THE HIGH COURT

COMMERCIAL

[2017 No. 350 MCA]

IN THE MATTER OF SECTION 123 OF THE LAND AND CONVEYANCING LAW REFORM ACT 2009

BETWEEN

HURLEY PROPERTY ICAV

APPLICANT

AND

CHARLEEN LIMITED

RESPONDENT

JUDGMENT of Mr. Justice David Barniville delivered on the 31st day of October, 2018

Introduction

1. This is my judgment on an application by the applicant, Hurley Property ICAV ("Hurley"), for orders pursuant to s. 123(b)(ii) of the Land and Conveyancing Law Reform Act 2009, (the "2009 Act"), or alternatively, pursuant to the inherent jurisdiction of the court, vacating various *lis pendens* [The singular and plural of *lis pendens* being the same,] registered by the respondent, Charleen Limited ("Charleen"), on certain folios of the Register of Freeholders, Co. Westmeath, namely Folios 1664L, 2753L, 28021F, 2928L, 23608F, 29586F and 33325F (the "Folios").

2. The applicant's application was made by an originating notice of motion issued on 20th November, 2017. The motion sought orders pursuant to s. 123(b)(ii) of the 2009 Act or, alternatively, pursuant to the inherent jurisdiction of the court vacating the *lis pendens* registered by the respondent as a burden on the Folios. The *lis* were registered on the Folios in the context of proceedings commenced by the respondent (as plaintiff) on 18th May, 2017 which bear record number 2017 No. 4489 P (the "proceedings"). The applicant (Hurley) is one of eight defendants named in the proceedings. Following the commencement of the proceedings, the respondent (Charleen) registered the *lis pendens* in the Central Office on 7th June, 2017 and registered the *lis* as burdens on the Folios on 3rd August, 2017. While the proceedings were issued on 18th May, 2017, they were not in fact served on the applicant until 23rd November, 2017. A statement of claim was not delivered until 14th February, 2018 (one week prior to the hearing of the applicant's application to vacate the *lis*).

3. The applicant contends that the *lis* should be vacated on various grounds. First, it is contended that the respondent was not entitled to register the *lis* on the grounds that the respondent can establish no estate or interest in any of the lands in question (which all form part of the Athlone Town Centre in Athlone, Co. Westmeath) and was, therefore, not entitled to register the *lis* having regard to the provisions of s. 121(2) of the 2009 Act. Second, the applicant contends that the *lis* should be vacated on the grounds that there has been an "*unreasonable delay in prosecuting the action*" on the part of the respondent. Third, the applicant contends that the action is "*not being prosecuted bona fide*" by the respondent.

4. The respondent has resisted the application. It contends, first, that the proceedings do seek to establish an estate or interest in the lands in the form of a transfer to the respondent of the freehold title in the Sheraton Hotel in Athlone and in the form of various easements over other parts of Athlone Town Centre by means of a transfer and a deed of mutual easements and covenants which it claims the applicant agreed to execute in its favour thereby entitling it to register the *lis* under s. 121 of the 2009 Act. Second, the respondent rejects the suggestion that there has been an "*unreasonable delay*" in the prosecution of the proceedings. Third, it contends that the proceedings are being "*prosecuted bona fide*". Therefore, it submits that the court should not vacate the *lis pendens* pursuant to s. 123(b)(ii) of the 2009 Act (or otherwise).

5. The applicant's application was grounded on an affidavit sworn by Ms. Darina Delahunt, an asset manager with Alanis Unlimited Company, a firm of asset managers retained by the applicant to manage its portfolio of real estate in Ireland, on 14th November, 2017. An affidavit was sworn on behalf of the respondent by Mr. John O'Sullivan, a director of the respondent company, on 18th December, 2017 in response to Ms. Delahunt's affidavit. Further affidavits were sworn by Ms. Delahunt and Mr. O'Sullivan for the purposes of the application.

Scheme of Judgment

6. I propose to initially outline a summary of the relevant factual background. There are significant factual disputes between the parties. The applicant accepts that it is not possible to resolve those factual disputes on the basis of the affidavit evidence adduced in the context of this application. It accepts that the respondent's case must be taken at its height for the purposes of the application. When setting out the relevant factual background below, I will point to areas in which the facts are in dispute. I will assess later in the judgment whether it is nonetheless possible to reach conclusions on the applicant's application in respect of those issues. Once I have addressed the relevant factual background, I will then turn to consider the relevant legal principles in relation to the court's jurisdiction to vacate a *lis pendens*. In that context I will consider a number of relevant authorities. Having identified the relevant legal principles, I will seek to apply them to the particular issues raised in this application and then set out my conclusions on the application.

Relevant factual background

7. The applicant and the respondent have interests in a property known as the Athlone Town Centre in Athlone, Co. Westmeath (the "Centre"). The Centre has three distinct and separate parts or areas (in respect of which there are some shared common areas), namely, (a) the commercial area, (b) residential units and (c) the hotel which trades under the Sheraton name (the "Hotel"). The applicant acquired ownership of the Centre on foot of a contract of sale dated 19th May, 2015 and a deed of transfer dated 2nd October, 2015. The applicant acquired ownership of the Centre from the Receivers of the previous owners, Abbiamo Ltd. ("Abbiamo") and Prefero Ltd. ("Prefero"), who were the freehold owners of the residential units in the Centre and of the Hotel, and of ATC Retail Ltd. ("ATC Retail"), which was the freehold owner of the commercial area (which it acquired from Abbiamo and Prefero in 2009 on foot of a contract of sale and a transfer of sale, both dated 30th October, 2009).

8. The applicant acquired the Centre subject to a lease in respect of the Hotel which the respondent had entered into with Abbiamo and Prefero on 1st December, 2006 (the "Hotel Lease"). The lease is a 700-year lease. As we shall see, the applicant accepts that at

the time it acquired ownership of the Centre in October 2015, the Receivers of Abbiamo and Prefero had been in negotiation with the respondent with a view to transferring the freehold interest in the Hotel to the respondent and with a view to entering into a deed of mutual easements and covenants with it. The applicant says that no agreement was reached for that transfer or for the grant of such a deed prior to the date of its acquisition of the Centre or indeed at any time thereafter, although it was agreeable "*in principle*" to the transfer and to entering into the deed on certain terms.

9. The respondent claims that an agreement for the transfer and for such a deed was reached in September 2015. It says that the consideration which it provided for that agreement was its forbearance from seeking injunctive relief in respect of the sale by the Receivers of Abbiamo, Prefero and ATC Retail of the freehold in the Centre to the applicant. The respondent contends that the proceedings issued by it seek to enforce that agreement and that it is entitled to register the *lis pendens* in the context of those proceedings.

10. There is a dispute between the parties as to what occurred prior to the applicant's agreement to purchase the freehold in the Centre on foot of the contract for sale dated 19th May, 2015. The applicant says that it has no knowledge of certain arrangements which the respondent claims were entered into, or intended to be entered into, in respect of the structure of the ownership of the various parts of the Centre back in 2006. Mr. O'Sullivan sought to explain what those arrangements were in the affidavit which he swore on 18th December, 2017. As of 2006, the freehold interest in the Centre was owned by Abbiamo and Prefero. Mr. O'Sullivan was the majority shareholder and a director of Prefero (which owned a 60 percent interest in the freehold of the Centre). He claims that at the time the Hotel Lease was entered into in December 2006, it was agreed between the respondent, Abbiamo and Prefero, that the commercial area of the Centre would be disposed of to an unconnected third party by way of a 700-year lease and that the residential units would be disposed of by way of long leases with the reversionary interest vesting in a residential management company so that the remaining freehold interest would then vest in a management company which would be controlled by the parties who owned the commercial area and the Hotel which would act as the landlord for the entire Centre. However, Mr. O'Sullivan states that those transactions did not proceed due to the change in economic conditions in 2007/2008 and for stamp duty reasons. Nonetheless, in order to protect certain tax allowances within Abbiamo and Prefero, he states that the freehold in the commercial area of the Centre was transferred by those companies to ATC Retail on 30th October, 2009 by means of a contract of sale and transfer (the "ATC Transfer") both dated that day. Mr. O'Sullivan claims that this was all done with the consent of the respondent and that it was vitally important that the freehold interest in the Hotel be transferred to the respondent before any future sale of the commercial area or of the residential units, as otherwise it would negatively impact on the value of the Hotel and would conflict with principles of good estate management. He asserts that it was agreed that the freehold interest in the Hotel would be transferred to the respondent and that a deed of mutual easements and covenants (a "DOMEC") would be entered into between the three freehold owners of the Centre, namely, the respondent (in respect of the Hotel), ATC Retail (in respect of the commercial areas) and Abbiamo and Prefero (in respect of the residential units). Mr. O'Sullivan claims that it was agreed at the time of the transfer of the commercial areas to ATC Retail (pursuant to the ATC Transfer) that a DOMEC would be entered into and that the respondent consented to the transfer to ATC Retail on the basis of an undertaking that the freehold interest in the Hotel would be transferred to it and that a DOMEC would be executed as between the owners of the freehold interests in the Centre.

