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**THE COURT OF APPEAL
CIVIL**

Court of Appeal Record Number.: 2023/133 & 2023/136

**High Court Record Number: 2019/5471P
Neutral Citation Number [2024] IECA 59**

Haughton J.

Pilkington J.

Butler J.

BETWEEN/

DAVID LANGAN

PLAINTIFF/APPELLANT

- AND -

TAILTE ÉIREANN AND THOMAS LANGAN AND KIM LANGAN

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Butler delivered on the 13th day of March 2024

Introduction

1. This judgment deals with the appellant's appeal against orders made by the High Court (Roberts J. [2023] IEHC 276) striking out his claim against all of the respondents under both O. 19, r. 28 of the Rules of the Superior Court and the inherent jurisdiction of the High Court and vacating a *lis pendens* under s. 123 of the Land and Conveyancing Law Reform Act, 2009 (the 2009 Act).

2. The scope of this appeal is ultimately narrower than the High Court judgment from which it was taken because, in written submissions filed by the appellant, he conceded that he had erred in joining the first respondent as a respondent to the proceedings, accepted that it had a statutory duty to complete duly filed registrations, and acknowledged that Tailte Éireann would abide by any order made by the court in the appellant's favour should he be successful in the proceedings. These submissions suggested that Tailte Éireann should be a notice party to the proceedings rather than a respondent. This suggestion was not withdrawn until shortly before the hearing of the appeal when Tailte Éireann were let out of the proceedings. On this basis, the court directed that Tailte Éireann's costs of the appeal should be paid by the appellant.

3. Consequently, the issues on the appeal narrowed to two questions, namely whether the second and third respondents (whom for reasons that will become apparent I shall refer to as "the purchasers") had established that the appellant's pleadings did not disclose a reasonable cause of action or that his case was otherwise bound to fail and, secondly, whether the *lis pendens* registered by the appellant on issuing his proceedings should be vacated. There has been a considerable delay in the prosecution of these proceedings which were issued in 2009 and there have been several material changes since their issue. Therefore, it may be of assistance at the outset to set out the history of this matter and of the case as pleaded before looking at how the issues were treated by the trial judge. It is notable that a number of other sets of proceedings have been brought by or involving the appellant and concerning the same property and these will be referenced where relevant.

Factual Background

4. The property in issue is a site upon which a dwelling house previously stood in a residential street in Rush, County Dublin. It appears that the house (which may have been

derelict or semi-derelict) was demolished at some point during the events I am about to describe in circumstances which are unclear from the papers, but which are not material to the issues I must decide. The property was purchased by the appellant in 2006 and he was registered as the full owner. The purchase was financed with a loan from ACC Bank Plc (“ACC”). The plaintiff executed a deed of mortgage/charge over the property in favour of ACC which was registered as a charge on the folio. It seems (and has been accepted by the appellant in related proceedings) that repayments on the loan were not made in accordance with the terms of the loan agreement as a result of which ACC demanded repayment of the outstanding amounts in February 2014. It is not suggested that the amounts due have been repaid since that date nor that the appellant is or was at any material time in a position to repay them.

5. On 23rd February, 2016 ACC appointed a receiver over the appellant’s assets referred to and comprised in the deed of mortgage/charge. The appellant issued proceedings in October 2017 (2017/8523P) against the receiver and ACC but those proceedings were never served. Instead, it appears that with the assistance of a third party the appellant took action on the ground as it were, to frustrate the attempts of the receiver to sell the property. This led to the institution of proceedings by the receiver in June 2018 (2018/5913P) seeking injunctive relief to restrain the appellant and the third party assisting him from obstructing the receiver in his attempts to sell the property (“the 2018 proceedings”). Interlocutory orders were granted by the High Court as a result of which the receiver was able to place the property for sale by way of public auction. This auction took place on 24th October, 2018 and the second and third respondents were the successful bidders, entering into a contract to purchase the property on that date. That sale was completed on 16th April, 2019. Subsequent to the completion of the sale, the purchasers applied to the Property Registration Authority on 18th April, 2019 to be registered as owners of the property on foot of this transfer. [Note

that the PRA was dissolved and Tailte Éireann established in its place by the Tailte Éireann Act, 2022 which was commenced on 20th February, 2023 (S.I. 58/2023). An order was made by Roberts J. amending the title to the proceedings to reflect this change on 18th May, 2023. I will refer to the relevant registration authority as Tailte Éireann in the balance of this judgment but acknowledge that for much of the material time the relevant functions were being exercised by the PRA. Nothing turns on this.]

6. At this stage I might pause to note two things. The first is that in the 2018 proceedings Allen J. observed at para. 38 of his judgment ([2019] IEHC 651) that the practical effect of the interlocutory orders was to put the appellant out of possession of the property and, as a corollary, it follows that the receiver had possession of the property from at least that date. The second is that at some point ACC sold its interest in the appellant's loan and related security to Cooperative Rabobank UA ("Rabobank") which registered the transfer of the charge on the folio on 5th February, 2019. As it happens, it appears that Rabobank have subsequently transferred their interest to another entity. Nothing turns on these transfers as regards the issues I have to decide, nor on the related novation of the appointment of the receiver from ACC to Rabobank. Nonetheless in light of these changes I will henceforth refer to both ACC and Rabobank as "the mortgagee".

7. The receiver's 2018 proceedings were heard before the High Court between the 28th and 31st May 2019 and judgment was reserved. The proceedings were defended by the appellant and the third party assisting him on the basis that the receiver had not been validly appointed. Although the property had been sold by the time the substantive action came on for hearing, Allen J. refused to allow the receiver to discontinue the proceedings as the effect of so doing would have been to dissolve the undertaking given by him in the context of the interlocutory orders without a determination as to whether he had been validly appointed. The main argument advanced by the appellant was based on the distinction between

appointment as a “*receiver*” and as a “*receiver and manager*” and whether the appointment as receiver entitled the plaintiff in those proceedings to exercise the powers under the deed of charge conferred on “*receivers and managers*”. This issue had been accepted by McDonald J. in *McCarthy v Moroney* [2018] IEHC 379 as raising a sufficiently strong argument to disentitle a receiver to injunctive relief which would have facilitated his taking possession of the property in issue. The issue had also been considered by the Supreme Court, again in the context of an interlocutory application, in *Charleton v Scriven* [2019] IESC 28 but had not been determined in circumstances where the court was able to deal with the appeal before it on other grounds. Thus, the issue fell to be determined substantively for the first time by Allen J. In a judgment delivered on 1st October, 2019 he held that the receiver had been validly appointed and was invested with the powers of a receiver and manager under the deed. The appellant appealed this decision but failed to turn up to prosecute his appeal which was duly struck out by the Court of Appeal on 18th March, 2021.

8. Whilst judgment was pending in the 2018 proceedings the appellant issued these proceedings on 10th July, 2019 and on 12th July, 2019 he registered a *lis pendens* over the property based on the existence of the proceedings. The *lis pendens* was also registered in the Central Office of the High Court. The appellant may have hoped that the appointment of the receiver would be held to have been invalid in the 2018 proceedings which, in turn, might have placed him in a stronger position to argue that the taking of possession of the property by the receiver, its sale to the purchasers and any subsequent registration of their title were consequently invalid. The fact that the validity of the receiver’s appointment was upheld necessarily altered the landscape within which the appellant chose to continue with the prosecution of these proceedings.

