

THE HIGH COURT

[2014 No. 8955 P]

BETWEEN

TOGHER MANAGEMENT COMPANY LIMITED AND NATIONAL ENTERPRISE PARK MANAGEMENT COMPANY LIMITED
PLAINTIFF

AND

COOLNALEEN DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

DEFENDANT

JUDGMENT of Mr. Justice Haughton delivered the 19th day of December, 2014

Introduction

1. In this motion the defendant seeks inter alia the following orders:-

- 1) An order pursuant to Order 19, rule 28 of the Rules of the Superior Courts dismissing the claim of the plaintiffs on the grounds that claim as pleaded is frivolous and/or vexatious and the pleadings disclose no reasonable cause of action.
- 2) Further and in the alternative, an order pursuant to the inherent jurisdiction of the court dismissing the plaintiffs claim on the grounds that the claim as pleaded is bound to fail.
- 3) Further and/or in the alternative, an order pursuant to Section 123 of the Land and Conveyancing Law Reform Act 2009 vacating the *lis pendens* registered by the plaintiffs on the grounds that the within proceedings are not being prosecuted bona fide.

2. Further reliefs including security for costs and other directions are sought in the notice of motion but it has been agreed that the hearing in relation to these matters will be adjourned pending the courts decision in relation to the reliefs mentioned above.

Background

3. The defendant company acquired lands comprised in Folios LS20495F, LS11259 and LS3191L in County Laois, extending to approximately 27 hectares, located in Portlaoise, County Laois, with monies advanced by Anglo Irish Bank Corporation, for the purpose of developing a business park thereon. The borrowing was secured with a first legal charge for the lands pursuant to a Mortgage Debenture dated 8th October, 2004. By deed of appointment dated 31st October 2012 Mr. Kieran Wallace was appointed as receiver on foot of the debenture and as statutory receiver by exercise of the powers of the National Asset Management Agency (NAMA) to appoint.

4. The defendant company duly commenced development of an industrial estate upon the lands and in total developed 33 units. Of these, 31 units are located within "lot 51", and the remaining 2 are located within the largely undeveloped "lot 52". Of the total number of units as constructed, 16 units have been demised under long leases.

5. The management company structure put in place for the lands development involved the establishment of two management companies being the first and second named plaintiffs, both of which are companies limited by guarantee. The first named plaintiff ("Togher") was established for the management of the entire park. The second named plaintiff ("National") was established for the management of "the Centre" being that part of Lot 51 on which 31 of the units were developed. Consistent with this scheme National is a member of Togher.

6. The defendant company as developer of the lands entered into separate Agreements with both Togher and National dated respectively 11th May, 2006 and 25th July, 2007 ("The Management Agreement(s)"), and these agreements are central to the case being pursued by the plaintiffs. The Management Agreements provided for *inter alia* the sale by the defendant company to the plaintiffs of the development's common areas for an estate in fee simple in possession or such superior leasehold reversion as was/is held by the defendant company, and for the purposes of the plaintiff companies performing and observing the covenants, obligations and agreements on the part of the defendant company pursuant to the lease agreements ('Deeds of Assurance') entered into between the defendant company as lessor, one of the plaintiffs as management company, and the lessee owners of the completed units.

7. In this regard the units constructed on the lands, or to be constructed, were demised and/or were to be demised by way of long lease (950 years) between the defendant company as lessor and the first or second named plaintiff as the case may be as the development's management company.

8. On the appointment of Mr. Kieran Wallace as statutory receiver pursuant to the National Asset Management Agency Act, 2000 ('NAMA Act, 2009') he ascertained from the balance sheet on the accounts of the defendant for the year ended 30 April 2013 that, while the aggregate value attributed to work in progress and the defendants bank account was €1,850,000, the defendants liability exceeded his assets by €9,494,925. Accordingly, he decided to sell the assets over which he was appointed receiver by way of public auction with Allsop Space. He instructed Messrs Kane Tuohy Solicitors to draft conditions of sale. He decided to sell the lands in two lots, namely Lot 51 (in respect of which National is the management company) and Lot 52 (Togher). The auction date was set for 22nd October, 2014.

9. By a letter dated 17th October, 2014 Tom Casey Solicitors acting on behalf of the plaintiffs wrote to Kane Tuohy Solicitors protesting at the conditions of sale published on the Allsop Space website. They raised issues in relation to the defendant's entitlement to effect a transfer of the fee simple, the recognition and preservation of easements enjoyed by unit holders over common areas including rights of access and egress, rights to free and uninterrupted passage and running of utilities, rights to enter on common areas, to connect, inspect, repair, clean, maintain etc., and the right to lay sewers, drains etc. for drainage or supply

utilities or other services to a unit. The letter asserted that the proposed sale would fundamentally prejudice the plaintiffs in fulfilling their role and contractual obligations as the management companies, with consequences for every unit owner occupier located within the park. The letter requested that the defendant withdraw the lands from auction, acknowledge the plaintiffs' interests, and discharge their clients' costs.

10. In a detailed reply from the defendant's general solicitors, Mason Hayes & Curran, the receiver, while agreeing to a minor amendment of the conditions of sale, fundamentally denied any misrepresentations, denied that the freehold interest in the lots had been transferred to the management companies and reasserted the defendant's right to sell both lots, pointed out that the leases of units and the management agreements were disclosed in the conditions of sale, and contested that any beneficial interest in the property was held by the defendant on trust for the plaintiffs. Accordingly, the receiver declined to withdraw the lots from auction.

The proceedings to date

11. The plenary summons was issued on 21st October, 2014, seeking 15 reliefs. The reliefs claimed at paragraphs 1-5 of the general endorsement of claim relate to Lot 52, and the reliefs at 6-10 relate to Lot 51. As they essentially replicate each other in respect of the two lots, it is sufficient to just quote the first 5 reliefs:-

"1. A Declaration that the lands referred to as "Lands adjoining the National Enterprise, Portlaoise, County Laois" in a contract for sale describing the terms and conditions on foot of which the Defendant offers same for sale by way of public auction proposed for the 22nd October, 2014, which lands are more particularly described in the First Schedule hereto by reference to the description of same in the Particulars and Tenure Schedule to the said contract for sale (hereinafter the "Schedule 1 Lands"), are lands which by virtue of an agreement in writing between the Defendant of the first part and the First Named Plaintiff of the second part and dated 11th May, 2006 (as set out in the Fourth Schedule hereto) are held in trust for the First Named Plaintiff by the Defendant.