11. The applicant says that it has no knowledge of these arrangements. In her affidavit of 15th January, 2018 Ms. Delahunt asserts that the respondent failed to exhibit any documentation in respect of the alleged undertaking or agreement referred to by Mr. O'Sullivan or any written evidence supporting it and further asserts that the applicant is not bound by any such alleged undertaking or agreement. Further, she states that the applicant had no knowledge of any alleged prior threat of proceedings by the respondent to restrain the sale of the Centre to the applicant or of any assurances allegedly given by the Receivers and contends that the applicant is not, and could not be, bound by any such alleged assurances.

12. In further response, the applicant relies on the provisions of the contract of sale which it entered into with the Receivers of Abbiamo, Prefero and ATC Retail (who were appointed in December 2013) on 19th May, 2015 (the "Contract") and in particular on the provisions of clause 4.11 of that Contract. At clause 4.11 of the Contract, the Receivers confirmed, having made enquiries, that to their knowledge, information and belief there was not in existence a "*legally binding agreement*" between either AIB or Abbiamo and Prefero and the respondent pursuant to which AIB was obliged to consent as mortgagee, or Abbiamo and Prefero were obliged, as owner, to transfer the freehold interest in the Hotel to the respondent or to enter into a DOMEC with it; and that there was no agreement or undertaking, whether in writing or oral, to conclude any such agreements or to bind the parties until such time as the agreements were in an agreed form in writing, executed by all parties and exchanged in the agreed form.

The applicant also notes that it was further provided at clause 4.11.1 that a "*draft Hotel Transfer*" was being "*negotiated on a without prejudice and subject to contract basis*" as between the Receivers and the respondent and that the applicant had been provided with a copy of that draft Hotel Transfer. It was further stated at clause 4.11.2 that a draft DOMEC was being "*negotiated on a without prejudice and subject to contract basis*" as between the Receivers and the respondent and that the applicant had also been provided with a copy of that draft deed. Clause 4.11.2 went on to state that the Receivers acknowledged that the draft DOMEC was not "*currently in a form acceptable*" to the applicant as it needed to be "*in a form which reflects substantially the provisions of both the ATC Transfer* [The transfer dated 30th October 2009 between Abbiamo and Prefero and ATC Retail for the transfer of the freehold in the commercial area of the Centre.] *insofar as the [applicant] considers appropriate for the Hotel premises and the Hotel Lease".*

13. Clause 4.11.5 of the contract provided that the Receivers would keep the applicant informed of any such "negotiations" and would notify the applicant in writing of any proposed amendments to the draft Hotel Transfer and/or the DOMEC and to certain other documents and that they would not agree to any amendments without the prior consent of the applicant (such consent not to be unreasonably withheld). The clause went on to state that the applicant would be entitled to withhold consent if the DOMEC was not in a form which reflected substantially the provisions of the ATC Transfer as the applicant considered appropriate for the Hotel premises and the Hotel Lease.

14. Clause 4.11.6 provided that the Receivers would "*endeavour to reach agreement*" on the form of the Hotel Transfer, DOMEC and certain other documents in a form acceptable to the applicant and to execute and exchange all those documents in advance of the completion of the sale.

15. The applicant relies on these provisions in the Contract in support of its contention that there was no binding agreement for the transfer of the freehold in the Hotel to the respondent or for the execution of a DOMEC. Nonetheless, it confirmed on a number of occasions (and still confirms) that it is willing in principle to execute such a deed of transfer and a DOMEC on certain terms (which, it says, have not been agreed).

16. The respondent initially relied on an exchange of correspondence in August and September 2015 in support of, and as evidencing, an agreement which it alleges was made "*in or around September 2015*" (para. 17 of the statement of claim) under which, in

consideration of the respondent forbearing from seeking injunctive relief "*in respect of the non-execution of the DOMEC and freehold transfer of the Hotel*", the applicant and/or the Receivers agreed with the respondent that a DOMEC would be executed by the parties in respect of the Centre and that the freehold interest in the Hotel would be transferred to the respondent. In support of that alleged agreement, the respondent relied in the statement of claim (at para. 18) on letters from its solicitors (FG Phelan & Company ("Phelans")) to Matheson, the solicitors acting for the Receivers, dated 27th August, 2015 and a response from Matheson dated 4th September, 2015. In the letter of 27th August, 2015, Phelans referred to previous correspondence (which was not furnished to me) and referred to a threat which the respondent had made to bring proceedings seeking injunctive relief if a DOMEC was not executed and registered and an alleged agreement by Phelans on behalf of the respondent to enter into further discussions regarding certain aspects of the DOMEC on the understanding that the sale to the applicant would not proceed without matters being agreed. In the letter, Phelans requested Matheson to confirm that they would undertake to the respondent that the DOMEC would be executed and registered in respect of the relevant folios before any agreement or contract was entered into for the sale of the assets, failing which the respondent would seek injunctive relief. Matheson replied on 4th September, 2015. In that letter, it was stated that Matheson had spoken with the proposed purchaser of the Centre (i.e. the applicant) and that it had confirmed that certain of the documentation was agreed (namely the deed of rectification of the lease and a deed of variation of the carpark) and also that the applicant had agreed "*in principle*" to the transfer of the freehold in the hotel and the DOMEC. The letter continued: "*However, they have pointed out their agreement is on the basis that the documents currently reflect what is in the hotel lease and the provisions of the 2009 Athlone Town Centre Transfer…*"

17. The Matheson letter then stated that the applicant was finalising a review of the DOMEC and had highlighted an issue of concern from its initial review. The letter then referred to an issue which the applicant had in relation to insurance (which continues right up to now to be unresolved between the parties). The applicant's concern was expressed in the letter as follows: "*In particular, they have concerns about the proposal that there should be an absolute obligation to insure the town centre and to reinstate. Also on the insurance they would have concerns also with the proposal that a mortgagee should not be allowed to claim insurance monies as they expect (and I would agree) that any lender would take issue with this."*

18. The Matheson letter concluded by stating that the purchaser (i.e. the applicant) was taking full instructions in respect of the revised draft of the DOMEC (which had been received from the respondent) and on the draft freehold transfer and would revert as soon as possible. I observe here that the Matheson letter of 4th September, 2015 was put forward as one of the letters which evidenced the alleged agreement of September 2015 relied on by the respondent in relation to the transfer of the freehold of the Hotel and the execution of the DOMEC. That was also the impression conveyed in the "*Chronology of Events*" document furnished in the course of the respondent's submissions at the hearing of the application. However, it was subsequently stated by counsel for the respondent on instructions (but not on affidavit) that the alleged agreement relied upon by the respondent was reached at a meeting on 10th September, 2015.

19. The alleged agreement relied on by the respondent as having been reached with the applicant or, alternatively, with the Receivers on 10th September, 2015 is disputed by the applicant. It is common case that the alleged agreement was not in writing and there is no contemporaneous recording of that alleged agreement. The respondent claims that the agreement was evidenced in writing, initially relying on the Matheson letter of 4th September, 2015 as being one of the letters which evidenced the alleged agreement. The respondent's position had changed in the course of submissions at the hearing. The respondent now relies on correspondence subsequent to October 2015 as evidencing the alleged agreement and also on alleged acts of part performance. The making of the alleged agreement on 10th September, 2015 (or at any time) is, therefore, a matter which is completely in dispute between the parties.

20. In order to understand the correspondence which followed the acquisition by the applicant of the freehold interest in the Centre on foot of the deed of transfer of the 2nd October, 2015 (the "Transfer"), it is perhaps appropriate at this stage that I outline how the respondent described that alleged agreement in the affidavits sworn by Mr. O'Sullivan in response to the applicant's application and in its statement of claim.

21. At para. 12 of his first affidavit, Mr. O'Sullivan stated that:-

> *"…the Respondent threatened to seek injunctive relief to prevent the sale of the freehold interests in the Centre by the receiver (sic), until such time as the DOMEC was executed. I say that the Respondent was requested by Green Property Ltd., a company which managed the receiver's interest in the Centre, not to proceed with its application for injunctive relief, on the assurance that the DOMEC would be executed and the freehold interest in the hotel transferred to the Respondent. A number of meetings were held in or around this time with Matheson, on behalf of the receiver, and with Davidson Kempner/Hurley (represented by Walkers Solitcitors) during which it was formally agreed that, in consideration of the forbearance of the Respondent in not seeking injunctive relief, a DOMEC would be executed and its terms would mirror those contained in the ATC Transfer and the Hotel Lease under which the Respondent occupied the hotel; and that the freehold interest in the Hotel would be transferred to the Respondent. It was also agreed that these pressing matters would be dealt with as soon as possible after the sale of the freehold interests in the Centre."*

Mr. O'Sullivan referred in that regard to and exhibited the Phelans' letter of 27th August, 2015 and the Matheson letter of 4th September, 2015 to which I have just referred.

22. At paragraph 13 of that affidavit, Mr. O'Sullivan described the alleged agreement as being an agreement entered into by the parties to the proceedings "*in September 2015*".

