



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 321

Appeal Number 2018 151

Irvine J.
Whelan J.
McGovern J.

BETWEEN/

EAMONN CARTHY

PLAINTIFF /

APPELLANT

- AND -

JEREMIAH HARRINGTON, PATRICK HARRINGTON AND MAURICE HARRINGTON

DEFENDANTS

- AND -

TOM O'BRIEN

NOTICE PARTY /

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 18th day of October 2018

1. This is an appeal against an order of Ms. Justice Baker made in the High Court on 21st March 2018 and perfected on 22nd March 2018. The order directed that Tom O'Brien (the receiver) be joined as a notice party to the proceedings and ordered pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 that *lites pendentes* registered by the appellant in the central office of the High Court in proceedings 2014 5978P be vacated.

Background

2. The appellant (Mr. Carthy) had a course of business dealings with the three defendants (the Harringtons) over many years whereby they carried out construction and building work at a number of sites of which the Harringtons were the owners. These included sites at Kilsheelan, Co. Tipperary and Fethard, Co. Tipperary. The lands were comprised in folios 43819F Co. Tipperary and 49366F Co. Tipperary respectively (the two folios). It appears that the Harringtons are brothers and were property developers who acquired the lands in the two folios at Fethard and Kilsheelan in Co. Tipperary with the assistance of loans advanced by Ulster Bank (Ireland) Ltd. (UBIL). The said loans were secured by charges on the two folios.

3. In the case of each of the folios a charge was registered on Part 3 of the folio as a burden in favour of UBIL for all present and future advances. Subsequently Promontoria (Aran) Limited (Promontoria) acquired the interest of UBIL in the two charges and came to be registered as owner of the said charges on the two folios.

4. During the economic crash the Harringtons defaulted on the loans and the receiver, Tom O'Brien, was appointed by Promontoria over specific assets of the Harringtons on various dates between 16th December 2015 to May 2016. The assets included various sites, dwellings and commercial units built on lands carved out of the two folios.

5. On 9th July 2014 Mr. Carthy instituted proceedings against the Harringtons claiming, *inter alia*, a declaration that a property development partnership existed between him and the Harringtons and that same had been rendered null and void as a result of their alleged conduct. He further sought a declaration that he was the sole beneficial owner of, and that the Harringtons had no beneficial interest in, the two properties specified in the schedule to the plenary summons, namely the property in the two folios.

6. After institution of the proceedings the appellant caused a *lis pendens* to be registered in the central office of the High Court. A *lis pendens* was registered as a burden on each of the folios also.

7. No appearance has ever been entered by the Harringtons in these proceedings. No step was ever taken by Mr. Carthy to seek judgment in default of appearance or to serve a statement of claim. The lands now remaining in the parent folios comprise the common areas of the two developments. The existence of the *lites pendentes* affects the capacity of the receiver to realise the secured assets over which he has been appointed for the purposes of discharging Harrington's secured debts.

8. The receiver caused a motion to be issued on 20th February 2018 seeking, *inter alia*, orders pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 vacating the various *lites pendentes* registered by the appellant in the central office of the High Court and as identified in a detailed schedule to that motion. He further sought an order pursuant to s. 123 of the said Act vacating *lites pendentes* registered by the appellant in the Property Registration Authority against the properties over which the receiver had been appointed and as identified in the second schedule to the motion which specified 27 distinct properties.

9. At the hearing in the High Court Baker J. made orders regarding five separate sets of proceedings instituted by Mr. Carthy and

considered the folios pertaining to 27 dwelling houses and 4 commercial properties. In this appeal the issues were confined to one plenary summons- 2014 5978P and the two folios which were specifically mentioned in the schedule to that plenary summons.

10. The transcript of the hearing in the High Court suggests that the appellant based his claim to an entitlement to an interest in the lands comprised in the two folios, at least in part, on a document which purports to bear the date 10th March 2011 over five years after the charge in favour of UBIL was registered over the folios.