9. Although the registration of the *lis pendens* impacted most directly on the purchasers who were at the same time seeking to register their title, the appellant only served the

proceedings on Tailte Éireann. The purchasers became aware of the existence of the proceedings through correspondence with Tailte Éireann as a result of which the existence of the *lis pendens* was brought to their attention. Notably, the *lis pendens* had not been registered until after the sale to them had been completed. On 18th February, 2020 the purchasers' solicitor wrote to the appellants seeking service of the proceedings. Despite this correspondence, service was not effected until 3rd July, 2020, just days before the plenary summons would have lapsed under O. 8, r. 1.

10. The purchasers' solicitor entered an appearance promptly on 23rd July, 2020 and on the same date sought service of a statement of claim. That was not forthcoming and on 23rd June, 2021 the purchasers brought a motion seeking to have the proceedings struck out under O. 19, r. 28 or under the court's inherent jurisdiction; to have proceedings dismissed for want of prosecution; to have the *lis pendens* vacated and an Issac Wunder order made against the appellant (restraining him from instituting further proceedings without leave of the High Court). It does not appear from the High Court judgment that the application to strike out the proceedings for want of prosecution was pursued separately to the question of delay warranting vacation of the *lis pendens* under s. 123 of the 2009 Act, nor was it pursued separately on this appeal. The High Court refused an Issac Wunder order and no appeal was taken by the respondents against that part of the order.

11. Separately, Tailte Éireann issued a motion to similar effect on 28 July, 2021. A statement of claim was delivered on 8th September, 2021. Tailte Éireann filed a defence to the proceedings in November 2021 and the purchasers did likewise in January 2022.

Pleadings

12. The plenary summons issued by the appellant seeks 22 reliefs of which 13 are expressly directed at Tailte Éireann and sought to restrain the processing of the purchasers'

application for registration of their title or making any change in ownership of the relevant folio, either generally or pending judgment being delivered by Allen J. in the 2018 proceedings. As the appellant now accepts that Tailte Éireann is not a proper party to the proceedings, all of these reliefs necessarily fail.

13. The appellant also sought a series of reliefs directed at precluding the purchasers from entering into a contract of sale for the property or prohibiting the closing of such sale. Again, most of those reliefs are expressed to be pending the delivery of judgment in the 2018 proceedings. As the purchasers had not just entered into a contract but had completed the sale before the proceedings were issued, these reliefs were necessarily moot from the outset. Apart from ancillary relief such as costs, that left 4 of the original 22 reliefs extant after the delivery of judgment by Allen J. These sought an order (presumably declaratory in nature) that the appellant was the beneficial owner of the property, a declaration that the purchasers had “*deliberately and intentionally lodged fraudulent documents*” with Tailte Éireann to “*facilitate an illegal and fraudulent transfer of the property*”, and an order setting aside the contract of sale of the property as “*null, void, fraudulent and illegal, and damages for slander of title.*”

14. As might be expected given both the contents of Allen J.’s judgment and the passage of time, there was a significant shift in the plaintiff’s pleaded case when the statement of claim was served over two years later in September 2021. A number of pleas are made regarding notice allegedly given to the auctioneer who had carriage of the sale or matters of which the auctioneer had or ought to have had knowledge. These largely relate to the fact that no “*order had been made conferring possession of the property on either the receiver or the mortgagee and that the sale was taking place without the appellant’s consent.*” The auctioneer is not a party to the proceedings.

15. There is also a series of pleas invoking the evidence given by the receiver to the High Court in the 2018 proceedings, apparently with a view to establishing that the receiver did not have “*legal possession*” of the property, that he had not formally transferred possession to the mortgagee and, thus, that the mortgagee was not a mortgagee in possession for the purpose of transferring title to the purchasers. Although the receiver is not a party to the proceedings, it would seem the purpose of these pleas is to put in issue the title the receiver or the mortgagee was capable of passing and thus which the purchasers acquired.

16. The pleas directed at the purchasers commence at para. 17 of the statement of claim. Some of these do not amount to pleas in the legal sense but call on the purchasers to put their title and entitlement to be registered as owners of the property on affidavit. Insofar as a case is pleaded against the purchasers it amounts to contending that in the circumstances legal title to the property could not have been validly transferred to them.

17. In order to understand the granular detail of the appellant’s case it is necessary to refer to the evidence given by the receiver in the 2018 proceedings. Extracts of the transcript of that evidence were exhibited in the affidavits on the motion. The receiver’s evidence was that he was in possession of the property since circa. 2017 (and as noted by Allen J. this was certainly so from the making of the interlocutory orders in 2018). He put the property on the market pursuant to the power of sale conferred upon him as receiver under the terms of the deed of mortgage/charge. Relevant portions of this deed are set out at para. 42 of Allen J.’s judgment and include, at Clause 9.4.1, a power to take immediate possession of the secured asset and, at 9.4.2, under the heading “*Deal with Secured Assets*” a power to “*sell, transfer, assign et cetera and otherwise dispose of or realise the secured assets*”. However, the receiver described the “*mechanism to close the sale*” as being the secured lender (i.e., the mortgagee) “*stepping in to close the sale out*” at the very end and selling as mortgagee in possession. The object of this mechanism was to overreach the judgment mortgages

registered on the folio and to maximise the return. The receiver stated that he “*offered up*” possession to the mortgagee but acknowledged that he had not signed any deed transferring possession to the mortgagee. He acted on legal advice throughout the sale and did not accept that a court order was necessary to transfer possession in the circumstances. The relevant portion of the deed of charge dealing with the powers of a mortgagee in possession are set out at para. 45 of Allen J.’s judgment and, under Clause 12.2, these powers are the same as those conferred upon a receiver and thus include a power of sale.

18. The gravamen of the appellant’s case is that, in the absence of consent from the registered owner, the only way a mortgagee could lawfully have acquired possession of registered land was through a court order under s. 62(7) of the Registration of Title Act, 1964 (“the 1964 Act”). It is common case that no such order was applied for nor granted. As a result, the appellant contends that the procedure through which the receiver placed the property for sale and then transferred possession to the mortgagee to facilitate a sale by the mortgagee in possession was an *ad hoc* and fraudulent process designed to get around the requirements of s. 62(7) and to unlawfully deprive him of his property rights. The pleadings go so far as to suggest at para. 18 that, if the purchasers have been victims of this “*unlawful ad hoc fraudulent process*”, they might seek redress elsewhere. Much emphasis is placed on the fact that the purchasers “*had the benefit of legal advice before entering into this unlawful process*” and (at para. 24) that it should have been “*blatantly obvious*” to the purchaser’s legal advisers that the contract was unlawful as the receiver, appointed as the agent of the borrowers, signed the contract of sale as agent of the mortgagee. At para. 19 it is pleaded that the purchasers should have withdrawn from the sale “*and they were put on notice of same by the plaintiff on several occasions*”.

19. The relief sought in the statement of claim is materially different to that sought in the plenary summons. There is only one relief directed at restraining Tailte Éireann from

registering the purchasers' title until "*there exists a court order for possession*" pursuant to s.62(7), which, in another declaratory relief, is characterised by the appellant as the due process to which he is entitled before he "*can be deprived of his property*". The balance of the relief seeks damages for slander of title, breach of the plaintiff's constitutional right to property, negligence and trespass and also a declaration that the appellant is entitled to be recognised as the full legal owner of the property.

