THE HIGH COURT

[2021] IEHC 428

[Record No. 2019/3901 P]

BETWEEN

PAT SHEAHAN AND QILEEN QUILL SHEAHAN

PLAINTIFFS

AND

PADRAIG QUILL JUNIOR AND PADRAIG QUILL SENIOR

DEFENDANTS

JUDGMENT of Ms. Justice Siobhán Stack delivered on the 24th day of June, 2021.

Introduction

1. The first defendant is the registered owner of the Whitegates Hotel, Muckross Road, Killarney, Co Kerry which is the property comprised in Folios 29383F, 22306F and 22680F of the Register, Co Kerry ("the Property"). This is an application by the first defendant to vacate the *lis pendens* registered by the plaintiffs as a burden on each Folio.

2. The proceedings were commenced by plenary summons issued on 17 May 2019, and the *lites pendentes* were registered on 29 May 2019. An appearance was entered by the first defendant on 5 June 2019 and a statement of claim was delivered on 13 June 2019. The first defendant delivered his defence and counterclaim on 29 October, 2019. A notable feature of the procedural history of these proceedings is that the second defendant has never been served with the proceedings.

3. The statement of claim pleads that, in or about July, 2018, the first and second defendants entered into an agreement with the plaintiffs. This agreement is said, in essence, to be an agreement whereby an earlier loan to the second defendant (who is the brother of the second plaintiff and father of the first defendant), had to be restructured as he could not repay a larger amount loaned to him by the plaintiffs in 2008. It is alleged that, in order this time to be sure of payment, it was agreed that the Property would be sold in order to ensure that the reduced sum which the plaintiffs were willing to accept would in fact be repaid, and the sale was to take place within 120 days of the agreement.

4. There is a complete dispute between the plaintiffs (who are husband and wife) and the first defendant as to whether he was party to the agreement at all. The first defendant says that he was not privy to any such agreement and it is common case that the second defendant was represented by his accountant, who has sworn an affidavit in this application to the effect that he was not acting for the first defendant and did not purport to conduct any negotiations or reach any agreement on his behalf. However, I do not have to come to any view on this issue for the purpose of this application.

5. In essence, it is pleaded in the statement of claim that the sale of the Property was to take place in order to ensure (or guarantee) that the second defendant would in fact repay the reduced sum. The indorsement of claim in both the plenary summons and the statement of claim seeks an order that the Property is subject to an equitable charge in the amount outstanding from the first defendant on foot of the alleged agreement.

6. The first defendant now seeks to vacate the *lites pendentes* on the grounds of unreasonable delay. Section 123 of the Land and Conveyancing Law Reform Act 2009 provides:

> " … [A] court may make an order to vacate a *lis pendens* on application by –
>
> …
>
> (b) any person affected by it, on notice to the person on whose application it was registered –
>
> …
>
> (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."

7. The first defendant relies predominantly on the "unreasonable delay" ground and makes only a subsidiary argument that the action is not being prosecuted bona fide.

The concept of "unreasonable delay"

8. Under the heading of "unreasonable delay", the first defendant claims, first, delay in the prosecution of the proceedings as against him and, secondly, on the fact that the second defendant has not yet been served with the proceedings at all.

9. He relies on the judgment of Barniville J in *Hurley Property ICAV v. Charlene Ltd* [2018] IEHC 611, which appears to be the leading authority on the concept of "*unreasonable delay*" within the meaning of s.123(b)(ii). It contains a helpful summary of the essential basis on which a *lis pendens* can be vacated by reference both to the law as it stood prior to the enactment of the 2009 Act and subsequently.

10. Prior to the 2009 Act, the sole basis upon which a *lis pendens* could be vacated was that the proceedings were not being pursued bona fide. This could be shown by establishing that the proceedings did not make a claim to an estate or interest in land or that they made such a claim but were doomed to fail. Barniville J concluded (para. 75):

> "The position, therefore, prior to the 2009 Act was that provided the proceedings concerned a claim to an estate or interest in land, a *lis pendens* could be registered as of right and, where the proceedings were bona fide, the court did not have the jurisdiction to vacate the *lites pendentes* even where there was a delay in registering the *lis*."

