

THE HIGH COURT

[2022] IEHC 483

[Record No. 2018/4987 P]

BETWEEN

CAROL FAY AND ANTHONY FAY

PLAINTIFFS

AND

PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY AND

TOM O'BRIEN

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 29th day of July 2022

Introduction

1. This judgment deals with the second defendant's application under s. 123 of the Land and Conveyancing Law Reform Act 2009 to vacate a *lis pendens* registered by the plaintiffs under s. 121 of the 2009 Act in respect of proceedings issued by them against the defendants. The underlying proceedings challenge the validity of the appointment by the first defendant of the second defendant as receiver over certain property that was mortgaged by the plaintiffs as security for loans made to them by Ulster Bank in 2007 and 2011. The properties are investment properties, one located in County Leitrim and the other in Dublin. Ostensibly, it is not in issue that the plaintiffs' loans and related security were transferred by Ulster Bank to the first defendant in 2016, although this is a matter to which I will briefly return. Nor is it

disputed that the loans in respect of which the security was offered are currently in arrears. Although the plaintiffs are not, and have not, resided in either of the properties, their son was apparently living in the County Leitrim property at the time of the second defendant's appointment as receiver.

2. In moving this application, the second defendant relied on two main grounds. The first is that the underlying proceedings do not make a claim to an estate or interest in land and, therefore, the *lis pendens* was improperly registered by the plaintiffs under s. 121. The second is to contend that the plaintiffs have been guilty of an unreasonable delay in prosecuting the underlying action. In this regard, the defendants point to the fact that at the time the motion was issued in September 2021, the proceedings had been in existence for a period of nearly three and a half years. Although the motion papers also raised an issue concerning the *bona fides* of the plaintiffs in prosecuting the underlying action, counsel, correctly in my view, did not pursue this line of argument at the hearing.

3. I will deal with each of these issues in turn but, before doing so, I propose to outline briefly the history of the interactions between the parties including as regards the underlying proceedings. I will also look at the statutory provisions under which this application is brought and the way in which the courts have approached the sometimes complex issues involved.

History of Interactions between the Parties

4. The underlying proceedings concern two mortgages entered into in 2007 and 2011, respectively, to support loans made by the Ulster Bank to the plaintiffs. The first of these mortgages is dated 30th May 2007 and relates to a property in County Leitrim. The second is dated 18th November 2011 and relates to a property – or

perhaps a number of adjoining properties – in Dublin. Both mortgages are in similar terms. Notably, under clause 8 of the mortgage deed, the provisions of ss. 17 and 20 of the Conveyancing Act 1881 are disapplied and, instead, it is provided that “...*the statutory power of sale and other powers shall be exercisable at any time after demand*”. Further, clause 11 provides that, at any time after the power of sale has become exercisable, “*the bank or any receiver appointed hereunder may enter and manage the mortgaged property*”. Under clause 12, any receiver appointed by the bank is deemed to be the agent of the mortgagors (i.e. the plaintiffs) and the plaintiffs are made solely responsible for the acts and defaults of any receiver and for his remuneration. Subsequent to the creation of these mortgages, the Ulster Bank registered them as charges on the respective folios.

5. On 19th December 2016, the Ulster Bank transferred a significant portion of its loan book, together with the related security, to the first defendant by way of a global deed of transfer. Consequently, the first defendant acquired the rights of the Ulster Bank in relation to the security documents executed by the plaintiffs. On affidavit the plaintiffs argued that the defendants had not proved that the first defendant was the owner of the original borrowings and asserted that they, i.e. the plaintiffs, were denying this fact. However, as was pointed out by the second defendant in reply, the plaintiffs’ proceedings expressly plead that the loans and securities connected with the properties were transferred by Ulster Bank to the first defendant. A fact pleaded by the plaintiffs against the defendants, and which is accepted by them is not one that requires to be proved for the purposes of this application, much less proved by the defendants against whom it has been pleaded. Counsel for the plaintiffs, correctly in my view, did not pursue this matter in oral argument.

6. Although the papers before the court do not identify either the sums borrowed by the plaintiffs nor the circumstances in which, or indeed when, the loans went into arrears, the exhibits suggest that, as of the end of 2020 (i.e. post-dating the appointment of the receiver), a significant six-figure sum remained owing by the plaintiffs on foot of these loans. On 14th December 2017, the first defendant purported to appoint the second defendant as receiver in respect of both properties. The deeds of appointment in each case state that the second defendant is to be appointed receiver over the assets charged by the security document and “*to enter upon and take possession of same*” and that he was entitled “*to exercise the powers conferred on him by the security document and by law*”. The plaintiffs take issue with the validity of the second defendant’s appointment because the counterpart to those instruments of appointment, confirmations of acceptance signed on the same date, were not signed by the second defendant but instead are signed by a Mr. Simon Coyle. In the context of this motion, the second defendant has sworn an affidavit in which he exhibits a general power of attorney, dated 12th December 2017, made by the second defendant under the Powers of Attorney Act 1996, under which he appointed Mr. Coyle as his attorney for a four-day period from 13th to 16th December 2017. Consequently, the second defendant asserts that Mr. Coyle was authorised to sign the instruments of appointment on his behalf, although I note that it is not specified on the document signed by Mr. Coyle that he did so as attorney for the second defendant, rather than in any personal capacity. The second defendant also argues that the appointment is not one which requires to be formally accepted so that a flaw in the confirmation of acceptance does not invalidate the appointment.

7. The papers before the court do not directly detail the course of the receiverships to date. However, it seems reasonably clear from the second defendant’s

affidavit that his intention is to sell the properties in order to discharge the monies secured thereon. Material is exhibited by the second plaintiff which indirectly shows that the second defendant corresponded with the occupants of the properties with a view to organising the payment of rent into a receivership account. It is unclear whether this was done in respect of the Dublin property, but the named tenant in the Leitrim property did not provide a copy of the lease as requested, nor pay the rent into the receivership account. The second defendant subsequently issued a notice to that tenant to vacate the property.

8. On an inspection subsequent to the expiration of that notice, the second defendant states that the property was found to be vacant, an inventory was made of its contents and the property was secured. This is disputed by the plaintiffs who assert that their son was one of the tenants of the Leitrim property, that no notice to vacate was served on him, that an agent of the second defendant unlawfully broke into the property, took possession of it and removed goods belonging to the plaintiffs' son to a value of €50,000. These allegations have been the subject of a complaint to the second defendant's professional body in 2018. The complaint was not upheld. They are also apparently the subject of legal proceedings separate to those currently before the court. The processing of the complaint and its outcome (including the decision of an independent reviewer made in October 2019) is not relevant to the matters which I have to determine on this application save that it is relied on by the plaintiffs to explain, in part, their delay in prosecuting the proceedings.