2. A Declaration that the legal estate of the Defendant in the Schedule 1 Lands is subject to the easement rights and privileges such as are set forth in various lease agreements between the Defendant of the first part, the First Named Plaintiff or the Second Named Plaintiff (as the case may be) of the second part and the various tenants as described in the Second Schedule hereto in the terms as described in the agreements as set forth in the Third Schedule hereto.

3. A Declaration that the legal estate of the Defendant in the Schedule 1 Lands is subject to the easements rights and privileges such as are set forth in the agreement in writing between the Defendant of the first part, the First Named Plaintiff of the second part and in the terms as described in that agreement as set forth in the Fourth Schedule hereto.

4. If necessary a Declaration that the First Named Plaintiff holds its beneficial interest in the Schedule 1 Lands in trust for the tenants as described in the Second Schedule hereto.

5. If necessary and Injunction restraining the sale of the Schedule 1 Lands under the proposed contract for sale in the absence of provision being made in same to reflect the interest of the First Named Plaintiff in the Schedule 1 Lands and/or pending provision being made in same to reflect the full extent of the easements rights and privileges such as are set forth in various leasehold agreements between the Defendant of the first part, the First Named Plaintiff or the Second Named Defendant This is clearly meant to refer to the Second Named Plaintiff. (as the case may be) of the second part and the various tenants as described in the Second Schedule hereto as the terms as described in agreement as set forth in the Third Schedule hereto and/or pending provision being made in same to reflect agreement with regard to easements rights and privileges as set forth in the agreement set forth in the Fourth Schedule hereto."

12. The First Schedule sets out a description of the lands in Lot 52. The Second Schedule lists 12 owners of units, and the Third Schedule sets out their respective lease agreements. The Fourth Schedule then refers to "memorandum of agreement made 11th May, 2006 between Coolnaleen Developments Ltd. and Togher Management Company Ltd."

13. The plenary summons also claims –

"11. Damages for breach of Duty.

12 If necessary an Order that the Defendant indemnify the Plaintiffs in respect of any action or damages by any interested party arising by virtue of the failure of the Defendant to secure compliance by any purchaser of the Schedule 1 and Schedule 5 Lands with the rights and obligations of the Defendant in favour of Plaintiffs pursuant to leases and agreements for sale between the Plaintiffs and the Defendant."

14. On 21st October, 2014 the plaintiffs applied ex parte to this court and White J granted liberty to them to issue an application with short service returnable for 22nd October, 2014 seeking an order pursuant to section 182(2) of the NAMA Act, 2009 deeming the registration of a "*lis pendens*" and/or caution and/or inhibition pursuant to section 195 of that Act effective.

15. Following the opening of that application, which included an application for an injunction, on 22nd October, 2014 before this court (Gilligan J), the receiver agreed to amend the Particulars and Conditions of sale on a basis that would then allow the auction to proceed. Prior to this date the conditions of sale had already been amended to include the following Special Condition 8:

"Possible Action by the Management Company

8. The Receiver has been put on notice of the possible registration of a *lis pendens*, a caution and inhibition by the Management Company against the Subject Properties. If a *lis pendens* and/or a caution and/or an inhibition is/are registered against Subject Property the Receiver will immediately take whatever steps are necessary to procure their removal. In the event that the Receiver has been unable to procure the removal of any such *lis pendens*, caution and inhibition registered against the Subject Property on or before 06 December 2014 or by such later date as may be agreed between the parties hereto, then either party shall be entitled to rescind the Contract, whereupon, the Purchaser will be refunded its deposit but without interest costs or compensation and the Purchaser shall have no claim against the Receiver."

A similarly worded Special Condition (No.6) was inserted in the contract for the sale of Lot 52.

16. As a result of the agreement reached while the matter was pending before Gilligan J the following words were added "in handwriting" to both these Special Conditions :-

"Without prejudice to the generality of the foregoing if the court grants an order under section 195 of the NAMA Act,

2009 the Purchaser will be bound by same."

17. On this basis the auction proceeded and lot 51 was sold for €1,000,000 and lot 52 was sold for €820,000.

18. Section 195 of the NAMA Act provides:-

"Where NAMA or a NAMA group entity has acquired a bank asset, a lis pendens, caution or inhibition registered on or after 30 July 2009 shall be of no effect against NAMA, a NAMA group entity or a person who acquires that bank asset from NAMA or a NAMA group entity, even if it is registered against the title to any registered land that forms a part of the bank asset unless the party registering it has secured or secures an order under section 182(2)."

19. Section 182(1) of the NAMA Act 2009 limits the remedies that may be sought under Part 10 Chapter 2 to damages or other relief that does not in any way affect a bank asset or the interest of NAMA in such a bank asset unless the claimant obtains an order under Section 182(2) which provides:-

"A person may apply for an order that the person may for a remedy other than or in addition to that permitted by subsection (1) in relation to a claim to which this Chapter applies."

20. The ensuing subsection requires that leave be sought, and under Section 182(4) "Leave shall not be granted to apply for an order under subsection (2) unless the Court is satisfied that the application raises a substantial issue for the Court's determination....".

21. Section 182(6) provides that "the Court shall make an order under subsection (2) if and only if the Court is satisfied that if the applicant's claim were established, damages would not be an adequate remedy".

22. The section 182 motion brought by the plaintiffs was heard before this court (Binchy J) on 11th November, 2014 and on 12th November, 2014 Binchy J granted the order sought. Binchy J accordingly made an order pursuant to Section 182(2) on the basis of Section 182(6), and that order permitted the plaintiffs in these proceedings to claim for remedies other than damages and rendered effective the *lis pendens* registered in respect of lots 51 and 52.

23. Following the hearing of the Section 182 motion Binchy J granted liberty to the defendant to issue the present motion seeking orders dismissing the plaintiffs' proceedings and other orders. Having regard to the longstop provision in special conditions 8 and 6 in the sale contracts ("06 December, 2014, orsuch later date as may be agreed between the parties"), the court heard argument over two days on 8th and 15th December and undertook to give its decision on 19th December and if necessary giving reasons at a later date.

24. Shortly before the first hearing date there was a further exchange of correspondence, and between the two hearing dates there were EGMs held by both plaintiff companies resulting in further correspondence and materials being referred to in supplemental affidavits, and these were considered by the court.

25. Unusually in respect of a motion to dismiss, in this case no statement of claim had been delivered before the motion was heard. Accordingly, the basis of the plaintiffs' claims for declarations and other reliefs had to be gleaned from the plenary summons, the documents and correspondence exhibited in the affidavits sworn by the receiver Mr. Kieran Wallace, and in the correspondence and documents exhibited by Mr. Paul Kelly in his affidavit sworn on behalf of the plaintiffs, and in the subsequent affidavits filed by the parties. As a result of the course of proceedings, and the exchange of further correspondence, matters progressed from the date of issue of the plenary summons, and the areas of dispute became clearer, and possibly narrowed. The defendant relied in particular on what were suggested to be material concessions in the third affidavit of Paul Kelly sworn on 2nd December, 2014. As a result the defendants prepared a "General Endorsement of Claim" with "Proposed Amendments" dated 4th December, 2014, and Counsel argued that the application to dismiss should be judged against the text of this document in so far as it contained modifications reflecting the perceived concessions by the plaintiffs.