23. Paragraph 17 of the statement of claim delivered by the respondent on 14th February, 2018 refers to the alleged agreement in the following terms :-

> *"17 In or around September 2015, in consideration for the plaintiff forbearing from seeking injunctive relief in respect of the non-execution of the DOMEC and freehold transfer of the Hotel, the first named Defendant and/or the Receivers (acting on behalf of the third, fourth and fifth named defendant)* [i.e., Abbiamo, Prefero and ATC Retail.] *, agreed with the Plaintiff that a DOMEC would be executed by the parties in respect of the Town Centre, and that the freehold interest in the Hotel would be transferred to the Plaintiff. A draft DOMEC was furnished to the first named Defendant and/or the Receivers by or on behalf of the Plaintiff at this time*."

24. Paragraph 18 of the statement of claim then sets out the express or implied terms of the agreement allegedly reached in September 2015 which is relied on by the respondent. Those alleged terms are set out at sub paras. (a) to (i). Paragraph 18 then states that the alleged agreement was evidenced by the Matheson letter of 4th September, 2015 "*and by subsequent correspondence between the parties*". Paragraph 17 then pleads, in the alternative, that the respondent had performed its obligations

under that alleged agreement by:-

> *"forbearing from legal action against the Defendants, or one or other of them, and continued to perform its obligations under the 2015 Agreement by making strenuous efforts to agree the contents of a DOMEC to be executed by the parties. In the premises, the Plaintiff is entitled to rely upon the doctrine of part performance where necessary."*

25. The alleged agreement which the respondent claimed to have entered into in September 2015 is also described at paragraph 4 of Mr. O'Sullivan's second replying affidavit.

Correspondence: October 2015 - August 2017

26. It is against that background that I now turn to consider the correspondence between the parties which preceded the applicant's application. At a particular point in the correspondence (commencing in February 2017 and ending in June 2017), the respondent's solicitors, Phelans, wrote various letters and sent various emails which were headed "*without prejudice*". Those communications were referred to and exhibited by Ms. Delahunt in the affidavit she swore grounding the applicant's application to vacate the *lis pendens*. The respondent took issue with the applicant's reference to these letters and written submissions were exchanged between the parties on this issue. However, ultimately the dispute on this issue fizzled out and it was agreed that I could consider the correspondence (with each side vigorously asserting that its respective position on whether the letters were properly the subject of a "*without prejudice*" claim was correct). In those circumstances, it is unnecessary for me to express any view on the appropriateness or otherwise of the use of the "*without prejudice*" designation on those letters.

27. The first relevant letter following the transfer of the 2nd October, 2015 under which the Receivers transferred the freehold in the Centre to the applicant (the "Transfer") is an email from Mr. Smyth of Phelans, the respondent's solicitors, to Mr. Toner of Walkers Global ("Walkers"), the applicant's solicitors. In that email, Mr. Smyth stated that at their meeting "*some weeks ago*" in Matheson "*we agreed that the following matters would be addressed as soon as possible:".* Three matters were then set out. The first referred to the deed of transfer and variation, which Mr. Smyth stated was "*agreed*", transferring the freehold reversionary interest to the respondent. The second concerned the DOMEC. Mr. Smyth attached a mark-up and noted replies to queries which had previously been raised by Mr. Toner in relation to that deed. Mr. Smyth stated that he had "*highlighted the contentious paragraphs".* He then stated that he was attaching a redacted version of the respondent's "*offer letter*" and asked Mr. Toner to note the position regarding the sole loss payee in the insurance clause (this issue was, and to this day remains, an issue of contention between the parties). Third, he referred to the licence agreements and variations or side letters in favour of the respondent relating to the car park which he stated should be registered as a burden against the freehold. Mr. Smyth then continued:

> *"The main issue of contention revolves around the insurance and you will note in the lease that your client is obliged to notify our client of the quotation they receive for the Town Centre. Our client is entitled to go back to the market to get a better price*. [This is a reference to the provisions of Clause 6.3.5 of the Hotel Lease.] *It has always been the positon that our client has obtained a better price. The second issue is the position of the Bank as sole loss payee. Our client must retain their rights as set out in the attached redacted offer letter."*

It was then suggested by Mr. Smyth that a meeting might be arranged.

28. There was no reply initially from Mr. Toner. Mr. Smyth sent a further email to him on 1st December, 2015. In that email, Mr. Smyth again referred to the positon in relation to insurance and to the issue which he had raised concerning the sole loss payee. Mr. Smyth requested Mr. Toner to revert and confirm the position. There was no response to that email either and it was followed up by Mr. Smyth by letter dated 8th December, 2015. In that letter, Mr. Smyth referred to the alleged agreement reached in September 2015. He said:

> *"In consideration of our client not pursuing injunctive relief and allowing the sale of the Athlone Town Centre to proceed to completion, it was agreed between our clients in open correspondence and at a meeting some months ago in Matheson that your clients would complete the following transactions as soon as possible thereafter.*
>
> > *1. A Deed of Transfer and Variation transferring the Freehold Reversionary Interest of the Sheraton Hotel as constructed to Charleen Ltd.*
> >
> > *2. A Deed of Mutual Easements and Covenants (DOME & C) to be registered against the Freehold title to the owners of the Hotel, Commercial and Residential areas.*
> >
> > *3. That the licence agreements and any variations or side letters in favour of Charleen Ltd. relating to the car park should be registered as a burden against the freehold of the Commercial Area.*
>
> *The closing of the sale of the Athlone Town Centre to your client has long since passed and these transactions remain outstanding.*
>
> *Unfortunately, to date your client has made no meaningful effort to bring these transactions to completion.*
>
> *If we do not hear from you within 28 days of the date herein with a proposal for the expeditious completion of these transactions our client will have no alternative but to pursue an action for specific performance of the agreement without further notice to you."*

29. That letter was met with a response from Mr. Toner, on behalf of the applicant, by email sent to Mr. Smyth on 9th December, 2015. In that email, Mr. Toner pointed out that it had previously been confirmed that the lease rectification and car park licence variation were in agreed form and the applicant had no difficulty in executing those. He stated that it had also previously been confirmed that the applicant had "*no issue in principal (sic)"* with the transfer of the freehold reversion in the Hotel to the respondent and with the DOMEC "*provided it reflects the existing Hotel Lease of 1 December 2006 and the provisions of the 2009 ATC Transfer*". He continued:

> *"Following the meeting in Matheson a number of issues were clarified and others were agreed to be taken away for further client instruction. In particular, it was noted that there were a number of drafting inaccuracies in the draft deed of mutual easements and it was agreed that a revised deed of mutual easements would be produced by your firm."*

Mr Toner stated that a revised deed had been received from Phelans and from a "c*ursory inspection*" there were still drafting

inaccuracies, numbering discrepancies and other errors. Mr. Toner concluded his email as follows:

> *"I repeat my above statement that our clients have no issue in principal (sic) with the granting of the deed of mutual easements provided it reflects the existing lease. I would however suggest that it is not for my client to incur unnecessary legal fees in drafting revisions to the deed of mutual easements, and that if you could please produce a workable draft we shall endeavour to complete out this matter to the satisfaction of all parties."*

I do note that in this email there is no reference to outstanding insurance issues and, although Mr. Toner did not expressly deny the making of an agreement in September 2015, it is implicit from what he says that certain matters remain to be agreed and required further client instruction.

30. Mr. Smyth replied by email on 11th December, 2015 in relation to the outstanding documentation which he stated he would work on and mark up. On 19th February, 2016 , Mr. Smyth sent an email to Mr. Toner attaching a further draft of the DOMEC and indicated that further revised draft documentation would follow. His email then dealt with the contentious issue of insurance. Mr. Smyth stated:-

> *"It appears they (sic) may be some difficult (sic) reconciling our respective client's needs around the issue of insurance. You might advise as to your client's position with regard to their lender being noted as sole loss payee. The Town Centre is already doubly insured and if a workable solution cannot be found it may be the case in future that the parts of the Town Centre will need to (sic) insured separately. That will obviously create its own problems."*

The possibility of a further meeting was mentioned although it was indicated that that might not be necessary if the parties could agree outstanding items.

31. Mr. Smyth sent a further email to Mr. Toner on 23rd March, 2016 enclosing a draft deed of transfer in respect of the transfer of the freehold in the Hotel to the respondent. Mr. Smyth then stated that the "*the matter of insurance needs to be resolved*" and suggested a meeting.

32. The issue of insurance was the subject of separate correspondence between Walkers and the respondent in April 2016 when Walkers wrote on behalf of the applicant to the respondent threatening proceedings for the recovery of a sum of an excess of €42,000 in respect of allegedly unpaid invoices for an insurance premium.

33. In the meantime, the respective solicitors, Mr. Smyth and Mr. Toner, exchanged emails in April and May 2016 seeking to progress outstanding issues. On 11th May, 2016, Mr. Toner sent an email to Mr. Smyth confirming that he had received instructions to complete the review of the documentation relating to the transfer of the freehold interest in the Hotel to the respondent and that the applicant was satisfied to discharge Walker's fees:-

> *"subject to the negotiations not being protracted, your client acting reasonably and the furnished draft of the deed of mutual easements being largely in final form, incorporating previously agreed amendments following our discussions in the offices of Matheson."*

34. Mr. Toner's email also referred to the alleged failure by the respondent to discharge the insurance premiums under the terms of the lease. Mr. Smyth responded by email on 16th May, 2016 stating:-

> *"As previously advised the insurance matter can be resolved concurrently. I do not anticipate that it will take long to settle on the documents and we should have all matters resolved in a few weeks."*

Mr. Smyth requested Mr. Toner to return his mark-up of the documents sent previously. Mr. Smyth sent a follow up email on 31st May, 2016 seeking an update from Mr. Toner on his review of the documents. He also again referred to the question of insurance and expressed the desire to have the insurance issues resolved before November.