9. On 31st May 2018, the plaintiffs issued proceedings against the defendants. I will consider the contents of these proceedings below as they are relevant to the second defendant's argument that the proceedings do not make a claim to an estate or interest in land. On the same date, the plaintiffs, through their solicitor, applied to the

Central Office of the High Court to register a *lis pendens* in respect of the proceedings under s. 121 of the 2009 Act. In fact, two separate applications were made, one as against the first defendant and the other as against the second defendant, and the registrar has certified the registration of both in the Central Office on the same date. Interestingly, and as noted by Cregan J. in *Tola Capital Management LLC v. Linders* [2014] IEHC 324, the exhibited registrations under s. 121 do not identify or even refer to the properties affected by the *lis pendens*. Instead, the registration is by reference to the title and record number of the proceedings and the name and address of the defendants as the persons intended to be affected. In his affidavit, the second defendant indicates that the plaintiff then applied to the Property Registration Authority to register a *lis pendens* on the folio in respect of the Leitrim property. At the time the affidavit was sworn, that registration was still pending. The affidavit does not mention any application to the PRA in respect of the Dublin property as a result of which I have assumed that no such application was made.

10. Having been served with the proceedings, the defendants entered an appearance on 13th June 2018 and their solicitor immediately wrote to the plaintiffs' solicitor seeking delivery of a statement of claim. That request was repeated on 5th July and a motion was threatened in the event that the statement of claim was not received within 21 days. A motion seeking to strike out the plaintiffs' claim for want of prosecution was issued on 31st July 2018 returnable for a date in October. On 22nd October 2018, the High Court, Barniville J., allowed a further two weeks for the delivery of the statement of claim. In fact, the statement of claim was not delivered within this extended two-week period and was not filed until 5th December 2018. The defendants have not yet filed a defence, so to date the statement of claim is the last pleading filed in this case.

11. There continued to be some limited interaction between the parties in the period that followed. The plaintiffs' complaint to the second defendant's professional body was live between August 2018 and October 2019 although, as previously noted, the contents of that complaint are not directly relevant to either the proceedings generally nor to this application. The second plaintiff has asserted that there was extensive correspondence between the parties' respective solicitors but very little of that correspondence is in evidence before the court.

12. The evidence before the court suggests that matters remained largely in abeyance until 17th February 2021 when the defendants' solicitor wrote to the plaintiffs' solicitor noting the registration of the *lis pendens*, stating that there was no valid basis for a *lis pendens* as the proceedings do not concern any claim for an estate or interest in land, and asserting that the purpose of the *lis pendens* was to frustrate the defendants' efforts to bring the properties forward for sale. The defendants' solicitor requested written confirmation that the plaintiffs would arrange for the cancellation of the *lis pendens*. Needless to say this confirmation was not forthcoming. There then appears to have been some exchanges between the parties culminating in an open offer by way of plaintiffs' solicitor's letter of 10th May 2021 proposing terms upon which the plaintiffs believed that the dispute between the parties might be resolved. Details of these terms are not relevant to the issues I have to decide. The second plaintiff states that no reply was received from the defendants to this offer. Instead on 14th September 2021, this motion was issued.

Registration of *Lis Pendens* – Statutory Position

13. It is helpful to understand the historical origins of the registration of *lis pendens* in order to appreciate the purpose served by the statutory provisions which

govern their registration today. The Latin term *lis pendens* means simply that there is litigation pending but it is now generally understood as referring to the formal notice given of the existence of an action affecting land through registration, in Ireland, in the Central Office of the High Court. The significance of the term originally derived from the common law principle that, once proceedings were issued relating to land, any person subsequently dealing with the land, whether as a purchaser, mortgagee or otherwise, did so subject to the rights of the parties to the litigation as might ultimately be determined by the courts regardless of whether they had actual notice of the litigation. Apparently delays in the Chancery list in the seventeenth and eighteenth centuries meant that such litigation could often be pending for 20 or 30 years during which there was obviously potential for third parties to acquire an interest in the lands in question. Such a purchaser would have no right to join in the extant litigation, notwithstanding that its outcome could be determinative of their own interest in the land and equally had no way of ensuring that the rights upon which their rights depended were adequately asserted or defended.

14. The introduction of a statutory system under which pending suits affecting land were registerable in the High Court and a rule that a purchaser would not be bound by the outcome of the litigation unless either they had express notice of the litigation or the action had been so registered was intended to protect such purchasers. The system of registration originally introduced in Ireland under s. 10 of the Judgments (Ireland) Act 1844 remained, with some modification, the legal basis for the registration of *lis pendens* until 2009. One significant modification made by s. 21 of the Judgments Registry (Ireland) Act 1871 was to allow the vacation of a *lis pendens* by court order. Nonetheless, there remained some doubt as to whether this

could be done without the consent of the party who had registered it until this was clarified by the decision of the Supreme Court in *Flynn v. Buckley* [1980] IR 423.

15. It is, I think, useful to bear in mind that the person the registration of a *lis pendens* is intended to benefit is not either party to the litigation but a third party who might otherwise be unaware that the rights of the party from whom they are acquiring an interest in land are subject to challenge. Although the registration of a *lis pendens* is often characterised – and indeed has been so characterised in this case – as frustrating the ability of a litigant (usually the defendant) to deal with the land, strictly speaking, the registration of a *lis pendens, per se*, does not preclude any dealing in the land in respect of which it was registered. Rather, it is the understandable unwillingness of a purchaser to take the risk that the person from whom they are purchasing might ultimately be held not to have had the right to sell which creates the chilling effect of a *lis pendens*. Thus, although the legal effect of registering a *lis pendens* is to fix a purchaser with notice of pending litigation affecting land, the practical effect is to limit the landowner's ability to sell, mortgage or otherwise dispose of the lands which are the subject of the litigation.

16. The provisions governing *lis pendens* in Ireland are now contained in Part 12 of the Land and Conveyancing Law Reform Act 2009. The fundamental provision, i.e. that which protects purchasers, is s. 125. This provides that a *lis pendens* does not bind a purchaser of unregistered land without actual knowledge of it unless it has been registered in the Central Office of the High Court within five years before the making of the conveyance to the purchaser. The reference to unregistered land is notable as the parallel system of registering a *lis pendens* as a burden on the folio of registered land under the Registration of Title Act 1964 continues. The usual practice in the case

of registered land is for the *lis pendens* to be registered both in the Central Office and by the Property Registration Authority on the folio.

