APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

Appeal Number: 2021/181 & 2022/7

High Court Record Number: 2018/2431P
Neutral Citation Number [2023] IECA 72

BETWEEN/

Costello J.
Faherty J.
Butler J.

DECLAN KEHOE AND UNA KEHOE

PLAINTIFFS/APPELLANTS

-AND-

PROMONTORIA (ARAN) LIMITED AND KEN FENNELL

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Butler delivered on the 30th day of March, 2023

Introduction

1. This is the plaintiffs' appeal against a decision of the High Court (Twomey J. [2021] IEHC 573) vacating a *lis pendens* under s.123 of the Land and Conveyancing Law Reform Act 2009 and striking out the plaintiffs' proceedings for delay and want of prosecution. In consequence of making these orders Twomey J also dismissed the plaintiffs' application under O.8, r. 3 for leave to renew an expired plenary summons for the purpose of service on the defendants. There is a related appeal against a decision made by Allen J. on 15 July 2021

in the course of managing the Chancery list refusing to adjourn the hearing date for the applications in order to allow the plaintiffs file further affidavits.

2. The plenary summons in the proceedings was issued on 20 March 2018 but never served. The *lis pendens* was registered six days later on 26 March 2018 in the Central Office of the High Court. It was registered in the PRA on the relevant folio on 10 May 2018 . The defendants entered an appearance and issued this motion on 5 February 2021. The plaintiffs did not take a further step until 7 May 2021 when they filed an *ex parte* docket seeking to renew the plenary summons. There is some dispute as to whether the relevant period of delay runs from the issuing of the plenary summons to the next formal step – which was that taken by the defendants in February 2021 (34 months) - or to the next formal step taken by the plaintiffs in May 2021 (37 months). In my view nothing material turns on this difference of 3 months and for ease of reference I will simply refer to the period as a three-year delay.

3. This appeal took some unexpected turns in the course of the hearing before this Court in that the main argument advanced, a lack of fair procedures in the High Court hearing, was not readily evident as the focus of the appeal in the Notice of Appeal. This may be because the Notice of Appeal was an unwieldy document advancing some 55 grounds of appeal in respect of a High Court judgment running to just under 18 pages. Pleading of this type is generally unhelpful to the court. The respondent invariably feels obliged to respond to each ground of appeal and consequently the entire of the case before the High Court is canvassed extensively in written submissions. Most of the grounds of appeal are then not pursued at the hearing. It would greatly assist this Court if an intending appellant could, in advance of drafting a Notice of Appeal, focus on the issues of real concern and the areas in which the trial judge might plausibly be said to have erred. Simply going through the judgment and asserting that the trial judge erred in law and/or in fact in respect of every finding made rarely enhances the court's understanding of what is really in issue on the appeal. Needless

to say, the same considerations apply to a respondent in framing a Respondent's Notice, albeit that the shape and length of such notice may often be dictated by that of the Notice of Appeal.

4. That said, in order to examine the issues on this appeal I propose to outline the factual and procedural history between the parties; to look at the respective applications brought by them and how they were treated by the trial judge and then to consider the issues actually canvassed on the appeal. Much of the law to be applied both as regards delay and the vacation of the *lis pendens* is well established and the parties did not suggest that the trial judge had erred either in identifying the relevant law or in his summary of it (between paras. 27 and 35 of his judgment).

Factual Background

5. The issues between the parties have their origin in loans taken out by the plaintiffs from Ulster Bank between 2008 and 2011. The various loans were secured by an '*all sums due*' mortgage/charge which the first plaintiff had executed in favour of Ulster Bank on 22 February 2008 in respect of a property in County Kerry ("*the secured property"*) of which he is the registered owner. Ulster Bank registered this charge on the folio in October 2008. Additional security over other property was also provided. As the scheduled repayments were not made by the plaintiffs, under the terms of the loan the entire amount borrowed became repayable on demand.

6. On 12 February 2015 Ulster Bank executed a Global Deed of Transfer under which the plaintiffs' loans and related security were transferred (along with many others) to the first defendant. The transfer of Ulster Bank's interest in the charge over the secured property in favour of the first defendant was registered on the folio on 9 April 2015. The first defendant made a formal demand of each plaintiff by letters dated 8 October 2015 for

repayment of the total sums due on foot of their respective loans. At that stage, on the first defendant's calculations, the amount outstanding was just under €5m. Proceedings were issued by the first defendant in March 2017 in respect of the sums then allegedly outstanding. No steps have been taken by the defendant to progress these proceedings, a fact upon which the plaintiffs place much reliance.

7. As the loans were not repaid the first defendant then moved to appoint the second defendant as a receiver over the secured property and three other properties the subject of separate securities. This was done by an Instrument of Appointment dated 28 October 2015, accepted by the second defendant on the same date. The plaintiffs were notified of this appointment by letters the following day.

8. By special summons proceedings issued against the second defendant on 8 December 2016, the first plaintiff challenged the validity of the second defendant's appointment as receiver over all four properties (the 2016 proceedings). A number of affidavits were sworn in those proceedings by both parties and also on behalf of the first defendant to these proceedings who was not a party to the 2016 proceedings. Although the 2016 proceedings were issued by the first plaintiff as a litigant-in-person, by the time the matter came into the Judges List on 29 May 2017 he had instructed a solicitor, albeit the solicitor was not formally on record. The court was advised by the solicitor in question ("*the plaintiffs' first solicitor*"*)* that a Notice of Discontinuance had been filed and that the proceedings could be struck out which they duly were with an order for costs against the first plaintiff. Despite the transcript suggesting that the first plaintiff was physically present in court that day, he now maintains that the 2016 proceedings were withdrawn without his knowledge or consent.

9. It appears that the first plaintiff also issued proceedings against Ulster Bank in 2016 and that these proceedings are still extant although at the time of engagement between these parties the plenary summons had not been served on Ulster Bank. It is not known whether

an application has been made to renew that plenary summons and, if so, whether that application was successful.

10. Subsequent to the 2016 proceeding being struck out, the receivership appears to have progressed and the other three secured properties were sold by the receiver. The plaintiffs contend that these sales were at an undervalue.

11. On 20 March 2018 a further set of proceedings was issued on behalf of both plaintiffs against these defendants ("*the 2018 proceedings*" or "*these proceedings*"). Notably, these proceedings were issued by a different firm of solicitors on the plaintiffs' behalf (i.e. not the solicitor who had appeared in the 2016 proceedings) and the summons was drafted by a barrister. The plenary summons seeks various reliefs including orders restraining the defendants from enforcing the securities and from dealing with the properties, the subject of the securities, and a declaration to the effect that the appointment of the second defendant as receiver was invalid and of no legal effect. Despite the fact that the proceedings were, in effect, seeking orders restraining the conduct of an ongoing receivership, no steps were taken to secure interlocutory relief and indeed the proceedings were never served on the defendants. Instead, on 26 March 2018 a *lis pendens* was registered over the secured property. Although the proceedings refer to all four properties, it does not appear that a *lis pendens* was registered over the other three properties. The Court was informed that these three properties had been sold but, notwithstanding the fact that the proceedings refer to all four properties, it is not known if they were sold before or after the 20 March 2018.

12. The basis of the defendants' application to strike out the proceedings is that the plenary summons of March 2018 had not been served on them by the time they issued their motion in February 2021 nearly three years later. The plaintiffs contend that during this period there was engagement by them with Ulster Bank in respect of their loans. This appears to have related primarily to an issue concerning the correct rate of interest applicable to the loans

post-2012 when Ulster Bank changed the basis on which it calculated its interest rates ("*the tracker issue*"). The plaintiffs received correspondence from Link Asset Management on behalf of the first defendant on 26 July 2019 stating that it had reviewed the plaintiffs' loans and identified that those loans were impacted by the interest overcharging during the period of the first defendant's ownership. Consequently, it recalculated the loan amounts using the correct interest rate and adjusted the plaintiffs' loan account reducing it by just over €7,000. Apparently, Ulster Bank remained responsible for reviewing and rectifying any error prior to the transfer of the loans and that exercise was ongoing during this period. It is unclear the level of engagement that this required from the plaintiffs nor the timeframe over which such engagement took place. There is some reference in the correspondence to the plaintiffs having engaged in an Ulster Bank complaints process in 2018 and early 2019. No detail is provided and there is no suggestion of formal engagement thereafter.