35. Mr. Toner replied on 2nd June, 2016 indicating that he was still reviewing the documents and hoped to be in a position to respond "*in the near term*". Following a further email from Mr. Smyth on 27th July, 2016, Mr. Toner responded on the same date stating that he had largely completed his review of the draft DOMEC and would be suggesting a number of "*alterations and corrections*". He informed Mr. Smyth that he had not yet received the consent of the applicant's lending institution in respect of certain additional insurance provisions which were being sought on behalf of the respondent to be inserted at clauses 5.6.4, 5.6.8, 6.2 and 6.3 of the draft DOMEC. Mr. Toner was departing on annual leave and indicated that he would take up the matter again on his return.

36. Mr. Smyth sent an email to Mr. Toner on 25th August, 2016. In that email, he noted that the insurance renewal date was imminent and that "*matters remain unresolved*" in relation to insurance. He then referred to issues which the respondent had in relation to the insurance for the Hotel which had been put in place by the applicant. He stated that in the context of the applicant's intention to dispose of the residential units in the Centre, it was important that the covenants of the applicant and the respondent be agreed in the DOMEC as soon as possible. He suggested a meeting in September 2016 (proposing various dates) and concluded by stating "*this negotiation may take some time and I would appreciate the return of your mark us (sic) as a matter of urgency".*

37. Mr. Smyth sent a further email to Mr. Toner on 8th September, 2016 indicating that the respondent was anxious to have matters in relation to insurance resolved and to avoid any "*further dispute*" on that issue. He also requested an update on the applicant's position and in relation to the draft documentation. Mr. Toner replied by email the same day. That email addressed both the outstanding insurance issues and the draft DOMEC. In relation to insurance and, in particular, the respondent's request to be noted as a composite insured and the proposed restriction on the applicant's bank's rights as sole loss payee, Mr. Toner stated that the applicant had sought its bank's consent to the requested amendments and that confirmation was awaited. On the draft DOMEC, Mr. Toner stated that the draft had required numerous corrections and amendments and quite a considerable time had been spent in producing a revised draft. He enclosed that revised draft and noted that it remained subject to "*a number of outstanding confirmations and clarifications*". The revised draft attached to the email highlighted with footnotes the areas requiring further clarification. Mr. Toner also provided a comparison document highlighting the requested amendments. He noted that the draft was furnished "*based upon an agreement negotiated with Eversheds prior to [his] clients purchasing the Town Centre and that [he had] endeavoured to retain the structure of the agreement*". However, he went on to suggest a possible alternative way of dealing with the proposed transaction and requested Mr. Smyth's thoughts on that.

38. Mr. Smyth replied by email on 16th September, 2016. At the outset of that email, Mr. Smyth stressed the importance of a DOMEC for the respondent and referred to the provisions of the 2009 ATC Transfer and asserted that the applicant was on notice of the

terms agreed at that time and that the applicant had agreed to complete the process and to execute the DOMEC. He requested Mr. Toner to take the applicant's "*clear instructions* on the matter" and to revert and was critical of the extent of the applicant's engagement over the past year (describing it as "*only piecemeal engagement*"). He also referred to the potential for litigation and stated:-

> "*…there appears to be fundamental differences in relation to our respective positions!".*

39. Mr. Smyth then commented on Mr. Toner's email of 8th September, 2016 both in relation to the insurance issues raised and the revised draft DOMEC. With reference to the proposed amendments to the DOMEC to reflect the respondent's requirements in relation to insurance, Mr. Smyth stated that "*this has been dragging on too long and decisions are now required*". With regard to the revised draft DOMEC itself, Mr. Smyth stated "*..we are facing into another dispute over insurance" and continued "our client has the right to insure separately but that will no doubt lead to a dispute between our respective insurers in the event of a claim*". He then stated:-

> "*Your client (sic) predecessors in title agreed by contract to enter into a DOME&C. We had agreed with Matheson to allow the sale to proceed on the basis that these matters would be dealt with. The documents were agreed at that time between Byrne Wallace and MOP."*

40. Mr. Smyth commented on certain of the amendments asserted by Mr. Toner in the draft DOMEC and in relation to the suggested alternative way of dealing with the transaction put forward by Mr. Toner and concluded by stating :-" *I don't propose to go into any further detail until the fundamentals around insurance are agreed*". He finished by referring to the fact that the applicant intended disposing of the residential units and that it would be "*important to get matters settled before that process starts*".

41. Mr. Smyth sought an update from Mr. Toner by email sent on 18th November, 2016. He suggested a meeting early in December 2016 so that they could "*focus on settling the issues or at least narrowing them*". Mr. Toner replied by email sent on the same date. He stated that he was still awaiting confirmation from the applicant's bank's legal advisors on the amendments to the DOMEC in relation to insurance proposed by the respondent. Mr. Toner noted that he understood from previous discussions that this was "*a critical piece for your client*". He suggested that it would be premature to arrange a meeting prior to receipt of confirmation of the bank's position and that he would follow up with the bank that day and revert once he had received instructions.

42. There then seems to be have been a hiatus in the correspondence until 9th February, 2017 when Mr. Smyth sent an email to Mr. Toner. That email was headed "*without prejudice*" and is the first communication so designated by Mr. Smyth. Having ascertained whether Mr. Toner was available for a call the following day, Mr. Smyth continued:-

> "*My client is aware that your client now intends disposing of residential units on a piecemeal basis and matters have still not been resolved in respect of the deeds that were agreed when your clients purchased the Town Centre. The matter of sole loss payee was the only significant matter to be dealt with and in the space of twelve months that has not yet been resolved. I suspect that your client has no real interest in dealing with the matter? With regard to insurance our respective clients are now insuring their properties separately and their relationship is a little colder!*
>
> *I now have instructions to brief Counsel with a view to issuing proceedings against ALL the parties to the original transaction with the intention of preventing the sale of the residential property until the documentation including the DOME&C is settled.*
>
> *Presumably this is very much avoidable and I would like to discuss this with you tomorrow."*

While Mr. Smyth's letter of 8th December, 2015 had threatened proceedings and his email of the 16th September, 2016 had mentioned the "*potential*" for litigation, there had been no mention of that issue in the correspondence over the following months until Mr. Smyth's email of 9th February, 2017.

43. It appears that Mr. Smyth spoke with Mr. Toner on 10th February, 2017 and followed up that conversation with another further email sent on 13th February, 2017. That email was also headed "*without prejudice*". It requested Mr. Toner to "*set out [his] proposal to deal with the outstanding issues and documentation and an estimate of the timescale".* There was no reply to that email. Mr. Smyth sent a further email on 21st February, 2017. That email was also headed "*without prejudice*". He requested a response from Mr. Toner "*as soon as possible*". There was no response to that email and Mr. Smyth sent another email on 9th March, 2017 (again headed "*without prejudice*"). In that email, having referred to his email of 9th February, 2017 Mr. Smyth stated:-

> "*In the absence of any commitments from your client I must now brief Counsel and issue proceedings. I will be sending you a formal letter tomorrow."*

That "*formal letter*" does not appear to have ever been sent.

44. Mr. Toner replied by email on the 9th March, 2017. His email was headed "*Subject to Agreement / Agreement Denied"* but was an open, on the record, response. He noted at the outset that the respondent's position was that it would not go into detail in relation to the latest draft of the DOMEC "*until the fundamentals around insurance are agreed*". By that stage, Mr. Toner had obtained instructions from the applicant in relation to the respondent's insurance requirements. Mr. Toner noted that the respondent had sought a number of alterations to the insurance position (over and above the position contained in the 2006 Hotel Lease). They included a non-average reinstatement provision and a first loss payee clause in respect of insurance claim payments made in respect of the Hotel. Mr. Toner asserted that a number of the respondent's requirements in relation to insurance were not consistent with the terms of the existing Hotel Lease (which he said did not permit the respondent to insure the hotel separately). He further pointed out that the applicant was obliged under its banking arrangements to note its bank as sole loss payee and was prevented from covenanting to expend the whole of the insurance proceeds in rebuilding or reinstating the Centre. In the circumstances, he stated that the applicant was unable to agree to the amendments to the DOMEC deal requested by the respondent. Mr. Toner did however state that: -

> "*We have previously confirmed that our client has no issue in principal (sic) with the transfer of the freehold reversion and deed of mutual easements provided it reflects the existing Hotel Lease of 1 December 2006 and the provisions of the 2009 ATC Transfer."*

45. Mr. Toner sent a further email to Mr. Smyth on 21st April, 2017 in which he suggested that their respective client's insurance advisors might liaise directly in relation to their requirements and that that might progress matters more expeditiously.

46. Mr. Smyth responded by email on 27th April, 2017 (which was again headed "*without prejudice*"). Mr. Smyth referred to the respondent's difficulties with what was being proposed in relation to insurance in circumstances where it was likely that ownership of the Commercial area, the residential area, and the Hotel would be separate and would have separate insurable interests.