17. The key sections for the purposes of this case are s. 121 which deals with the register of *lis pendens* maintained by the Central Office and s. 123 which deals with the power of the court to vacate a *lis pendens*. I propose to set out both of these provisions in full save for s. 121(4) which is a transitional provision dealing with *lis pendens* registered prior to the coming into force of the 2009 Act and is of no relevance here. Section 121(1) provides that: -

- “121. (1) *A register of lis pendens affecting land shall be maintained in the prescribed manner in the Central Office of the High Court.*
- (2) *The following may be registered as a lis pendens:*
- (a) *any action in the Circuit Court or the High Court in which a claim is made to an estate or interest in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action; and*
- (b) *any proceedings to have a conveyance of an estate or interest in land declared void.*
- (3) *Such particulars as may be prescribed shall be entered in the register.*

123. *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.”*

Section 121(4) provides that a *lis pendens* registered prior to the coming into force of the 2009 Act may only be vacated on a ground which would have been applicable to a *lis pendens* registered under s. 10 of the Judgments (Ireland) Act 1844..

18. The application made by the second defendant focuses on the meaning and application of s. 121(2)(a) and s. 123(b)(ii). Much of the argument concerned the meaning of a claim to “*an estate or interest in land*” for the purposes of s. 121(2)(a). These terms are not defined in the general interpretation section of the 2009 Act, which is s. 3, but are instead the subject of more detailed provision in ss. 10 and 11 of the Act. One of the principal objects of the 2009 Act was the updating and reform of Irish property law which included the abolition of feudal tenure (see s. 9(2)). As a result, the consequent definition and treatment of estates and interests in land in the immediately following sections, ss. 10 and 11, focus somewhat on the continuation, subject to the abolition of feudal tenure, of the existing concepts of an estate in land subject to the modifications required to deal with the removal of tenurial incidents from such estates. In a similar vein s. 12 prohibits the creation of a fee farm grant, s. 13 prohibits the creation of a fee tail of any kind and s. 14 prohibits the grant of a lease for a life or lives. Section 11(1) provides that the only legal estates in land

which can be created or disposed of are the freehold and leasehold estates specified by the section. Section 11(4) specifies in eleven subparagraphs the only legal interests in land which may be created or disposed of. These interests do not include or make any express reference to the power of sale of a receiver over land. However, s. 11(6) is potentially relevant in that it provides the estates and interests other than those referred to in subs. (1) to(4) take effect as equitable interest only and subs. (7) provides that nothing in the Act is to affect judicial recognition of an equitable interest. Thus, in general terms, the phrase “*an estate or interest in land*” insofar as it relates to a legal estate or interest must relate to one of those specified in s. 11(1) to (4) of the 2009 Act. The range of estates or interest that may exist in equity is broader and is, in effect, unrestricted save insofar as the Act expressly prohibits the creation of certain types of estates or interests in law or in equity.

The Plaintiffs’ Proceedings

19. The plenary summons issued by the plaintiff seeks six substantive reliefs. These include declarations that the purported appointment by the first defendant of the second defendant as receiver over each of the properties is invalid, void and of no legal effect; that the plaintiffs are registered owners of each of the properties; an order setting aside the purported appointment of the second defendant as receiver of the properties and damages for trespass, negligence, breach of contract and/or tortious interference with contractual relations.

20. The claim made in the statement of claim is somewhat different and, perhaps significantly, the relief which sought confirmation of the plaintiffs’ title as registered owners of the properties is omitted from the relief sought in the statement of claim. The plaintiffs challenge the validity of the appointment of the second defendant as

receiver on the basis that the instrument of appointment does not evidence, record or acknowledge the appointment or acceptance by the second defendant of the appointment as it was signed by Mr. Coyle. There are then a number of pleas made in respect of correspondence received by the plaintiffs from Ulster Bank on 23rd July 2018 in which it is admitted that the plaintiffs had been overcharged on their loan. The level of admitted overcharging had not been determined and, at the time the proceedings were instituted, was not expected to be determined until 2019. At para. 8 of the statement of claim, it is expressly pleaded that because of the said overcharging, neither the original loan holder nor the first defendant had any legal right to call in the loans by way of demand or, on the basis of such allegedly deficient demand, to enforce the securities connected to the loans. Consequently, it is alleged that the appointment of the receiver by the first defendant was void and invalid *ab initio*. It is alleged that because of such wrongful appointment, the second defendant is a trespasser upon the plaintiffs' properties and that the defendants have wrongfully converted the properties to their own use and are exercising possession inconsistent with the plaintiffs' right of possession over the properties. Damages are claimed as a result of these matters.

21. No defence has yet been filed by the defendants and, consequently, none of the pleas made by the plaintiffs in their statement of claim have been formally denied. I previously noted that the second defendant exhibited a power of attorney apparently executed by him in favour of Mr. Coyle and covering the period during which his appointment as receiver was accepted and confirmed. In circumstances where the second defendant did not pursue any argument as to the *bona fides* of the prosecution by the plaintiffs of their claim, I do not think I need to address the extent to which the claims made by the plaintiffs are ones which appear to have substance or not. The

issue is not the substance but, rather, the nature of those claims. Put simply, the second defendant asserts that the plaintiffs' pleadings do not comprise an action in which a claim is made to an estate or interest in land - and they clearly do not comprise proceedings to have a conveyance of an estate or interest in land declared void.

22. In the second defendant's view, a claim that the receiver has been invalidly appointed is not amenable to the registration of a *lis pendens*. It is contended that, if there were no *lis pendens* in issue and the property was sold by the receiver to a third party, even if the plaintiffs were subsequently successful in their proceedings, it would not have any effect on the title which had been validly acquired by the third party through the sale by the receiver. According to the defendants this is because under the mortgage deeds the receiver, although appointed by the lender, acts as agents of the borrowers and, thus, when the receiver offers the property for sale, he is essentially offering the plaintiffs title for sale.

23. The principal authority relied on by the second defendant in support of this argument is the decision of Clarke J. in *Moorview Developments Ltd v. First Active Plc* [2011] 1 IR 117 ("*Moorview*"). This judgment is one of a number delivered by him in the context of a long running and complex receivership over a group of companies. Counsel for the plaintiffs, who appeared in the *Moorview* litigation, complains that the judgment does not set out sufficient background detail to enable him to illustrate the points of distinction between that case and this. I am not convinced that this criticism is fair, especially since in the opening paragraph of the *Moorview* judgment, Clarke J. refers the reader to his earlier and very detailed judgment at [2009] IEHC 214 which he refers to as "*the main judgment*". He notes that the underlying proceedings in respect of which the *lis pendens* was registered had

been dismissed by him in the main proceedings, but that there was still a pending appeal to the Supreme Court. Further, he acknowledged that as long as the appeal was pending, there was still a *lis* in existence between the parties. The point on which counsel wishes to rely, namely that there was no stay placed on the dismissal of the proceedings, seems to me to be *nihil ad rem*. The existence of a stay would stall the actual dismissal of the proceedings until the appeal had been determined, but in circumstances where Clarke J. acknowledged that an appeal against this dismissal maintained in existence the *lis* between the parties, the fact the proceedings had been dismissed *simpliciter* and no stay granted would seem to me to make no difference to the application of the relevant legal principles. The real issue was how those principles should be applied in proceedings taken against a receiver.