Legal Principles applicable to the Motion to Dismiss

26. Order 19 rule 28 states:-

"The court may order any pleading to be struck out, on the ground that it discloses no reasonable course of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

27. Although the receiver did assert that the plaintiffs' claims were frivolous and vexatious, argument concentrated on the ground that the pleadings did not disclose any "reasonable cause of action", or the alternative ground that the court should exercise its inherent jurisdiction to dismiss on the basis that the claim had no reasonable prospect of success.

28. With regard to the courts inherent jurisdiction to dismiss, the principles are well established in cases such *Barry v. Buckley* [1981] IR306, *Sun Fat Chan The Osseous Limited* [1992] 1 I.R. 425 (Supreme Court – McCarthy J), *Ennis v. Butterly* [1996] I.R. 426, and *Salthill Properties Limited & Cunningham v. Royal Bank of Scotland Plc & Ors* [2009] IEHC 207. From this jurisprudence the following principles may be extracted:-

- The jurisdiction exists to ensure than an abuse of the process of the courts does not take place.
- The jurisdiction should be exercised sparingly and only in clear cases.
- It enables the court to avoid injustice.
- If a statement of claim admits of an amendment which might "save it" and the action founded on it, then the action should not be dismissed.
- A variety of circumstance may emerge at the trial of an action which might not be entirely contemplated at earlier stages in proceedings, and what may appear clear and established at an early stage may become less so at trial.
- It is a jurisdiction to dismiss where the proceedings are bound to fail.

- Such an application may be of particular relevance to cases involving the existence or construction of documents – in which it may be possible for a party to persuade the court that no reasonable construction of the document(s) concerned could give rise to a claim on the part of the plaintiff, even if all the facts alleged by the plaintiff were established.
- Where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, it is difficult to envisage circumstances where an application to dismiss on the grounds that the action is bound to fail could succeed.
- The plaintiff should not be required to show a *prima facie* case at the stage of an application to dismiss.
- The onus lies on the defendant to establish that the plaintiff's case is bound to fail.
- It follows from the foregoing point that the defendant must demonstrate that any factual assertion on the part of the plaintiff that the defendant contests could not be established.

The Relevant Documentation

29. In order to better understand the case being propounded by the plaintiffs, and the defendant's assertion that it discloses no reasonable cause of action, it is necessary to consider in particular the Management Agreements between the defendant and each of the plaintiffs and certain terms of the contracts of sale entered into by the receiver following the auction.

30. Both Management Agreements are in similar terms. The agreement made on 11th May, 2006 between the defendant company and Togher is expressed to be made by the defendant company as "the Vendor" which expression shall where the context so admits or requires include its successors and assigns", and the first named plaintiff is described as "The Purchasers" which expression shall where the context so admits or requires include its successors and assigns".

31. In Clause A meanings are ascribed to certain terms. "The Park" is defined to mean "the development of commercial units to be known or intended to be known as the National Business Park, Portlaoise, County Laois, as more particularly described in the **First Schedule** of the Deeds of Assurance subject to the right contained in the Deeds of Assurance of the Vendors as Lessor to alter or vary the location, layout and extent of the Park or to extend or expand the Park onto additional lands of the Vendor". "Deeds of Assurance" is defined to mean "collectively the Indentures of Assurance (all of which will be by way of lease) of the Unit and/or the Car Parking Spaces (if any) either individually or collectively forming part of the Park, (Units and Car Parking Spaces collectively referred to as "Demised Premises"). "The Park Common Areas" is defined to mean "all parts of the Park including the roads, footpaths, kerbs, steps, passages, walkways, storage areas, gardens, landscaped areas and roadways but excluding the (i) Enterprise Park and (ii) the Retail Park (as defined in the Deeds of Assurances) and (iii) the Units **PROVIDED** that the Vendor shall prior to the completion of this agreement be at liberty to vary the nature location layout and extent of the Park Common Areas as aforesaid and in the event of the Vendor varying the Park Common Areas as aforesaid this definition shall refer to the Park Common Areas as so varied." "The Perpetuity Period" is defined to mean "the period of 21 years from the date of this agreement". "The Retained Land" is then defined to include the Common Areas, staff rooms and other premises used in connection with the provision of services for the Park, plant and equipment used in the Park, all conduits in upon, under or within the Park except those solely serving and are within or on any Demised Premises; and any other public or other conveniences within the Park, but not included in any Demised Premises.

32. The operative Part and agreed terms then state:-

*"B. In consideration of the Purchaser assuming liability for the performance and observance of the covenant obligations and agreements on the part of the Lessor or the Vendor as the case may be set out in the Schedules to the Deeds of Assurance and in further consideration of the sum of Ten Euro(€10.00) now paid by the Purchaser to the Vendor (the receipt of which the Vendor hereby acknowledges) the Vendor agrees that it shall sell subject to the provisions of Clause E hereof and the Purchaser agrees that it shall purchase subject to the provisions of Clause E hereof **ALL THAT AND THOSE** the Park for an estate in fee simple in possession or such superior leasehold reversion as is held by the Vendor at the closing date, **SUBJECT TO:***

(a) The Deeds of Assurance;

*(b) Any easements, rights and privileges over the Retained Lands which the Vendor within the Perpetuity Period excepts and reserves or requires the Purchaser to grant to it in substantially the same form as the easements, rights and privileges specified in the **Part 3 of the First Schedule** to the Deeds of Assurance, for the benefit of the Units and/or the Car Parking Spaces but otherwise free from encumbrances."*

C. Subject to the provisions of Clause E hereof, before completion of this Agreement the Vendor and the Purchaser shall execute the Deeds of Assurance;

D. Subject to the provisions of Clause E hereof this agreement shall be completed within 28 days from the date of execution of the last of the Deeds of Assurance or the expiration of 28 days from service of notice requiring completion by the Vendor's Solicitor on the Purchaser whichever shall be the later but in any event shall be completed within the Perpetuity Period. Completion shall be at the offices of the Vendor's Solicitors. The date of actual completion is hereinafter referred to as "the Closing Date";

