

THE HIGH COURT

[2001 No. 13712 P]

BETWEEN

DAN MORRISSEY (IRL) LIMITED AND DAN MORRISSEY LIMITED

PLAINTIFFS

AND

DONAL MORRISSEY, LISMARD DEVELOPMENTS LIMITED AND LISMARD PROPERTIES LTD

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on the 28th day of February, 2008

1. Introduction

1.1 These proceedings concern the ownership of certain registered lands in County Laois together with an alleged entitlement on the part of the plaintiffs to a right of way across certain other adjacent lands. The proceedings have been in being since 2001, and have progressed to the stage where a notice of trial has been served. Notwithstanding the fact that the proceedings involve a claim to own lands in respect of which the defendant is the registered owner, and also involve a claim to a right of way over other lands of which the defendant is also the registered owner, no *lis pendens* was filed in respect of the proceedings until recent times.

1.2 However, it would appear that on the 24th of August, 2007 a *lis pendens* was registered in the Central Office of this Court, in circumstances which it will be necessary to describe in more detail in due course. The defendants now seek to have the *lis pendens* concerned vacated. This judgment is directed to that application. The grounds on which this application is based are quite unusual. This Court has, not infrequently, to deal with applications which seek to vacate a *lis pendens*. The normal basis upon which such applications are brought is to the effect that the underlying proceedings are not *bona fide* maintained. In other words it is asserted that the proceedings are bound to fail at least insofar as they relate to any claim in respect of an interest in the lands in dispute.

1.3 However, in this case no attempt was made to suggest that the plaintiffs' claim in respect of the ownership of the lands concerned could be described as failing *bona fides*. Rather it is the circumstances and manner in which a *lis pendens* was filed at an advanced stage of the proceedings, that gives rise to the defendants' complaint. With that in mind it is appropriate to turn to the circumstances surrounding the filing of the *lis pendens* concerned and the manner in which it was filed.

2. The Facts

2.1 On the basis of the evidence put before the court on the hearing of this application, it would seem that it is contended on the part of the plaintiffs that, in a conversation in relation to the lands in December 2006, it was intimated on behalf of the defendants that at least some of the relevant lands had been charged in favour of the defendants' bankers as part of a reorganisation of the defendants' financing. It is said on behalf of the plaintiffs that it was in those circumstances, and being concerned that lands in respect of which a claim is made in the proceedings might be the subject of a charge in favour of a bank who might take without notice, that the *lis pendens* was filed. It is said that up to that time the plaintiffs had no particular reason to be concerned and had not, therefore, filed any *lis pendens*. It should, in fairness to the defendants, be pointed out that it has now been averred to on affidavit that the bank concerned were, at all material times, aware of the proceedings.

2.2 It appears to be common case that the *lis pendens* was filed without any advance notification or warning to the defendants. There is, of course, nothing in itself unusual about that course of action. In many cases a *lis pendens* will be filed immediately upon the issue of proceedings so as to protect the interests of the plaintiff by putting any potential third parties on notice of the existence of the proceedings. In such circumstances it is rarely the case that the defendant will be put on notice of the intention to file a *lis pendens* although it may well be that the defendant will be on notice of the intention to commence proceedings, and in that context, it is possible that the defendant may also be formally notified of the intention to file a *lis pendens*.

2.3 In any event it is clear that a *lis pendens* was filed, in the ordinary way, in the Central Office. It is also the case that that *lis pendens* was not registered as a burden against any of the folios which comprised the lands which are the subject of these proceedings both in respect of the claim to ownership and in relation to the claim for a right of way. Against the background of those facts it is necessary to turn to the legal principles applicable.

3. The Legal Principles

3.1 The jurisdiction of this Court to vacate a *lis pendens*, notwithstanding the opposition of a plaintiff, has been clear, at least since the decision of the Supreme Court in *Flynn v. Buckley & Anor* [1980] 1 I.R. 423. In this Court in *Flynn v. Buckley*, McWilliam J., [1979] 1 I.R. 8, had concluded that he had jurisdiction to vacate a *lis pendens* notwithstanding the opposition of the plaintiff and in circumstances where he was satisfied that the proceedings were not being *bona fide* pursued. On appeal O'Higgins C.J., (speaking for the Supreme Court) determined that McWilliam J. was correct in holding that the court had jurisdiction to make the order sought in the absence of the plaintiff's consent. On the facts of the case, O'Higgins C.J. disagreed with McWilliam J. as to whether it could be said that the proceedings were being prosecuted *bona fide* and thus the appeal was allowed. However, it is clear that the court does have a jurisdiction to vacate a *lis pendens* where proceedings are not being *bona fide* pursued.