24. Counsel on behalf of the receiver relied on paras. 15 and 16 of the judgment to make the argument that, as the plaintiffs' proceedings do not make a claim to a proprietary estate or interest in land as against either defendant, they do not justify the registration of a *lis* under s. 121. The relevant paragraphs are as follows: -

“15. *That quote seems to me to express the fundamental proposition. The issue between the parties must relate to the ownership of some interest in land. Where there is more than one defendant in the proceedings, then in order that a lis pendens be validly registered in respect of a particular defendant, the issues which arise on the pleadings and which are being bona fide pursued by the plaintiff insofar as the relevant defendant is concerned, must relate to the ownership of some interest in land.*

16. *In those circumstances, it does not seem to me that the position of a receiver or agent is captured. A receiver does not own any interest in lands which are properly described as being owned by the company to which the receiver has been appointed. The lands remain owned by the company (in receivership). The fact that the receiver may well be entitled, provided that all necessary formalities are complied with, to execute a deed of transfer of a relevant interest in property in the name of the company does not alter that fact. It is the company which transfers the property. The receiver is simply entitled, by virtue of the debenture in favour of the relevant lender, and his appointment, to cause the company to effect the transfer. There is a real sense in which the receiver's position in this regard is no different than that of the directors of a solvent company who are, of course, entitled to act on behalf of the company, to sell its property, and, within the articles of association and the law generally, to fix the company seal to any relevant deed of assurance. The fact that, in different circumstances, it may be the receiver rather than the directors who can cause the company to execute a deed of assurance, does not make the receiver any more a person with an interest in the land owned by the company than the directors were persons with an interest in the land owned by the company."*

The key passage is clearly that at the beginning of paragraph 16 to the effect that, although a receiver may be legally entitled to execute a transfer of land owned by a company, this does not alter the fact that the receiver does not own any interest in the lands transferred by him.

25. However, it may be significant to note Clarke J.'s description of the receiver's entitlement to transfer the property as arising from both the debenture in favour of the lender and the receiver's appointment. As I understand the *Moorview* litigation, the proceedings against the second defendant were dismissed on the basis of a non-suit – i.e. a failure on the part of the plaintiff companies to satisfy the evidential burden upon them to make out a *prima facie* case against the defendants. The validity of the appointment of the receiver does not appear to have been in issue save insofar as it was asserted that the lender had invoked its security for an improper purpose. That in turn was based on an allegation of fraud which was, apparently, abandoned. Therefore, it is certainly arguable that the very clear statement made by Clarke J. in *Moorview* to the effect that the receiver has no interest in lands owned by a company to which he has been appointed but is entitled to effect a transfer of those lands on behalf of the company does not hold good if the validity of the receiver's appointment is put in issue. A receiver who has not been validly appointed surely cannot have the right to effect such a transfer.

26. Counsel on behalf of the plaintiffs sought to distinguish *Moorview* from the present case on three grounds. Firstly, it was contended that the fact that there was no stay on the judgment dismissing the underlying action is material. For the reasons already discussed above, I do not agree with this proposition in circumstances where, as Clarke J. pointed out, the *lis* between the parties continued to exist because of the appeal regardless of whether the order appealed from had been stayed.

27. Secondly, it is contended that there is a material difference between a corporate receivership, such as was an issue in *Moorview*, and circumstances where a receiver is appointed over a particular property owned by natural persons such as the plaintiffs. Counsel described this as being the difference between a charge over all of

the company's assets and a personal receivership over a specific asset. In my view, this represents the distinction between a floating charge and a fixed charge and, of course, the fact that a floating charge can only be created over a company's assets and not over the property of an individual. Counsel points to the comments made by Clarke J. at para. 17 of his judgment to the effect that, insofar as a plaintiff may wish to contest the ownership of land held by a company in receivership, then it is the company in receivership which is the proper defendant to that aspect of the proceedings rather than the receiver personally. Leaving aside the extent to which a company can sue itself in receivership, it is beyond doubt that an individual cannot sue themselves simply because a receiver has been appointed over property which is now the subject of dispute between that person and the receiver. Thus, the remedy identified by Clarke J. at para. 17 of the *Moorview* judgment is one which could never be available to the plaintiffs in this case. In my view, this is potentially significant as it would mean that applying *Moorview* strictly to this case because of the common factor of a receivership could leave the plaintiffs without any effective remedy.

28. Thirdly, counsel is critical of the fact that the judgment does not set out a summary of the plaintiffs' case which, he stated, obviously did not relate to an estate or interest in land. As discussed above, this is correct insofar as it goes, but the main judgment contains a detailed account of the claim. In addition, the judgment in *Moorview* focuses on the extent to which the receiver had a sufficient interest in the land purportedly owned by the company to justify the registration of a *lis pendens*. As the *lis pendens* was vacated on that basis, the judgment simply does not deal with the question of whether the underlying proceedings themselves justified such registration. The issue may simply not have arisen because the *lis pendens* was registered in 2007, before the enactment of the 2009 Act. Section 10 of the 1844 Act

was framed differently to s.121 of the 2009 Act stating that no *lis pendens* would bind a purchaser etc. unless it had been registered and without specifying or restricting the type of action in respect of which a *lis pendens* could be registered.

29. More generally, counsel for the plaintiffs argued that the entitlement to register a *lis pendens* was not limited to a claim to ownership of land but included a claim to possession of land on the basis that the right to possession was an incident of ownership. In this context, counsel pointed to the fact that the plaintiffs were advancing a trespass action against the second defendant as receiver, the underlying rationale for which is that they have an interest in the property which is vested in possession, whereas the receiver does not. The receiver's claim to be entitled to possession of the property is dependent on the validity of his appointment which is impugned in the proceedings. Thus, the receiver's interest in the property, and by extension his right to sell the property, is, according to the plaintiffs, squarely placed in issue in the proceedings.