E. The Vendor covenants that it shall carry out any necessary works to the Park and to the Units in a good, substantial and workmanlike manner and to the standards required by any planning permissions which relate thereto prior to the Closing Date and the Vendor shall repair and maintain or procure the repair and maintenance of the Retained Lands in a proper state of repair and condition up to the Closing Date;

F. The title in respect of the Retained Lands shall consist of a copy Folio and File Plan or a series of copy Folios and File Plans showing the Vendor registered as full owner thereof together with a Declaration pursuant to Section 72 of the Registration of Title Act, 1964;

*G. In the Transfer to the Purchaser of the Retained Lands the Purchaser shall indemnify and save harmless the Vendor in respect of all liability on foot of the covenants in the **Second Schedule** to the Leases. The said Transfer shall be*

stamped and registered in the Land Registry at the expense of the Purchaser and the counterpart thereof duly stamped shall be furnished by the Purchaser to the Vendor within two months of the Closing Date;

H. On completion the Purchaser will be furnished with the counterparts of all of the Deeds of Assurance which are in the Vendor's possession together with the originals or certified copies (as the case may be) of all documents of title in the Vendor's possession evidencing the Vendor's title to the Park;

I. The Vendor shall require all of the Purchasers of Units to become members of the Purchaser and to have their respective names entered on the Register of Members of the Purchaser;

J. The Purchaser acknowledges that the Common Areas may be taken in charge by the Local Authority following the transfer of same to the Management Company.

K. This agreement is dependant on Laois County Council taking the roads and services within the Park in it control. In the event that Laois County Council agree to the transfer of the roads and services then, this agreement shall be at an end. The Vendor shall serve a notice on the Purchaser notifying it of its intention to terminate this Agreement and the consideration payable therein shall be refunded to the Purchaser without interest cost claim or compensation. This Agreement shall be at an end upon service of the written notice by the Vendor to the Purchaser;"

33. Thus it can be seen that the management agreement purported to be binding on the defendant and its successors and assigns; it was capable of lasting for a period of 21 years and during that period further disposals of units by the defendant company were contemplated and had to be carried out by way of a standard form Deed of Assurance, containing covenants, obligations and agreements on the part of the defendant company. During the 21 year period the defendant company covenanted to carry out necessary works to the Park and to Units to keep them in a good, substantial and workmanlike manner and to repair and maintain the retained lands, including all Common Areas and services – in a proper state of repair and condition.

34. While Clause E uses the word "covenant", it is apparent that the Vendor took on other obligations under the terms of this agreement e.g. relating to title and the delivery of counterparts and documentation, of a sort that would be characteristic of a standard contract of sale of land, and which are not expressed to be 'covenants'. Also significant is Clause I under which the Vendor took on the obligation of ensuring that all purchasers of units became members of the management company.

35. The Management Agreement entered into on 25th July 2007 between the defendant and National in respect of "the Centre", meaning "The National Enterprise Park, Portlaoise, County Laois" was in very similar terms. This Management Agreement relates to the property comprised in Lot 51, and includes the 16 units the subject of long leases under "Deeds of Assurance".

36. A sample Deed of Assurance entered into by the Purchaser of on of these units is exhibit "PK17" in Mr. Kelly's third affidavit. This shows that, consistent with the management company agreements, the defendant company entered into the deed as a landlord, and the unit purchaser is tenant and the management company joined in as "the Management Company". The definitions of "Common Areas" and "Retained Premises", for example, are consistent with the definitions in the Management Agreements, as is the "Perpetuity Period" of 21 years. The assurance is for a term of 950 years, and the demise is in respect of "The Demised Premises together with the Assured Easements, excepting and reserving onto the Landlord for the benefit of the Retained Premises and any buildings which may now or may at any time within the Perpetuity Period be erected thereon, the Excepted Easements **TO HOLD.....**".

37. Clause 5 reads:-

"5 The Landlord's Covenants and the Management Company's Covenants

Pending completion of the Management Company Agreement all liability on the part of the Landlord pursuant to the provisions of this Lease shall absolutely cease to the intent that with effect from completion of the Management Company Agreement the Management Company shall be solely liable to the Tenant for the performance and observance of the covenants, conditions and obligations on the part of the Landlord pursuant to the terms of this Lease and this Lease shall be read as though "Landlord" is replaced with "Management Company"

38. In Clause 5.1.1 the defendant covenanted in respect of quiet enjoyment, and in clause 5.1.2 the defendant company provided an insurance covenant.

39. In paragraph 5.5 the Management Company covenanted in relation to the provision of "The Services", being the Estate Services set out in the Third Schedule, and concerned with matters such as the cleansing, repair, renewal and maintenance and decoration of the common areas.

40. The contracts of sale entered into by the receiver in respect of lots 51 and 52 following the auction on 22nd October, 2014 are in similar but not identical terms given that they related to different properties with different documents of title. In the conditions of sale relating to lot 51 the Particulars and Tenure described the property in sale as follows:-

"ALL THAT AND THOSE the property known as The National Enterprise Park, Portlaoise, County Laois being part of the property described in Folio LS20495F which part is shown for, identification purposes, only outlined in red on the Plan annexed hereto subject as therein, together with Units A3, A4, A7, A8, A12, A15, A16, B2, B4, B5, B7, B8, B9, B10, B11, B12 and B17 constructed thereon which Units are shown outlined in blue on the said Plan but excluding those units coloured green on the said Plain **SUBJECT TO AND WITH THE BENEFIT OF** the Leases and Licences listed at 28, 30, 32, 34, and 35 in the Documents Schedule".

41. Thus it will be seen this sale was expressly subject to and with the benefit of the Leases of various units.

42. In the "Documents Schedule" to the sale item 36 lists a copy of the Management Agreement dated 25th July, 2007, and item 37 consisted of a certificate of incorporation of the second named plaintiff. Special Condition 6, which is central to the plaintiffs complaint in these proceedings, reads as follows:-

"6 Management Company

6.1 Save as may be disclosed in this Contract or the documents furnished, the Receiver has no material knowledge of the National Enterprise Management Company Limited ("the Management Company") or its affairs and no documents

information or confirmation shall be sought by the Purchaser or provided by the Receiver. No objection, requisition or enquiry shall be raised in respect thereof. Strictly without prejudice to the generality of the foregoing:-

(a) *The Purchaser is being furnished with the documents listed at 36 and 37 in the Documents Schedule;*

(b) *The Receiver understands that no transfer of the common areas within the Subject Property to the Management Company has yet occurred. The Purchaser shall not require any transfer of the said common areas to be effected that prior to the completion within sale. It will be a matter for the Purchaser to deal with such transfers subsequent to the completion of the sale.*

(c) *The Vendor will not be required to provide or procure replies to any requisitions (including without limitation requisitions 36 or 37) concerning the management of the Subject Properties. The Purchaser shall satisfy (and is deemed to have satisfied) itself in full in respect of such matters prior to the execution of this Contract."*

43. There then followed at Special Condition 8 - the Special Condition already quoted relating to the possible registration of a *lis pendens* - giving the Purchaser the option to rescind on or before 6th December, 2014 or such later date as may be agreed between the parties in the event that a *lis pendens* is registered - an event that has of course happened.