3.2 However, it is clear from the judgments of both McWilliam J. and O'Higgins C.J., that the focus in that case was as to whether the underlying claim in respect of the lands was *bona fide* made. No authority was cited to me, nor am I aware of any authority, in which a jurisdiction to vacate a *lis pendens* has been asserted to be based on the circumstances in which the *lis pendens* was filed rather than the underlying circumstances giving rise to the cause of action in the first place. Given that no challenge is made in this application to the *bona fides* of the underlying claim, it seems to me that this application can only succeed if the court has a wider jurisdiction to vacate a *lis pendens* notwithstanding the opposition of a plaintiff, than has heretofore been identified. It is, therefore, necessary for me to consider that legal issue from first principles.

3.3 It is important to recollect that, historically, any purchaser of lands was fixed with the consequences of a cause of action that was in being in respect of the lands in question as of the time of purchase. As pointed out by Kenny J. in *Giles v. Brady* [1974] 1 I.R. 462 at p 467, the original doctrine of notice must have worked considerable hardship because a purchaser or mortgagee who had bought property in ignorance of a suit might find that the land was liable for claims established in an action which had been started many years before and of which he was unaware. It is clear that it was in that context that the original legislation governing *lis pendens*, that is the Judgment (Ireland) Act, 1844 ("the 1844 Act"), was passed, which provided that a purchaser would not be bound by the result of litigation pending at the time of his purchase unless notice of the existence of the relevant litigation had been registered in accordance with the terms of the 1844 Act. Thus a party was entitled to search the relevant register, and if finding no relevant registration, was entitled to assume that there was no litigation pending in respect of the land, and could thus purchase free

from the consequences of the litigation concerned.

3.4 The registration of a *lis pendens* in accordance with the relevant legislation was thus simply a means of notifying any potentially interested parties as to the existence of the litigation. The registration of the *lis pendens* was done as of right provided that the proceedings were actually in being and could, in my view, be maintained as of right, subject only to the jurisdiction identified in *Giles v. Brady* to vacate where the proceedings were not *bona fide*.

3.5 It is important to note the purpose of the registration of a *lis pendens*. The *lis pendens* is designed to bring to the attention of third parties who may be interested in acquiring the property, or a charge over it, the fact that there are proceedings in being in relation to the property which might affect their interests. Provided that there is a set of genuine proceedings in being which could have an effect on property then, on what basis could it reasonably be said that a party is not entitled to register a *lis pendens*.

3.6 It is, of course, the case that defendants or other relevant parties may agree to provide a plaintiff with some alternative form of protection whether by way of undertaking or otherwise. It may well be that there is considerable merit in adopting such a course of action by agreement to the mutual benefit of all. However, the fact that a plaintiff may agree to such a course of action does not deprive the plaintiff of an entitlement to register a *lis pendens* subject only to maintaining a *bona fide* claim. It is important to recollect that the registration of a *lis pendens* is, therefore, in an entirely different category to the grant of an interlocutory injunction. A court from whom an interlocutory injunction is sought must have regard not only to whether a plaintiff has made out a stateable case, and thus has established that there is a fair issue to be tried, but also to the established principles concerning the balance of convenience. The court must, of course, also have regard to whether damages might be an adequate remedy, but in respect of a claim to property such a consideration is unlikely, in most cases, to be of significance. However, it is clear that even in the case of a claim to property, a court asked to grant an interlocutory injunction pending trial, which would have an effect on the property concerned, will have to have regard to a range of factors and not just the question of whether there is a stateable claim. Indeed it might well be that a plaintiff who allowed proceedings to go on for some considerable time without seeking an interlocutory injunction would be faced with quite a difficulty in moving for an interlocutory injunction, at a stage close to trial, unless he could point to some significant change in circumstances which justified him in so doing. However, such factors are, in my view, of no relevance in relation to the registration of a *lis pendens*.

3.7 A party is entitled to register a *lis pendens* immediately upon the issuing of appropriate proceedings without notice to anyone. It does not seem to me that such a right can be lost by delay in registering a *lis pendens*. Neither does it seem to me that such a right can be, in any way, dependant on notifying the defendant.