30. In response, counsel for the receiver described this argument as a clever one – perhaps intending to damn it with faint praise. He argued that the pleadings do not in fact put the receiver's title in issue, whether that title is established by possession of the property or otherwise. Again, he reverted to the *Moorview* principle that a receiver does not take an interest in the property but has a contractual right to sell the plaintiffs' interest and, consequently, does not have an interest in the property over which a *lis pendens* can be registered. Further, he asserted that a claim in trespass is not an action in respect of an estate or interest in land and that, in purporting to sell the property, the receiver is not asserting a claim of title to the property contrary to that of the plaintiffs. He is merely exercising his functions under the mortgage to sell the property on behalf of the plaintiffs.

31. I think it is fair to observe that not every claim in trespass will justify the registration of a *lis pendens* over the affected lands. A claim in trespass which arises out of the disputed exercise of an easement such as a right of way is not one with the capacity to affect the landowner's title to the property in question. This much was accepted by McGarry J. in *Calgary & Edmonton Land Co. Ltd v Dobinson* [1974] All E.R. 484 where he noted that not all actions relating to land (the specific example was a nuisance alleged to emanate from one party's land) could reasonably be taken as coming within the relevant statutory term, namely a "*pending land action*".

32. The specific circumstances of this case concern the disputed entitlement of the receiver to take possession of the land for the purpose of effecting a sale. If such a sale is effected, then the plaintiffs will be divested of their title to the land and all of their estate and interest in the lands. The outcome of the proceedings will determine whether the receiver is in a position to offer good title to the property to a third party. Consequently, I think that *Moorview* can be distinguished from the facts of this case mainly on the basis that the statement of principles set out by Clarke J. is predicated on the receiver having been validly appointed and the validity of the receiver's appointment lies at the heart of the plaintiffs' proceedings. If the receiver is not validly appointed, then his consequent right to sell the property on behalf of the plaintiffs simply cannot arise. Equally, Clarke J.'s observation that the plaintiff companies' remedy lay in suing the company in receivership can have no application to this case as the plaintiffs, being natural persons, cannot sue themselves in order to contest the receiver's entitlement to sell their property.

33. Any doubts I may have had on this issue have been allayed by an examination of some of the older authorities, most particularly the decision of Kenny J. in *Giles v. Brady* [1974] IR 462 and the earlier cases referred to in that judgment. It is, I think,

important to bear in mind that the statutory registration of *lis pendens* had its origin in the common law rule that a purchaser of property was bound by litigation affecting that property at the time of the purchase even where the purchaser was not a party to the litigation and had no notice thereof. In order to mitigate the harshness of this rule, Parliament intervened so that the registration of a *lis pendens* (coupled with an entitlement on the part of the public to search the register) was required to put a purchaser on formal notice of the pending litigation. The purchaser could then choose to take the land subject to the dispute or not. If a *lis pendens* was not registered then, in the absence of express notice, the purchaser was entitled to take the title offered unaffected by any claim in pending litigation.

34. *Giles v. Brady* itself has some similarities to this case. The underlying action was a claim for rescission of a contract for the sale of a public house premises and the return of a deposit which had been paid by the plaintiff. The defendants had agreed a sale of the premises to another purchaser who would not complete the sale as long as the plaintiffs' *lis pendens* remained registered on the property. The defendants applied to the High Court for an order that the *lis pendens* be vacated on the grounds, *inter alia*, that the plaintiff's proceedings – an action in contract for the return of the monies which had been paid by the plaintiff – did not affect the estate of the defendants so that the *lis pendens* should not have been registered. Although there was an issue as to whether the court had jurisdiction to vacate a *lis pendens* without the consent of the party who had registered it (a point not settled until the later Supreme Court decision in *Flynn v. Buckley* [1980] IR 423) on the assumption that the court had such jurisdiction, Kenny J. would in any event have declined to exercise it. His rationale was based on the fact that if the plaintiff succeeded in his action, he would have a purchaser's lien over the land in respect of the monies due to him, i.e. a

right capable of protection by the registration of a *lis pendens*. Interestingly, he also noted that the proceedings as drafted did not actually claim a purchaser's lien but anticipated that this might be done at a later stage.

35. In reaching this conclusion, Kenny J. looked at the evolution of the common law rule in respect of *lis pendens* giving rise to the subsequent statutory interventions. In describing the rule, he cited the observations of Sir William Grant MR in *Bishop of Winchester v. Paine* (1805) 11 Ves. 194 as to the effect of the rule: -

“Ordinarily, it is true, the decree of the court binds only the parties to the suit. But he, who purchases during the pendency of the suit, is bound by the decree, that may be made against the person, from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title, so acquired. As to them it is as if no such title existed. Otherwise, suits would be indeterminable:...The rule may sometimes operate with hardship upon those, who purchase without actual notice: yet general convenience requires its adoption...”

Kenny J. also noted the observations of the Lord Chancellor in *Gaskell v. Durdin* (1812) 2 Ball & B. 167 to the effect that *“any interest acquired in the subject matter of a suit pending the suit was so far considered as a nullity that it could not avail against the plaintiff's title”*. The rationale for the rule was explained by Lord Cranworth in *Bellamy v. Sabine* (1857) 1 De G. & J 566 as follows: -

“It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the

suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings.”

36. This analysis of the basis for the statutory system of formal registration of *lis pendens* begs the question as to what the position in this case would be if, as the receiver asserts, a *lis pendens* could not be validly registered. Can a third party take good title to the plaintiffs’ property from the receiver if it is ultimately established in the plaintiffs’ proceedings that the receiver was not validly appointed? Logic would suggest not. If the receiver is not validly appointed, then he has no legal right to purport to exercise powers which, in the event of a valid appointment, would otherwise be conferred upon him by the mortgage deed. The resulting difficulties for the third party purchaser might not be easily overcome by reliance on the fact that that person would no doubt be a *bona fide* purchaser for value without notice. It would represent a fundamental injustice to the plaintiffs and potentially a breach of the protection the Constitution affords to their property rights if the innocence of a potential purchaser could operate to divest them of their property because of the actions taken by a receiver shown not to have had any legal power or authority to act on their behalf.

37. In circumstances where the stated intention of the receiver is to sell the property in order to realise the first defendant’s security and, indeed, the object of this motion is to facilitate such sale, it seems to me that the plaintiffs’ proceedings which challenge the validity of the receiver’s appointment and seek damages for trespass by the receiver having taken possession of the property with a view to selling it must be characterised as an action making a claim to an estate or interest in land. The object of the proceedings is to ensure that the plaintiffs maintain their estate or interest in the

mortgaged property and to prevent its alienation by a person whom they claim has no legal right to sell their property. The fact that a receiver validly appointed under the mortgage deed would act on behalf of the plaintiffs as their agent is irrelevant to this scenario as the thrust of the plaintiffs' claim is that the receiver is not validly appointed.