11. By its terms it appears that the Harringtons purported to grant an option to the appellant over unspecified unfinished sites comprised in the two folios in lieu of payment for claimed expenditure and investment by Mr. Carthy in the common areas should the two estates at Kilsheelan and Fethard not be completed and taken in charge within three years from 10th March 2011. There was no suggestion by Mr. Carthy that UBIL either knew, assented to or was bound by this alleged agreement. It post-dated the creation and registration of UBIL charges by many years.

12. In the course of the hearing of this appeal it is significant that Mr. Applebe, solicitor for the appellant, did not contend, nor could he have, that the document dated 10th March 2011 vested rights in his client that would or could rank in priority to UBIL's charges on the two folios which are now beneficially owned by Promontoria.

Order of the High Court

13. At the conclusion of the hearing of the receiver's motion on 21st March 2018, Baker J. granted orders pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 vacating the *lites pendentes* registered by Mr. Carthy in the central office and on the two folios. Mr. Carthy appealed the orders made in respect of the two folios.

The appeal

14. The first ground of appeal contended that the trial judge had erred as a matter of law and of fact in allowing the receiver to bring the motion "when he was not appointed receiver over the subject properties and had no *locus standi* or legal right to bring such an application..." However, that ground of appeal was abandoned at the appeal hearing in this Court.

15. The key ground of appeal in this Court was that the High Court judge had erred in law and fact in finding that the receiver's application satisfied the requirements of s. 123 of the Land and Conveyancing Law Reform Act 2009 and further that the High Court judge had erred in vacating the *lites pendentes* which the appellant had registered over the two folios.

16. It was contended further on behalf of Mr. Carthy that there was an entirely alternative route available to the receiver and, in particular, steps could be taken by Promontoria to appoint him receiver over the two folios.

17. It was disputed that there had been delay on the part of Mr. Carthy. It was asserted that he could frame a claim based on remuneration due to him for work he had carried out in respect of the common areas including for his labour and material supplied. There was no particularity with regard to the precise nature and extent of the works done or the value in money of such a claim. The appellant contended that the receiver was not "a person affected" within the meaning of s. 123(b) of the Land and Conveyancing Law Reform Act 2009.

18. Counsel for the receiver argued that a jurisdiction to vacate the *lites pendentes* affecting the two folios existed under s. 123 Land and Conveyancing Law Reform Act 2009 which could be invoked by the receiver on the following grounds: firstly, that the receiver is a "... person affected" within the meaning of s. 123(b) of the Land and Conveyancing Law Reform Act 2009 despite not being registered on either of the two parent folios. It was acknowledged that the receiver has not been appointed over the lands in the two folios. However, counsel emphasised that in each case the lands now remaining in the parent folios constitute the common areas which would encompass roadways, pathways and utilities which are integral to the two developments in question. Counsel also argued that all of the sale assets managed by the receiver are served by the one or other of the two folios. It was contended that the existence of the *lites pendentes* on the parent folios is adversely affecting the ability of the receiver to make title to the sale assets.

19. Counsel asserted that in all the circumstances there had been "unreasonable delay" on the part of the appellant in prosecuting his claim within the meaning of s. 123(b)(ii) such as would justify the Court in making the order and further she argued that, in the alternative, the litigation was not being prosecuted *bona fide* by the appellant.

20. Counsel placed weight on the fact that Promontoria is the owner of the security charged on both parent folios and that its security ranks in priority to any claim as might ever be established by the appellant. She further argued that the language in s. 123(b) pertains to "any person affected by it" rather than "any person directly affected by it." (emphasis added) Counsel attached significance to the absence of the word "directly".

The law

21. Each application to vacate a *lis pendens* must turn on its own particular facts. Conventionally, a *lis pendens* is registered where proceedings concern the ownership of registered lands or where it is asserted that a claimant has a right or interest in or over same.

22. Significant factors in the instant appeal include the following: there was a business relationship between Mr. Carthy and the Harringtons for many years prior to the institution of these proceedings. He is owed money for work done/and materials supplied to the Harringtons. The two folios are the subject of charges registered to UBIL. In the case of folio 43819F, Co. Tipperary, the charge was registered on 15th June 2005 and in the case of folio 49366F, Co. Tipperary, the charge was registered on the 26th day of June 2007. Promontoria is now the owner of the said charges and in all material respects stands in the shoes of UBIL in relation to same. No basis to support a claim to any beneficial or proprietary interests in the lands comprised in either folio is identified by Mr. Carthy.

