings in May 2017 and in registering the *lis pendens* on foot of those proceedings. I would not, therefore, have been prepared to vacate the *lis pendens* on the first of the two limbs relied on in respect of the non *bona fide* prosecution ground in s. 123(b)(ii)."

56. No submission was made, by either party, by reference to this section of *Charleen* or by reference to the three judgments mentioned by Barniville J. The position taken by the Defendants was that the motivation in registering the *lis pendens* was improper, and that the consequent advantage was also improper. The Plaintiffs made no submission to the effect that any advantage resulting from the registration of the *lis pendens* was not an improper one. They contented themselves with two arguments. Firstly, they said that I could not decide on motivation because of the conflicting evidence; I have already described that submission, and my view on it. Secondly, they argued in their written submissions (summarised at paragraph 54) that:-

"[...] issues as to whether the *lis pendens* have been registered as a matter of tactical manoeuvring are immaterial and irrelevant to any consideration as to whether the proceedings are being prosecuted *bona fide*, the Plaintiffs are entitled to register the *lis* or they are not."

57. With respect, this submission does not engage with the judgment of Cregan J. in *Tola* (certain portions of which are relied upon by the Plaintiffs). Strikingly, as already observed the submissions make no effort to defuse or counter the evidence of Mr. Moran about the Plaintiffs' motivation in the registration of the *lis pendens*.

5. CONCLUSION

58. On the evidence before me, I have decided that the Plaintiffs initially raised the specific threat of the registration of *lis pendens* against the properties in Crumlin, Ranelagh and Blackrock on the 10th of March 2021. They did so knowing just how disruptive and harmful the registration of such instruments would be to the Defendants; Mr. O'Loughlin had seen such tactics deployed, to some effect, in respect of the Highfield development which had involved himself and Mr. Moran. The *lis pendens* threat was made on the 10th of March in order to compel the Defendants to make a deal with the Plaintiffs satisfactory to the latter. When that did not work, the Plaintiffs began these proceedings and immediately registered a *lis pendens* against each of the three sites. The effect of these registrations is to cause very significant damage to the Defendants in connection with the development of the Crumlin and Ranelagh sites; while the development of Blackrock may be some distance off, it is not impossible that these proceedings will remain unresolved and (if the Plaintiffs had their way) the *lis pendens* on that site remain in place at a time when commercial use might be made of the Europa property. I am unimpressed by the argument of the Plaintiffs that these proceedings will go to trial in January or February 2022, and that there will be no practical effect on the Defendants of the *lis pendens* as far as Blackrock is concerned. When this submission was made to me in late June 2021 I saw no reality to such a trial date.

59. For the reasons outlined earlier I accept, for the purpose of this motion, the uncontradicted evidence of Mr. Moran that the motivation of the Plaintiffs in taking the step of registering the *lis pendens* was to pressurise the Defendants into paying money to the Plaintiffs. To use the language of Cregan J. in *Tola*, the Plaintiffs sought 'to extract the maximum commercial advantage using the registration of [the *lis pendens*] as a tactic.' I also find credible the uncontradicted evidence of Mr. Moran that the purpose of the registration of each *lis pendens* was not to notify prospective purchasers of a claim (whether genuine or not) but rather to extract monies from the Defendants.

60. Of course, it could be said that the issuing of legal proceedings in many cases is designed to extract money from the persons sued. The issuing of proceedings is designed to give a party a tactical advantage, but that does not rob actions of the characteristic of being prosecuted *bona fide*. What is different about the registration of the *lis pendens* in this case is the factors which I have set out above including my finding that the registration of the instruments was not done for its proper purpose but rather to obtain (under acute pressure) concessions which the Defendants were not otherwise prepared to give. As it

happens, notwithstanding the pressure exerted by the Plaintiffs, the Defendants are not for turning but the Plaintiffs presumably did not know this when the instructions were given to register the *lis pendens*.

61. There is one other factor which must be noted. The arrangements which the Plaintiffs argue exist between the parties are for the development, on a joint venture basis, of sites including Crumlin and Ranelagh (but excluding Blackrock). The Plaintiffs were to benefit from these developments; indeed, the particulars of loss provided by the Plaintiffs in this action include a claim for several million euro flowing from the profits to be made by the joint venture out of the development of Crumlin and Ranelagh. However, the action of the Plaintiffs in registering the *lis pendens* over these two properties may well compromise these very developments. In other words, the Plaintiffs by their own actions are potentially frustrating or at least delaying the maximisation of returns from these two sites. This is profoundly illogical, particularly given the known predilection of the Irish property market to troughs as well as peaks. This signal example of cutting off your nose to spite your face supports my finding that, rather than being done for its proper statutory purpose, the registration of the *lis pendens* in respect of each of the sites was done solely to pressurise the Defendants into settling the claims of the Plaintiffs.