38. For these reasons, I am satisfied that the *lis pendens* registered by the plaintiffs was validly registered pursuant to s. 121(2)(a) of the 2009 Act. In reaching this conclusion, I am conscious that the system of registration of *lis pendens* now contained in Part 12 of the 2009 Act is intended to protect, not the parties to these proceedings, but any third party purchaser who might purport to take title from the receiver in circumstances where it may be ultimately held that the receiver was not legally entitled to offer that title for sale.

Delay

39. The second ground upon which the receiver seeks to vacate the *lis pendens* is what the receiver characterises as an unreasonable delay on the part of the plaintiffs in prosecuting the action pursuant to s. 123(b)(ii). This aspect of the application raises a discrete issue which does not appear to have been previously considered in the decided case law. The issue is this: can a lengthy delay ostensibly due to the failure of the defendants to take a step required of them under the Rules of Court to advance the litigation be characterised as an unreasonable delay on the part of the plaintiffs in prosecuting their action by reason of the plaintiffs' failure to take positive steps to compel the defendants to act?

40. The resolution of this question is by no means clear cut for a number of reasons. Stepping back for a moment, unreasonable delay in the prosecution of an

action was introduced as a ground for vacating a *lis pendens* for the first time in the 2009 Act. Prior to that, the court's jurisdiction was limited to circumstances where the proceedings were not being prosecuted *bona fide* or where the *lis pendens* had not been properly registered in the first place. Whilst a failure to prosecute proceedings expeditiously having registered a *lis pendens* might well call into question the *bona fides* of the litigation, the two concepts – delay and *bona fides* – are not synonymous. The new jurisdiction under the 2009 Act has been considered by a number of judges, including myself in *Ellis v. Boley View* [2022] IEHC 103, but, most notably, by Cregan J. in *Tola Capital Management LLC v. Linders (No. 2)* [2014] IEHC 324, Haughton J. in *Togher Management Company Ltd v. Coolnaleen Developments Ltd (In Receivership)* [2014] IEHC 596 and Barniville J. in *Hurley Property ICAV v. Charleen* [2018] IEHC 611.

41. A consensus emerges from this case law as to a number of matters. Firstly, the jurisprudence recognises the chilling effect that the registration of a *lis pendens* can have on a defendant's ability to deal with the property and characterises the obligation on the plaintiff to prosecute proceedings without unreasonable delay as a legislative counterbalance to the otherwise untrammelled ability of a plaintiff to register a *lis pendens* under s. 121. Secondly, and because of this, the obligation to act expeditiously is accepted as being one which goes beyond the general obligation on litigants to comply with the time limits set down in the Rules of the Superior Courts. Barniville J. in *Hurley Properties v. Charleen* described this as “*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 the proceedings on expeditiously*”. Time taken which might otherwise be tolerated or excusable in the conduct of an action is not permissible by a party who has registered a *lis pendens*.

Haughton J. described such a plaintiff as being under an obligation to exercise “*expedition and vigour*” in prosecuting the proceedings.

42. Thirdly, notwithstanding the similarity between an application to vacate a *lis pendens* under s. 123 of the 2009 Act and an application to dismiss proceedings for delay in prosecuting them, the more general jurisprudence, as set out in the decision of the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 is not applicable in these circumstances. Under the *Primor* line of authority, a defendant seeking to strike out proceedings for delay must establish, firstly, that the delay was inordinate and inexcusable, and, secondly, that the balance of justice requires that the proceedings be struck out. This latter requirement brings into play a number of factors such as the potential prejudice to the defendant and, conversely, the potential injustice to a plaintiff if they are not permitted to pursue their action. In the case of an application under s. 123, the moving party does not have to establish prejudice nor that the delay is inordinate or inexcusable but merely that it has been unreasonable. Further, once it has been established that the delay is unreasonable, the court does not proceed to conduct a balancing exercise of the type required by *Primor*. Of course the requirement that the delay be “*unreasonable*” of itself imports an obligation on the part of the court to consider all of the circumstances, including any explanation offered by the plaintiff for the delay. There is a significant difference in consequence between the two “*delay*” jurisdictions: if a case is struck out under the *Primor* test, then that plaintiff loses the right entirely to proceed with their action. The vacation of a *lis pendens* under s. 123 does not prevent the plaintiff from proceeding with the action in respect of which the *lis pendens* has been registered – although the practical consequences of vacating a *lis pendens* may make some or all of the relief sought impossible to attain. No doubt as a result of these factors, it seems that the courts have

been prepared to exercise the jurisdiction to vacate a *lis pendens* under s. 123(b)(ii) following periods of delay which are less extensive than those which might be required to strike out proceedings under the *Primor* test.

43. In this case, there is no doubt that there has been an extensive delay between the registration of the *lis pendens* and the bringing of this application. Were it clear that that delay was exclusively, or even primarily, the fault of the plaintiffs, I would have no hesitation in making the order sought. The difficulty arises because, put simply, the plaintiffs are not the parties guilty of the delay complained of. The last action taken in the proceedings was the service by the plaintiffs of their statement of claim on 5th December 2018. Since that date, the defendants have been in default in the filing of a defence. Nonetheless, the defendants argue that there has been unreasonable delay on the part of the plaintiffs in the prosecution of these proceedings. They do so for two reasons. The first is the delay on the part of the plaintiffs over the summer and autumn of 2018 in filing a statement of claim subsequent to the defendants entering an appearance. The second is the assertion that, notwithstanding their own delay, the plaintiffs were nonetheless under an obligation to motion the defendants to file a defence and, thus, to move the proceedings on. Much of the debate on this issue has centred around the concepts of active and inactive delay, a matter to return I shall return.

44. The period of delay between the entry of the defendants' appearance and the filing of the plaintiffs' statement of claim is just under six months. The plaintiffs point out that, under the rules of court as they stood at the time, they could not have filed their statement of claim during the two months of the long vacation and, consequently, calculate the period of their default to be approximately ten weeks – using the expiration of the defendants' warning letter as the starting point for the

running of time against them. The argument about the long vacation would be more convincing if the statement of claim had been filed promptly in October when the Central Office re-opened for the filing of documents. Instead, there was a further delay of two months and, indeed, the statement of claim was not even filed within the two-week period allowed by Barniville J. on foot of the defendants' motion. Further, I do not find the plaintiffs' forensic approach to dissecting this period of time attractive as I note that the plaintiffs did not have to await the defendants calling for a statement of claim, much less the service of a warning letter, in order to file one. The plaintiffs' obligation to plead their case exists independently of steps taken by the defendants to force them to do so.