20. I do not propose to consider the defence filed on behalf of Tailte Éireann as that body has now been released from the proceedings. The defence filed on behalf of the purchasers makes three preliminary points. These are firstly that the proceedings do not disclose a stateable cause of action against them; secondly that the validity of the sale at public auction was the subject of other proceedings (presumably the 2018 proceedings) already determined by the High Court and thirdly that the value of the property was such that the proper jurisdiction for the proceedings was the Circuit Court. Of those only the first is relevant at this stage. Although the value of the property certainly suggests that the Circuit Court is the more appropriate jurisdiction, the plaintiff has presumably chosen to institute proceedings in the High Court on the basis of the value he has placed on his claim for damages. Insofar it is suggested that the validity of the sale to the purchasers was the subject of the 2018 proceedings, it is not entirely clear from the judgment of Allen J. that this was so. The validity of the sale insofar as it was based on the validity of the receiver's appointment was certainly an issue, but the judgment does not refer to any argument made under s.62(7) of the 1964 Act. It may be that the matter was pleaded but not pursued (although the excerpt from the transcript suggests that cross examination was directed to this point). Even if it was not pleaded, it is something which arguably should have been raised in the earlier proceedings but again that is an argument for another day.

21. The balance of the purchasers' defence denies the appellant's claim and puts him on strict proof of his case. The purchasers rely on having bought the property in good faith at a public auction, on the receiver having delivered title on behalf of the mortgagee in possession and plead that the appellant was aware of the process but nonetheless failed to seek resolution before the auction (which he attended). The arguments made on behalf of the purchasers on this appeal were considerably more detailed than those pleaded and were based on the statutory protection afforded to purchasers under s.21(2) of the Conveyancing Act, 1881 and s.5(1) of the Conveyancing Act, 1911. I will return to these in due course.

Purchasers' Motion

22. Rather oddly, although the matter was not adverted to it appears that the motion from which this appeal is based was issued twice. It was initially issued on 23 June 2021 grounded on an affidavit sworn by the purchasers' solicitor and then issued a second time on 9 September 2022 grounded on an affidavit of the second respondent, the only difference between the two affidavits being a reference in the later one to the delivery of the statement of claim. The motion sought to strike out the proceedings for failure to prosecute and/or on the grounds that the pleadings did not disclose a reasonable cause of action under O.19, r.28 or pursuant to the inherent jurisdiction of the court on the basis that the claim was unsustainable and bound to fail. The purchasers also applied for the vacation of the *lis pendens*.

23. The affidavit grounding the application (sworn in duplicate by both the solicitor and the second respondent) sets out the history of the folio from the time the property was purchased by the appellant focusing on the appellant's loan and related security and the purchase of the property at a public auction by the purchasers. It then deals with the registration of the *lis pendens* and the judgment of Allen J. in the 2018 proceedings. It

concludes by saying that because of the *lis pendens* the property cannot be registered in the purchasers' names. Tailte Éireann suggest that this is not correct but, there is no doubt that the registration of a *lis pendens* is intended to have the effect of restricting the ability of the owner of property to deal with the property. As Tailte Éireann point out, even when cancelled, a folio will still reflect the past registration of the *lis pendens*.

24. The appellant swore an affidavit in reply on 8 November, 2022. This affidavit comprises largely legal argument and does not really contain any new or relevant factual averments. The appellant relies on his own status as the registered owner of the property and the lack of any court order pursuant to s.62(7) of the 1964 Act. He disputes the entitlement of the receiver to have put the mortgagee into possession of the property and the entitlement of the mortgagee to have sold as mortgagee in possession, characterising these actions as a fraudulent misrepresentation of the true position. He then goes through the second respondent's affidavit and disputes it paragraph by paragraph. He asserts that the purchasers unlawfully entered into the contract "*without any proper due diligence*"; that they appear to have mistakenly relied on the conclusiveness of the register regarding ownership of the charge and on "*false representations*" made by the receiver. He denies that he has failed to explain the basis for the *lis pendens* and asserts that this is evident from the statement of claim (which of course had not been served at the time the motion was issued). Lest this not be so, he seeks the opportunity to amend his pleadings. No proposed amendment is identified. The appellant concludes (at para. 35 of his affidavit):-

"It is clear that the Langan defendants have got involved in a 'workaround' or ad hoc process of buying property from someone with no proper possession of my property and it appears that they direct their ire at me, however they should properly be annoyed at the persons who made false representations to them as persons having proper legal possession of my property that they could properly transfer to them."

High Court Judgment

25. I do not propose to summarise the High Court judgment in detail as I will address the relevant passages when dealing with the issues raised on the appeal. In brief, Roberts J. sets out the background to the dispute and its procedural history leading to the bringing of the motion. She then outlines the arguments made by the parties, including Tailte Éireann whose motion was still live at that point. Her analysis deals firstly with the Tailte Éireann motion and, having found that Tailte Éireann was not a necessary party to the proceedings and that no stateable case had been made against that body, she struck out the claim against it.

26. Roberts J. then moved to consider the purchasers' motion starting with the application to vacate the *lis pendens*. She found there was a considerable delay of almost a year in serving the proceedings compounded by a further delay (of over a year) in serving the statement of claim. She was satisfied that an order to vacate the *lis pendens* could be made on the basis of delay alone such that it was unnecessary for her to also consider whether the action was being prosecuted *bona fides*.

27. Her analysis of the strike out application was more detailed. She set out the relevant law, quoting from a summary of the applicable principles by McDonald J. in *Moroney v. Property Registration Authority* [2018] IEHC 397 at para. 30. This summary encompasses the distinction (and overlap) between the court's jurisdiction under O.19, r.28 and the court's inherent jurisdiction; the threshold to be met on an application of this nature and the fact that the onus lies on the purchasers as the moving parties. As regards the appellant's plea that he is the beneficial and full owner of the property, Roberts J. observes at para. 53: "*He relies on the fact that he is still the registered owner of the property and the conclusiveness of the register in that regard. However this particular plea is an entirely circular one where the purchasers are seeking to register their interest as owners of the property*". She then

addresses the argument made by the appellant under s. 62(7) of the Registration of Title Act, 1964 and the claim that the transfer was illegal or fraudulent.

28. There follows between paras. 56 and 68 of the judgment a very careful but succinct explanation of the distinction between the role and powers of a receiver and of a mortgagee in possession. I do not think that I can better that explanation by purporting to summarise it here. Suffice it to say Roberts J. analyses the power of the mortgagee to appoint a receiver; the statutory powers, including a power of sale, of a receiver under s.19(1)(i) of the Conveyancing Act, 1881 and the fact that additional powers may be conferred on a receiver under the terms of the mortgage; the role of a receiver in taking possession of (but not title to) property pursuant to the powers conferred on him by deed and without the necessity of a court order. She notes that a sale by a receiver, as agent of the borrowers, will not be free of those interests over which the mortgage has priority but that a sale by a mortgagee in possession under s.21(1) of the Conveyancing Act, 1881 will wipe out the burdens and encumbrances over which the mortgage has priority. At para. 62 she notes that it is common both that a mortgage deed confers a power of sale on the receiver acting on behalf of the mortgagors and also for the mortgagee's power of sale to be delegated to a receiver appointed to take possession of the property. At para. 64 she expressly finds that contrary to the appellant's argument "*it was not essential that before the sale there was an order for possession made in favour of the mortgagee*". She describes s.62(7) as providing a mechanism through which possession of a property can be secured by way of summary proceedings but notes "*this is not the only means by which a bank/lender can become a mortgagee in possession*" (at para. 67). She then goes on to hold:-

"Another method commonly used for registered property is, as outlined above, for the bank/lender to appoint a receiver who takes possession of the property and can then deliver possession of it to the bank/lender or sell as appointed agent of the

bank/lender for that purpose. This is what the evidence confirms happened in the present case when the Property was sold to the Purchasers at a public auction.”