13. It also appears from the solicitor's correspondence that there was engagement by the plaintiffs in terms of attempts to reach an overall settlement in respect of their indebtedness. It seems that at least one substantive offer was made by the plaintiffs (referred to as a historical matter in a solicitor's letter of 9 September 2020) but it is unclear when this offer was made and whether it was made in a broader context of ongoing negotiations.

14. In a general sense the plaintiffs dispute the amounts demanded by the first defendant as being due on foot of their loans; the validity of the transfer of their loans by Ulster Bank to the first defendant; the validity of the appointment of the second defendant as receiver; the validity of the sale by the second defendant of the other three properties in his capacity as receiver and assert that such sale was at an undervalue. The first plaintiff states that "*various banking and financial experts*" were engaged to review the status of their accounts at the time of the sale to the first defendant. No further detail is provided as to who these

experts were, when they were engaged and how their reports (if any) impacted on the ability of the plaintiff to serve the plenary summons.

15. The matters identified in the preceding paragraph are essentially legal complaints which the plaintiffs seek to make. They do not really form part of the chronology of events nor provide an excuse for the non-service of the plenary summons or suggest an inability on the part of the plaintiffs to pursue these proceedings during the three-year period under consideration. There is one proviso to this which is that the plaintiffs have requested sight of the unredacted Global Deed of Transfer which, to date, has not been provided to them. As will be seen, the redaction of documents was the focus of much of the plaintiffs' response to the defendant's motion in the High Court.

16. At some stage after issuing the proceedings in March 2018, the plaintiffs fell out with their second solicitor over fees in a non-related matter. Strikingly, the court is not told when this falling out occurred. The falling out was serious and resulted in the plaintiffs making a complaint against the solicitor to the Legal Services Regulatory Authority (the first plaintiff had earlier made a complaint against the first solicitor's handling of the 2016 proceedings to The Law Society). The court was told by counsel – although this evidence was not on affidavit – that the plaintiffs instructed their current solicitor in February 2020 at which stage he sought to take up the plaintiffs' litigation file from the second solicitor who had issued the 2018 proceedings. (As the plaintiffs dealt with three sets of solicitors in respect of the proceedings discussed in this judgment I will for convenience refer to them as the plaintiffs' first solicitor, the plaintiffs' second solicitor and the plaintiffs' current solicitor.) It seems that there was a delay in recovering the file from the second solicitor and it was not provided to the current solicitor until 19 March 2021. Again, very little concrete information in respect of this factor, which features significantly in the argument on appeal, is on affidavit before the court. Because of the plaintiffs' complaint that the trial judge ignored this

evidence, I will set out the relevant portions of the first plaintiffs' affidavit in full (save that the names of the solicitors have been removed):

> *"13. ...I say that a dispute arose with [the second solicitor]. in respect of a purported "success fee" (in addition to the standard professional fees which were paid in full) that was allegedly due and owing on another matter. That matter related to conveyancing work which [the second solicitor] were unable to complete and as such I was required to transfer to another solicitor in order to finalise same. Upon completion of that matter, [the second solicitor] sought payment of a "success fee" and in fact issued proceedings in relation to same, registered a judgment mortgage against my properties and withheld my files. I say that no further action was taken in respect of this matter, and I have made a complaint to the Legal Services Regulatory Authority in respect of this matter which is ongoing, and I say that this complaint has been deemed admissible by the LSRA and is being investigated. I say that my files have recently been released to my solicitor. I beg to refer to a copy of the correspondence from the Legal Services Regulatory Authority dated 21 December 2020 and [the second solicitor] dated 19th March 2021 furnishing the file to my solicitors…*
>
> *16. I have now engaged [the current solicitor] who reviewed the history of the within proceedings and corresponded with the defendants herein to set out my concerns in respect of the foregoing and I beg to refer to a copy of the said correspondence …. I say that [the current solicitor] issued Notice of Change of Solicitor and Notice of Intention to Proceed on 10 August 2020…. In the meantime, efforts were made to take up my file from the previous solicitors as well as to make an application to take up the transcript of the hearing before Mr. Justice White.*

17. It transpired that the within Plenary Summons had not been served on the Defendants and I say, as above, that [the second solicitor] recently released the original file [to the current solicitor], to include the original Plenary Summons, which has enabled [the current solicitor]to bring the necessary application to renew the Plenary Summons…"

17. These averments are decidedly vague. The first plaintiff does not state when the dispute with his second solicitor arose, so the court is unable to ascertain how long those solicitors were on record for the plaintiffs before the dispute arose. Equally, he does not say when his current solicitor was engaged nor when the efforts to take up the file commenced nor how actively they were pursued. He does not explain the two- month delay from the point at which the file was received by his current solicitor before any application to renew the plenary summons was made. Finally, the language used in the opening of para. 17, "*it transpired that…*", suggests that the first plaintiff was unaware that the plenary summons had not been served on the defendants, but the first plaintiff does not categorially aver to this as a fact. Therefore, the court simply does not know the reason why the plenary summons was not served on the defendants in normal course shortly after it had been issued.

Correspondence

18. Subsequent to the plaintiffs instructing their current solicitor, correspondence in relation to these matters between the parties' respective solicitors commenced in September 2020. I note that this is some six months after the current solicitor was first instructed. It appears that there was some earlier correspondence comprising a subject access request under the Data Protection Acts in July 2020. This correspondence is not before the court and it is unclear whether there was further correspondence, in particular correspondence relating more generally to the subject matter of the 2018 proceedings, until September 2020.

Notably, the plaintiffs' current solicitors filed a Notice of Change of Solicitors and Notice of Intention to Proceed on 7 July 2020 (the date is mis-stated by the first plaintiff in his affidavit). It seems that these notices, although filed, were not served on the defendants. At the hearing of the appeal counsel was unable to confirm whether these notices had ever been served.

19. The material correspondence commences with the letter from the plaintiffs' current solicitor to the second defendant dated 9 September 2020 which appears to have been prompted by receipt by the plaintiffs of a letter addressed to "*the occupier*" of the scheduled property a month or so earlier. Strikingly, in its first paragraph the letter refers to the 2016 proceedings, to that claim having been withdrawn without the plaintiffs' knowledge or consent and asserts that the second defendant's appointment as receiver is "*very much in dispute*". No reference at all is made to the 2018 proceedings in respect of which the current solicitor came on record just two months earlier. The letter then makes a series of demands both as to the furnishing of documentation and details in respect of the loans and the provision of an undertaking not to take any further action in respect of the plaintiffs' assets "*pending resolution of the dispute between our clients*", Ulster Bank, and the defendants. The letter threatens that the plaintiffs will seek interlocutory relief if these demands are not met. Again, surprisingly, no reference is made to the extant 2018 proceedings in the context of these threats.

20. The defendants' solicitors replied the following day querying the plaintiffs' position on 2016 proceedings and expressly adverting to the 2018 proceedings and the related *lis pendens* which had come to their attention through a High Court search. This letter sought confirmation as to why the 2018 proceedings had not been progressed and anticipated that an application to renew the plenary summons would be required. The defendants' solicitor

called upon the plaintiffs' current solicitor "*to immediately attend to this*" or, alternatively, if the plenary summons had not expired, to serve it immediately.

21. The plaintiffs' solicitor replied by way of letter dated 17 September 2020. They advised that the 2018 proceedings had been issued by the plaintiffs' second solicitor but "*we have now been instructed to take over these proceedings and to progress same*" and that the proceedings would "*be subject to an application to renew and which will immediately be served*". It is then clarified that any interlocutory relief will be sought in the 2018 proceedings. The solicitor then sought consent to the plaintiffs' intended application to renew the plenary summons. The letter proceeds to deal with the outstanding requests for information, with various substantive matters concerning the 2016 proceedings and with the tracker issue. Although this letter expressly deals with the 2018 proceedings and the fact that the plaintiffs' current solicitor is now instructed in respect of these proceedings, strikingly, no reference is made to any difficulties arising in relation to taking up the file from the second solicitor nor is forbearance sought to enable any difficulties to be resolved.

22. The defendants' solicitor's next letter of 7 October 2020 focuses on the registration of the *lis pendens* and the failure to progress the proceedings since its registration. It disputes the entitlement to register a *lis pendens* in connection with proceedings against a receiver. Consent to renew the proceedings is refused and the plaintiffs are called upon to voluntarily vacate the *lis pendens* within 14 days.