45. Were I to have been hearing this application in December 2018, it is possible, although by no means certain, that I would have regarded this six-month delay as sufficient to constitute an unreasonable delay on the part of the plaintiffs in prosecuting their proceedings. However, the application came on for hearing before me in April 2022, over three years after the plaintiffs had filed their statement of claim. Whilst I accept that a defendant does not have to establish prejudice in order to succeed on an application to vacate a *lis pendens* under s. 123(b)(ii), the making of an order even in cases of unreasonable delay is not automatic. The introductory part of s. 123 provides that “A court may make an order to vacate a *lis pendens*”, thus implying a measure of discretion as to whether the order should be made in any particular case. As previously noted, this does not amount to an obligation on the court to ascertain where the balance of justice might lie as between the competing interests of the plaintiffs and the defendants, but it does allow the court a residual power to refuse to make an order even where unreasonable delay has been established. In the circumstances of this case, where the second defendant did not

bring his application for over three years after that particular period of delay had terminated and been resolved by the filing of a statement of claim, I would not, in any event, be minded to vacate the *lis pendens* on the basis of that delay alone. Therefore, I do not have to formally determine whether that period of delay was, of itself, unreasonable – something which would likely have been difficult to do at this remove and in light of the far longer period of time which has elapsed since then.

46. The more difficult issue is whether the defendants can rely on the subsequent period of three years during which no step was taken in the proceedings when, technically speaking, the obligation to take the next step lay on the defendants. The defendants' argument in this regard is somewhat brazen. As the section places a particular and special onus on the plaintiffs to prosecute their action without unreasonable delay, it is contended that the plaintiffs ought to have moved to compel the defendants to act by requiring them to file a defence in order that the proceedings could be progressed.

47. Two matters were identified by the plaintiffs as justifying or explaining their delay during some or all of this period. These are the fact that they made a complaint to the second defendant's professional body and the fact that there was correspondence between the parties' solicitors which culminated in an offer of settlement by the plaintiffs. The defendants argue that neither of these matters should have impacted on the plaintiffs' ability to progress their proceedings. I accept that this is largely correct. Although the plaintiffs included a ground as regards the validity of the second defendant's appointment in the complaint they made to his professional body, from the outset the professional body took the view that this fell outside the scope of their jurisdiction and was something which could only be determined by a court. Thus, from an early stage, it was clear to the plaintiffs that the professional

body was only considering the conduct of the second defendant as regards their son's alleged tenancy of the property in County Leitrim and would not consider his authority to act *simpliciter*.

48. As regards the solicitors' correspondence culminating in an offer of settlement, whilst I have held in *Primor*-type cases that where the costs of litigation outweigh the value of the dispute, it may be reasonable for a party not to take steps in the legal proceedings which would add to the costs whilst settlement proposals are under consideration (see *Campbell v. Geraghty* [2022] IEHC 241), I do not think that this necessarily applies when one of the parties to the litigation has registered a *lis pendens*. In those circumstances, there is an independent obligation to prosecute the proceedings expeditiously because of the existence of the *lis pendens* which cannot be disregarded in the hope that, from the plaintiffs' perspective, a more cost-effective solution might be achieved.

49. That still leaves the question of whether the second defendant can rely on the plaintiffs' failure to challenge the defendants' delay as constituting unreasonable delay on the part of the plaintiffs in the prosecution of their action. The main basis on which the plaintiffs resisted this part of the application was to contend that the ongoing delay was not active delay on their part but was, rather, inactive delay due to the fact, as counsel put it, that the ball was in the defendants' court during all of that time. The distinction between the two types of delay is explained in the judgment of Clarke J. in *Rogers v. Michelin Tire Plc* [2005] IEHC 294 as follows: -

“While it has often been commented that litigation is a two way process (see for example the comments of Ó Dalaigh C.J. in Dowd v. Kerry County Council [1970] I.R. 27 at p. 42) it seems to me that the weight to be attached to any delay which, it might be said, should be attributed to the defendant is

significantly dependent on whether, on the one hand, the defendant is guilty of what I might call active delay in the sense of itself failing to take steps required of it in the course of the proceedings (such as replying to particulars, filing pleadings, dealing with discovery and the like), or, on the other hand is guilty of inactive delay. In circumstances such as the former it is necessary for the court to assess the extent to which the respective parties may have contributed to the length of time it has taken for the proceedings to reach the stage which they are at as of the hearing of the application to dismiss. The extent that it might be said that the ball was in the court of the defendant for a significant portion of that time is clearly a weighty factor to be taken into account in the assessment of the balance of justice.

While the authorities (such as Dunne v. ESB (Unreported, High Court, Laffoy J. 19th October, 1999) make it clear that inactivity on the part of a defendant (such as a failure, as here, to move the court to dismiss for want of prosecution while the action lies dormant for a significant period of time), is a factor it seems to me that it is a factor to which much less weight attaches. On the facts of this case there has been no material delay on the part of the defendant in the active sense of the word...”

50. The reference to *Dowd v. Kerry County Council* is interesting as it refers not to the *ratio* of that case (whether medical negligence proceedings should be dismissed for delay in circumstances where the plaintiffs’ solicitor had experienced considerable difficulty in securing necessary information from the defendants such as the identity of attending medical personnel and the plaintiffs’ medical records) but to an

observation made by a Ó Dalaigh C.J. at the end of his judgment. The full text of the relevant quotation is as follows: -

“First, in weighing the extent of one party’s delay, the Court should not leave out of account the inactivity of the other party... The adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will “get by” without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at.”

Whilst it remains the case that a court will look at the conduct of both parties when assessing the balance of justice in *Primor*-type cases, it is now well established that a defendant is not under a positive obligation to actively pursue a plaintiff to prosecute their proceedings in order to subsequently seek the dismissal of those proceedings on account of the plaintiff’s delay. Courts are now far more likely to accept the wisdom of letting the sleeping dog lie, especially if the alternative is to require a defendant to take positive steps to prompt action on the part of the plaintiff who might otherwise be happy to let the litigation lapse. Delay on the part of the defendant becomes particularly relevant where it can be construed as acquiescence on the part of the defendant in the plaintiff’s delay (*per para. (d)(iv) of the Primor principles*).

51. Although this distinction between active and inactive delay on the part of the party moving to have proceedings struck out on the basis of the other side’s delay is now a recognised feature of the jurisprudence (see also Noonan J. in *Doherty v. Ryan* [2015] IEHC 242), it is not without its critics. McKechnie J. in *Comcast INT. Holdings v. Minister for Public Enterprise* [2012] IESC 50 identified the distinction as one between circumstances where there was an undischarged obligation on the defendant’s part to do something as against the passage of time *simpliciter* or the “do

nothing” approach. He remained unconvinced that such a formal departmentalising of the defendant’s conduct was justified.