29. Finally on this issue Roberts J. acknowledges that Allen J. did not expressly approve the sale of the property to the purchasers. Indeed, he expressly declined to consider this issue in circumstances where the purchasers were not party to the 2018 proceedings. However, she regarded the finding that the receiver had been validly appointed as essential as was the evidence he gave to Allen J. that *“he agreed to give possession of the property to the mortgagee who then conveyed the property to the purchasers.”* Consequently, she concludes that the purchasers acquired good title by that conveyance to the estate or interest which had originally been mortgaged by the appellant, namely the full legal and beneficial interest in the property.

30. Roberts J. then goes on to consider the legal protection afforded to purchasers who buy from mortgagees exercising a statutory power of sale under s.21(2) of the Conveyancing Act, 1881 and s.5(1) of the Conveyancing Act, 1911. Following a consideration of the Northern Irish decision of McBride J. in *Trimble v Cassidy* [2022] NICH 7 she makes two key observations. The first is that the limit of the protection afforded to a purchaser under these sections is reached where the purchaser has actual knowledge of an impropriety or irregularity in the exercise of the power of sale or knowingly participates in such exercise. Secondly, however, this is subject to the proviso that a purchaser is not obliged to make inquiries as to whether a power of sale is properly exercisable and will not be fixed with constructive knowledge of irregularities in circumstances where inquiries have not been made.

31. On the basis of these findings Roberts J. concluded that the appellant had not made out a stateable cause of action against the purchasers. She regarded the unparticularised claim of fraud made in the proceedings as begin directed at the sales process rather than any action

on the part of the purchasers. To the extent that the plaintiff's claim was based on an alleged illegality in the sale, this was premised on his mistaken belief that a court order was required under s.62(7) before the property could be sold or that the receiver had to formally transfer possession to the mortgagee to create a chain of title for the purchasers. In any event she concluded that by virtue of s.21(2) of the 1881 Act even if there were an issue about the validity of the exercise of the power of sale by the receiver, this would sound in a remedy in damages against the receiver or the mortgagee and not in a remedy against the purchasers. For these reasons Roberts J. struck out the appellant's claim as against the purchasers.

Vacation of *Lis Pendens*

32. Although the notice of appeal filed by the appellant as a litigant in person did not raise any grounds of appeal directed at the order vacating the *lis pendens*, the appellant addressed this issue in his written submissions and through counsel at the hearing of the appeal.

33. In looking at the terms of s.123 of the 2009 Act under which a *lis pendens* may be vacated by court order, it is useful to briefly mention the ease with which a *lis pendens* can be registered under s.121 of the same Act. The only requirement under s.121(2) is that the *lis pendens* relate to an action “in which a claim is made to an estate or interest in land” or to proceedings to have the conveyance of an estate or interest in land declared void. The person registering the *lis pendens* is not obliged to give those affected, including the owners of the property, any notice of the fact of registration. Indeed, if the proceedings to which the *lis pendens* relates are not served promptly, there may be a considerable lapse of time before the owner becomes aware of them. Finally, there is no screening of a *lis pendens* prior to its registration nor any examination to ascertain whether the claim made in the proceedings to which it relates justifies the interference the *lis pendens* may cause with the owner's property rights. This is no doubt because historically the purpose of a *lis pendens* is to advise third

parties who are not involved in the dispute of the existence of proceedings which may affect title to the property. If the third party chooses to acquire an interest in the property notwithstanding the registration of a *lis pendens*, they do so subject to any rights or interests that may subsequently be upheld in the proceedings.

34. However, the ease with which a *lis pendens* may be registered is balanced by the provisions of s.123(b) under which any person affected by it may apply to court to have the *lis pendens* vacated. Section 123 provides as follows:-

“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.”

35. Roberts J. relied upon the first limb of s.123(b)(ii) and vacated the *lis pendens* on the basis of unreasonable delay in the prosecution of the proceedings. There is now an established body of jurisprudence under s.123 dealing with the question of unreasonable delay. The two leading decisions are those of Barniville J. in *Hurley Property v Charleen* [2018] IEHC 611 and Haughton J. in *Togher Management Company Ltd. v. Coolnaleen Developments Ltd. (in receivership)* [2014] IEHC 596 both of which have been applied in a number of subsequent cases.

36. It is clear from these decisions that a party who registers a *lis pendens* assumes a particular obligation to act not just in accordance with the timetables set out in the Rules but with a degree of “*expedition and vigour*” (*per* Haughton J.) going beyond mere compliance with the Rules. Further, the question of unreasonable delay under s.123 is distinct from the treatment of delay in the prosecution of proceedings generally under the principles set out by the Supreme Court in *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459. In particular, the court is not undertaking an assessment of the balance of justice between the parties nor considering the extent to which a defendant may or may not have been prejudiced by the delay (*per* Barniville J.).

37. That said, the concept of “*unreasonable*” delay does entail some consideration of the reasons, if any, offered by a plaintiff for the delay which has occurred. Consequently, there is no period of delay which will automatically be regarded as unreasonable. Nonetheless it is interesting to note that in *Hurley Property v Charleen* a delay of 6 months between issuing and serving proceedings in the face of repeated requests by the plaintiff’s solicitors for service was regarded as unreasonable. Other cases have tended to adopt a similarly strict view suggesting that in cases where a *lis pendens* has been registered, delay is to be measured in weeks or, at most, months rather than in years.

38. In this case it is difficult to regard the non-service of the proceedings on the purchasers as being anything other than a deliberate tactic on the part of the appellant. Firstly, service was effected on Tailte Éireann on some date prior to the 13th December, 2019 when Tailte Éireann’s solicitor wrote to the appellant enclosing a copy of its appearance. No explanation is offered as to why attempts were not made to serve all the defendants at this time, especially since the purchasers were directly impacted by the registration of the *lis pendens* in a way that Tailte Éireann was not. Secondly, after the purchaser’s solicitor became aware of the *lis pendens* through correspondence with Tailte Éireann (some time in December 2019) she

wrote directly to the appellant in February 2020 seeking service of the proceedings. She advised that she had authority to accept service on the purchasers' behalf, thereby rendering service a straightforward step for the appellant. The appellant did not reply to this correspondence and did not serve the proceedings. Thirdly, service was eventually effected in July 2020 just one week before the summons was due to lapse under O. 8, r. 1. It seems likely that the appellant deliberately withheld service for as long as he could while still avoiding the need to make an application to court to renew the plenary summons. It is hard to see how these actions could be characterised as prosecution of the proceedings with expedition and vigour.

39. No attempt has been made on affidavit by the appellant to offer evidence to explain this delay nor the subsequent delay in serving the statement of claim. The appellant's written submissions in the High Court dealt only with the strike out application and the title issues and did not address the application to vacate the *lis pendens*. His written submissions in this court seem to accept that there was a delay but contend that it was not an unreasonable delay. It is suggested that the principles set out in *Hurley Property v Charleen* should not have been applied to the appellant, a full-time farmer who is not legally represented. Correspondence sent to Tailte Éireann's solicitor in September 2021 stated that the late delivery of the statement of claim was due to the appellant's poor health at the time. This is also relied on in correspondence to explain his failure to prosecute the appeal from the High Court judgment in the 2018 proceedings. However, no medical evidence is offered to support this and, in any event, the appellant's health is not relied on by him in the context of this motion.