23. The final letter in the sequence of those exhibited is from the plaintiffs' current solicitor and is dated 27 November 2020. At this stage the solicitor advises as regards the 2018 proceedings that "*we are in the process of taking up the files from the previous solicitors on record and we will be making an application to renew the Plenary Summons herein in early course.*" As regards the delay, the solicitor states "*Our client continually throughout 2018 and 2019 engaged with both Ulster Bank in order to resolve matters. In*

particular, during late 2018 and early 2019, our client engaged with Ulster Bank GRG complaints process which is specifically designed to avoid protracted litigation. However, this did not deal with the substantive issues including the validity of the alleged transfer of the loans to PAL and the tracker issue." The plaintiffs refused to voluntarily vacate the *lis pendens* because of their claim that the other properties were disposed of at a loss when there were numerous outstanding issues which, it is contended, the defendants "*still refuse to answer*". The balance of the letter makes substantive arguments in respect of the tracker issue. Notably, despite advising the defendants that he is in the process of taking up the files from the second solicitor, this letter does not give any indication that any particular difficulty has arisen in doing so.

24. The High Court judgment refers to a letter dated 14 May 2021 from the plaintiffs' current solicitor which does not appear to have been exhibited but may have been provided to the trial judge in a booklet of correspondence. It does not seem to have found its way into the Books of Appeal. According to the extracts quoted in the judgment under appeal, the plaintiffs' current solicitor referred to his earlier correspondence in which he advised that he was taking up the file from the plaintiffs' second solicitor and to the fact that the plaintiffs were in dispute with their second solicitor such that "*no further action was taken in respect of this matter*". The letter also referred again to the Ulster Bank GRG complaints process and attributes the fact that the plenary summons "*was never in fact formally served*" to these matters.

Applications Before the Court

25. As previously noted, shortly before the commencement of the correspondence set out in the preceding section of this judgment, the plaintiffs' current solicitor filed a Notice of Change of Solicitor and a Notice of Intention to Proceed on 7 July 2020. Despite repeated

requests that either the proceedings be served or an application to renew the summons be brought "*immediately*", no step was taken to do either of these things. The plaintiffs now say this was because the second solicitor had retained their file and that an application to renew the plenary summons could not be made in the absence of the original summons which was on the file in the possession of the second solicitor. If this be the case, it is surprising that the defendants were not advised of these difficulties in the course of correspondence in which they were assured that those steps would be taken "*immediately*" and "*in early course*".

26. Instead, the next steps were taken by the defendants on 5 February 2021 when an appearance was entered to the 2018 proceedings and a motion issued seeking to vacate the *lis pendens* under s.123 of the 2009 Act and to strike out the proceedings for delay and want of prosecution either under O.122, r.11 (default of proceeding for two years or more) or the court's inherent jurisdiction. As an alternative relief, the defendants sought the dismissal of the proceedings pursuant to its inherent jurisdiction on the grounds of abuse of process, lack of *bona fides* and that they were frivolous, vexatious and oppressive. It appears from the defendants' written submissions in the High Court and the transcript of the High Court proceedings that the relief sought on the basis of abuse of process etc. was primarily directed to the fact that the first plaintiff had issued and then discontinued earlier proceedings in which the validity of the appointment of the receiver had been challenged before issuing a second set of proceedings in which substantially the same issues were raised.

27. As was made clear by counsel for the defendants, an appearance was entered solely because that was the most pragmatic and effective method of enabling the defendants to bring the applications they wished to bring, especially as regards the vacation of the *lis pendens*, without having to institute a separate set of legal proceedings in order to do so. The defendants' motion is grounded on an affidavit of the second defendant and of a Mr. Dowling

on behalf of the first defendant. These set out the plaintiffs' borrowing history with Ulster Bank, the transfer of the loans to the first defendant, the sending of the formal demands, the appointment of the receiver and the bringing and withdrawal of the 2016 proceedings. According to the first defendant, the plaintiffs' indebtedness as of 1 December 2020 stood at just over €3.2m. which, presumably, reflects a reduction attributable to the sale of the other properties. The plaintiffs complain that no details have been provided to them in relation to these matters.

28. The plaintiffs did not immediately reply to this motion. Instead, on 7 May 2021 an *ex parte* docket was filed on foot of an affidavit sworn by the first defendants on the previous day to ground an application under O.8, r.3 to renew the plenary summons. Somewhat surprisingly in light of earlier correspondence stating that an application would be brought to renew the summons and the fact that such application was actually prepared, the plaintiffs purported to serve the original, unrenewed plenary summons on the defendants on 12 May 2021. Further correspondence between the parties ensued during that month in which the plaintiffs' current solicitors implicitly accepted that the plaintiffs were required to apply to renew the summons. When the plaintiffs attempted to move this application *ex parte* on 17 May 2021 the court directed that the application be made on notice to the defendants and adjourned the application to the Chancery list to join the defendants' motion to strike out the proceedings.

29. The plaintiffs subsequently filed an affidavit of the first plaintiff dated 4 June 2021 in response to the defendants' motion. This affidavit is in largely similar, although not identical, terms to that sworn in respect of the plaintiffs' own application to renew the plenary summons.

30. On 10 June 2021 the motions were assigned a hearing date for 20 July 2021 on the basis that the affidavits were closed and the matter was ready for reading. However, the

plaintiffs' legal team took the view that written legal submissions prepared by the defendant and dated 29 June 2021 somehow impugned the plaintiffs' credibility and that the plaintiffs needed to address matters raised by way of further affidavit. An application was made on 8 July 2021 to vacate the hearing date and for liberty to file a supplementary affidavit. This was refused. The application was renewed on 15 July 2021 and refused again. Allen J., being the judge then in charge of the Chancery list, declined to change his earlier ruling on the basis that any assertion of fact in legal submissions does not constitute evidence and would be disregarded by the trial judge. The plaintiffs were not entitled to an adjournment to remedy a deficit in their evidence which had been identified in the defendants' submissions. Finally, the trial judge could always adjourn a case if he were persuaded that the plaintiffs were prejudiced by the contents of the legal submissions. Allen J. also refused leave to the plaintiffs to file a further affidavit.

31. Having been refused an adjournment, the plaintiffs' solicitor then filed a Notice to Produce Documents under O.31, r.15 requiring the production for inspection of the Global Deed Transfer dated 12 February 2015. Although not evident on the face on the notice, it appears from submissions that the plaintiffs sought access to the complete, unredacted version of this document rather than the redacted extracts which had been exhibited in the affidavit of Mr. Dowling.

32. When the matter was opened before the trial judge on 20 July 2021 counsel for the plaintiffs renewed the application to adjourn the hearing and for liberty to file supplemental affidavits for a third time. However, at the conclusion of his reply on this point, counsel suggested a compromise approach whereby the court would reserve its position on adjourning the application until the papers had been fully opened and it would be evident whether the plaintiffs were, in fact, prejudiced by the contents of the defendants' written

legal submissions. The trial judge agreed to proceed on that basis the hearing then proceeded that day and concluded on 22 July 2021.

The High Court Judgment

33. The High Court judgment is commendably concise. It opens with a summary of the issues and of the applications before the court and indicates that for the reasons set out in the balance of the judgment the court proposes to strike out the proceedings. The trial judge then sets out a chronology of the relevant events under the heading "*Summary of Time Line*" and a more detailed account under the heading of "*Background*".

34. On the opening of the appeal, counsel for the plaintiffs contended that the statement of the amounts owed set out at para. 17 of the judgment (of approximately €3.2m.) is an error of fact as it does not take account of the properties sold by the receiver, the proceeds of which have to be credited against the amounts due. Whilst this is, of course, correct in principle it is not clear that the trial judge has in fact made the error alleged. Paragraph 17 of his judgment quotes the figures in Mr. Dowling's affidavit of the amounts which were due on foot of the plaintiffs' loans in December 2020. As noted earlier this is some €1.8m. less than the amounts demanded of the plaintiffs in October 2015 which would suggest that a significant reduction has taken place presumably because the properties were sold. The court would require more detailed evidence as to the properties sold and the amounts realised before it could conclude that an error had been made by the trial judge. It is perhaps notable that apart from disputing the extent of their indebtedness by reference to the interest rate applied/the tracker issue, the plaintiffs do not take issue on affidavit with the figures quoted by Mr. Dowling. In any event even if this were an error (which I am not satisfied it was) it does not appear to be material either way. This is not an application for judgment by the defendants in respect of which the court would have to be satisfied as to the exact amounts

claimed to be due. It is an application by the defendants to strike out the plaintiffs' proceedings for delay. If the matter proceeds, the validity of the appointment of a receiver will depend in part on there being sums due which are secured by the mortgage and charge purportedly transferred to the first defendant. A dispute as to the amount due would not necessarily invalidate that appointment although clearly this is not a matter which the court has to decide at this stage.