47. Mr. Smyth sent a further email to Mr. Toner on 7th June, 2017 (again headed "*without prejudice*"). In that email he stated that the respondent had issued the proceedings in the High Court against the applicant and others. He continued: -

> *"Unfortunately, this appears to be the only way our client will get these transactions expedited. I will not be serving the proceedings in the hope that the transactions will be completed very soon. I appreciate that the distraction of refinancing might have delayed matters, but the sale of the residential units without the completion of the above transactions will only prejudice our clients (sic) position further".*

48. Mr. Toner responded by email dated 9th June, 2017, although he did not refer in that email to the commencement of proceedings by the respondent. He did note that he had:

> *"continually re-iterated [his] client's position that they have no issue in principal (sic) with the transfer of the freehold reversion together with the deed of mutual easements provided it reflects the existing Hotel Lease of 1 December 2006 and the provision of the 2009 ATC Transfer."*

He went on to refer again to the "*potential difficulties*" with the respondent's proposals in relation to its insurance requirements and how they did not reflect the existing arrangements to which the respondent was entitled under the existing Hotel Lease. He again referred to the possibility of the parties' respective insurance brokers meeting.

49. Mr. Smyth responded by email on 4th July, 2017 (this time not "*without prejudice*"). He referred to the fact that contact had been made between the parties' respective insurance brokers and that they were arranging to meet. He then sought some further information in relation to the draft transfer documentation and the draft DOMEC. He continued; -

> *"My instructions are to register a* Lis Pendens *in the PRAI, but I see no reason why these matters cannot be completed in the next few weeks".*

50. That email did not attract an immediate response from Mr. Toner. Mr. Smyth sent a further email (again not headed "*without prejudice*") on 20th July, 2017. He requested a response from Mr. Toner to his earlier email. There was no response from Mr. Toner. Mr. Smyth sent a further email on 28th July, 2017 (not headed "*without prejudice*"). Some contact had by that stage taken place between the insurance brokers but there had been no resolution of the insurance issues. Mr. Smyth referred to the outstanding issue in relation to insurance as follows: -

> *"Our client has already agreed that the terms of the lease should apply to the DOME&C. Our main concern is with the insurance and how it is best structured and we are willing to agree a compromise on the sole loss payee issue. You have also agreed that the freehold can be transferred and the DOME&C can be drafted as long as it is in line with the lease".*

Mr. Smyth then stated that a *lis pendens* had by that stage been registered in the Property Registration Authority (PRA) and concluded: -

> *"My instructions now are to issue proceedings next week and seek an injunction in respect of the sale of the residential properties unless I receive the relevant documents and confirmation that the transaction will be completed before any residential units are disposed of".*

51. Three points immediately arise in relation to this email. The first is that it appears that the *lis pendens* were registered on the Folios on 3rd August, 2017 (having previously been registered in the Central Office in June 2017). Second, the proceedings had in fact already been issued on 18th May 2017. They had not, however, by that stage been served on the applicant or indeed on any of the other defendants. Third, while referring to the respondent's instructions to seek an injunction in relation to the sale of the residential properties, no application for any interlocutory injunction was ever made by the respondent.

52. Mr. Toner responded to Mr. Smyth's emails by email dated 31st July, 2017 (which was headed "*Subject to Agreement / Agreement Denied*"). Having referred to the proposed meeting between the insurance brokers (which had apparently not taken place by then), Mr. Toner went on to point out that the draft DOMEC provided on behalf of the respondent did not reflect the terms of the existing Hotel Lease and that a significant amount of drafting had to be done by Walkers to amend the draft documentation in order to reflect the terms of the lease. He also pointed out that the respondent's position had been that until the outstanding insurance issues were resolved, the documents could not be agreed. He then referred to a series of differences between the parties on the question of insurance and in relation to the amendments proposed by the respondent to the insurance provisions of the draft DOMEC. Those differences were set out by Mr. Toner in his email. While Mr. Smyth had indicated (in his email of 28th July, 2017) that the respondent was willing to agree a compromise on one of those outstanding differences (the sole loss payee issue), Mr. Toner pointed out that he had not specified what that compromise might be. Mr. Toner concluded by encouraging the meeting between the insurance brokers to proceed so that they could understand the impact of the respondent's insurance requirements in terms of the existing Hotel Lease. Mr. Toner's email did not refer to the proceedings or to the registration of the *lis* by the respondent.

53. There were further email exchanges between Mr. Toner and Mr. Smyth over the first half of August 2017, both in relation to the proposed meeting between the insurance brokers and in relation to some of the details of the outstanding documentation (apart from the DOMEC).

Correspondence re Service of Proceedings

54. On 16th August, 2017 Walkers wrote to Phelans referring to the commencement of the proceedings on 18th May, 2017 and to the registration of the *lis pendens* in the Central Office on 7th June, 2017. The letter pointed out that the proceedings had not yet been served on the applicant. The letter then requested the respondent to provide full details of:

> (1) the identity of the land over which the respondent was claiming to have an estate or interest;
>
> (2) the nature of the estate or the interest in the relevant land being claimed by the respondent; and
>
> (3) the basis on which the respondent was claiming to be entitled to such estate or interest.

55. It was also confirmed that Walkers had authority to accept service of the proceedings on behalf of the applicant and called on Phelans to serve the proceedings "*forthwith*". This was the first of several requests made by Walkers on behalf of the applicant for the proceedings to be served. It met with no response.

56. Walkers sent a further letter to Phelans on 25th August, 2017. That letter repeated the request for the details sought in the previous letter and called upon Phelans to serve the proceedings "*immediately*". The letter then continued:

> *"It is not open to your client to register a* lis pendens *and then fail to progress the proceedings in an expeditious manner. In the event that your client fails to serve the proceedings immediately upon our client we would seek to rely on this failure as demonstrating a lack of bona fides on the part of your client".*

57. Mr. Smyth of Phelans replied to the Walkers' letters of 16th and 25th August, 2017 by email sent that day. He asserted that the applicant was "*well aware of the nature of these proceedings"* and that Phelans had put Walkers "*on notice of this on more than one occasion*". He then stated that the Walkers' correspondence had been forwarded to counsel and that he would revert "*thereafter*". There was no confirmation on behalf of the respondent that the proceedings would be served immediately.

58. Walkers sent a further letter to Phelans by email on 25th August, 2017. In that letter they noted that the respondent had failed to provide the details of the claim as had been requested and stated that the respondent's refusal to set out the nature of the estate or interest which it was claiming and the basis for that claim "*demonstrates the complete lack of good faith on your client's part"*. The letter further stated that having regard to the fact that *lis pendens* had been registered on foot of the proceedings, it was incumbent upon the respondent to serve the proceedings "*without further delay*" and it was not understood how counsel would be required in relation to the service of the proceedings. Walkers, therefore, requested, for the third time, that the proceedings be served "*immediately*". There was no reply to that letter or to the third request contained in it for the immediate service of the proceedings.

59. Walkers sent a further letter (again by email) on 27th September, 2017. The letter reiterated the applicant's request for the service of the proceedings "*without further delay*" and continued:

> *"Based on your client's steadfast refusal to serve the Proceedings on our client and/or otherwise seek to progress the Proceedings, it appears that the sole purpose of instituting the Proceedings was to enable your client to register the* lis pendens *and therefore burden our client's lands. This is not a proper use of court proceedings."*

60. The letter then requested for the fourth time that the proceedings be served. The letter concluded:

> *"Your client's inaction to date evidences the fact that your client is not progressing with proceedings in a bona fide manner and/or that its conduct constitutes an abuse of process".*

61. The letter finished by stating that unless the proceedings were served before close of business on 29th September, 2017, the applicant would be reserving its right to seek relief from the High Court without further notice.

The Application to Vacate

62. One might have thought that following the fourth request for the service of proceedings, the respondent would have ensured that the proceedings were served immediately. That, however did not occur. Instead, the applicant was required to bring this application to vacate the *lis pendens* and to bring a further application to have its application to vacate entered into the Commercial List and case managed in that list. As noted earlier, those applications were issued on 20th November, 2017 and while initially returnable for 11th December, 2017, they were brought forward and dealt with by McGovern J. in the Commercial List on 27th November, 2017 when directions were given for the hearing of the application to vacate the *lis pendens*. The proceedings were not served until 23rd November, 2017, shortly before the applications were listed before McGovern J. on 27th November, 2017.

63. As noted, the plenary summons was served on the applicant on 23rd November, 2017. An appearance was entered on behalf of the applicant by Walkers on 27th November, 2017. The appearance was then followed by a letter from Walkers to Phelans dated 28th November, 2017 calling upon the respondent to deliver its statement of claim in accordance with the timeline set out in the Rules of the Superior Courts. That was not done and a further letter was sent by Walkers on 20th December, 2017. In that letter, the applicant consented to the delivery of a statement of claim within a further period of 21 days failing which a motion would be issued. Again that was not done. In fact, a statement of claim was not delivered until 14th February, 2018, one week before the application to vacate the *lis pendens* was listed for hearing.