23. A further factor in the instant appeal is that the validity of the appointment of the receiver was not in dispute, that ground of appeal having been abandoned at the appeal hearing.

24. S. 123 of the Land and Conveyancing Law Reform Act 2009 governs the procedure to vacate a *lis pendens* by court order. It provides:

"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."

Locus standi and "any person affected by it."

25. I am satisfied on the particular and somewhat unusual facts obtaining in the instant case that the receiver has demonstrated that he is a "person affected" by the *lites pendentes* registered by the appellant against the two folios in question. In the course of effecting a valid disposition of the dwelling units and/or commercial units in the two developments carried out on the lands which were originally comprised within the two folios on the respective dates that the charges were registered over each it is necessary to assure covenants and rights over the common areas which represent the balance of the lands now remaining in the two folios. The lands remaining on the two folios comprise, at least in part, common areas and as such are subject to the grant and reservation of various easements, rights, grants, way-leaves and other important interests integral to the transfers and dispositions of the houses, units and buildings over which the respondent has been appointed receiver.

26. The consequence of registration of a *lis pendens* is well established. The registration of pending litigation was originally governed by the Judgments (Ireland) Act of 1844 and subsequently by the provisions of the Chancery (Ireland) Act 1867. The authorities clearly show that *pendente lite*, neither party to the litigation in question can alienate or effect any disposition of the property in dispute in such a manner as to adversely affect the other party to the suit. I am satisfied that the receiver has established that he is a person affected by the *lites pendentes* registered against the two folios to a limited but very real extent. He meets the test as being a "person affected" within the meaning of s. 123(b) of the Act.

27. Accordingly the receiver has *locus standi* as a person affected by the existence of the *lites pendentes* over the two parent folios which in each case appear to comprise common areas of the respective developments

"Unreasonable delay"

28. The court is entitled to make an order to vacate a *lis pendens* at the behest of a "person affected" by, it *inter alia*, "(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action."

29. The considerations as to what constitutes "unreasonable delay" in this statutory context are, accordingly, quite distinct from the principles and the complex jurisprudence which has developed in regard to litigation delay where a party to litigation can seek to stay or dismiss proceedings on grounds of delay and for want of prosecution.

30. It must be emphasised that the vacating of a *lis pendens* pursuant to s. 123 of the 2009 Act does not affect the pleadings in this suit and they continue in being as between the parties thereto. It will be recalled that the pleadings in question in this appeal, bearing record number 2014 5978P, were instituted by the appellant Mr. Carthy on 9th July 2014. No appearance has been entered by or on behalf of the defendants or any of them. No step of any kind has yet been taken to progress the claim before the courts.

31. It behoves a litigant who asserts a beneficial interest in or over encumbered property and who institutes proceedings in relation to same to prosecute such a claim with reasonable expedition, particularly in circumstances where the registered legal owners of the property are substantially indebted and where the rights and interests of third parties including a chargeholder who has validly appointed a receiver stand to be adversely impacted by delays in litigation.

32. In the course of the hearing before the High Court in March 2018 the appellant identified some personal reasons for failing to progress his substantive claim. It is noteworthy from the transcript that the learned judge clearly explained to the appellant the consequences of failing to prosecute his claim and in particular the continued failure to deliver a statement of claim that might identify some or any stateable basis for a contention that he has any right to be registered as owner of the lands in the said two folios as is pleaded in the writ.

33. A relevant factor in evaluating the reasonableness or otherwise of the delays in this case is that the appellant did not join the chargeholder, who at the date of the institution of the proceedings on 9th July 2014 was UBIL, or its successor Promontoria as notice party to the proceedings.

34. The only reasonable inference to be drawn from that omission in the circumstances is that the appellant does not assert or claim any interest that might affect or be capable of affecting or ranking in priority to the rights of Promontoria as chargeholder.