40. I am satisfied that the trial judge was entirely correct to find that the delay on the part of the appellant both in the service of the proceedings and then in serving the statement of claim constituted an unreasonable delay within the meaning of s. 123. The time involved - 26 months - is by any standard extensive. I do not accept the proposition that a different and

presumably lower standard should be applied to an unrepresented litigant compared to those that are legally represented. Whilst some leeway might be allowed to an unrepresented litigant, particularly in meeting tight deadlines for the drafting and filing of complex legal documents, there is no basis for extending a similar leeway in circumstances where a plenary summons which was already drafted, filed, issued and served on one party is deliberately withheld from the persons affected by the registration of the related *lis pendens* until the latest possible moment at which it could be served without an application being made to court. The choice a party makes to proceed as an unrepresented litigant cannot be allowed to operate to the detriment of those he chooses to sue.

41. The argument made in court on behalf of the appellant on this issue suggested that the court should also look at the time taken by the purchasers from the point at which the statement of claim was served in September 2021 to the filing of their defence in January 2022 and the re-issuing of their motion in September 2022. This argument is misconceived. As explained by Barniville J. in *Hurley Property v Charleen*, establishing delay under s. 123 does not lead to the court conducting an analysis of the balance of justice in which the conduct of and prejudice to the other party to the litigation falls to be considered and weighed against the registrant's delay. The statutory trade-off for the ease with which the appellant could register a *lis pendens* was the imposition on him of an obligation to prosecute the proceedings without unreasonable delay. Save in circumstances where, exceptionally, the actions of the other party to the litigation might have caused or contributed to delay on the part of the person registering the *lis pendens*, any delay on the part of those affected by the *lis pendens* is largely irrelevant to the court's consideration of whether there has been unreasonable delay in the prosecution of the action under s. 123(b)(ii). I am satisfied that the appeal on this ground must fail.

Striking out of Proceedings

42. The purchasers' application sought to strike out the appellant's proceedings either on the basis that they disclose no reasonable cause of action or are frivolous and vexatious under O. 19, r.28 or on the basis that the proceedings constitute an abuse of process and are bound to fail pursuant to the court's inherent jurisdiction. There is substantial overlap between the jurisdiction available to the High Court under these two headings, both as regards their purpose and the effect of any order made. Nonetheless the two jurisdictions remain distinct and somewhat different considerations apply to each of them.

43. O.19, r.28 provides as follows:-

“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just”.

The law as regards O.19, r.28 is well settled, and applications made under that rule are subject to three overriding principles. Firstly, the jurisdiction to strike out is one which the court should exercise sparingly. This is particularly so if the effect would be to dismiss the proceedings in their entirety since, as a result, the intending plaintiff would be deprived of their constitutionally protected right of access to the court.

44. Secondly, the court must take the plaintiff's case at its height and assume that the facts pleaded by the plaintiff would be established at trial. Although the focus of the court's consideration under O.19, r.28 is on the pleaded case, if an amendment to the pleadings would resolve the deficiencies complained of, then the application to strike out should be refused and the litigant permitted to amend their pleadings.

45. Thirdly, the purpose of the jurisdiction is not to remove from a defendant who is likely to be successful the burden of dealing with the litigation. Rather it is to ensure that a claim which cannot succeed is not permitted to engage the time and resources of the court and of the other party.

46. Separately, the High Court has an inherent jurisdiction to strike out proceedings which, if allowed to proceed to trial would constitute an abuse of the court's process. Whilst there are many reasons why proceedings might constitute an abuse of process, central to most of them is the fact that the proceedings are ones which simply cannot succeed. The test is not to ask whether the plaintiff would succeed but whether the plaintiff could succeed, i.e., not what are the plaintiff's prospects of success but whether the plaintiff has any prospect of success. There is an important difference in the manner in which the court approaches this question when exercising its inherent jurisdiction rather than the jurisdiction under O.19, r.28. The difference lies in the extent to which the court can look behind the pleaded facts in order to determine that the proceedings are bound to fail (*per* Clarke J. in *Lopes v. Minister for Justice*, [2014] IESC 21). Thus, under its inherent jurisdiction the court can strike out a case which technically could succeed on the basis of the pleadings, in circumstances where it is established that there is no credible basis for suggesting that the facts are as asserted and, consequently, the proceedings are bound to fail on the merits.

47. In approaching the applications to strike out Roberts J. relied on the summary of the applicable principles set out by McDonald J. in *Moroney v. Property Registration Authority* [2018] IEHC 379 and I am happy to adopt that summary. It was undisputed that the purchasers, as the moving parties in the motion, bore the onus of demonstrating that the appellant's claim was bound to fail. In particular it is important to bear in mind that all the appellant needs to do is to put forward a credible basis for suggesting that at trial he may be able to establish the facts which are asserted in the pleadings and which are necessary for

the success of the proceedings. Finally, if the court moves beyond looking at the pleaded case under O.19, r.28 to consider whether the facts are such that they do not support the pleaded case, it should be borne in mind that if the litigation proceeds the appellant may avail of the procedures provided rules such as discovery, interrogatories and the subpoenaing of witnesses, which may assist in establishing the pleaded case.

48. There was in fact no dispute and little engagement by the parties with these principles which are well settled. The appellant approached this appeal on the basis that the threshold he had to meet was a low one and if he could show that the proceedings were not bound to fail then he should be permitted to continue with them. This is substantively correct and I will treat the arguments on that basis.

Statutory Protection of Purchasers

49. I propose to consider the issues raised in this appeal against the order made striking out the appellant's proceedings in reverse order to that adopted by Roberts J. This is because, if, as she found, the statutory protection afforded to purchasers means that no relief can be obtained against them regarding the transfer to them of the property, then the question of whether the power of sale was correctly exercised may be largely moot. It is notable that notwithstanding the detailed and clear analysis of this issue in the High Court judgment there is no ground of appeal raised by the appellant specifically directed to it. Further, although the appellant's written submissions engage expressly with various paragraphs of the judgment dealing with the title issue, there is no mention of nor engagement with that part of the judgment dealing with the statutory protection afforded to purchasers nor the statutory provisions relied on to this effect.

50. Consequently, based on the pleadings this issue is arguably moot. This would have the logical consequence of the entire appeal failing *in limine* since, regardless of whether the

trial judge was correct on the title issue, the appellant cannot obtain relief against the purchasers and therefore has no stateable claim against them. However, counsel who appeared on behalf of the appellant at the hearing of the appeal but who had not been involved in drafting the notice of appeal or the written submissions, made arguments directed to this issue. Given the importance of the points raised I propose to deal with them.

51. At the outset it is useful to set out the two statutory provisions which Roberts J. held afforded the purchasers protection in this case. These are s. 21(2) of the Conveyancing Act, 1881 and s. 5(1) of the Conveyancing Act, 1911 which provide as follows: -

“Section 21(2) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

“5—(1) Upon any sale made in professed exercise of the power conferred on mortgagees by the Act of 1881, a purchaser is not, and never has been, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised.”

52. Although I will be returning to the power of sale in the next part of this judgment, the power of sale referred to in s. 21(2) is that conferred by s. 19(1) of the 1881 Act on all mortgagees subject to the provisions of s. 19(1)(i) to the effect that the power of sale does not arise until the mortgage money has become due. Section 20 of the 1881 Act provides that the power of sale could not be exercised by the mortgagee unless and until one of the

conditions set out in that section had been satisfied. The conditions in issue concern default in repayment where a demand has been made, arrears due for more than two months or breach of the mortgage deed. As noted by Allen J. in his judgment in the 2018 proceedings, evidence was given before him that the mortgage was in arrears and that a demand had been made for payment of the outstanding balances, which demand was defaulted upon and this evidence was not challenged.