35. The trial judge's chronology continues with an account of the 2016 proceedings and of the 2020 correspondence between the parties. Apart from taking issue with the figures, no material issue is taken with the substance of this account. However, counsel for the plaintiffs opened the appeal on the basis that the judgment refers extensively to the correspondence but does not refer to the first plaintiff's sworn testimony in his affidavit, thus raising an issue as to whether the trial judge had received a copy of the first plaintiff's affidavit. I will return to this submission in due course, which in light of the transcript of what occurred before the trial judge, is frankly bizarre.

36. I have already noted that the trial judge set out a brief summary of the law relating to the vacation of a *lis pendens* (i.e. ss. 121 and 123 of the Land and Conveyancing Law Reform Act 2009 and *Hurley Property ICAV v. Charleen Limited* [2018] IEHC 611, Barniville J.) and of the law relating to the striking out of proceedings for delay (O.122, r.11, *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459). Whilst brief, the summary in both cases captures the essence of the principles to be applied.

37. In his analysis the trial judge moved through the steps in the *Primor* test. He first asked whether the delay was inordinate and found that it was. Whilst there was some dispute between the parties as to whether the delay should be taken to continue up to the point where the plaintiff took a step by moving the *ex parte* application to renew the plenary summons (May 2021) or should terminate at the slightly earlier date of the defendants' motion

(February 2021), I do not feel that this is an issue that needs to be resolved in this case. The difference is that between 34 and 37 months. The trial judge based his views on the longer period which is, of course, slightly more prejudicial to the plaintiffs. However, this does not really affect the outcome either way as a delay of 34 months in serving a plenary summons after it has issued is, in any event, clearly inordinate.

38. The trial judge then moved on to consider whether the delay was excusable and found that it was not. This is the area of the judgment subject to most criticism by the plaintiffs on appeal. In essence, the argument made is that the evidence of the first plaintiff regarding difficulties in taking up the file from the second solicitor (without which the plenary summons could not be renewed) and of the plaintiffs' engagement with Ulster Bank were not dealt with either adequately or at all in the judgment. Counsel for the plaintiff characterises this as a failure to engage with the evidence led by the plaintiffs and, thus, a breach of fair procedures. He suggested that the first plaintiffs' affidavit might not have been received by the trial judge and said that this had been drawn to the attention of the trial judge at a subsequent hearing on 17 November 2021, but the trial judge did not take on board his concerns nor make any alternations in his judgment. Again, I will examine this in more detail below.

39. In looking at whether the delay was inexcusable, the trial judge examined in detail the correspondence between the parties and the reasons offered therein as set out at paras. 18 to 24 above. The plaintiff contends that this was an error of law as he should have looked at the affidavit evidence, particularly that of the first plaintiff, rather than the correspondence exhibited in the affidavit. The same correspondence is exhibited by both parties in their affidavits and in the affidavits of both parties in respect of both motions and therefore is clearly material of some significance on which both parties were relying. Thus, it was properly considered by the trial judge. The real issue is whether he omitted to consider or

address something of significance which he should have considered. The plaintiff contends that he did, and I will return to this issue below. In examining the correspondence, the trial judge considered the reasons for the delay advanced in that correspondence which included a dispute with the plaintiffs' second solicitor and the plaintiffs' involvement in the Ulster Bank GRC complaints process.

40. The trial judge is critical of the plaintiffs' conduct as evident from the correspondence in repeatedly stating that the plenary summons would be renewed and served but failing to take the steps necessary to do this and then, some eight months later, treating the requirement to renew as if this was something of which they had only just become aware. Ultimately, the trial judge concludes that "*no real attempt*" had been made by the plaintiffs to explain their delay, rejecting the excuses based on the inaction of their second solicitor and their interactions with Ulster Bank and its complaints process.

41. Having decided that no valid excuse had been advanced which justified the delay, the trial judge then proceeded to the third limb of the *Primor* test and considered whether the balance of justice favoured the dismissal of the proceedings. His starting point was that prejudice almost inexorably follows inordinate and inexcusable delay (*per Primor v. Stokes Kennedy Crowley* above) and that even modest prejudice can tip the scales in favour of a defendant (*Leech v. Independent Newspapers (Ireland) Limited* [2017] IECA 8). He attached significant weight to the fact that the proceedings were never served and that a *lis pendens* had been registered. He looked at the general nature of the case the plaintiffs wish to make and the contrary evidence exhibited by the defendants. He concluded that the balance of justice favoured the striking out of the proceedings.

42. The trial judge does not deal with the alternate relief sought by the defendants, namely the striking out of the proceedings as an abuse of process nor with the *res judicata* argument flowing from the 2016 proceedings upon which that application was largely based.

Presumably this was because he was satisfied to allow the defendants' application and to dismiss the proceedings on the basis of the *Primor* test and, therefore, felt it unnecessary to consider the alternate grounds.

43. Having reached the conclusion that the proceedings should be struck out, the trial judge proceeded at para. 69 of his judgment to deal with the *lis pendens*. He stated firstly, and correctly, that if the proceedings were struck out it would follow that the *lis pendens* should be vacated. This is because once the proceedings or the "*lis*" in respect of which the *lis pendens* had been registered are no longer in being, then they are no longer pending to form a basis upon which a *lis* can be registered. He continued "*for good order*" to hold that there had been an unreasonable delay in prosecuting the proceedings such as to justify the vacation of the "*lis pendens*" under s.123 of the 2009 Act. This was based on the reasons already set out in the judgment and the trial judge did not conduct a separate analysis of the facts for the purposes of the relief sought in respect of the *lis pendens*.

44. The judgment does not expressly deal with the plaintiff's application to renew the plenary summons. However, the order of 17 December 2021 does and expressly refuses the plaintiffs' application and grants the defendants the costs of that application to be taxed in default of agreement. It follows logically that if the proceedings are struck out, leave should not be granted to renew the plenary summons in those proceedings.

The Issues Arising on the Appeal

45. Notwithstanding the very large number of grounds advanced on this appeal there are essentially four matters with which the Court must deal. These are as follows:

- The plaintiffs' application to renew the Plenary Summons.
- The appeal against Allen J.'s refusal of an adjournment.
- The trial judge's treatment of the *lis pendens.*

- The trial judge's decision on delay.

46. The most substantive of these issues is undoubtedly delay. The arguments under this heading break down into two parts, firstly, the contention that the plaintiffs' evidence as contained in the first plaintiff's affidavit was not properly considered by the trial judge and thus, they were not given a fair hearing on the question of whether the delay was excusable and, secondly, the question of whether the trial judge exercised his discretion appropriately in considering the balance of justice. The argument advanced under the latter heading relates to whether the justice of the situation would have been met by vacating the *lis pendens* without striking out the proceedings. I will deal with each of these issues in turn.

Plaintiffs' Motion to Renew Plenary Summons

47. The Notice of Appeal filed by the plaintiffs does not list the High Court order refusing their application to renew the plenary summons nor the consequential costs order as being orders which the plaintiffs wish to appeal. Of the 55 grounds of appeal only one, ground (x), relates to the renewal of the plenary summons although, in the section of the Notice of Appeal headed "*Order(s) sought*" the plaintiffs identify that they are seeking "*if necessary*" an order renewing the plenary summons and directions thereafter in relation to the exchange of pleadings. If the order refusing the renewal of the plenary summons remains *extant* then the balance of the appeal, certainly insofar as it concerns the striking out of the proceedings, is largely moot as the non-renewal of the plenary summons effectively precludes the plaintiffs from progressing their proceedings.

48. When this issue was brought to the attention of the plaintiffs by the Court, counsel's initial reaction was to assume that because the renewal issue was touched on in the grounds of appeal the defendants were on notice of it and thus there was no lack of fair procedures in allowing it to be pursued. However, the issue was a more fundamental one as the

jurisdiction of this Court as an appellate court is dependent on the invocation of that jurisdiction in respect of particular orders made by the High Court. Ultimately, and with some encouragement from the Court, counsel applied to amend the Notice of Appeal so as to include in Section 2 an express reference to the refusal of the plaintiffs' application to renew the plenary summons. As the Court accepted that this would not cause prejudice to the defendants, that application was allowed. However, as the appeal was run on the basis of the High Court judgment which did not expressly deal with the renewal application, I propose to adopt a similar approach and to leave the renewal issue to await the outcome of the Court's decision on delay.

