THE HIGH COURT

[2016 No. 9956 P.]

BETWEEN

JEREMIAH HARRINGTON, MAURICE HARRINGTON, PATRICK HARRINGTON, IN THEIR OWN CAPACITY AND JOINTLY TRADING AS THE HARRINGTON PARTNERSHIP

PLAINTIFFS

AND

TOM O'BRIEN

DEFENDANT

AND

EAMONN CARTHY

PROPOSED NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2017

1. The plaintiffs are property developers involved in a development in lands at Kilsheelin and Fethard, County Tipperary. From 2005 onwards Mr. Carthy, the proposed notice party, developed the site and says he constructed roads, sewers, a playground and other elements of the development. Certain difficulties arose and from 2014 onwards five sets of High Court proceedings were issued by Mr. Carthy against the plaintiffs. On the 9th July, 2014 the first of five applications by way of *lis pendens* were issued in the Central Office. That first application was not lodged in the Property Registration Authority (PRA). The second application was issued on the 26th August, 2014 and lodged in the PRA on the 18th February, 2015. The third application was issued on the 11th December, 2014 and lodged in the PRA on the 11th November, 2016. The fourth application was issued on the 8th February, 2017 and lodged in the PRA on 20th February, 2017 and the 5th and final *lis pendens* was issued on 29th May, 2017 and lodged in the PRA on 22nd June, 2017.

2. The defendant meanwhile had been appointed receiver over certain assets the plaintiffs on various dates between 16th December, 2015 and May, 2016. He did not make any application between December, 2015 and the bringing of the present motion dated 18th July, 2017 to discharge any *lis pendens* that had been registered in relation to any of the properties. Between mid to late 2016 I am told that the defendant offered the properties for sale. On the 18th November, 2016 the present proceedings were commenced by the plaintiffs against the receiver seeking *inter alia* declarations that the properties could not be sold in the defendant's capacity as receiver and that the defendant was not validly appointed.

3. In November, 2016 the property at issue was "sale agreed" as between the defendant and the housing authority but no formal contract has been entered into. On 16th December, 2016 the plaintiffs sought an injunction to prevent the sale of the property to that housing authority which was refused by O'Connor J. That refusal was appealed to the Court of Appeal which dismissed the appeal on 24th April, 2017, *ex tempore*, holding that there was not a serious issue to be tried regarding the appointment of the receiver and that damages would be an adequate remedy. On 18th July, 2017 the present application was brought by the defendant to vacate any *lis pendens* registered by Mr. Carthy by way of notice of motion. I have heard a very helpful submission from Ms. Imogen McGrath B.L. for the defendant and from Mr. Eamonn Carthy the proposed notice party in person. On 26th July, 2017 I dismissed the application and I now set out more formal reasons for having done so.

How should an application to discharge a *lis pendens* or caution be made?

4. A *lis pendens* may be registered under s. 121(2) of the Land and Conveyancing Law Reform Act, 2009 and a caution may be entered under s. 97 of the Registration and Title Act, 1964. Section 123 of the 2009 Act provides for the discharge of a *lis pendens*. The discharge of a caution is under the court's inherent jurisdiction which Ms. McGrath submits should be exercised by analogy with the 2009 Act, a submission which I would broadly accept. Ms. McGrath relies on O. 72A of the Rules of the Superior Courts and submits that that provision mandates certain procedures by reference to the 2009 Act but makes no provision for the procedure for discharge of a *lis pendens* under s. 123. That is correct but that does not mean that the defendant can proceed any way he wishes. In the absence of specific provision one falls back on the general law which provides that substantive relief should be sought by plenary summons or, in a case appropriate for special summons, under O. 3 r. 21. Ms. McGrath says that there is "*a valid third option*" which is to join a party to existing proceedings but for that option to exist those existing proceedings be they instituted by plenary summons or special summons would have to be proceedings in which such a substantive claim was actually brought. Here there is no such claim in the plenary summons to vacate any relevant *lis pendens* and there is no such claim by way of counterclaim if only for the reason that no defence in counterclaim has yet been delivered; but also because such a relief in relation to a *lis pendens* entered in entirely separate proceedings would not seem to be a proper counter-claim against these particular plaintiffs.