3.8 The whole point of registering a *lis pendens* is to protect the plaintiff's interests. The plaintiff is entitled to protect those interests in all circumstances subject only to having a *bona fide* claim to protect. For all of those reasons it does not seem to me that the fact that a *lis pendens* was not registered at an early stage, or that it was somewhat belatedly registered without notice to the defendant, is of any materiality to the entitlement, as of right, of a plaintiff to put the public on notice of the existence of the proceedings concerned.

4. Application to the Fact of this Case

4.1 I am not, therefore, satisfied that the absence of notice to the defendants or the belated stage at which the *lis pendens* in this case was registered are matters which can effect the validity of the *lis pendens* or ground a jurisdiction to vacate same.

4.2 The other leg of the defendants' argument pointed to the fact that it is open to the plaintiff to register a *lis pendens* as a burden on any relevant folio. It is pointed out that the claim in these proceedings relates to part only of certain folios being, so far as the claim to ownership is concerned, referable to a portion only of one folio and being, so far as the other folios which are mentioned in the proceedings are concerned, related only to a claim to a right of way.

4.3 There is no doubt that the relevant provisions of the Land Registry Rules (rule 56) provide that, where the existence of a *lis pendens* is to be registered as a burden on the folio concerned, but where the action which underlies the *lis pendens* relates only to part of the folio concerned, the portion of the lands which are the subject of the relevant litigation must be specified. It is, thus, a matter of complaint on the part of the defendants that the absence of registration by the plaintiff of the *lis pendens* as a burden on the relevant folios leads a person conducting a search in relation to the defendants in a position where it will not be clear from the public record as to the extent of the plaintiffs' claims. Such a third party will, it is said, have the existence of the proceedings disclosed by the registration of the *lis pendens* in the first place, but will not have the extent of those proceedings disclosed by virtue of the absence of a registration of the *lis pendens* as a burden on the relevant portions of the applicable folios.

4.4 However, it does not seem to me that this is a material consideration. Provided that there is a *bona fide* claim, then a plaintiff is entitled to register a *lis pendens* and is under no obligation to engage in any other form of registration. The fact that a plaintiff may choose to also register the *lis pendens* as a burden on relevant folios does not take away from the entitlement to register the original *lis pendens* in the Central Office. Again it should be emphasised that the only thing that the registration of a *lis pendens* does is to bring to the attention of interested third parties the fact that there are proceedings in being which affect land. Should such third parties require to be satisfied as to the entitlement of the defendant to deal with its lands in any particular manner, then such third parties are entitled to enquire as to the extent of the proceedings concerned so as to satisfy themselves that the proceedings could have no possible effect on any transaction which might be proposed. That is a matter between the defendant and the third party concerned. The plaintiff is entitled to bring his proceedings before the court and specify them in whatever way is set out in the pleadings. If the proceedings are *bona fide* and affect land, he is entitled to register a *lis pendens* so as to bring to the notice of any interested third party the existence of those proceedings. The extent to which the existence of those proceedings might affect decisions which a third party might make is a matter for that third party.

5. Conclusions

5.1 I am not, therefore, satisfied that this Court has any jurisdiction to vacate a *lis pendens* by virtue of the manner in which the *lis pendens* is filed, having regard to whether the defendant is put on notice or the timing of the registration of the *lis pendens*. Subject only to the overriding requirement that the *lis* which is said to be pending must be *bona fide*, it seems to me that a plaintiff is entitled to register the *lis pendens* as of right and at any time that he chooses. It is not, in my view, appropriate for the court to exercise any discretion which might be analogous to the considerations which a court would apply in granting an interlocutory court order. A *lis pendens* can be registered without reference to the court. Such registration clearly does not, therefore, involve the exercise by the court of any consideration or discretion as to whether the *lis pendens* should be registered. Likewise, it does not seem to me that the court has any general discretion to order the vacation of a *lis pendens* save in circumstances where it can be determined that the underlying proceedings are not *bona fide*.

5.2 Given that the registration of a *lis pendens* is, in my view, an entitlement of a plaintiff who has a *bona fide* claim in respect of

land, then it follows that that entitlement is not circumscribed by whether or not the plaintiff may also have an entitlement to register a *lis pendens* as a burden on an appropriate folio and by considerations of whether such a registration (or appropriate undertakings or the like) could afford such plaintiff an equivalent degree of protection. He is free to accept such alternative protection if he wishes. He is equally entitled to rely upon his right to register a *lis pendens* if he so wishes.

5.3 In those circumstances it does not seem to me that the defendant has established any entitlement to have the *lis pendens* in this case vacated.