53. As I understand the argument, the appellant does not dispute that the mortgagee had a statutory power of sale. Rather he contends that the power could not be exercised in the absence of an order under s. 62(7) of the 1964 Act putting the mortgagee into possession of the property. I will return to this issue in the next section of this judgment. What is relevant at this point is that the mortgagee was purporting to exercise an undisputed power of sale, albeit that the appellant asserts it was doing so illegally. On this basis, it is clear that the text of s. 21(2), especially when combined with s. 5(1), precludes any challenge to the purchaser's title by reason of the fact that the power of sale may have been improperly or irregularly exercised. The fact that the purchasers' title is unimpeachable precludes an award of damages against them for slander of the appellant's title, breach of constitutionally protected property rights, negligence, trespass etc. since each of those claims necessarily depend on the appellant's title being established as against the purchasers which is exactly what the s.21(2) prevents. If the appellant has a remedy, it is a remedy against the mortgagee and/or the receiver who put the sale in train prior to delivering possession to the mortgagee.

54. The appellant disputes this straightforward reading of s. 21(2) primarily based on the absence of a court order for possession under s. 62(7) of the 1964 Act. This, however, is to miss the point. If an order for possession was required and not obtained, then the sale by the mortgagee purporting to be in possession to the purchasers would have been an irregular or improper exercise of an undisputed power of sale. These are precisely the circumstances in

which s. 21(2) comes into play. The protection afforded to the purchasers' title by this section is only required because the sale is irregular or improper. If this were not the case, no protection would be needed. Therefore, I reject the proposition that the purchasers cannot rely on s. 21(2) because of the absence of an order for possession, even assuming the appellant were correct in his central argument under s. 62(7).

55. The other argument made on behalf of the appellant is that the purchasers wilfully shut their eyes to an irregularity that should have been apparent to them - as I understand it on the basis that the property was offered for sale by the receiver acting as their agent, but the sale was entered into by the receiver acting as agent for the mortgagee. The appellant relied on *Bailey v Barnes* [1894] 1 Ch 25 to support this argument.

56. *Bailey v Barnes* concerned a series of transactions the first of which was subsequently found by a court to have been fraudulent. The purchaser of the equity of redemption in the last of the transactions did not have actual notice of the fraud but, on becoming aware of it, he secured his title by purchasing the legal estate from the mortgagees. In proceedings seeking to unravel this transaction it was contended that the final purchaser ought to have appreciated that the earlier sale was at an undervalue and thus had constructive notice of the irregularity. This was rejected by Stirling J. (in a decision upheld on appeal) who held that the purchaser was entitled to the benefit of s.21(2) "*unless it can be made out that he had actual notice that the power of sale contained in the mortgages ...were improperly or irregularly exercised*". He went on to observe that, if the purchaser had actual notice, then for the court to uphold title "*would be to convert the provisions of the statute into an instrument of fraud*". He relied on the decision of Lord Cranworth in *Ware v Lord Egmont* (1854) 4 D.M. & G. 460 who stated:

"But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might

have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him – that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining of it was an act of gross or culpable negligence.”

57. Lindley L.J. in the Court of Appeal clarified that gross or culpable negligence did not necessarily require a breach of legal duty as the purchaser was not under a legal obligation to investigate the vendor’s title. However, a purchaser who wilfully departed from the normal practice of investigating title “*in order to avoid acquiring knowledge of the vendor’s title*” could not then “*be allowed to derive any advantage from his wilful ignorance which would have come to his knowledge*”.

58. The difficulty with these arguments is that even if they had some bearing as to whether a purchaser in these circumstances would have been held to have constructive notice of a defect in the vendor’s title in 1894, it is clear from the subsequent enactment of s. 5(1) of the 1911 Act that the purchaser is under no obligation to make enquiries as to whether the power of sale is being properly exercised by a mortgagee.

59. These provisions are so clear it is unsurprising that they have not generated much litigation. One useful recent decision is referred to by Roberts J. in her judgment, namely that of the Northern Ireland High Court in *Trimble v Cassidy* (McBride J. [2022] NICH 7). There the plaintiffs had purchased the defendant’s land in a receiver sale. The defendant contended that the appointment of the receiver was irregular as no valid demand for payment had been made. The court had the benefit of being able to examine the “*title pack*” on foot of which the property had been offered for sale. For some unexplained reason the purchasers in this case have not exhibited the title documents which form the basis for the sale of the

property to them at public auction. McBride J. proceeded on the basis that the receiver had not been validly appointed. She held that the word “*professed*” regarding the exercise of the power of sale conferred by the 1881 Act should be given a wide meaning to include “*alleged*” or “*ostensible*”.

60. In circumstances where she accepted that the plaintiffs could have acquired knowledge of the irregularities if they had carried out enquiries, but that no such enquiries were conducted, McBride J. characterised the resulting question as being “*What standard of enquiry is required from a purchaser who is buying from a mortgagee, in light of the provisions of s. 21(2)?*” In answering this question, she looked at the passages already referred to in *Bailey v Barnes* and *Ware v Lord Egmont* to conclude that s. 21(2) does not protect a purchaser with actual or “*blind eye*” knowledge of an irregularity. It would seem from the absence of any reference to it, that s. 5(1) of the 1911 Act no longer applies in Northern Ireland. McBride J. concluded at para. 43 of her judgment: -

“Accordingly, I am satisfied that the effect of section 21(2) is that a purchaser from a mortgagee or fixed charge receiver is under no obligation to make enquiries and will not be fixed with constructive knowledge of irregularities in circumstances where he has made no enquiries. He would only be fixed with such knowledge if there is fraud or mala fides.”

On this basis she held that the plaintiffs could not be fixed with constructive notice of the irregularities in the appointment of the receiver. She was also satisfied of this on the facts of the case by reference to the terms of the memorandum of sale.

61. Accepting, as I do, McBride J.’s analysis of the effect of s.21(2) to be correct, the effect of that section when combined with s.5(1) can only be greater. It may well be that this discourages purchasers from enquiring too deeply into the circumstances in which a mortgagee has come to exercise a power of sale. Nonetheless, this is what the legislature

has deemed to be appropriate in order to simplify conveyancing procedures in the circumstances of a mortgagee sale and, presumably, to facilitate the disposability of properties so affected.

62. Although the appellant has pleaded that the process which resulted in the sale of his property to the purchasers was a “*fraudulent ad hoc process*” he has not made any specific allegation of fraud against them. Indeed, some of his pleas suggest that the purchasers were also the victims of this allegedly fraudulent process. What he fails to understand is that even if there were in fact a fraudulent process conducted by the receiver and/or the mortgagee, the purchasers and their title are protected by s.21(2) and s.5(1), and he must seek the remedy for any loss to him from the receiver and/or the mortgagee. In light of this statutory protection, it is clear that the appellant’s claim as pleaded against the purchasers is unstateable and, even if it were permitted to proceed, it is bound to fail.

63. In the course of argument counsel suggested that the appellant should be permitted the opportunity to amend his pleadings to expressly plead that the purchasers were aware of the irregularity or deliberately shut their eyes to it. It is clear from the judgment of Clarke J. in *Lopes v. Minister for Justice* that proceedings should not be dismissed at an early stage if an amendment to the statement of claim might save them by disclosing a proper cause of action. In this case I do not think that an amendment would avail the appellant for the following reasons. Firstly, the contention that the purchaser shut their eyes to the alleged irregularity, even if correct, would not affect the statutory protection afforded to them by s.21(2) and s.5(1). Unless they have actual notice of the irregularity, they are not obliged to conduct inquiries which might put them on notice of it. They must be guilty of fraud or *mala fides* (per *Trimble v Cassidy*) and not merely of a failure to inquire, no matter how imprudent that failure.