64. The applicant seeks to vacate the *lis pendens* on a number of grounds. First, it contends that the respondent has no estate or interest in any of the lands in respect of which it has registered the *lis*. The applicant contends that there is no concluded and binding agreement in writing under which the applicant is obliged to transfer the freehold interest in the Hotel to the respondent and that there is no agreement to execute a DOMEC on the terms put forward by the respondent, or at all, as a number of essential terms were never agreed. In those circumstances, the applicant contends that the respondent was not entitled to register the *lis pendens* pursuant to s. 121(2) of the 2009 Act.

65. Second, the applicant contends that the *lis pendens* should be vacated as there has been "*an unreasonable delay* in prosecuting the action" on the part of the respondent. It points to the commencement of the proceedings on 18th May, 2017, the registration of the *lis pendens* in the Central Office on 7th June, 2017 and as burdens on the Folios on 3rd August, 2017, the failure to serve the proceedings notwithstanding several requests until 23rd November, 2017 and the failure then by the respondent to deliver a statement of claim until 14th February, 2018, just one week before the hearing of this application. The applicant contends that this amounts to an "*unreasonable delay*" in the prosecution of the proceedings justifying the court in vacating the *lis pendens* pursuant to the first part of s. 123(b)(ii) of 2009 Act.

66. Third, the applicant contends that "*the action has not been prosecuted bona fide*" on the ground that it contends that the proceedings were issued (and the *lis pendens* registered) with a view to obtaining a commercial advantage in negotiations for the respondent by preventing the applicant from selling the residential units and, therefore, by seeking improperly to deploy the court process solely to obtain a commercial benefit for itself. A further limb to this aspect of the applicant's contention is its claim that the proceedings are bound to fail. On those two bases it is contended that the court should vacate the *lis pendens* pursuant to the second part of s. 123(b)(ii) of the 2009 Act.

67. In response the respondent makes the following points. First, it contends that the proceedings which it has commenced and in which it has delivered a statement of claim do seek to assert an interest in land entitling it to register the *lis pendens* pursuant to s.

121(2) of the 2009 Act. It refers to the fact that the proceedings seek various reliefs intended to enforce an agreement which it alleges was made in September 2015 whereby, in consideration of the respondent forbearing from seeking injunctive relief arising from the non-execution up to that point of the transfer of the Hotel to the respondent and the non-execution of a DOMEC, the applicant and/or the Receivers of Abbiamo, Prefero and ATC Retail agreed to execute those documents. The respondent contends that the proceedings which seek to enforce such an agreement fall within s. 121(2)(a) of the 2009 Act. Second, the respondent disputes the contention that it has been guilty of an "*unreasonable delay*" in the prosecution of the proceedings. The respondent says that it was open to it to withhold service of the proceedings at a time when negotiations were in being and where it considered that the parties could resolve matters amicably. The respondent contends that it served the proceedings following the bringing of this application by the applicant when it appeared that matters could not be resolved. It also denies that there has been any unreasonable delay in the further prosecution of the proceedings following the service of the plenary summons in November 2017.

68. Finally, the respondent denies that the action is not being "*prosecuted bona fide*". It disputes the allegations of abuse of process by the applicant and also the contention that the proceedings are bound to fail. It says that the court should only exercise its jurisdiction to vacate the *lis pendens* on this ground where the position is clear cut and there are no disputed facts, which it contends is not the case here. The court should only exercise the jurisdiction to vacate where it was satisfied that the proceedings are "*doomed to failure*" and it contends that these proceedings are not so doomed.

69. This then is the context in which I must consider the application to vacate the *lis pendens*. In doing so, I will first set out the relevant legal principles. I will then seek to apply those principles to the facts as they are deposed in the affidavits and in the correspondence referred to earlier in this judgment.

The relevant legal principles

70. Prior to the enactment of the 2009 Act, the jurisdiction to vacate a *lis pendens* was contained in s. 2 of the *Lis Pendens* Act 1867. Under that provision, the court had the jurisdiction to make an order vacating registration of a *lis pendens* without the consent of the party who registered it where the court was "*satisfied that the litigation [was] not prosecuted bona fide*". That jurisdiction was concisely described by Laffoy J. in the High Court in *Gannon v. Young* [2009] IHEC 511 ("*Gannon*") as follows:-

> *"Accordingly, the test on an application such as this to vacate a* lis pendens*, where the plenary proceedings are pending and the defendants, who registered the* lis pendens*, are not consenting, is whether the defendants, as plaintiffs therein, are prosecuting the plenary proceedings in relation to the lands bona fide. That involves showing that no issue of fact remains between the parties (Flynn v. Buckley [1980] I.R. 423 at p. 429)." (Per Laffoy J. at p. 8).*

71. The extent of the court's jurisdiction to vacate a *lis pendens* prior to the 2009 Act was considered by Clarke J. in the High Court in *Dan Morrissey (Irl.) Ltd. v. Donal Morrissey & ors* [2008] 3 I.R. 752 ("*Morrissey*"). In that case, six years after proceedings were commenced, the plaintiff registered a *lis pendens* in the Central Office of the High Court. The defendants applied to vacate the *lis pendens* on the grounds that it was registered at a very late stage in the proceedings and that they were not given notice of the intention to register it. The High Court (Clarke J.) refused to vacate the *lis pendens*. He noted that:-

> *"The normal basis upon which such applications are brought is to the effect that the underlying proceedings are not bona fide maintained. In other words it is asserted that the proceedings are bound to fail at least insofar as they relate to any claim in respect of an interest in the lands in dispute." (per Clarke J. at para 1.2, p. 753)*

72. In that case, however, it was not suggested that the plaintiff's claim in respect of the ownership of the lands at issue was lacking *bona fides*. The case made was that the *lis pendens* was filed at an advanced stage of the proceedings. In considering whether the court had jurisdiction to vacate the *lis pendens* on that basis, Clarke J. examined the jurisdiction of the court to do so. He pointed out that the jurisdiction had been clear at least since the decision of the Supreme Court in *Flynn v. Buckley* [1980] I.R. 423 ("*Flynn*"). Clarke J. stated that following that decision it was clear that the court did have a jurisdiction to vacate a *lis pendens* where proceedings were not being *bona fide* pursued. He was satisfied that the court did not have a wider jurisdiction to vacate a *lis pendens* in a case where it was not suggested that the proceedings were being pursued other than on a *bona fide* basis. In the course of his conclusion that the court did not have a wider jurisdiction to vacate a *lis pendens* in a case where it was not suggested that the proceedings were not *bona fide*, Clarke J. outlined the purpose of the registration of a *lis pendens* and the objective sought to be achieved. I refer to this here as the respondent placed some reliance in submissions before me on the purpose of a *lis pendens* in support of its contention that I should not vacate the *lis* in the present case.

73. Clarke J. stated:-

> *"3.4 The registration of a* lis pendens *in accordance with the relevant legislation was thus simply a means of notifying any potentially interested parties as to the existence of litigation. The registration of the* lis pendens *was done as of right provided that the proceedings were actually and in being and could, in my view, be maintained as of right, subject only to the jurisdiction identified in* Giles v. Brady *[1974] I.R. 462 to vacate where the proceedings were not* bona fide*.*
>
> *3.5 It is important to note the purpose of the registration of a* lis pendens*. The* lis pendens *is designed to bring to the attention of third parties who may be interested in acquiring the property, or a charge over it, the fact that there are proceedings in being in relation to the property which might affect their interests. Provided that there is a set of genuine proceedings in being which could have an effect on property then, on what basis could it reasonably be said that a party is not entitled to register a* lis pendens*." (per Clarke J. at p. 756)*

74. A plaintiff was, therefore, entitled to enter a *lis pendens* subject only to maintaining a *bona fide* claim. Clarke J. continued:-

> *"3.7 A party is entitled to register a* lis pendens *immediately upon the issuing of appropriate proceedings without notice to anyone. It does not seem to me that such a right can be lost by delay in registering a* lis pendens*. Neither does it seem to me that such a right can be, in any way, dependent on notifying the defendant.*
>
> *3.8 The whole point of registering a lis pendens is to protect the plaintiff's interests. The plaintiff is entitled to protect those interests in all circumstances subject only to having a bona fide claim to protect. For all of those reasons it does not seem to me that the fact that a lis pendens was not registered at an early stage, or that it was somewhat belatedly registered without notice to the defendant, is of any materiality to the entitlement, as of right, of a plaintiff to put the public on notice of the existence of the proceedings concerned."* (per Clarke J. at p. 757)

75. The position, therefore, prior to the 2009 Act was that provided the proceedings concerned a claim to an estate or interest in land, a *lis pendens* could be registered as of right and, where the proceedings were *bona fide*, the court did not have a jurisdiction to

vacate the *lis pendens* even where there was a delay in registering the *lis*.

76. The jurisdiction to vacate a *lis pendens* was extended under the 2009 Act. Section 123(b)(ii) continued the jurisdiction to vacate the *lis pendens* where the action was not being prosecuted in a *bona fide* manner but added an additional ground for vacating the *lis* where there has been "*an unreasonable delay in prosecuting the action".* That jurisdiction did not exist prior to the 2009 Act.

