

THE HIGH COURT

[2019 No. 3086 P.]

BETWEEN

LUCY PINFOLD

PLAINTIFF

AND

JOHN ALEX KANE

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of September, 2019

1. In proceedings entitled *Harrahill v. Kane* [2009 No. 325 R / 2009 162 COM], the Collector General of the Revenue Commissioners obtained judgment against the defendant for approximately €4.9 million in relation to unpaid taxes. That order was made on 3rd July, 2009. On 24th January, 2017, by order made by Kelly P. in the 2009 proceedings, Mr. Myles Kirby was appointed as a receiver over the assets of the defendant.
2. In 2019, these proceedings were instituted. The plaintiff is the wife of the defendant and the proceedings seek orders preventing the defendant from disposing of his interest in a number of specified properties (including that at issue in the present application, folio 4406F Co. Longford) and claiming various declarations.
3. On 16th April, 2019, the day the proceedings were filed, the plaintiff made an application for registration of a *lis pendens* in relation to the relevant properties, including the one at issue now. On 15th May, 2019, the receiver, Mr. Kirby, issued a notice of motion under s. 123 of the Land and Conveyancing Law Reform Act 2009 seeking to discharge the *lis pendens*. The various *lites pendentes* were discharged by Kelly P. on 9th July, 2019 by consent. The receiver succeeded in obtaining costs against the plaintiff on the basis *inter alia* that her action was not being prosecuted *bona fide*. The order of 9th July, 2019 was amended under the slip rule on 2nd September, 2019. However there was another problem – one property was not included because it was misdescribed. What is now before the court is an application by the Collector General by notice of motion filed on 5th September, 2019 in the 2019 proceedings to rectify this by vacating the *lis pendens* in relation to folio 4406F Co. Longford. That was made returnable for 12th September, 2019 at which stage the plaintiff sought time to consider it and the matter was adjourned to 18th September 2019.

Parties

4. I have received helpful submissions from counsel for the applicant in the motion, Mr. John E. Donnelly B.L. and from the solicitor to the respondent to the motion and the plaintiff in the action, Mr. Michael Finucane. The defendant in the substantive action appeared in person.

Application to vacate the *lis pendens*

5. Section 123 of the Land and Conveyancing Law Reform Act 2009 provides that the court may vacate a *lis pendens* on the application of any person affected by it on notice to the person on whose application it was registered, *inter alia* where the court is satisfied that the action to which the *lis pendens* relates is not being prosecuted *bona fide*. I noted

previously in *Harrington v. O'Brien* [2017] IEHC 506 [2017] 7 JIC 3117 (Unreported, High Court, 31st July, 2017) that the 2009 Act had repealed the legislation providing for the procedure by which this was to be done but did not expressly set out a replacement procedure. That omission does not allow applicants to apply in any proceedings whatsoever that they wish. The simplest procedure is to apply by motion in the very proceedings in which the *lis pendens* was registered and, commendably, the receiver has done that here. As I am satisfied that the action is not being prosecuted *bona fide*, the only thing potentially stopping the order being made is that the defendant has asked for yet another adjournment to consider the papers.

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

Order

7. Accordingly, I will grant the relief sought in the notice of motion filed on 5th September, 2019, namely:
 - (a) an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 vacating a *lis pendens* registered by or on behalf of the plaintiff over the lands comprised in folio 4406F of the Register Co. Longford on the basis that the action is not being prosecuted *bona fide*; and
 - (b) an order directing the Registrar of Deeds and Titles and/or the Property Registration Authority to cancel any *lis pendens* registered by or on behalf of the plaintiff over the lands comprised in folio 4406F of the Register Co. Longford registered in the Central Office on 16th April, 2019.
8. It may be that because the application was as a result of an error by the applicant, a matter that is sensibly accepted by Mr. Donnelly, that may have cost consequences, and I will hear the parties on that.

Postscript - Costs

9. Having heard Mr. Donnelly and Mr. Finucane, it appears that, given that the present application was a result of an error on behalf of the moving party, the receiver, and given that Mr. Finucane was therefore perfectly entitled to attend and make submissions, and also given that the thrust of his submission was on how procedurally costs could be minimized, certainly a matter of legitimate concern for him to raise I don't think it can be said that there was no point to him attending, so consequently I will accede to Mr. Finucane's application for costs of the present motion against the receiver.

10. But given that the receiver already has an order for costs against the plaintiff in relation to the previous motion, my suggestion subject to hearing from counsel was that to minimize further squabbling and to simplify matters all round, I should just measure the costs of this motion as being equal to the costs of the motion on 9th July, 2019 and thus everybody is all square. Such an approach will avoid probably pointless further argument in relation to costs in these proceedings.

11. Having heard from Mr. Donnelly and Mr. Finucane on the question of the measuring the costs of this motion as equal to those awarded on 9th July, 2019, no particularly tangible reason has been put up as to why I should not do that. Mr. Finucane is prepared to acquiesce to that course although Mr. Donnelly's instructions don't extend to allowing him to agree to that, but the only tangible matter that he points to is that there are other costs issues in the 2009 proceedings. However that is not a reason why the costs of the 2019 proceedings shouldn't be simplified and set off in the appropriate manner so in the absence of any strong reason not to, and given the tangible practical reasons why such an order would make sense, and indeed given that it is really doing the receiver a favour in terms of avoiding the further costs and inconvenience of possibly futile taxation in the 2019 proceedings, I will measure the plaintiff's costs in this motion as being equivalent to the receiver's costs in the earlier motion and to provide for set-off of one set of costs against the other such that there is a net overall balance of no order as to costs for the two motions taken together.