Appeal against Allen J.'s Refusal of an Adjournment

49. I have little difficulty in refusing the plaintiffs' appeal against the decision of Allen J. refusing to vacate the hearing date fixed for the application in order to allow the plaintiffs file further affidavit evidence in response to the defendants' written legal submissions. This is for the following reasons.

50. Firstly, and most significantly, that order is now moot. I note that having been refused an adjournment, counsel for the plaintiffs asked for an order to be drawn up for the purposes of an appeal and that was done on the same day. Despite this, the plaintiff did not seek to bring the matter before the Court of Appeal prior to the hearing date in order to seek to prevent the matter proceeding. Thus, the order refusing an adjournment has been overtaken by the fact that the matter proceeded on the hearing date originally assigned.

51. Secondly, and more generally, appellate courts are rightly reluctant to interfere in decisions of a lower court made in the course of case management of proceedings and a judge charged with the administration of a list is allowed a significant margin of appreciation (*per* Irvine J. in *Rice v. Muddiman* [2018] IECA 402*)*. Thus, for this Court to set aside such

an order, the appellant must demonstrate that failure to do so "*would call into question the proper administration of justice*". No argument was advanced by the plaintiffs as to why the refusal of an adjournment in respect of these applications called into question the proper administration of justice.

52. The circumstances in which it might be appropriate to entertain an appeal from a case management decision were considered recently by Ní Raifeartaigh J. in *Hanrahan v. Minister for Justice* [2020] IECA 340. She dismissed an appeal against the refusal to adjourn the hearing date fixed for an application largely on the basis that the appeal was moot since it had been overtaken by subsequent events which, as here, included the unsuccessful renewal of the application before the trial judge and the fact that the trial had taken place. In *Hanrahan* the plaintiff, having failed to secure the adjournment, did not participate in the High Court hearing which led to his application being dismissed. Here, when the plaintiffs renewed their adjournment application their counsel proposed a compromise approach which was accepted by the other side and by the Court and they actively participated in the trial.

53. In the course of considering the circumstances in *Hanrahan*, Ní Raifeartaigh J. rejected the basis on which the adjournment application had been made, namely that the filing of written submissions and a book of authorities by the other side required a further affidavit to be sworn by the plaintiff. The basis for the adjournment here is identical and thus can properly be treated in a similar manner - as indeed it was by Allen J. Other factors in *Hanrahan* which might have weighed in favour of the grant of an adjournment (such as a medical condition) are absent here.

54. Thus, the plaintiffs have not advanced any grounds upon which it might be said that Allen J., as the judge then in charge of managing the Chancery list, failed to exercise his discretion in an appropriate manner. As the hearing proceeded, the issue of an adjournment

is moot and no purpose would be served by allowing the appeal. In any event the plaintiffs have not come close to meeting the requisite threshold for an appellate court to interfere with the case management decision, namely showing that the proper administration of justice would be called into question by a failure to do so.

Treatment of *Lis Pendens* Issue

55. Given the time available to the parties at the hearing of the appeal, counsel for the plaintiffs indicated that he was largely going to rely on his written submissions on the *lis pendens* issue. The difficulty with this approach is that despite the plaintiffs' written submissions being very extensive, there is no section dealing expressly with the defendants' application to vacate the *lis pendens*. Indeed, there is little enough reference to the *lis pendens*, other than on a purely factual basis, throughout the submissions. The submissions made concerning the *lis pendens* identified that the receiver had not sought to sell the secured property before the *lis pendens* was registered, that he was unaware of the registration of the *lis pendens* until September 2020 (despite it being a matter of public record), and that there was no evidence of an intention to sell the secured property on the part of the receiver such that the registration of the *lis pendens* did not, in fact, inhibit the receiver and has not actually caused prejudice (see paras. 26, 51, 52, 94, 95, 96 and 99 of the submissions). An overarching submission, also made in oral argument, was to the effect that the Court should have considered vacating the *lis pendens* without striking out the proceedings. These observations really go to whether the registration of the *lis pendens* caused prejudice to the defendants which should be weighed in the balance of justice under the third limb of the *Primor* test. In accordance with s.123 of the 2009 Act and the *jurisprudence* on that section, prejudice is not in issue when the Court is considering the vacation of a *lis pendens*.

56. An argument that was somewhat difficult to understand is made at para. 38 of the written submissions suggesting that "*one of the considerations in vacating the lis pendens should have been whether "no issues of fact remain between the parties" to be resolved by the Court.*" This is located in a part of the submissions dealing with the striking out of proceedings as being frivolous and vexatious or bound to fail. It appears to be based on case law to the effect that proceedings should not be struck out where they disclose a reasonable cause of action. As the trial judge did not in fact strike out the proceedings on the basis that they were frivolous or vexatious or bound to fail and the defendants did not cross-appeal his failure to do so, the relevance of this part of the plaintiffs' submissions is not understood. In any event, the connection between this jurisprudence and the jurisdiction to vacate a *lis pendens* is neither obvious in itself nor set out in the submissions.

57. Apart from this, the plaintiffs' submissions do not set out or break down the terms of s.123 under which the Court has jurisdiction to vacate a *lis pendens*, consider the jurisprudence on that section nor address whether, on the facts of this case, that jurisdiction was correctly exercised.

58. Under s123(b)(ii) of the 2009 Act a court may make an Order to vacate a *lis pendens* on the application of any person affected by it where "*the court is satisfied that there has been an unreasonable delay in prosecuting the action or that the action is not being prosecuted bona fide.*" Most of the jurisprudence has focussed on the first limb of this sub-paragraph, *i.e.* unreasonable delay, rather than the second, *i.e.*, lack of *bona fides*. There is some suggestion that a delay in prosecuting proceedings in which a *lis pendens* has been registered might, of itself, be evidence of a lack of *bona fides* but it has not been necessary to decide this as the delay alone is usually sufficient to justify the making of the order. The jurisprudence accepts that the jurisdiction is discretionary, such that the Court retains a discretion to refuse to vacate a *lis pendens* even where one of the grounds in sub-paragraphs

(b) is otherwise satisfied. The vacation of a *lis pendens* does not affect the status of the underlying proceedings. Hence, the fact that the defendants here have sought separate relief in respect of the vacation of the *lis pendens* and the striking out of the proceedings.

59. The main authorities on the vacation of a *lis pendens* under the 2009 Act are referred to in the defendants' written submissions and the principal one, *Hurley Properties Limited v. Charleen* (above) is cited in the High Court judgment. In the circumstances I do not think it necessary to examine this jurisprudence in detail but it includes the decisions of Cregan J. in *Tola Capital Management v. Linders (No. 2)* [2014] IEHC 324; of Haughton J. in *Togher Management Company Limited v. Coolnaleen Development Limited (In Receivership)* [2014] IEHC 596; of Butler J. in *Ellis v. Boley View Management Company* [2022] IEHC 103 and Simons J. in *Sheeran v. Buckley* [2022] IEHC 400. These decisions establish that s.123(b)(ii) imposes an obligation on a litigant who has registered a *lis pendens* to prosecute their proceedings with an element of expedition and vigour going beyond mere compliance with the time limits laid down in the Rules of Court.

60. In my decision in *Ellis v. Boley View* I attempted to analyse the differences between inordinate and inexcusable delay under the *Primor* jurisprudence and unreasonable delay under s.123(b)(ii). It seems clear that the level of delay required to be shown to meet the inordinate and inexcusable standard is, by some measure, higher than that required to establish unreasonable delay. Unreasonable delay necessarily entails that the length of the delay goes beyond that which might be regarded as acceptable in the circumstances, but this might fall well short of being "*inordinate*". That this is so is evident from the facts of *Hurley Properties v. Charleen* where a delay of six months in the service of a plenary summons followed by a further three months in the delivery of a statement of claim was held to be unreasonable. The total period of delay was less than that allowed for service of the plenary

summons under the Rules and thus would generally only be held to be inordinate in exceptional circumstances.

61. Section 123(b)(ii) does not automatically discount delay which might be excusable, although the concept of delay being unreasonable does import some consideration of the reasons proffered for the delay. Here the reasons relied on by the plaintiffs to excuse the delay are the same for both limbs of the defendant's application. Finally, there is no balance of justice step under s.123(b)(ii). The court must look at whether the delay is unreasonable but, if it is, it does not thereafter conduct a balancing exercise in which matters such as prejudice or the lack thereof are automatically weighed as regards both parties. This is most likely because the consequences of making an order vacating a *lis pendens* are not as far reaching or as drastic as a striking out of proceedings. Of course, the fact that the making of the order is ultimately discretionary means that the court can always decline to vacate a *lis pendens* in any case where it would be manifestly unfair to do so.