44. The agreement for sale in respect of Lot number 52 is in similar terms, but as units on this plot have not been disposed of by the defendant company the Particulars and Tenure do not refer to the sale as being subject to or with the benefit of any long leases. However, the Documents Schedule does list the Management Agreements, and Special Condition 5.3 is similar to Special Condition 6.1 in the sale of Lot 51, but is slightly different and reads:-

"In anticipation of the Subject Property being developed as a business park (which never occurred) Togher Business Park Management Company Limited ("the Management Company") was incorporated and the Agreement listed at 13 in the Documents Scheduled entered into. The Receiver has no material knowledge of the Management Company or its affairs. Strictly without prejudice to the generality of the foregoing:-

(a) *The Purchaser is being furnished with the documents listed at 13 and 14 in the Documents Schedule;*

(b) *The Vendor will not be required to provide or procure replies to any requisitions (including without limitation CORT Requisitions 36 or 37) concerning the management of the Subject Property;*

(c) *The Purchaser shall accept without objection requisition or enquiry that the Subject Property comprises undeveloped lands (save for the road constructed thereon) and is not a managed property."*

45. Special Condition 6 in this agreement mirrors Special Condition 8 in the Lot 51 agreement in relation to the question of *lis pendens*.

The Defendants/Receivers Arguments

46. The Receiver argued that the proceedings were frivolous and vexatious pointing out that the directors of the defendant company are Mr. Paul Kelly and his wife and they are also directors of the two plaintiff companies, and that Mr. Kelly has personally guaranteed the debts of the defendant. They assert that Mr. Kelly has no legal or equitable interest in the lands or any of the units built on the lands, and question the motives for the plaintiffs in bringing these proceedings and whether or not bringing the proceedings have the consent of the members of the plaintiffs. The receiver suggests that the plaintiffs are not seeking genuinely to protect the interests of the owners of the units in the estate, and they are not being prosecuted in a bona fide manner.

47. It is argued on behalf of the Receiver that the interest to be conveyed pursuant to the management company agreements is intended to be a limited interest whereby, prior to conveyance and to the plaintiffs, the defendant or its successors in title remain entitled to dispose of all valuable interests in the lands by granting long leases of the units in each of the Industrial Estates, varying the nature, location, layout and extent of the Industrial Estates and granting easements. Thus when the defendant or its successors in title become obliged to execute a conveyance pursuant to either of the management company agreements what will be conveyed is the reversion of the leasehold interests in the units and the simple interest in the common areas in the relevant estate. They therefore assert that the plaintiffs will never hold any valuable interest in the property.

48. It is argued that the defendant company is therefore entitled to sell its interest in the subject lands, that it is not obliged to do so "subject to and with the benefit of" the Management Agreements, or in a manner such that the purchasers must step into the shoes of the defendant company in those agreements. In particular the Receiver argues that in so far as the Management Agreements contain a Positive Covenant - and they refer in particular to Clause E - any purchaser from the defendant company will not be bound by same. Reliance is placed on the common law rule that the burden of positive covenants touching and concerning land does not run with the land, and a subsequent purchaser is not bound by such covenants. The Receiver also points out that the defendant is insolvent and therefore unable to comply with the positive covenant; that the plaintiffs have no legal estate in the lands in sale as of the present time; and that the plaintiffs have already commenced maintaining the Industrial Estates and collecting service charges.

49. As an alternative argument the Receiver asserts that the issue of whether or not the positive covenant runs with the land is properly one that arises between the purchasers and the plaintiffs. It is also argued that as the Closing Date as defined in the Management Agreements has not yet arrived there is no basis on which the plaintiffs could call for compliance with that covenant at the present time.

50. By reference to reliefs 1-5 sought in the plenary summons (in relation to Lot 52, but replicated at relief's 6-10 in respect of Lot 51), and adopting that numbering, the defendant/receiver argues -

(1) that as a matter of law the plaintiffs cannot be entitled to the declaration of trust sought as this "would be to set at nought the valuable rights retained by the Defendant" in the subject lands.

The defendant would consent to modification of the declaration so that it read that the "*lands in which by virtue of [the relevant management company agreement]...the ...plaintiff holds a beneficial interest and in which the defendant, or its successors entitled, will, subject to the variations permitted by the said agreement, in due course, be obliged to convey the legal title to the...plaintiff, or its successors in title."*

Some reliance is placed on an averment by Mr. Kelly at paragraph 41 of his third affidavit that “the plaintiffs claim that they have a beneficial interest in the lands the defendant is seeking to sell.”

(2) That the declaration sought here relates to easements, rights and privileges which are set out in leases, and that as such they are registered or registrable in the Land Registry – either as burdens on freehold folios and/or in the register of leaseholders - and this is axiomatic and inherent in the system, so there is no entitlement to this declaration.

(3) That as a matter of law this declaration that the legal estate of the defendant in the lands is subject to the easements, rights and privileges set out in the Management Agreements, cannot apply to “the positive covenants in the said agreements”. The Receiver would consent to a declaration modified by the addition of the words “save and accept that the positive covenants in the said agreements shall not be binding on any successor and title of the defendant”.

(4) That the plaintiff’s solicitors have acknowledged that this is unnecessary and that the declaration sought here is therefore superfluous.

(5) That the injunctive relief is now moot, the matter having been pursued in the application before Gilligan J and having been compromised by the agreed amendment to the special conditions of sale.

51. With regard to the claim endorsed for damages for breach of duty, the Receiver asserts that no duty of care is properly pleaded or owed and that in any event there is no evidence of any damage.

52. With regard to the twelfth relief sought (“An order that the defendant indemnify the plaintiffs in respect of any action or damages by any interested party arising by virtue of the failure of the defendant to secure compliance by any Purchaser... with the rights and obligations of the defendant in favour of the plaintiffs pursuant to the leases and agreements for sale between the plaintiffs and the defendant.”), it is argued that this does not disclose any cause of action because as a matter of law in so far as they are negative covenants the plaintiff can enforce them directly under the rule in *Tulk v. Moxhay*, but in so far as they are positive covenants they are unenforceable – and if they are registerable burdens for example easements, then they can be protected by registration, or they may be protected without registration by virtue of Section 72 of the Registration of Title Act, 1964.