64. Secondly, insofar as the appellant wishes to now plead that the purchasers had express notice of the alleged irregularity, such a plea would be tantamount to implicating them in the fraudulent process which he alleges resulted in the unlawful sale of his property. An allegation of fraud is a very serious one and should not be pleaded unless there is material available to support it and, even then, it should be pleaded with particularity. The appellant's statement of claim, despite pleading fraud in a general sense made no allegation of fraud against the purchasers. That statement of claim is now some two and a half years old. There is nothing in it nor in any of the appellant's correspondence exhibited for the purpose of the motion which suggests there is any basis for contending that the purchasers had actual notice of the irregularity and thus were active participants in the alleged fraud. The first time at which it was suggested that such a plea might be made was during the hearing of this appeal. To allow the appellant to amend his pleadings to make what appears to be an unstateable claim of fraud against the purchasers nearly five years after the proceedings were instituted would be manifestly unfair to them.

65. Finally, in suggesting that leave might be granted to amend the appellant's pleadings, counsel did not indicate any factual basis on which a plea of fraud based on actual notice might be made against the purchasers. As fraud is a plea which must be made with particularity it would be inappropriate to deny the purchasers of the benefit of a statutory protection to which they are entitled to facilitate the appellant pursuing these proceedings on the basis of a bald assertion that they had actual notice of an irregularity and thereby participated knowingly in a fraudulent process. The height of the appellant's case seems to be that the receiver, who had been appointed as their agent, sold the property as agent of the mortgagee and this either was in itself an irregularity or should have alerted the purchasers to an underlying irregularity. I note that in *Moorview Developments Ltd. v First Active plc* [2009] IEHC 214 Clarke J (as he then was) saw no legal difficulty with the transfer by a

receiver of possession to the mortgagee followed immediately by the sale of the property by the mortgagee in possession with the receiver acting as its agent, particularly in circumstances where the mortgagee had an independent right to possession under the terms of the mortgage. As the practise was one which had been judicially upheld, it is difficult to see how it could ever be held to constitute notice of an irregularity.

66. In light of the statutory protection, it is clear that the appellant's claim as pleaded against the purchasers is unstateable and, even if it were permitted to proceed, it is bound to fail. Therefore, I am satisfied that Roberts J. was correct in her conclusions under this heading and I dismiss the appellant's appeal.

Was an Order for Possession Required

67. The findings made in the last section of this judgment are capable of disposing of the entire of the appellant's appeal on the title issues since, even if he is correct that an order for possession was required under s.62(7), the purchasers and their title have comprehensive statutory protection which renders his claim against them unstateable. However, I will briefly address the issues raised by the appellant under this heading since it is in fact the main focus of his appeal and the one towards which most of the grounds of appeal are directed.

68. At the outset I can dispose of three grounds of appeal complaining that the mortgage deed was not exhibited by the purchasers and, therefore, the power in the deed of charge to sell the property had not been demonstrated to the court. The sale to the purchasers was effected by the mortgagee as mortgagee in possession. The power of a mortgagee to sell the mortgaged property once the sums due under a mortgage have become due is a statutory one under s.19(1) of the Conveyancing Act, 1881. As previously noted, the fact that this power of sale had arisen and was exercisable was established by unchallenged oral evidence in the

appellant's proceedings regarding the validity of the receiver's appointment (the 2018 proceedings). Consequently, the purchasers were not required to exhibit the mortgage deed to establish the power of sale purportedly exercised by the mortgagee.

69. The balance of the grounds of appeal contend that an order for possession under s.62(7) of the 1964 Act was required but not obtained and expressly rely on the decision of the Supreme Court (Baker J.) in *Bank of Ireland Mortgage Bank v. Cody* [2021] 2 IR 381. That case is relied on of itself but it is also contended that the trial judge failed to consider it or to acknowledge its authority. In fairness to the trial judge although *Bank of Ireland Mortgage Bank v. Cody* is mentioned in the appellant's written submissions to the High Court, it seems the emphasis in the court below was on the lack of a "*chain of title*" (i.e. a formal conveyance of possession by the receiver to the mortgagee) rather than on the lack of an order for possession justifying the sale by the mortgagee as mortgagee in possession. As often occurs, particularly where lawyers are instructed to argue an appeal in litigation previously handled by a litigant in person, the focus of the appeal shifted significantly from the argument made in the court below. I am reluctant to be critical of the trial judge for not having anticipated that a relatively minor element of the argument made to her would become central to the appeal.

70. In order to put *Bank of Ireland Mortgage Bank v. Cody* in context, it may be useful to look at the provisions of s.62(6) and (7) of the 1964 Act. Although these provisions were repealed by the Land and Conveyancing Law Reform Act 2009, by virtue of amendments made by the Land and Conveyancing Law Reform Act 2013, they continue to apply to mortgages such as this one, created before 2009. The relevant subsections provide:-

"(6) On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts, and the

registered owner of the charge shall, for the purposes of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge.

(7) When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or said part thereof, shall be deemed to be a mortgagee in possession.”

71. In *Bank of Ireland Mortgage Bank v. Cody* the mortgagee applied summarily for an order under s.62(7) and refused the invitation extended by the High Court judge to remit the application for plenary hearing. Having heard the summary application, the trial judge then refused it on the basis that the mortgagee had not proved its case on the facts. The mortgagee then applied to have the matter remitted for plenary hearing, an application which was refused on the basis that, having delivered judgment, the trial judge was *functus officio*. The appeal primarily concerned the procedure through which an application for possession under s.62(7) should be made and whether the trial judge had jurisdiction to adjourn summary proceedings to plenary hearing at his own discretion and in the absence of an application from either party.

72. In considering the historical antecedence for s.62(7) Baker J. stated as follows (at p.393 of the report):-

“But in regard to registered land since the Local Registration of Title Act 1891 (“the 1891 Act”), a security is created by a charge over the lands in favour of a lender, and

the key difference is that there is no conveyance or transfer of the lands to the lender, simply an entry in the Register of the charge on the folio.

*The 1891 Act granted to charge holders all the rights of a mortgagee. However, the statutory provision that the owner of a charge has the power of a mortgagee under s. 19(1) of the Conveyancing Act 1881 is limited by the fact that the charge creates no estate in the property. The Court of Appeal of Northern Ireland (Andrews L.J.) in *Northern Banking Company v. Devlin* [1924] 1 I.R. 90 held that the court had no jurisdiction to put a registered charge holder into possession of property as they had no legal or equitable estate in the land. (see the comments of Dunne J. in *Start Mortgages Ltd v. Gunn* [2011] IEHC 275)...*

*A charge of registered land can carry an express right to possession as was found in *Gale v. First National Building Society* [1985] IR 609 where Costello J. upheld the right of an owner of a charge to enter into possession on foot of a contractual licence by which it was entitled to take possession on default of payment and subject to a proviso that the power did not become exercisable unless a default had occurred for three months. Many modern charges do contain a right to possession but, as no estate or interest passes, no right to take or be in possession without a court order exists at common law and none was created by the scheme of the 1964 Act, or by the 1891 Act and the amending legislation. The charge registered against the folio of the defendants does contain a contractual right to take possession on default, but a court order is now required by reason of s. 97(1) of the 2009 Act, which provides that a mortgagee may not take possession of mortgaged property without a court order, except with the written consent of the mortgagor."*

73. Although these comments made by Baker J. are largely *obiter*, as the judgment is one of a five judge Supreme Court, they are observations to which it is necessary to afford great

deference. Further, in noting that the comments are *obiter* I do not mean to suggest in any way that they are incorrect. Rather, I am mindful that Baker J. was expressing her views as to the derivation and meaning of s.62(7) in a context where that section was expressly invoked by the moving party and no issue arose as to whether its application was mandatory.