35. Of further relevance, in the context of evaluating whether the delays are "unreasonable" within the narrow meaning of s. 123(b) (ii) of the 2009 Act, is that no statement of claim has ever been delivered. Neither has any correspondence been exhibited or shown to the Court encompassing any claim capable of giving rise to any legal or beneficial interest in favour of Mr. Carthy in or over the two folios or either of them referred to in the schedule to the plenary summons.

36. Furthermore, at the hearing of this appeal, the claim of the appellant at its height was articulated as being in the nature of a claim for payment for work done and for remuneration due in respect of his labour and efforts on the sites and materials supplied. Nothing stated on behalf of the appellant in the course of the appeal identified a basis for the bare assertion advanced in the writ that the appellant was the sole beneficial owner of the property comprised in the two folios and that the defendants, who in each case are registered owners of same, had no beneficial interest in the said properties.

37. At its highest the claim of the appellant sounds in *quantum meruit* or otherwise as a claim for work done and services rendered, and separately for goods and material supplied which, so far as one can ascertain from the transcripts before the High Court, may have been subject to a retention of title clause. None of these claims in and of themselves could constitute a stateable basis for a claim by Mr. Carthy for a declaration of a right to a beneficial interest in the properties or at least any interest that could rank in priority to the chargeholders' rights. It does not appear to be in contention but that the properties appear to be in significant negative equity.

38. The reasonableness or otherwise of the clear delays on the part of Mr. Carthy in prosecuting his action against the Harringtons in the instant case, and thereby keeping alive the *lites pendentes*, must be bench against key facts which include that the chargeholder was not joined as a party or notice party to the proceedings, the charges were registered in favour of UBIL many years prior to the institution of proceedings by Mr. Carthy in 2014 and the receiver has entered into contracts for the sale and disposition of various of the properties which have appurtenant rights, access ways and wayleaves over the two folios. The continued existence of the *lites pendentes* trenches upon the capacity of the receiver to realise the security and discharge the debts in question.

39. No explanation has been forthcoming at the hearing of the appeal for the further gratuitous delays and sustained inertia that have operated after 21st March 2018 when the matter was disposed of in the High Court. Neither did the legal representative for the appellant articulate or identify any basis in law or in equity which would support a contention that the appellant has a stateable claim or any legal basis for contending to have a beneficial or proprietary interest in or over either of the two secured properties.

40. Whilst there is a bare claim to an interest clearly disclosed from the writ sufficient to secure the registration of a *lis pendens* in the central office and in the Land Registry in the first instance, it has never been substantiated nor has it been articulated with any particularity such as would be required were a statement of claim to be delivered. Hence, as matters stand, Mr. Carthy has not identified any basis for a claim to any proprietary interest in the two folios.

41. At its height, if he succeeded in a claim for monies due for labour and services rendered and goods supplied, he would have an entitlement to register any judgment as a judgment mortgage on the folios but the rights of Promontoria in each case would rank in priority.

On the basis of the available information, there would not be any equity to satisfy any judgment he might secure.

42. No just cause has been identified for the omission to comply with the Rules of the Superior Courts in regard to the delivery of a statement of claim and to conduct the litigation with reasonable expedition. I am satisfied that the delays on the part of the appellant have been unreasonable within the meaning of s. 123(b). This does not affect, nor is it intended to affect, his entitlement to pursue the litigation as he sees fit.

43. The trial judge correctly vacated the *lites pendentes*. Having regard to the provisions of the Land and Conveyancing Law Reform Act 2009 and the factual matrix obtaining in the instant case there has been "*unreasonable delay*" within the meaning of s.123 of 2009 Act in prosecuting this action before the High Court on the part of the appellant. The receiver had satisfied the court that he was "*a person affected*" by the *lites pendentes* registered against the two folios.

44. Whilst an alternative ground that "the action is not being prosecuted *bona fide*" exists pursuant to s. 123(b)(ii) it is not necessary to consider same. The receiver was entitled to an order that the said *lites pendentes* be vacated.

45. Accordingly, in the unusual circumstances that obtain in this case, the appeal should be dismissed.