62. It is difficult to see how a delay of three years in the serving of a plenary summons can be characterised as anything other than unreasonable. The plaintiffs have not seriously attempted to suggest otherwise. Instead, the argument made was that the trial judge had applied the wrong standard, namely the *Primor* test, in assessing whether the delay was unreasonable. The starting point for addressing this argument is, of course, to acknowledge that the *Primor* test is not the appropriate one in respect of unreasonable delay under s.123(b)(ii) (see Barniville J. in *Hurley Properties v. Charleen* above). However, it is important to understand that the *Primor* test is not appropriate because the standard imposed is too high. The defendants did not have to establish that the delay in the prosecuting of the action was inordinate and inexcusable in order to succeed in an application to vacate the *lis pendens*. They only had to meet the lower standard of establishing that it was unreasonable.

The erroneous application of the *Primor* standard would have been in ease of the plaintiffs rather than operating to their detriment.

63. However, I am not satisfied that the trial judge erred in the manner alleged. I have previously referred to para. 69 of his judgment in some detail. Properly construed, that paragraph cannot be read as suggesting that the trial judge erroneously applied the *Primor* test in considering whether the *lis pendens* should be vacated. His initial statement that the vacation of the *lis pendens* should follow the striking out of the proceedings is entirely correct as a matter of law because if the proceedings no longer exist there is no *lis* in respect of which the *lis pendens* can remain registered. Thereafter, he expressly addresses whether he would vacate the *lis pendens* independently of this automatic consequence and finds that he would do so. He expressly notes that he is doing so under s.123(b)(ii) of the 2009 Act and, earlier in the same judgment, he has set out that section and summarised the principal authority relating to it. There is simply no basis upon which a court could conclude that having expressly stated that he was vacating the *lis pendens* on a particular basis and having correctly set out the law in that regard he nonetheless proceeded to err by applying a different test.

64. The defendants' argument appears to hinge on the fact that rather than set out for a second time the excuses for the delay proffered by the defendant and why he did not accept those excuses, the judge used the shorthand of saying that he was vacating the *lis pendens "for the foregoing reasons"*. In circumstances where the *jurisprudence* relating to the striking out of proceedings for inordinate and inexcusable delay imposes a higher onus on the defendants than does s.123, it would seem logical that if in the judge's view the higher test was satisfied then the lower one was also satisfied. Arguably it would have been erroneous to deal with matters the other way around – *i.e.* to consider whether the delay was unreasonable for the purposes of vacating the *lis pendens* under s.123 and then to treat it as

being inordinate and inexcusable for the purposes of striking out the proceedings – but this is not what the trial judge did. I will dismiss the plaintiffs' appeal against the order striking out the *lis pendens*.

Delay – Was Plaintiffs' Evidence Considered?

65. The principal argument made on behalf of the plaintiffs was based on the fact that the first plaintiff's replying affidavit of 4 June 2021 is not expressly mentioned in the judgment. Counsel for the plaintiffs opened the appeal by suggesting that there may have been a mistake in the papers before the court which was not evident at the time as the hearing took place remotely. The suggestion was that the first plaintiff's affidavit which was on a separate pdf had not made its way to the court and, consequently, the trial judge was unaware of it. He indicated that subsequent to delivery of the judgment but before perfection of the order, a short hearing took place in which this potential mistake was raised (17 November 2021). He specifically drew the Court's attention to a plea at para. 2(c) of the defendants' grounds of opposition to the effect that the trial judge *"upon query by the appellants legal counsel, acknowledged that he had all the relevant affidavits and evidence as filed"*, expressly contending that the trial judge did not provide this confirmation.

66. When pressed by the Court as to what elements of the first plaintiffs' replying affidavits were different and additional to the excuses already set out by the plaintiffs' current solicitor in correspondence, counsel identified three matters, to which a fourth was later added. These were, firstly, the fact the plaintiffs were in dispute with their second solicitor in relation to another matter. Secondly, that the second solicitor withheld the litigation file and, thirdly, that the defendants had failed to provide information. At a slighter later point he added the plaintiffs' engagement with Ulster Bank. When asked to identify where in the affidavit these matters were dealt with, counsel identified paras. 13 and 17

which are set out above. He then agreed that the alleged failure of the defendants to provide information is not actually dealt with in the affidavit although it was raised in the correspondence - which he agreed was fully set out in the judgment. Thus, the issue narrowed down to whether the trial judge was aware of the plaintiffs' excuses for the delay arising from their dealings with the second solicitor and their engagement with Ulster Bank and, if he was aware, whether he dealt adequately with them in his judgment.

67. Obviously, it would be serious matter if an application proceeded without the trial judge being in possession of all of the evidence which had been adduced by the parties. It would be an even more serious matter if a trial judge were in possession of evidence which he then chose to ignore in reaching a decision and in giving judgment. Counsel for the plaintiffs opened two judgments with a view to supporting his arguments on this point focusing on the effect of non-engagement by a trial judge with either evidence or argument. In my view the proposition is so self-evidently correct it does not need authority to support it but, as it happens, the authorities relied on by the plaintiffs are misplaced in that they are not directly relevant to the type of application and the type of hearing with which the trial judge was concerned.

68. In *Comerford v. Carlow County Council* [2021] IECA 253 the Court of Appeal (Whelan J.) allowed an appeal against the decision of the High Court in a personal injuries case where the plaintiff had been cross-examined on the basis of doctor's notes which appeared to put his credibility in issue. The plaintiff's counsel objected that these notes were not properly in evidence before the court and the defendant gave an undertaking to call the doctor who had made them. The case concluded without the defendant calling the doctor (whom they were unable to trace), so that the plaintiff's legal team never had the opportunity to challenge the observations supposedly made by that doctor in the notes. The plaintiff's counsel applied either for the formal withdrawal of the notes and the cross-examination

based on them or the adjournment of the case to allow the doctor to be called. The trial judge appeared to reserve his judgment on this specific issue but then proceeded to deliver judgment on the case in which the plaintiff's claim was dismissed on the basis that the accident had not occurred as the plaintiff alleged. Unsurprisingly, Whelan J. held that this was a breach of what the Court termed the Phipson rule, namely that counsel should not suggest by cross-examination the contents of documents which are inadmissible as evidence because they have not been properly proved. Whelan J. was critical of the trial judge's non-engagement with the evidence. He had not made any reference to the missing doctor or explained how he was treating the medical notes which had been used in the cross-examination of the plaintiff. As a matter of law, the notes should have been excluded as inadmissible as should any cross-examination based on them. By failing to expressly address the issue and to indicate the approach he was taking, the trial judge had failed to provide the parties with a reasoned conclusion on the case and, thus, had denied the plaintiff a fair trial.

69. Obviously, there are a number of differences between a plenary trial in which oral evidence is heard in real time and the trial of an application on affidavit in which all of the evidence is prepared in advance and available prior to the hearing to the parties and the judge alike. Here, there was no issue of any evidence being inadmissible nor was any application made to exclude evidence. Consequently, there was no question of cross-examination on the basis of inadmissible evidence. The only point of connection is the alleged non-engagement of the trial judge with the evidence adduced by the plaintiffs, a matter to which I will turn below.

70. The second case relied on by the plaintiffs, *Betty Martin Financial Services Limited v. EBS DAC* [2019] IECA 327 was a judgment on appeal from the decision of the High Court granting an interlocutory injunction to restrain the termination of agency agreements

between the parties. An issue arose as to the weight the Court of Appeal should afford to the exercise by the trial judge of his discretion (assuming it to be open on the evidence and based on a correct application of legal principles). At para. 40 of the judgment Collins J. agreed with the proposition that the weight to be attached to the trial judge's view on a contested issue would be affected by his non-engagement with the arguments made to the Court and by a lack of explanation for the conclusion reached. This seems to me to be somewhat tangential to the point the plaintiffs are making. Instead of questioning the exercise of the trial judge's discretion, (which was really only an issue as regards the balance of justice under the *Primor test*), the plaintiff seeks to impugn the validity of the decision on the basis that no reason was given for the rejection of their evidence.

71. Before looking at the extent to which the trial judge engaged with the evidence led by the plaintiffs it is necessary to address the first point in the plaintiffs' argument suggesting that the first plaintiff's affidavit may not have been before the trial judge. In the course of the appeal the Court was handed a full set of transcripts of all of the hearings in this matter. Frankly, counsel's submission is bizarre in light of the contents of those transcripts.