(a) Unreasonable delay in prosecuting the action

77. As noted above, this is a new and additional basis on which the court can vacate a *lis pendens* under s. 123(b)(ii) of the 2009 Act. The section does not give express guidance as to the circumstances in which a delay in the prosecution of proceedings would be "*unreasonable*". Nor have counsel uncovered any authority in which this new jurisdiction has been considered in any detail or where its parameters have been explored.

78. It was, however, touched upon in the decision of the High Court (Haughton J.) in *Togher Management Company Ltd. v. Coolnaleen Developments Ltd. (in receivership)* [2014] IHEC 596 ("*Togher*"). In that case the basis on which the defendant sought to vacate the *lis pendens* was that the action was not being prosecuted in a *bona fide* manner and not that there had been unreasonable delay in the prosecution of the proceedings. Haughton J. was not satisfied that the proceedings were not being prosecuted in a *bona fide* manner and so refused to vacate the *lis pendens* on that basis. However he added the following remarks:-

> *"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."* (Per Haughton J. at para. 81, p. 38)

79. He then stated:-

> *"82. … 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."* (Per Haughton J. at para. 82, p. 38)

80. Although there was no delay in the prosecution of the proceedings in that case (the proceedings in fact only issued on 21st October, 2014 and were followed very quickly by a motion to vacate the *lis pendens*, a hearing of that motion and a judgment being delivered by Haughton J. on 19th December, 2014), it is clear from the observations of Haughton J. set out above that having regard to the provisions of s. 123 of the 2009 Act, a particular onus lay on the plaintiffs to progress the proceedings "*without undue delay*" and that if the plaintiffs did not exercise "*expedition and vigour*" in prosecuting the proceedings and if there was "*unreasonable delay*" in prosecuting them, an order could be made under s. 123 vacating the *lis pendens* at that stage.

81. Having included a new jurisdiction to vacate a *lis pendens* (in the case of "*unreasonable delay*" in the prosecution of the action) it is clear that the Oireachtas intended to impose an obligation on a litigant who has registered a *lis pendens* to prosecute the proceedings expeditiously. This is an obligation over and above the obligation which already exists under the Rules of Superior Courts prescribing time limits for the delivery of pleadings and for the taking of steps in the proceedings and over and above the jurisdiction which already inheres in the court to dismiss proceedings in the circumstances outlined by the Supreme Court in *Primor plc. v Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("*Primor*"). In my view, therefore, the consideration as to whether a person who has registered a *lis pendens* has been responsible for an "*unreasonable delay*" in the prosecution of the proceedings for the purposes of s. 123(b)(ii) of the 2009 Act does not require the sort of assessment which a court must undertake in deciding whether to dismiss proceedings in accordance with the test in *Primor* which requires not only a consideration as to whether the delay in the prosecution of proceedings has been inordinate and inexcusable but also, critically, involves the court undertaking a complex assessment of the balance of justice, including issues such as prejudice to the defendant and Constitutional principles of basic fairness of procedures. I do not believe that such considerations arise in the context of the court's assessment as to whether there has been "*unreasonable delay*" in the prosecution of an action for the purpose of s. 123(b)(ii) of the 2009 Act. Rather, that section was intended to counterbalance the statutory entitlement conferred on a person in certain circumstances to register as of right a *lis pendens* and to impose a corresponding obligation on that person to expeditiously prosecute the proceedings in respect of which the *lis pendens* was registered. While the purpose of a registration of a *lis pendens* is, as Clarke J. explained in *Morrissey*, to bring to the attention of third parties who might be interested in acquiring the particular property or a charge over it the fact that there are proceedings in existence in relation to the property which might affect their interests, the registration of a *lis pendens* can adversely affect or hinder the ability of a person to sell his or her property or otherwise affect that person's ability to deal with the property. That is the very point made by Ms. Delahunt on behalf of the applicant at paras. 47, 48, 53 and 54 of her affidavit of 14th November, 2017.

82. It seems to me, correctly construed, the provisions of s.123(b)(ii) of the 2009 Act impose a particular obligation on a person who has commenced proceedings and registered a *lis pendens* to move with greater expedition than would normally be required or than is required under the Rules of Superior Courts. Such a person would, in my view, be required to act with particular "*expedition and vigour*" (to adopt the words used by Haughton J. *Togher*) in the prosecution of the proceedings.

83. The section refers to an unreasonable delay in "*prosecuting the action*". Therefore, the focus of the examination in the context of any alleged delay is on what has occurred in the prosecution of the "*action*". The "*action*" starts when the proceedings are commenced and can only be prosecuted following their commencement. Therefore, in considering whether a delay in the prosecution of the action has been "*unreasonable*" for the purposes of s123(b)(ii) of the 2009 Act, the court must focus on the period after the commencement of proceedings rather than on any period of time prior to commencement. In my view, the time before commencement of the proceedings and any delays which may have occurred whether in correspondence or otherwise prior to the commencement of the proceedings are not relevant to the court's consideration as to whether there has been an "*unreasonable delay in prosecuting the action*" for the purposes of s. 123(b)(ii) of the 2009 Act. The court must focus on what the person who has registered the *lis pendens* does in the prosecution of the action following its commencement. Further, while the question of unreasonableness in the context of a delay in the prosecution of proceedings will always depend on the context and on the particular facts, the policy of the section and the intention of the Oireachtas is clear. There is a particular and special obligation on a person who has issued proceedings and then registered a *lis pendens* for the purpose of those proceedings to bring those proceedings on expeditiously. That person is not permitted to sit back or to proceed with the action at leisure or to take time which might otherwise be tolerated or excusable in the conduct of the action. Since the expeditious prosecution of the proceedings is essential, a court considering whether to vacate a *lis pendens* under the first part of s.123(b)(ii) should not tolerate delays in the prosecution of the action, such as in the service of the proceedings or subsequent pleadings in the proceedings without very good reason. The absence of a good reason for a delay is likely to lead the court to conclude that the delay has been unreasonable for the purposes of the section.

(b) Action not being prosecuted *bona fide*

84. As noted above, the jurisdiction to vacate a *lis pendens* where the action in respect of which the *lis* was registered was not being prosecuted in a *bona fide* manner is not a new jurisdiction. It existed under s. 2 of the *Lis Pendens* Act 1867 and, as Clarke J. observed in *Morrissey*, it was clear, at least since the decision of the Supreme Court in *Flynn*, that the court had a jurisdiction to vacate a *lis pendens* where the proceedings were not being prosecuted in a *bona fide* manner. The decision of Laffoy J. in *Gannon* is an example of a case in which the court had to consider whether to exercise that jurisdiction to vacate a *lis pendens*. Laffoy J. noted, by reference to the decision of the Supreme Court in *Flynn*, that in order to exercise the jurisdiction to vacate a *lis pendens* on that basis it would have to be shown that no issue of fact remained between the parties. In *Gannon*, Laffoy J. had to consider whether, in light of circumstances which had changed in the case, the defendants were *bona fide* in prosecuting their claim. She added: "*Clearly, if their claim is doomed to failure, they are not*." (per Laffoy J. at p. 9).

85. The jurisdiction to vacate a *lis pendens* where an action is not being prosecuted in a *bona fide* manner is confirmed in s. 123(b)(ii). There have been a number of cases in which this provision has been considered.

86. The courts have taken a similar approach to the exercise of the jurisdiction to vacate a *lis pendens* on this basis following the enactment of the 2009 Act to that taken prior to the legislation. The High Court considered this part of the test in s.123(b)(ii) in *Tola Management LLC v. Joseph Linders & Anor. (No. 2*) [2014] IEHC 324 ("*Tola*"). In that case, Cregan J. noted that the relevant provisions of s.123(b)(ii) do not refer to a situation where the claim is not being brought *bona fide* but rather "*where the action is not being prosecuted bona fide*". He considered that that phrase should be interpreted as meaning both where the action as a whole was not being prosecuted in a *bona fide* manner and where specific steps in the action were not being prosecuted in a *bona fide* manner (at para. 131, p. 44). He concluded that "*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*." (per Cregan J. at para. 132, p. 44). On the facts of that case, Cregan J concluded that the plaintiff's action was not being prosecuted in a *bona fide* manner as the specific steps of registering and maintaining the *lis pendens* were not being pursued in a *bona fide* manner for various reasons. Cregan J. vacated the *lis pendens* on that basis.

87. This part of s. 123(b)(ii) was also considered by the High Court (Faherty J.) in *Kenmare Property Finance Ltd v. McGuinness* [2015] IEHC 576 ("*Kenmare*"). Faherty J. cited with approval a number of the pre-2009 Act cases including *Gannon* and *Morrissey* as well as the decision of Cregan J. in *Tola* and noted that the test to be applied in determining whether the court should exercise its discretion under this part of the subsection was whether the plaintiff "*is now prosecuting the Special Summons proceedings against the defendant bona fide*". She observed, as Laffoy J. did in *Gannon*, that if the plaintiff's claim was "*doomed to failure*", it was not prosecuting its claim *bona fide*. Faherty J. further stated that, following *Gannon*, the proceedings would be "*doomed to failure if no issues of fact remain between the parties"* (per Faherty J. at para. 34, p. 24). Having looked at the plaintiff's claim and the evidence adduced by the plaintiff in support of its claim and its entitlement to register the *lis pendens*, and having noted that the defendant disputed the factual basis of the plaintiff's claim, Faherty J. observed that it could not be said that there were "*no issues of fact*" arising in the case. On that basis, therefore, the court was not satisfied that the defendant had established that the action was not being prosecuted *bona fide* and refused to vacate the *lis pendens*. It will be recalled that Laffoy J. reached a similar conclusion (under the pre-2009 Act jurisdiction) in *Gannon* where she found that it could not be said that there were no issues of fact between the parties or that the defendants were bound to fail in the proceedings and, therefore, a finding that the defendants were not *bona fide* prosecuting their claim could not be made at that juncture.