The Plaintiff’s Arguments

53. As to whether the proceedings are vexatious or frivolous and to their bona fides generally, the plaintiffs insist that the proceedings are brought to protect the interests of the plaintiff companies on foot of the Management Agreements, and “specifically to give the plaintiff companies meaningful recourse with regard to the performance of their obligations on foot of the Leases with the Development Units, owner/occupiers to which they are party and to protect the interest of the members of the plaintiff companies who are unit owners on foot of long leases conferring rights on them which are vested in the management companies to their benefit”. They say that unit holders have been kept apprised and that EGMs were held recently at which members of the companies – including all the unit holders could express their views.

54. Notwithstanding the reference in Mr. Kelly’s affidavit to “the plaintiffs’ beneficial interest in the lands”, they do assert that the purchasers can only acquire a bare legal interest in the sale in respect of the common areas and the leasehold reversions, which the plaintiffs assert are and would be held in trust for the plaintiffs.

55. Fundamentally the plaintiffs’ claim is that the contracts for sale make no provision in relation to the future development of the lands so as to ensure that the purchasers will be compelled to comply with the terms of the management company agreements in accordance with the overall intent and structure of the scheme as reflected in the existing leases and the Management Agreements. So for instance no obligation will be imposed on the purchasers to grant leases in the form of the Deeds of Assurance, or to ensure that the incoming unit holders are members of one or other of the management companies. Counsel on behalf of the plaintiffs, Mr. Hayden S.C. argued that the objective of these proceedings is to ensure that the Management Agreements work, and that they cannot be circumvented by the manner in which the undertakes the sales. It was argued in this context that the special conditions concerning the management agreements are impermissible. Mr. Hayden accepted that in the event that the current sales proceed to completion the plaintiffs in due course may need to consider joining one or more purchasers in these proceedings in order to ensure that all affected parties are before the court.

56. With regard to positive covenants, while it was accepted that Mr. Kelly at paragraph 52 of his affidavit states “The plaintiffs are not seeking to enforce positive covenants, they are seeking to enforce negative covenants these do run with the lands”, it was not accepted that this should be regarded as a legal concession, or that it was such a concession that it should entitle the receiver to a dismissal.

57. Two further matters were relied upon. Firstly it was argued that Binchy J, in deciding that there were substantial grounds for granting leave to seek remedies other than damages, and by so ordering enabling the plaintiffs to register effective *lis pendens*, the question of whether or not the plaintiffs had a reasonable or stateable course of action had already been determined. This was not an argument which found favour with the court in that on an application pursuant to Section 182 the court is merely determining whether a person may apply for a remedy other than the remedy in damages. It seems to me that this should not, in the circumstances of these proceedings, be taken as prejudging issues falling to be determined on this application to dismiss. Secondly Mr. Hayden placed reliance upon the fact that, in the context of the Defendant’s alternative application for security for costs, the receiver has referred to the probable need to engage a property law/conveyancing expert to give expert opinion evidence, at an estimated cost of €25,000, at the trial of the action which it is considered may last three days. Mr. Hayden argues that this demonstrates the existence of a reasonable course of action. In the view of the court little weight can be attached to these considerations, and it remains incumbent on the court to decide from an analysis of the pleadings, affidavits, documentation and legal argument whether the plaintiffs have any or any reasonable course of action.

58. Mr. Hayden placed particular reliance on the case law relating to dismissal under the inherent jurisdiction of the court. He argued that in effect what the Receiver is seeking to achieve in this application is a summary dismissal of the plaintiff’s claims, and that what the defendant asks the court to do is engage in the determination of substantive issues. He argues that there are serious issues to be decided, and that the defendant/Receiver has failed to show that the plaintiff’s claims are “bound to fail”. He submitted that elements of the plaintiff’s claims may be novel – indeed counsel on both sides appear to be of the view that there was no previous case in which management companies had sued development companies selling in these circumstances – but he argued that merely because a claim is novel does not mean that it might not succeed.

Decision

59. The court approaches the determination of this motion on the basis that, by reference to the relief’s claimed in the plenary

summons, the defendant/receiver would consent to certain declarations as modified in the terms of the draft Proposed Amended General Endorsement of Claim that is exhibited. Its task is therefore approached on the basis that the defendant/receiver maintains that the Plaintiffs' claims are bound to fail beyond the terms of the declarations to which the defendant would consent and as indicated in that draft.

60. The court is not satisfied the defendant/receiver has shown the claims made by the plaintiffs to be frivolous or vexatious. There is conflicting evidence in relation to this. On the one hand the receiver points to the plaintiff's lack of any real economic interest in the lands, and asks the court to infer from the fact that Mr. Kelly and his wife are directors of the defendant company and also the plaintiff management companies, that there is no proper motive for the proceedings. On the other hand the plaintiffs assert that they bring these proceedings for the benefit of the unit holders and to try to preserve the management structure intended by the management agreements and the leases.

61. The court is mindful that, as the unit holders were not themselves party to the Management Agreements with the developer (the defendant), they may not have such privity of contract as would entitle them to bring such proceedings against the Defendant to address their concerns in relation to the contracts of sale terms/ the sales by the receiver. Accordingly some credence may be given to the plaintiffs' assertions that these proceedings are brought for the benefit of the unit holders. At any rate there is such conflict of evidence on this issue that it would require a full hearing with oral evidence to resolve it, and this court cannot, and should not attempt to resolve it on a motion to dismiss under Order 19 rule 28 or pursuant to the inherent jurisdiction of the court.

62. In the view of the court these proceedings raise a significant issue as to whether and to what extent the defendant/receiver can dispose of its interest in the subject properties in such a manner that the purchaser(s) will not be bound by all, or indeed any of the terms of the Management Agreements and dated 11th May, 2006 and 25th July, 2007 respectively. This issue is raised, albeit perhaps not very fully or felicitously at this early stage in the proceedings, in the reliefs sought at paragraphs 3 and 8 of the General Endorsement of Claim (even in the proposed amended form). This issue arises between the plaintiffs and the defendant because the current sales of Lots 51 and 52 have not been completed.

63. In the view of the court this issue could involve a number of legal questions that may come into clearer focus when a statement of claim is delivered, pleadings are exchanged, and legal submissions are filed. These could include:-

(1) Does the fact that the Management Agreements state that they are entered into by the defendant company which includes "its successors and assigns" mean that the purchasers will automatically be bound by all the terms of those agreements?

(2) If not, are there any terms, and if so which terms, that will be binding on the purchasers?