72. At the outset of the hearing on 20 July 2021 the trial judge indicated that it would be unnecessary to open all of the affidavits and the parties might just refer him to the key sections. The plaintiffs' counsel expressed concerns about this approach stating that he was anxious that the case be fully opened. Counsel for the defendant then began to open the case by opening the affidavits in full. In the course of the defendants' affidavits, he opened the exchanges of correspondence between the parties' solicitors in some detail. Having done so, he then moved to the plaintiffs' affidavit evidence and commenced by stating to the Court:

> *"Then Mr. Kehoe has filed a replying affidavit, Judge, that is in the booklet – I believe the Court has been sent that, it is entitled "Supplemental Booklet of Pleadings" – I*

believe it was filed this morning. In fact it was omitted in error. Does the Court have that?"

To which the trial judge replied: *"Yes, I do"* confirming that he was in possession of Mr. Kehoe's affidavit.

73. In light of the trial judge's positive confirmation that he was in possession of Mr. Kehoe's affidavit which had been sent to him as a supplement document, the contention that he was not in fact in possession of that document is very difficult to understand. No basis was advanced for it save for the fact that Mr. Kehoe's affidavit is not expressly mentioned in the judgment. There is of course no obligation to expressly mention an affidavit in a judgment provided that its contents, if relevant, are dealt with appropriately.

74. Returning to the transcript, counsel for the defendants then commenced opening Mr. Kehoe's affidavit. The trial judge intervened and again suggested that counsel might just highlight the areas he thought were relevant and that counsel for the plaintiffs could then come back and highlight ones that he may have missed. At that stage counsel for the plaintiff expressly queried whether it could be taken *"that the Court will have read the affidavits at some stage?"* and the trial judge confirmed that this was the case. This appears to be the exchange referred to at para. 2(c) of the defendants' grounds of opposition and, again, it is difficult to understand the objection that has been taken to this.

75. In any event, as is evident from the transcript, counsel for the plaintiff did not really curtail his opening of Mr. Kehoe's affidavit and instead opened it in full, in particular paras. 13, 14 and 17 (which are set out above). He also opened the correspondence from Link Asset Management in relation to the interest rates and overcharging. When counsel for the defendants concluded opening the affidavits on the defendants' application, there was some dispute as to which of the two applications should be decided first. Counsel for the plaintiffs indicated that he was concerned that all of the material, including the affidavit evidence in

the application to renew, should be before the Court before any decision was made. He regarded the papers in the application to renew as filling in aspects of the chronology which were relevant to the balance of justice. At the suggestion of counsel for the defendants, the trial judge allowed counsel for the plaintiffs to open his affidavit on the renewal of the application to meet his stated concern that all of the evidence should be before the court. Counsel for the plaintiffs did so but did not specifically identify any material in Mr. Kehoe's affidavit on the application to renew, that went to the excusability of the delay which had not already been opened in his later affidavit, i.e. that of 4th June 2021.

76. Two things are evident from these exchanges. Firstly, the trial judge was expressly asked whether he had received the first plaintiff's affidavit which was separate in a booklet of pleadings and he confirmed that he had. He was asked whether he had read or would have read all of the affidavits and confirmed that he had or would (any confusion here arises from the way in which Counsel put the query). Secondly, all of the material on the defendants' application including the first plaintiff's affidavit was opened in full to the Court. The suggestion that there is any doubt about this is astonishing.

77. The application to Court on 17 November 2021 is difficult to understand. It was nominally an application to adjourn a costs hearing, which was duly adjourned. Thereafter, counsel for the plaintiffs drew the trial judge's attention to what he described as a preliminary issue which was the subject of an additional booklet of correspondence. He proceeded to open the correspondence in which the plaintiffs' solicitor wrote to the defendants' solicitor identifying the fact that no reference was made in the judgment to the first plaintiff's affidavit dated 4 June 2021. He then made a complaint that this affidavit was not listed in the index to the booklet of pleadings. The letter acknowledged that there was a separate .pdf of the first plaintiff's affidavit and queried whether the separate booklet of pleadings was provided before suggesting the possibility either that the first plaintiffs' affidavit was not furnished to

the Court or was not appropriately identified in the index of the papers before the Court. Replying correspondence from the defendants' solicitors confirmed that the separate .pdf for the first plaintiff's affidavit *"was lodged in the List Room in advance of the hearing of the matter together with the Booklet of Pleadings"*. The defendants' solicitor had also raised the matter with the registrar who indicated that once judgment had been delivered it was a matter for the Court.

78. Having opened the correspondence, counsel for the plaintiff concluded by indicating that *"That is the end of it insofar as discharging our obligations to the Court is concerned. Simply drawing attention to the exchange of letters, and not giving any indication that anything arises from it."* Counsel for the plaintiffs was very anxious to stress that it would not be appropriate for him either to question the Court directly on the matter or to suggest to the Court what course of action should be adopted. This may well be so, but if matters are put to a Court in such a non-specific manner it is very difficult for a judge to understand what the problem is supposed to be or how that problem might be rectified, if indeed rectification is required. There are further exchanges between the parties and the Court as to the adjournment of the costs hearing but this matter is not mentioned by the trial judge.

79. In all of the circumstances I am satisfied that there is no merit to the suggestion made by the plaintiffs that the trial judge was not in possession of the first plaintiff's affidavit. That leaves the potentially more serious allegation that, being in possession of that affidavit, he chose to ignore it. Again, an analysis of the submissions that were actually made to the Court and the way in which they were treated in the judgment suggest that this complaint is equally unmeritorious.

80. I have already set out the limited evidence which was placed on affidavit by Mr. Kehoe in relation to the two matters identified by counsel for the plaintiff as not having been considered by the trial judge (and which are actually addressed in the affidavit). The amount

of time devoted to these issues at the High Court hearing was similarly limited. Counsel for the defendants anticipated the plaintiffs' argument in relation to their previous solicitor's conduct and contended both that insufficient information had been provided and that it was not in any event a valid excuse to blame delay on a former solicitor. Counsel for the plaintiffs did not engage with either of these arguments. Instead, the bulk of his argument was devoted to the non-availability to his clients of the unredacted documentation in respect of the transfer of the loan. The conduct of their previous solicitor and the plaintiffs' involvement with the Ulster Bank complaints process were dealt with very much in passing at the very end of his submission. Apart from giving a date as to when the current solicitor first requested the file, very little was said on either subject that went beyond the brief outline in the first plaintiff's affidavit which, in turn, added very little to what had been set out in the correspondence addressed by the trial judge in the judgment.

81. I have gone into the argument heard before the High Court in more detail than usual because when a claim is made on appeal that a trial judge did not engage with the material or arguments that were before the High Court it is necessary to appreciate exactly how extensive that material and argument was. In this case whilst both the conduct of the previous solicitor and the engagement with Ulster Bank were flagged on affidavit this was done mostly through the exhibited correspondence rather than through detailed averment. As previously noted, the correspondence is strangely silent as to any difficulties in taking up the file until a very late stage in the exchanges. Absolutely no detail is provided on affidavit either as to when the plaintiffs fell out with their second solicitor or what efforts were made by them or their current solicitor to take up the file and when those efforts were made. On the basis of this limited information (not all of which was on affidavit), it seems that the plenary summons had been issued for nearly two years before the plaintiffs' current solicitor

requested the file from the previous solicitor. No account is given of events during those two years.

Trial Judge's Treatment of Excuses for the Delay:

82. The trial judge does deal with both of these issues in his judgment, albeit relatively briefly. At para. 48 of the judgment the trial judge notes the statement of Hamilton C.J. in *Primor* that inactivity on the part of a solicitor will not excuse delay on the part of a client, who will to some extent be vicariously liable for the solicitor's inactivity and expresses the view that this also applies to a change of solicitor. He returns to both excuses at para. 60 of the judgment and rejects them again referring to the comments in *Primor* to the effect that a party will not be held blameless for their solicitor's inactivity. In reaching this conclusion he effectively accepted the defendants' legal argument as to the validity of that excuse.

83. At para. 51 the trial judge notes the excuse proffered in respect of the plaintiffs' engagement with Ulster Bank during 2018 and 2019. However, at para. 52 he observes that the correspondence does not offer details of this engagement and so it was unclear when the proceedings could not have been progressed during this period. As previously noted, the affidavit does not provide any further details on this point. Further, at para. 53 he points out that according to the plaintiffs' solicitor this engagement did not deal with the substantive issues. Indeed, it is difficult to see how engagement with Ulster Bank could deal with the substantive issues in litigation against another party. Finally, at para. 62 he returns to the plaintiffs' involvement with Ulster Bank, again decrying the lack of evidence setting out the exact engagement and making the point that as Ulster Bank were not parties to the proceedings any engagement would have to be with the defendant. On the basis of these findings, he rejected both of these matters as excuses for the plaintiffs' delay.