5. Ms. McGrath says that in this case O'Connor J. on the 16th December, 2016 made an order by consent discharging a *lis pendens* registered by the plaintiffs' spouses and that that application was brought by notice of motion in these proceedings dated the 25th November, 2016. That is all well and good but a consent determination of a point that is not brought to the court's attention invokes the principle that *"a point not argued is a point not decided" (The State (Quinn) v. Ryan* [1965] 1 I.R. 70, p. 120 *per* Ó Dálaigh C.J.). She says that a notice of motion was also brought to discharge a *lis pendens* in *Tola Capital Management LLC v. Linders (No. 2)* [2014] IEHC 324 (see para. 1 of the judgment of Cregan J.) But again no question about the appropriate procedure seems to have been brought to the court's attention. Ms. McGrath submits that the use of a notice of motion is what she calls "*custom and practice*". Prior to 2009, the *Lis Pendens* Act, 1867 s. 2 provided that such applications can be brought *"in a summary way by petition or motion in court, or by summons at chambers*". The reference to *"a summary way"* is perhaps suggestive that relief could be sought by an originating notice of motion. So for the period from 1867 to 2009 such applications could indeed be brought by motion, but of course if such relief were sought not by originating notice of motion but as an interlocutory motion, that does not necessarily mean by motion in any proceedings whatever. It would have to be a motion in appropriate proceedings; and the appropriate proceeding to bring such a motion in would, it seems to me, have been presumptively the proceedings in which the *lis pendens* itself was entered. However, not for the first time the 2009 Act repealed legislation without full re-enactment, thus losing something in translation and causing a certain degree of difficulty. The 2009 Act does not include provision for an originating motion procedure so one is brought back to the general law that such an application should be brought by summons, unless it is properly an interlocutory motion. The general savings provisions of s. 26 of the Interpretation Act, 2005 do not assist the defendant. So the appropriate procedure to set aside a *lis pendens* or by analogy a caution, is normally by special summons although a plenary summons

is also possible, where the relief is sought as a substantive relief. Where sought as an interlocutory relief, that application could only be brought by motion in proceedings which properly relate to that issue, classically the proceedings in which the *lis pendens* was entered. That application can be made returnable before the Master under O. 63 r. 29.

6. What cannot be done (and what was not permissible even under the old procedure) was for a defendant to wander into court in any old proceedings he or she thinks fit, seek to drag in to those proceedings some hitherto uninvolved third party, and then on the back of making such person a notice party, seek to discharge, by motion, a *lis pendens* entered by that person in entirely different proceedings. That is what the defendant is impermissibly seeking to do here.

If, contrary to the foregoing, this relief can be sought by motion, should the plaintiffs have been served?
7. It is notable here that the plaintiffs were not served with the application. Ms. McGrath submits that O. 15 r. 13 is silent and there is nothing specific in the rules requiring her to have done so; but the requirement to serve parties arises from general law. She says that only focused reliefs are sought; but the difficulty with that argument is that it is not necessarily a matter for one party to determine whether another party is affected. More fundamentally, the whole basis of Mr. Carthy being a notice party is that his involvement would have some relevance to the issues in the current proceedings. That contradicts the argument that the plaintiffs should not be heard on an application of this kind. If, for example, the defendant wanted Mr. Carthy to be bound by the court's findings on the plaintiffs' contentions as they stand in the pleadings then it might well be appropriate to join him as a notice party (see for example *Corbett and Anor. v. Coffey Construction Ireland Ltd*. [2017] IEHC 352). But that is of course a reason for hearing from the plaintiffs before making such an order. Different considerations may arise if the application was one solely limited to the *lis pendens* issue and did not involve making Mr. Carthy a notice party in other proceedings (*e.g.*, brought by a proper initiating proceeding such as a special summons against Mr. Carthy alone and seeking solely to discharge any *lis pendens* entered by him; or alternatively a motion brought in the proceedings to which any *lis pendens* relates). If wider relief is sought, the receiver would have to serve other parties affected as well as Mr. McCarthy with that summons. That would certainly have been required if I were of the view that a motion in the present proceedings was a permissible procedure. If the issue was simply one of a lack of service I would have considered adjourning the matter as requested by Ms. McGrath to allow the plaintiffs to be served; but given that the procedure being adopted is not the correct one that option does not arise.

Order
8. For the foregoing reasons I will refuse the application.