(3) Covenant E is worded as a positive covenant. However it appears in an agreement which is an agreement for sale and a management agreement. Is it to be equated with a positive covenant touching and concerning lands contained in a conveyance, and which under common law rules would not be binding on a subsequent purchaser?

(4) Should the common law rule that the burden of positive covenants is not enforceable against a subsequent purchaser be applied or extended to developer/management company agreements of this nature, particularly having regard to the fact that under Section 49 of the Land and Conveyancing Law Reform Act, 2009, with effect from 1st December, 2009 provides that "the rules of common law and equity including the rule known as the rule in *Tulk v. Moxhay* are abolished to the extent that they relate to the enforceability of a freehold covenant"?

(5) Are other clauses of the management company agreements, not explicitly described as positive covenants, such as the obligation of the defendant to furnish counterparts of all Deeds of Assurance to the management company at closing (Clause H) and most importantly the obligation of the defendant to require all purchasers of units to become members of the management company (Clause I), to be construed as positive freehold covenants to which the common law rule applies? Does the temporary nature of the Management Agreements mean that they fall outside the scope of the old common law rule?

64. Some of these questions may involve a careful reappraisal of the common law in the context of modern management company structures as they apply to industrial, business, retail or residential estates or apartment blocks. There may be public interest considerations. There is undoubtedly a public interest in a statutory receiver on behalf of NAMA achieving the best possible price in the sale of unsold parts of incomplete developments. However there is a countervailing public interest in the retention of properly constituted management companies and structures for the orderly completion, running and maintenance of such estates and the avoidance of "ghost estates" or properties where the lack of properly functioning management companies leads to disrepair and the deterioration of infrastructures and services. Failed or failing management structures could also have a significant impact on the value of existing units, and affect the security given by unit holders to lending institutions, and unit holder's credit rating. It may well be that the public interest is better served by statutory receivers selling incomplete estates upon the basis that purchasers are required to enter into deeds of novation confirming and agreeing to be bound by existing agreements between developers and management companies. These considerations are heightened in this case because the defendant company is hopelessly insolvent and therefore cannot be made accountable in damages for any breach of the Management Agreements. In short, in the view of the court the members of the Plaintiffs management companies may well have genuine concerns, and they are entitled to litigate these in these proceedings through the vehicle of the plaintiffs.

65. In the Proposed Amended General Endorsement of Claim the defendant receiver has sought to deal with this by conceding that the negative covenants in the management company agreements are enforceable at the suit of the plaintiffs but not the positive covenants. They have also exhibited a letter from the purchaser of Lot 51 indicating "for the avoidance of doubt" that if the property is ultimately conveyed to them on foot of the contract they accept the easements granted in the leases of units are binding on them and their successors and title and run with the property, and that they will be bound to ultimately convey their interest in common areas and the reversionary interest in unit constructed on the property to the management company (or its successor in title) in accordance with the terms of the agreement entered into on 27th July, 2007 with the first named plaintiff. However, they have expressly stated their belief that they will not be bound by the positive covenant 'to build out the Industrial Estate' (although the court observes that no such express covenant appears in the Management Agreement), or to maintain the common areas prior to transfer to the management company (covenant E). This concession and this letter do not resolve the significant issue identified above, and if anything they tend to crystallise some of the legal questions that may arise in these proceedings.

66. The court also accepts the Plaintiffs' submission that the mere fact that the claim the plaintiffs make may be novel does not mean that it could not succeed. Whilst some novel claims could be considered to have no foundation whatsoever, the defendants/receiver

has not persuaded me that that is the case in this instance.

67. The court is also satisfied that the declaration sought at paragraphs 1 and 6 concerning whether the common areas and the leasehold reversions are held in trust for the management companies, while not necessarily being matters of great substance, do raise questions of law that fall to be considered. A similar question was considered by Laffoy J in *Heidelstone Company Limited & Court View Management Limited*: in re the Trustee Act 1993 [2007] 4 I.R. 175, (2006) IEHC 408. That case concerned apartment and town houses in a residential development, with a comparable scheme involving a management company and common areas. The management company and the Vendor company were struck off the register of companies for failing to make returns and were dissolved, and the application to the court was made in an effort to regularise the position for owners of apartments and houses, seeking to vest the interest of the Vendor company and/or the management company in a new management company which had been incorporated by applicants. In the course of the judgment Laffoy J held that the vendor company held the varied estates in fee simple upon trust for the management company by virtue of the provisions of the management company agreement at and immediately before the date of its dissolution. She further held that the management company held its beneficial interest in the varied estate for the benefit of lessee of the apartments and of the leases created by the first company carved out of the fee simple at and immediately before the date of its dissolution. Those lessees or their successors, who were applicants, were held to be the ultimate beneficiaries of the varied estate. At page 178 Laffoy J stated:-

"I have no doubt that where, as part of a scheme of disposal of apartments or townhouses, a vendor incorporates a management company to manage the common areas and enters into an agreement to transfer the common areas to the management company on the completion of the sales of the apartments and houses, the management company becomes the owner in equity on the completion of the sales of all of the apartments or houses, as the case may be, subject to the terms of the agreement and subject to payment of any nominal sum provided for therein. On the completion of such sales, the vendor thereafter merely holds the legal estate as trustee on behalf of the management company."

68. The defendant/receiver argued against the existence of any trust on the basis *inter alia* of uncertainty, pointing to the fact that under the Management Agreements the vendor retains the right to vary the nature, location, layout and extent of the common areas prior to completion. The plaintiffs argued by way of response that while this was so, it did not apply to the area where units had been developed, and the layout and extent of the common areas was settled.

69. In the view of the court this element of the dispute is not one that the court should seek to determine summarily or in the course of a motion to dismiss of this nature.

70. With regard to the claims for injunctions (the reliefs claimed at paragraphs 5 and 10) it is a fact that while contracts have been entered into they have not yet been completed. It is also the case that since 6th December, 2014 the purchasers either have, or will have as a result of this decision, the right to rescind, in which case the defendant/receiver will be faced with the prospect of reselling. Whether or not the defendant/receiver uses the same proposed contract for sale if proposing to resell is neither here nor there – in the view of the court it would be inappropriate to close off the plaintiffs from seeking the reliefs or modified reliefs at paragraphs 5 and 10 in circumstances where the court is declining to dismiss the proceedings.

71. While the declarations sought at paragraphs 2 and 7 are not disputed by the defendant/receiver and might be regarded as unnecessary, the court is not inclined to cherry pick elements of the General Endorsement of Claim having come to the view that the proceedings do raise significant issues. In due course, this will be a matter for the trial court and indeed there may well be reliefs claimed that the plaintiffs may decide not to pursue. The same considerations apply to the reliefs claimed at paragraphs 4 and 9, although it might be argued that these reliefs are more closely connected to the trust dispute, and refer to claims that should not be dismissed for reasons given above.