84. It is probably fair to observe that the trial judge's treatment of both issues is relatively terse. That may not be surprising given that he rejects both in part because of the lack of detailed evidence provided by the plaintiffs to support them. It is important to bear in mind the obligations of both a trial court and an appellate court as regards the evidence and arguments adduced at first instance. In *Doyle v. Banville* [2012] IESC 25 the Supreme Court, Clarke J., identified the former as including an obligation that the judgment engages with the key elements of the case made by both sides and explain why one or other is preferred. In other words, the trial judge must analyse the broad case made by both sides. An appellate court, on the other hand, should not *"engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling"*. Instead, it should address the competing arguments on both sides in whatever terms might be appropriate on the facts and issues of the case. I do not regard the issue of the plaintiffs' previous solicitor's conduct nor of their negotiations with Ulster Bank as tangential since they are clearly offered as excuses for the plaintiffs' delay. However, I think it follows from the analysis provided by Clarke J. in *Doyle v. Banville* that where complaint is made that an issue is not addressed or adequately addressed in a judgment, the appellate court can examine the extent to which that issue was one of the key elements of the case which had been made by the complaining party.

85. In my view the trial judge's treatment of the two issues highlighted by the plaintiff on appeal was adequate in the context of the limited evidence tendered and the limited argument made on those issues before the High Court. The judgment identifies both arguments and then rejects them for stated reasons being, in both instances, a lack of detailed evidence to support them and, as regards the solicitor's conduct, the legal proposition that a client is *prima facie* vicariously liable for the inaction of their solicitor and, as regards engagement

with the Ulster Bank, the fact that the Ulster Bank was not a party to the proceedings. In accepting the trial judge's treatment of these issues I should note that it is not necessarily an absolute rule in all cases either that a litigant cannot rely on the inactivity of a solicitor or their engagement with a third party to explain a delay. However, if such matters are, exceptionally, to be regarded as justifying or excusing an otherwise inordinate delay, there must necessarily be detailed evidence before the Court allowing it to reach that conclusion. This would involve evidence not just of what occurred but the timeframe within which it occurred so that a Court can assess the extent to which it provides justification for the particular periods of delay. Manifestly, evidence of that type was not placed before the Court in this case. The plaintiff, as appellant before this Court, has not met the threshold envisaged in *Doyle v. Banville* for overturning the findings of the trial judge on these issues.

86. This deals in substance with the main argument advanced by the plaintiffs on this appeal. However, even if these issues were to be examined *de novo* by this Court and not just for the purposes of addressing whether the trial judge had before him, considered and treated in his judgment the averments made by the first plaintiff, I would be of the view that the evidence put by the plaintiffs before the High Court was too vague and insubstantial to excuse the delay in issue. It is, I think, significant that the delay complained of concerns the failure to serve a plenary summons on the defendants for a period of three years. As I read the papers, no real explanation is offered for the first eighteen months or more of this period. Given that the plaintiffs had filed a *lis pendens* on foot of issuing the proceedings there was an onus on them to act expeditiously. Instead, the plenary summons was allowed to lapse and the defendants only became aware of it when the second defendant, as receiver, entered into correspondence directly with the plaintiffs which prompted a reply from their solicitor on 9 September 2020. The first attempts made by the plaintiffs to serve the plenary summons occurred after the defendants had issued this motion to strike out the proceedings. There

does not appear to be any basis legally or factually for interfering with the finding of the trial judge on this issue.

87. Finally, I might mention in passing that the plaintiffs also relied on the covid-19 pandemic and the restrictions imposed on public health grounds as explaining part of their delay. This is unconvincing. Restrictions were not imposed as a result of covid-19 until March 2020, some two years after the plenary summons had been issued and manifestly cannot provide an excuse for the failure to serve it before then. Whilst there were a number of weeks – perhaps two months - at the very outset of the restrictions during which it might have been difficult for a client to instruct a solicitor or for a solicitor to engage in proceedings, methods were quickly devised to allow a resumption of normal services, albeit with an emphasis on remote rather than face-to-face dealings. The plaintiffs have not provided any explanation of how the pandemic or the restrictions affected their progression of these proceedings. As it happens, the step which the plaintiffs were required to take involved the service of proceedings on the defendants – something which could have been effected notwithstanding the restrictions.

Balance of Justice

88. The main argument made by the plaintiffs under this heading was to the effect that the High Court could have adopted an approach which was less damaging to the plaintiffs, by vacating the *lis pendens* but allowing the litigation to proceed. There is no issue but that the *lis pendens* should be vacated. The plaintiffs have delayed unreasonably in the prosecution of their proceedings and the vacation of a *lis pendens* thereafter is not dependant on a balance of justice analysis. That then leaves an issue as to whether the Court should have allowed the litigation to continue without the plaintiffs having the benefit of the *lis pendens.*

89. In looking at the balance of justice the trial judge focussed on the length of the delay, being over three years, and the fact that no steps at all had been taken by the plaintiffs to progress the proceedings during this period. He took account of the fact that not only did the defendants have the proceedings hanging over them (albeit that they did not know this for more than two years), a *lis pendens* was registered over the property such that the defendants would be unable to realise the security by selling the property, which the trial judge regarded as a significant prejudice. These are all valid considerations. As the proceedings were not served and indeed the defendants were unaware of them for most of the period, there is no conduct on the part of the defendants to be considered which might have affected the progress of the proceedings.

90. In addition, it seems to this Court that some regard can be had to the fact that the 2018 proceedings seek to raise an issue concerning the validity of the receivership which had been raised by the first plaintiff in the 2016 proceedings, engaged with on affidavit between the parties only for the proceedings to be withdrawn. The Court is concerned at circumstances in which a defendant who has actively engaged in the defence of proceedings which are withdraw should become the subject of another set of proceedings raising the same issues and not be made aware of the existence of those proceedings for in excess of two years. On the basis of the papers before the Court, it is difficult to conclude that these proceedings were issued other than for the purposes of registering a *lis pendens*. There is no evidence of any real intention to prosecute the proceedings on the part of the plaintiffs. If the defendants had not issued a motion and brought the matter to court, it seems unlikely that the plaintiffs would have taken any meaningful step to advance matters.

91. In considering the balance of justice I should note an argument made by the plaintiffs that as the first defendant had issued summary summons proceedings in 2017 and not proceeded with those proceedings there was, in effect, delay on both sides. I accept that the

jurisprudence on delay acknowledges that delay on the part of a defendant must also be considered although there is some difference of opinion as to how exactly this should be done and if such consideration should take account of whether the delay is "*active*" or "*passive*". It is not necessary to consider those complex issues here as no authority was opened to suggest that the Court should consider delay by the defendant in a different set of proceedings. Consequently, delay on the part of the first defendant in prosecuting separate proceedings does not provide an excuse for the plaintiffs' delay in this case, although it may well have justified a similar application to this by the plaintiff in those proceedings. The Court was informed by counsel that those proceedings had recently been withdrawn by the first defendant. Whilst the plaintiff was anxious to make arguments as to the legal effect of such withdrawal, this was a matter which had not been flagged to either the Court or to the defendants and which did not seem to fall squarely within the scope of this appeal.

92. Notwithstanding the absence of any claim of specific prejudice on the part of the defendants, I am satisfied in all of the circumstances that the trial judge's conclusion that the balance of justice favours the striking out of the proceedings was the correct one. The manner in which the plaintiffs issued a second set of proceedings seeking similar relief, registered a *lis pendens* and then took no step at all to prosecute them places them in a particularly unmeritorious position.

Conclusions

93. In light of the analysis set out above I will dismiss the plaintiffs' appeal. As the plaintiffs have been entirely unsuccessful in this appeal, my provisional view is that the defendants should be entitled to the costs of the appeal and I propose making an order to that effect. If either party wishes to contend for a different order, they may contact the Office of the Court of Appeal within ten days of the delivery of this judgment and request a short

hearing. It should be borne in mind that if a hearing is requested and the proposed order is not varied, the party requesting the hearing may be required to pay the additional costs thereby incurred.

94. Costello and Faherty JJ have authorised me to indicate that they have read this judgment in draft and agree with the Order proposed.