However, the jurisdiction to vacate a *lis pendens* was extended under the 2009 Act, which introduced a new and additional ground, "unreasonable delay", upon which the court could vacate a *lis pendens*.

11. In construing the concept of "unreasonable delay", Barniville J concluded, approving the *dictum* of Haughton J. in To*gher Management Co. Ltd. v. Coolnaleen Developments Ltd (In Receivership)* [2014] IEHC 596, that there was an obligation on the party registering a *lis pendens* to progress the proceedings without undue delay and with "expedition and

vigour" (para. 82). He was satisfied that, by including the new jurisdiction in s.123, the drafters intended to impose an obligation on a litigant who has registered a *lis pendens* to prosecute the proceedings expeditiously. This is an obligation over and above the obligation which already exists under the Rules of the Superior Courts prescribing time limits for the delivery of pleadings and for the taking of steps in the proceedings, and over and above the jurisdiction which already inheres in the court to dismiss proceedings in the circumstances outlined by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

12. Barniville J. was also satisfied that it was not necessary to undertake the sort of assessment which was required by the *Primor* test, and which involved an assessment of the balance of justice, including issues such as prejudice to the defendant and constitutional principles of basic fairness of procedures. Indeed, the Court of Appeal came to the same conclusion in a judgment issued less than two weeks previously, *Carthy v. Harrington* [2018] IECA 321. Instead, the new s.123(b)(ii) was intended to counterbalance the statutory entitlement conferred on a person in certain circumstances to register as of right a *lis pendens* and to impose a corresponding obligation on that person to expeditiously prosecute the proceedings in respect of which the *lis pendens* was registered.

13. In that case, this Court was satisfied that the plaintiff was guilty of "unreasonable delay", first, because the proceedings were not served for six months, and then only when the application to vacate the *lites pendentes* was listed in the Commercial Court. The excuse given was that it was hoped that the parties could come to an amicable resolution of the dispute, but this was rejected by Barniville J in circumstances where the property owner was aware of the proceedings and was requesting service.

14. In addition, the statement of claim had not been served promptly and then only after a warning letter threatening a motion had been sent. Furthermore, the remaining defendants had not been served at all.

Application to this case

15. In my view, the plaintiffs in this action have been guilty of unreasonable delay. First, though their pleadings make it clear that the primary debtor is the second defendant, he has not been served with the proceedings, the reason apparently being that he is making at least some payments on foot of the agreement the subject matter of the proceedings themselves.

16. There is no evidence that the second defendant is evading service and the hearsay averments at para. 37 of the affidavit of the first plaintiff demonstrate only that a summons server attended at the second defendant's place of business but "did not meet the second defendant to serve him." No steps appear to have been taken to serve him at his home address. Indeed, it is confirmed at para. 42 of the same affidavit that service "was not actively pursued" against the second defendant because he was making payments and "it appeared to us to be a bit churlish to actively advance the proceedings against him, when it appears … that … [he] is making genuine efforts to repay the money,

the subject matter of these proceedings and at a difficult time." It therefore appears that the plaintiffs have positively decided not to serve the second defendant.

17. Secondly, the plaintiffs have been guilty of unreasonable delay in prosecuting the proceedings as against the first defendant. On 4 December, 2019, approximately five weeks after delivery of their defence and counterclaim, the first defendant requested the plaintiffs to set the matter down for hearing. The first defendant then served a notice of trial on 23 January 2020. The plaintiffs do not appear to have responded on either occasion.

18. By letter dated 2 July 2020, the first defendant's solicitors wrote to the plaintiffs' solicitors notifying them that the first defendant intended to deliver a certificate of readiness on the parties to the proceedings on the expiry of 30 days from the date of that letter. In accordance with Practice Direction 75, the plaintiffs' assistance in estimating the duration of the hearing was requested for the purpose of obtaining a hearing date.

19. A prompt reply was received by letter dated 7 July 2020, which indicated that the matter was not ready for hearing as discovery remained outstanding. The first defendant's solicitors responded by letter dated 29 July 2020 indicating that the first defendant was prejudiced by the registration of the *lites pendentes* and also objecting to what they said was the failure of the plaintiff to take any substantive steps in the proceedings or even to serve the second defendant. The plaintiffs were notified that this application would be brought.