74. The issue here is different. The key question is whether the mortgagee is obliged to seek an order under s.62(7) or can acquire possession in the absence of a court order, in the circumstances from a receiver who had a contractual right to possession under the deed of charge. At the outset it is interesting to note that in her discussion of s.62(7) Baker J. does not exclude the possibility that possession may be acquired by a mortgagee through alternative means. The appellant accepts that possession can be obtained by a mortgagee through the consent of the registered title holder but contends that, in the absence of consent, a court order is always necessary. I do not read Baker J's comments as supporting this proposition. At an earlier point in the judgment (p.389) she describes the judgment as concerning "*one of the procedures for enforcement of the security provided expressly by the 1964 Act*". In the passage quoted she refers to the decision of Costello J. in *Gale v. First National Building Society* [1985] IR 609 in which the plaintiffs had challenged the defendant mortgagee's right to take possession without a court order. That challenge was unsuccessful in circumstances where the deed of charge created a contractual license to enter and take possession of the plaintiff's lands which right had been exercised by the defendant. Costello J. also rejected the argument that the right of possession conferred on the defendant by deed was an interest in the land which should have been registered. He held that the deed itself was registered and there was no separate requirement to register the ancillary right which it contained. Baker J. acknowledges that many modern charges expressly contain a right to possession and distinguishes this from the common law under which a right to possession did not follow from the creation of a mortgage over registered land. Put simply, *Bank of*

Ireland v. Cody says nothing about the delivery up of possession by a receiver who has possession of mortgaged lands to the mortgagee which appointed him.

75. I have already commended the admirably clear explanation in the High Court judgment of the distinction between the position of a receiver of mortgaged property and the mortgagee who appoints him. A receiver has a right to take possession of mortgaged lands and does not generally require a court order to do so. A mortgagee has a statutory power of sale. The receiver may also have a power of sale but, as he acts on behalf of the mortgagors (i.e., the borrowers), the terms on which he is able to sell the property may be less advantageous than the terms upon which the mortgagee can do so. The mortgagee does not have a right to possession of registered lands the subject of a mortgage at common law but may have such a right under the deed of charge. The mortgagee may lawfully acquire possession through a number of different means including but not limited to a court order under s.62(7) of the 1964 Act.

76. Apart from contending that in the absence of the registered owner's consent, a court order under s.62(7) is always required before a mortgagee can sell as mortgagee in possession, the appellant has not advanced any argument as to why a validly appointed receiver in lawful possession of the mortgaged property cannot deliver up possession to the mortgagee. His argument is based on the fundamental misconception that s.62(7) is a mandatory step which the mortgagee of registered land must take in order to acquire possession rather than providing a mechanism – but not an exclusive mechanism – through which possession can be acquired.

77. I do not have to decide conclusively that the appellant's case under s.62(7) is bound to fail *simpliciter* rather I must be satisfied that it is bound to fail as against the purchasers, although it will be apparent from the preceding paragraphs that I am of the view that it is fundamentally misconceived. The appellant complains that the mechanism through which

the sale of his property was effected (the receiver transferring possession to the mortgagee to facilitate sale by the mortgagee in possession) is a “workaround” to avoid the necessity of an application under s.62(7). This may well be so. The mechanism chosen not only avoided a court application under s.62(7), but also avoided the liability to account which the mortgagee would have if it took possession of the property at the outset and then by-passed the limitations of a receiver sale in terms of overreaching other charges registered on the title. However, the fact that the mechanism may be a “workaround” does not of itself make it unlawful. The appellant has not advanced any argument as to why an order under s.62(7) was a mandatory requirement in the circumstances and not merely an option of which the mortgagee did not seek to avail.

78. I am conscious that the threshold for striking out proceedings on the grounds that they fail to disclose a reasonable cause of action or are bound to fail is high and conversely that the bar which must be met by the appellant is low. For the reasons set out in the preceding paragraphs I am satisfied that the appellant has not met even this low threshold. Further, the issue is not whether the pleaded case might be stateable as against the receiver or the mortgagee or even if the auctioneer (none of whom are party to the proceedings), but whether the case is stateable as against the purchasers.

79. I can see no basis upon which this case could succeed as against the purchasers. The validity of the receiver’s appointment has been upheld by the High Court. The receiver had possession of the mortgaged property, conclusively so after the making of the interlocutory orders in the 2018 proceedings. The receiver delivered possession to the mortgagee who purported to sell to the purchasers as a mortgagee in possession. Section 62(7) of the 1964 Act provides a mechanism through which a mortgagee can obtain possession but there is nothing in *Bank of Ireland Mortgage Bank v. Cody* which suggests that this is an exclusive mechanism which must be availed of before a mortgagee can sell the mortgaged property as

mortgagee in possession. Therefore, since the lack of an order for possession under s.62(7) is the only irregularity which the appellant has identified, notice of this irregularity could never amount to participation in a fraudulent scheme on the part of the purchasers. Counsel for the appellant fairly acknowledged that his prospect of success on this appeal lay exclusively in establishing that this argument was not bound to fail. In my view it is bound to fail against the only remaining defendants in the proceedings, namely the purchasers.

Conclusions

80. For the reasons set out in this judgment I am satisfied firstly, and independently of my views on the other grounds, that the *lis pendens* registered by the appellant should be vacated under s.123 of the Land and Conveyancing Act Law Reform Act, 2009. The prosecution of these proceedings by the appellant has been characterised by delay which is not just unreasonable but quite exorbitant, and he has not offered any excuse for it.

81. Secondly, I am satisfied that the protection afforded to the purchasers under s.21(2) of the Conveyancing Act, 1881 and s.5(1) of the Conveyancing Act, 1911 provides an absolute defence to any case which the appellant wishes to make against them regarding their purchase of his property from the mortgagee. Regardless of how the appellant attempts to frame his claim it ultimately comes down to the contention that the transfer to the purchasers was unlawful and, at its height, that the purchasers should have known this was the case. The statutory provisions referred to make the purchasers' title unimpeachable and thus provide an absolute defence in those circumstances. Therefore, I am satisfied that the claim against the purchasers is one which is both unstateable and bound to fail.

82. Thirdly, the basis upon which the appellant asserts that the transfer was illegal, namely the failure on the part of the mortgagee to obtain a court order for possession under s.62(7) of the Registration of Title Act, 1964 is, in my view, misconceived. Even if there were some

merit, to this claim it could at most provide a basis for the appellant to seek relief against the mortgagee and perhaps the receiver who transferred possession of the mortgaged property to the mortgagee. It cannot provide a basis for relief against the purchasers both because of the statutory protections referred to in the preceding paragraphs and because the appellant has not pleaded or asserted any basis on which the purchasers were or should have been aware of the alleged irregularity.

83. In the circumstances I am satisfied that the appeal should be dismissed.

84. In circumstances where the appeal has been entirely unsuccessful my provisional view is that the purchasers (i.e., the second and third respondent) should be entitled to an order for the costs of the appeal. If the appellant wishes to contend for an alternative order he has liberty to notify the Circuit Court Office before close of business on 19th March with a view to having a hearing of his costs application on 21 March 2024. In default of such notice, the proposed order will issue in the terms suggested above. The costs of Tailte Éireann were dealt with in the course of the hearing of this appeal and the order should reflect that the costs of the appeal have been awarded against the appellant and in favour of Tailte Éireann.

85. As this judgment is being delivered electronically, Haughton and Pilkington JJ have indicated their agreement with it and the orders I have proposed.