52. Even allowing for the scepticism of McKechnie J. as regards this distinction, there is a separate issue as to whether it is one which should be applied under s. 123(b)(ii) in respect of delay in proceedings where a *lis pendens* has been registered. As none of the decided cases under s. 123(b)(ii) seem to have concerned cases where the delay was largely down to inactivity on the part of the defendant, the authorities discussed above, although of assistance, are not determinative of the issue. The jurisprudence establishes that there is a higher onus on the plaintiff to prosecute proceedings in which a *lis pendens* has been registered than would normally apply. It does not offer guidance on the extent to which the plaintiff is obliged to pro-actively pursue the defendant in the event of the defendant’s default.

53. Both parties agree that the reasonableness or unreasonableness of the plaintiffs’ conduct is the key issue, but disagree as to how that should be applied in the circumstances of the case. The plaintiffs argue that the conduct of the defendants is a relevant factor in asking if the plaintiffs’ delay in prosecuting the action is unreasonable. The defendants argue that the text of the section makes the reasonableness requirement referable to the prosecution of the action, a matter solely within the responsibility of the plaintiffs as the moving party. Consequently, the defendants argue that the court should not look at the conduct of both parties equally and the greater emphasis should be placed on the conduct of the plaintiffs. It was contended that this construction of the section was consistent with the recognition that an added onus to prosecute proceedings expeditiously arose because of the ease with which a *lis pendens* could be registered.

54. It is correct to note, as the plaintiffs do, that the defendants have not offered any explanation to the court as to why they have failed to deliver a defence. However, as the focus of s. 123(b)(ii) is on the unreasonableness of the plaintiffs' failure, it is not clear that the reason for the defendants' failure is of crucial relevance; certainly, the lack of an explanation for the defendants' failure does not convert what would otherwise be an unreasonable delay on the part of the plaintiffs into a reasonable one. The defendants are correct in saying that s. 123 requires the court to scrutinise in greater detail the conduct of the plaintiff who has registered a *lis pendens* as opposed to that of the defendant against whose interest it has been registered. Equal weight is not attached to delay which may have been caused by the plaintiff and delay caused by the defendant. That said, there is, I think, a valid distinction to be drawn between active and inactive delay on the part of a plaintiff in these circumstances. The failure on the part of a plaintiff to be proactive in requiring the defendant to take steps is not, in my view, automatically an unreasonable delay on the part of the plaintiff in prosecuting the action. It may become an unreasonable delay where it persists over an extended period of time, or where no justification is offered by the plaintiff for its continued failure to act.

55. I appreciate that these are necessarily poorly defined benchmarks as the question of whether the period of time that has been allowed to elapse without intervention by the plaintiff is excessive and whether the excuses, if any, proffered are sufficient will vary depending on the facts of each case. It is important for the court to bear in mind when looking at those facts that it does so through the prism of a specific legislative obligation on one side as opposed, more generally, to the balance of justice as between the parties. Lastly, even if the delay in prosecuting the action is found to be unreasonable, the court has a residual discretion not to make the order sought.

However, the circumstances in which a plaintiff who has registered a *lis pendens* and unreasonably delayed thereafter in the prosecution of their proceedings will be allowed to retain the benefit of the *lis pendens* will necessarily be very limited and exceptional.

56. Turning to the facts of this case, the period of three years between the plaintiffs filing their statement of claim and issuing a motion against the defendants for judgment in default of defence is undoubtedly a lengthy one. In my view, it is arguably such an extensive delay that it would shift the plaintiffs' otherwise reasonable conduct in awaiting completion of the step the defendants were legally obliged to take into unreasonable conduct in failing to provoke the taking of that step. The excuses offered by the plaintiffs, namely the making a complaint to the second defendant's professional body and the exchange of correspondence leading to the making of an open offer by the plaintiffs to resolve the proceedings, are definitely very much at the lighter end of the spectrum of potentially justifiable explanations. They are matters which undoubtedly took some time and effort on the part of the plaintiffs but did not of themselves preclude the plaintiffs from being more proactive with their litigation. On the other hand, the court has no evidence as to whether the second defendant, as receiver, has been in receipt of rents from the property since the receivership commenced or whether any steps, apart from this motion, have actually been taken with a view to readying the property for sale. The amounts outstanding on foot of the loans is difficult to decipher from the papers and, as a result, the court cannot form a view as to the extent to which the receivership, in the absence of a sale, was capable of making meaningful inroads into that indebtedness. I mention these matters not because there is an obligation on the defendant to establish prejudice if the order is not made but because they may go to the plaintiffs' understanding of the

defendants' intentions as regards the proceedings and, by extension, to the reasonableness of the plaintiffs' actions. In the absence of such evidence I am reluctant to characterise the plaintiffs' failure to proactively chase the defendants as unreasonable.

57. On balance and with some hesitation, I have concluded that the delay on the part of the plaintiffs in bringing a motion against the defendants to compel the defendants to file a defence was not unreasonable in all of the circumstances. Procedurally speaking, not only did the obligation lie on the defendants to take the next step in the proceedings, but by taking that step the defendants could have ensured that the plaintiffs would then be required to act and to act expeditiously. The period of delay is lengthy and would certainly warrant the vacation of the *lis pendens* were it a period of active delay on the plaintiffs' part. Nonetheless, in all of the circumstances it was not so lengthy as to make it an unreasonable for the plaintiffs to assume that the defendants were not going to comply with the obligation on them to file a defence without positive intervention on the part of the plaintiffs.

58. Finally, even if I am incorrect my characterisation of the plaintiffs' delay as not being unreasonable, I would, in any event, decline to exercise the jurisdiction under s. 123(b)(ii) to vacate the *lis pendens* in the particular circumstances of this case. Without engaging in a balance of justice-type analysis, it is nonetheless distinctly unattractive for a court to be asked by a party who has been in default of its obligations for a period of three years to exercise a jurisdiction that is based on the other party's unreasonable delay during that period. The obligation on the defendants to act in circumstances where a *lis pendens* has been registered against them is by no means as onerous as the obligation on the plaintiffs who have registered it. Nonetheless, there is still some obligation on them to engage meaningfully with the

litigation. They cannot simply ascribe their own delay to the other party and then seek to rely on it as against the other party. Were I to have found that the plaintiffs' delay was unreasonable (and I acknowledge that this is very much a borderline case on that issue), I would not have hesitated to refuse the application on discretionary grounds.