20. It appears that no steps whatsoever have been taken to progress the matter of discovery, and the plaintiffs have not even sent a letter seeking voluntary discovery in accordance with Order 31 of the Rules. I understood counsel for the plaintiffs to say at the hearing of the motion that discovery could not be sought after notice of trial is served, but if that is so, then it makes the response of the plaintiffs to the request to cooperate in accordance with Practice Direction 75 all the more unsatisfactory.

21. This application was brought by notice of motion issued 6 November, 2020, which got a return date of 8 March, 2021. The first replying affidavit filed on behalf of the plaintiffs was sworn 3 March, 2021. None of this demonstrates a sense of urgency on the part of the plaintiffs, notwithstanding the obligation on them to prosecute the proceedings with expedition and vigour in circumstances where they had registered three *lites pendentes* against the first defendant's Property.

22. In my view, therefore, the first defendant has established that the plaintiffs are guilty of "unreasonable delay" within the meaning of section 123(b)(ii) and is entitled to an order vacating the *lis pendens* registered as a burden on each of the three Folios.

Whether the proceedings are being prosecuted bona fide

23. The first defendant's counsel also advanced, very much on a subsidiary or alternative basis, an argument that the proceedings were not being prosecuted bona fide because the agreement for the creation of an equitable charge on the Property which was pleaded in

the statement of claim was not one evidenced as required by s. 51 of the 2009 Act. He conceded that this was not in his submissions and if the plaintiffs' counsel had been taken short by it he would not pursue it.

24. I did not understand the plaintiffs' counsel to indicate that she had been taken short by this additional argument and she dealt with the claim under this ground in her oral submissions.

25. I would comment in passing that the power to create an equitable charge over registered land, which previously was effected by deposit of the land certificate, is in doubt since the enactment of s.73 of the Registration of Deeds and Title Act, 2006: see the discussion in *Promontoria (Oyster) DAC v. Hannon* [2019] IESC 49.

26. However, this issue was argued solely by reference to s.51 of the 2009 Act which, the first defendant argued, applied to the creation of equitable mortgages as they fell within the definition of "disposition" in section 51. "Disposition" is defined in s.3 of the 2009 Act to include conveyances and "conveyance" is defined in the same section as including "an appointment, assent, assignment, charge, disclaimer, lease, mortgage, release, surrender, transfer, vesting certificate, vesting declaration, vesting order and every other assurance by way of instrument except a will." Finally, "instrument" is defined as including deeds, wills and other documents in writing.

27. It is not clear to me whether it is alleged that the equitable charge was to be by way of deposit or whether it exists by way of an agreement to create a charge over the Property. If the former, this would appear to no longer be possible as determined by the Supreme Court in *Promontoria (Oyster) DAC v. Hannon* and if the latter, the plaintiffs have not pleaded or referred to any written agreement, note or memorandum of same.

28. However, given that this issue was not raised in the written submissions of the first defendant, I do not think I could decide the application on this basis as the applicant has not been given any opportunity to produce a note or memorandum for the purposes of this application. Furthermore, s.51 is not clearly pleaded by the first defendant, at least insofar as the alleged agreement for an equitable charge is concerned. Paragraph 7 of the defence delivered by the first defendant seems to plead this in relation to the agreement insofar as it asserts that the first defendant guaranteed the loan to the second defendant. This confusion may well arise out of some lack of clarity in the statement of claim as to the nature of the agreement in the first place, but, so far as this application is concerned, the lack of clarity in the defence and the failure to raise it in written submissions in advance of the hearing leads me to conclude that I should not base my decision on this ground.

Conclusion

29. In my view, the first defendant has succeeded in showing that the plaintiffs are guilty of "unreasonable delay in the prosecution of the proceedings" as required by section 123(b)(ii) and is therefore entitled to an order vacating the *lites pendentes* registered on Folios 29383F, 22306F and 22680F, Co Kerry.

30. I will list the matter before me in early course so as to deal with the costs of this application.