62. For all these reasons, I have come to the view that the registration of each *lis pendens* was done for an improper purpose. I therefore conclude that this step in the proceedings was not done *bona fide*, that the proceedings are therefore not in this respect being prosecuted *bona fide*, and that each *lis pendens* should now be vacated.

6. THE ALTERNATIVE ARGUMENT

63. As noted, the Defendants make an alternative claim that the *lites pendentes* should be vacated on the ground that the proceedings do not make a stateable case for an estate or interest in any of these lands. As I have decided the motion on another basis, I do not need to determine this alternative submission. I should note however, that it is one with which I have considerable sympathy. I will explain, briefly, why this is so;

64. In reality the dispute between the parties is about money, not the ownership of properties. The parties were never involved in an enterprise that had intended the holding of properties for any significant length of time. Indeed the essence of the joint venture alleged by the Plaintiffs is that properties would be sold, not held. It is ironic, at the very least, that should the Plaintiffs succeed in establishing an interest in Crumlin, Ranelagh and Blackrock at trial, this will have the effect of the O'Loughlin interests and Moran interests together indefinitely owning property which they cannot develop, given the level of bad blood between them. That is the polar opposite of the business scheme which the Plaintiffs plead the parties intended.

65. While not of central importance, it is also worth noting that as a matter of commercial reality, there appears to be no issue about the ability of the Defendants to pay damages to the Plaintiffs, should this claim for damages be successful. Ordinarily, therefore, one would expect that the Plaintiffs would content themselves with a claim for damages for

breach of contract or misrepresentation, rather than engage in this somewhat involved claim for an interest in the property.

66. The Plaintiffs have consciously, and on advice, not sought specific performance of the joint venture agreements. It is therefore irrelevant to them whether or not the properties at Ranelagh or Crumlin remained owned by any particular entity.
67. It is for the Plaintiff to show that the claims they make give rise to an estate or interest in any of the three properties. In that regard, it is of more than passing interest that the Plaintiffs themselves appear unsure as to how such an estate or interest has arisen
68. The Statement of Claim delivered a month after the *lis pendens* were registered is vague about why the claimed interest or estate has come about. The Plaintiff's written submissions, undated but delivered about a further month on, refer to only one authority on this point. This judgment is *Foskett v. McKeown* [2001] AC 102 . A quote from the judgment of Lord Millett is said by counsel in their submissions to "encapsulate" the Plaintiffs' claim to the land. However, *Foskett* is an authority on the effect of the improper use of trust monies. I am not immediately convinced that the monies which the Plaintiffs claims to be owed to them, and which have been allegedly used to purchase the three properties, are impressed with any trust.
69. As is clear from the judgment of Lord Browne-Wilkinson in *Foskett* , that case does not involve any question of resulting trusts. However, on the morning of the first day of the hearing, the 22nd June 2021, over two months after the registration of the *lites pendentes*, the Plaintiffs' case on the claim to an estate or interest shifted to one now significantly based on the creation of a resulting trust.
70. Even if the facts of this case gave rise to the presumption of a resulting trust such a presumption is one that can be rebutted. To take just one example; in this case the arrangements between the parties under the 2016 agreement involved ownership by a development vehicle of any relevant land. Ultimately ownership of that vehicle was in the hands of parties such as Mr. O'Loughlin.
71. However, ownership of the land was not. I am not convinced that this central part of the arrangements between the parties is in any way diluted by Clauses 3,4 and 5 of the 2016 agreement (as is submitted by Counsel for the Plaintiffs). According to the pleaded case Annesley was acquired while the 2016 agreements were in place. It would therefore seem to be the case that Annesley was acquired at a time when the parties had agreed that any land to which they contributed the purchase price (either directly or indirectly) would be held not by them individually (and not by either Plaintiff at all) but rather by the nominated company. Under those circumstances I suspect that if it came to it the Plaintiffs would have an uphill battle in showing in that one instance (and that is simply an example) that a resulting trust arose. However, I am not deciding the issue at this point in time.

7. SUBSIDIARY SUBMISSIONS

72. Finally, there are a number of adjectival matters. There is, for example, reference in the submissions, made orally but not in writing, by counsel for the Plaintiffs to the ability to trace into the properties. That was not elaborated upon with any real level of detail.
73. Secondly, in the first affidavit of Mr. O'Loughlin there is a strong assertion made that the reliefs sought by the Defendants in this motion should be refused on the grounds of material non-disclosure. That has not been followed through in any way, shape or form but nor has it been abandoned. I am satisfied that there is nothing in this point.
74. Neither of these arguments change in any way the decision I reached on this motion.

8. SUMMARY OF DECISION

75. For the reasons set out earlier in this judgment, I will make Orders vacating the *Lis Pendens* registered in respect of each of the three relevant properties, namely the Europa Site, Annesley and The Glebe.