72. In relation to paragraph 11 for similar reasons the court does not consider it appropriate to dismiss the claim in so far as reliefs are sought at items 11-15. The claim for damages for breach of duty may or may not be pursued in due course, but should be left open. The claim for an indemnity (paragraph 12) would seem to be ancillary to the main issue that the plaintiffs seek to litigate, and the other reliefs are standard/ancillary reliefs.

73. Accordingly the court refuses the defendant/receiver's application for an order dismissing the claim of the plaintiff pursuant to Order 19 rule 28 of the Rules of the Superior Courts or alternatively pursuant to the inherent jurisdiction of the court.

Application to vacate lis pendens

74. Section 123 of the Land and Conveyancing Law Reform Act, 2009 provides:-

"Subject to section 124, a court may make an order to vacate a lis pendens on application by –

(a) the person 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."

75. The defendant moves this alternative application on the basis that the proceedings "are not being prosecuted in a bona fide manner". The factual basis for this is that in the plaintiffs' solicitors initiating letter 17th October, 2014 the plaintiffs initially sought that the properties be removed from sale, not that their interests be recognised – despite showing no economic interest in the properties. Despite having received the defendants' solicitors reply by email at 10.29 on 20th October, 2014 the plaintiffs did not communicate further with the defendant or its solicitors until 17.15 on the evening of 21st October, 2014, the eve of the auction. Accordingly the defendant/receiver asserts that the plaintiffs were simply seeking to disrupt the sale of the lands rather than to protect the owners of units. It is suggested that if all the reliefs sought in the general endorsement of claim, other than the declaration that the lands in sale are held in trust, were granted the defendant would still be entitled to sell the lands and the rights of the parties could be determined between the purchaser and the plaintiffs. The receiver also points to the fact Mr. Kelly and his wife are directors of the plaintiffs as well as the defendant company, and that he appears to have effective control over the plaintiffs. The receiver cast doubt over whether or not Mr. Kelly had sought consent to bring the proceedings – although since this motion was issued there have been EGMs of both companies.

76. The plaintiffs respond that these proceedings are being prosecuted in a bona fide manner. On affidavit Mr. Kelly insists that the proceedings are brought by the plaintiffs for the benefit of the unit holders, and it was argued that there was no other means by which their concerns could be litigated. The plaintiffs flatly deny that the proceedings are not being prosecuted bona fide and point to the history of proceedings to date and their success before Binchy J. in securing leave to pursue remedies other than the remedy of damages, thus permitting them to register effective *lis pendens*.

77. It is not disputed by the parties that the claims raised in the plenary summons relate to "a claim... made to an estate or interest in land" coming within section 121(2) of the 2009 Act. Section 123 was considered recently by Cregan J. in *Tola Capital Management LLC v. Joseph Linders & Patrick Linders* (No. 2) [2014] IEHC 324. Cregan J. stated, at paragraph 131:-

"131. In those circumstances, one must consider what is meant by the phrase "the action is not being prosecuted bona fide". In my view this phrase can be interpreted as meaning either:-

A That the action as a whole is not being prosecuted in a bona fide manner, or

B. That specific steps in the action are not being prosecuted in a bona fide manner.

132. In my view both interpretations are valid and the meaning of the section is that a court may make an order vacating a *lis pendens* if it is satisfied that the action as a whole is not being prosecuted in a bona fide manner or if particular steps in the prosecution of the action are not being taken in a bona fide manner."

78. On the particular facts of the case before him Cregan J. found that the plaintiff's action was not being pursued in a bona fide manner because the property over which the plaintiff was claiming and in respect of which a *lis pendens* had been registered was not owned by the defendants personally but was owned by companies of which they were directors and shareholders and he concluded that: "It should then have been clear to the plaintiff that it was not appropriate to maintain a *lis pendens* against the two personal defendants."

79. The court was of the view that as time went on and affidavits were exchanged this should have become abundantly clear to the plaintiff, and Cregan J. came to the view that "the registration and maintenance of the *lis pendens* by the plaintiff is a cynical and opportunistic attempt to destroy the defendants' refinancing agreement with Ulster Bank, to destroy the defendants' refinancing agreement with a third party financier and to extract maximum commercial advantage using the registration of *lis pendens* as a tactic."

80. Counsel for the plaintiffs sought to distinguish *Tola* on the facts, as it was clearly a case in which it was not appropriate for the plaintiff to maintain the *lis pendens* and as time went by it was being maintained as a tactic.

Decision on Section 123 application

81. The court declines to vacate the *lis pendens*. Firstly there does not appear to have been any delay let alone unreasonable delay in the prosecution of the action by the plaintiffs to date. Having said that, no statement of claim has yet been delivered, and it is incumbent on the plaintiffs to take this next step in the proceedings without undue delay.

82. Secondly the court is not satisfied that the action is not being prosecuted bona fide. As the action clearly touches and concerns the plaintiffs' interest or estate in the subject lands it is clearly one in which a *lis pendens* can be registered (provided leave of the court is granted under Section 182(2) of the NAMA Act, 2009). The court has already determined that these proceedings should not be dismissed as being frivolous or vexatious, and in my view the matters considered in respect of that decision apply equally to the question of bona fide's under Section 123(b)(ii). In particular, at this interlocutory stage in the proceedings where there is no compelling evidence adduced on the part of the defendants/receiver to suggest a lack of bona fides, and where the plaintiffs assert their bona fides and do so plausibly, and in the absence of oral evidence or any cross examination on affidavit, it would be unreasonable of the court to determine this issue against the plaintiffs. It may be commented however that a future test of the plaintiffs' bona fides will be the expedition and vigour with which they pursue these proceedings from this time on, and clearly Section 123 does not preclude an order vacating a *lis pendens* at some future date if there is unreasonable delay in prosecuting the action.

Orders

Accordingly, the following orders will be made :-

- (1) An order dismissing the defendant's application to dismiss the plaintiffs' claim pursuant to Order 19 rule 28 of the Rules of the Superior Courts.
- (2) An order dismissing the defendant's claim to dismiss these proceedings pursuant to the inherent jurisdiction of the court.
- (3) An order dismissing the defendant's application for an order pursuant to Section 123 of the Land and Conveyancing Law Reform Act, 2009 vacating the *lis pendens* registered herein.

83. An order will also be made adjourning the balance of the reliefs sought in the defendants notice of motion herein dated 17th November, 2014, but I will hear the parties in relation to this.

¹. This is clearly meant to refer to the Second Named Plaintiff.