88. Where, however, the relevant facts are not in dispute or where the court takes the case of the person who has registered the *lis pendens* at its height and on the assumption that any factual issues in the case are decided in its favour, orders have been made vacating *lis pendens* under this part of s.123(b)(ii) of the 2009 Act. An order in those terms was made by Ryan J. in *Kelly & O'Kelly v. Irish Bank Resolution Corporation Ltd* [2012] IEHC 401 ("*Kelly*"). In that case, the court found that the plaintiffs who had registered the *lis pendens* were in effect seeking to revisit or side step a consent order for possession made by the Circuit Court. Ryan J. held on the facts (which were not in dispute) that the proceedings constituted an abuse of process. He was satisfied that the plaintiffs' inability to provide any detail or even any basis for advancing a claim in relation to an interest in land was fatal to their claim and confirmed the absence of *bona fides* on their part in maintaining the claim. Ryan J. found that the particular claim made by the plaintiffs in the proceedings (on foot of which they registered a *lis pendens*) was introduced "*for the sole purpose of providing a colourable justification for registering a lis pendens in the hope of frustrating a sale of the property"* (per Ryan J. at p.5). He held, therefore, that there was no legitimate basis for registering the *lis pendens* and that it would be a "*clear injustice to permit the processes of the court to be employed for the purpose and only for the purpose of frustrating the exercise of legitimate rights"* (per Ryan J. at p.5). He, therefore, vacated the *lis pendens* under s. 123 (b)(ii) of the 2009 Act.

89. A similar conclusion was reached by McGovern J. in the High Court in *Bennett v. Earlsfort Centre (Developments) Unlimited Company* [2018] IEHC 61 ("*Bennett*"), a case decided just before the present case was heard. McGovern J. held that the claim in *Bennett* was in essence a claim for specific performance and/or damages and that specific performance element of the claim was not for the performance of a contract for the sale of land. On that basis, the proceedings did not in reality amount to a claim being made by the plaintiffs to an estate or interest in the land and the claim was not, therefore, one which came within the scope of s.121(2)(b) of the 2009 Act. He refused to allow an amendment to the statement of claim and stated:

> *"I am satisfied that the amendments sought are for the purpose of trying to give legitimacy to the registration of the lis pendens. Considering the true nature of these proceedings, the action is not being prosecuted bona fide in so far as it is being used to justify the registration of the lis pendens, but is an attempt to exert the maximum pressure on the defendant to meet the demands of the plaintiffs arising out of the agreement of 13th April, 2007. The issues in dispute will be resolved in due course at the hearing. These issues involve the construction of a contract and a determination as to whether or not the plaintiffs are entitled to damages. The issues do not involve a bona fide claim to an estate or interest in land."* (per McGovern J. at para. 26).

90. This aspect of the court's jurisdiction to vacate a *lis pendens* under s.123(b)(ii) encompasses a situation where the bringing of the proceedings (and the registration of a *lis pendens* on foot of those proceedings) amounts to an abuse of the process of the court (such as where the proceedings are brought for an improper purpose such as to frustrate a sale or to seek to exert improper pressure on an opposing party) (as outlined by Ryan J. in *Kelly* and McGovern J. in *Bennett*) as well as a situation where the proceedings themselves are bound to fail or, as Laffoy J. said in *Gannon*, "*doomed to failure*". A *lis pendens* which has been registered on foot of proceedings which are bound to fail will be vacated under s. 123(b)(ii) on the grounds that "*the action is not being prosecuted bona fide*", even though there might not be a lack of *bona fides*, as that term is commonly understood. It is true that where an action is brought, and a *lis pendens* registered on foot of that action, in circumstances where the processes of the court are employed solely for the purpose of frustrating the exercise of legitimate rights, that would involve a lack of *bona fides* as the term is commonly understood. Both situations are encompassed by this part of the jurisdiction contained s.123(b)(ii).

91. I agree with the submission advanced by the applicant that cases such as *Sean Quinn Group Ltd v. An Bord Pleanála & Ors* [2001] 1 I.R. 505 ("*Sean Quinn*") and *Dunnes Stores v. An Bord Pleanála & Ors* [2015] IEHC 716 ("*Dunnes Stores*"), which discuss conduct amounting to an abuse of the process of the court, are relevant to the court's consideration as to whether an action is not being prosecuted *bona fide* for the purposes of s.123(b)(ii). However, the case law of the courts on the circumstances on which it is appropriate to exercise a jurisdiction to dismiss proceedings as being bound to fail are also relevant, as are the particular strictures and limitations of that jurisdiction which is one which must be exercised sparingly and only in clear cases. Cases such as *Gannon* and *Kenmare* demonstrate that where facts are at issue a court will not vacate a *lis pendens* under the "*doomed to failure*" limb of the non-*bona fide* prosecution part of the test in s.123(b)(ii). Nonetheless, if the relevant facts are not in dispute or if the case of the party who has registered the *lis pendens* is taken at its very height and on the assumption that disputed facts are decided in its favour, the court may exercise its discretion to vacate the *lis pendens* on the grounds that the action is not being prosecuted *bona fide*.

Application of legal principles
92. I now seek to apply these legal principles in considering the three grounds on which the applicant contends that the *lis pendens* in this case should be vacated.

93. Ordinarily, I would deal with the three grounds raised by the applicant in the order in which it raised them so that I would deal first with the question as to whether the proceedings brought by the respondent do actually seek to establish a claim for an estate or interest in the lands affected by the *lis pendens* entitling the respondent to register a *lis pendens* under s. 121(2) of the 2009 Act. I would then consider each of the two grounds under s. 123(b)(ii) on which the applicant contends the *lis pendens* should be vacated. However, I intend to consider these three points slightly out of sequence as I have formed a very clear view that the *lis pendens* should be vacated on the ground that there has been an "*unreasonable delay in prosecuting the action"* on the part of the respondent such that the *lis pendens* should be vacated under the first part of s. 123(b)(ii). For completeness, however, I will briefly address the other two points which are somewhat related.

(1) Unreasonable delay
94. I have identified earlier the approach which I believe a court must take in considering whether a *lis pendens* should be vacated on the ground that the person registering it has unreasonably delayed in the prosecution of the action. A particular obligation is placed on a person who has registered a *lis pendens* to prosecute the proceedings in respect of which the *lis pendens* is registered with expedition and vigour. I have reached the conclusion, on the basis of undisputed facts, that the respondent has not prosecuted the proceedings with the required expedition and vigour and has been responsible for an "*unreasonable delay in prosecuting the action".*

95. I have reached that conclusion for a number of reasons. The proceedings were commenced by the respondent by a plenary summons which was issued on 18th May, 2017. While reference had been made in correspondence from the respondent's solicitors prior to that date to the fact that proceedings were being considered and to the fact that counsel had been instructed, the proceedings were actually issued on 18th May, 2017. The respondent's solicitors did not inform the applicant's solicitors of the fact of the commencement of proceedings until Mr. Smyth's email to Mr. Toner of 7th June, 2017, some three weeks later. Even then, Mr. Smyth merely informed Mr. Toner that proceedings had been issued against the applicant "*amongst others*". He did not enclose a copy of the plenary summons and indicated (in a communication headed "*without prejudice*") that he would not be serving the proceedings in the hope that the transactions would be completed "*very soon*". Mr. Smyth's email did not contain any detail in relation to the proceedings and did not identify all of the defendants or the reliefs being claimed.

96. While it is clear from my analysis of the correspondence between the parties that the applicant's solicitors did not press the respondent's solicitors in relation to the proceedings until 16th August 2017, nonetheless having regard to the obligation implicit in s. 123(b)(ii) to prosecute the proceedings without "*unreasonable delay*" or risk an order vacating the *lis pendens*, I conclude that the respondent had an obligation to serve and bring on the proceedings as soon as possible and was not entitled to "*sit on*" the proceedings while further attempts were made to negotiate a resolution of the issues which remained between the parties. In other words, the obligation on the respondent to prosecute the action was not dependent upon the applicant requesting service of the proceedings. The obligation was one which rested on the respondent by virtue of the statutory provision.

97. The respondent did not serve the proceedings in the three-month period between 18th May, 2017 and 16th August, 2017. On that date, Walkers, the applicant's solicitors commenced writing proactively to the respondent's solicitors, Phelans, requesting details of the proceedings and the immediate service of the plenary summons. The Walkers' letter of 16th August, 2017 was the first of four written requests made on behalf of the applicant for the respondent to provide details of the proceedings and for service of the proceedings prior to the bringing of this application to vacate the *lis pendens* which was issued on 20th November, 2017. Full details and service of the proceedings "*forthwith*" were requested in the Walker's letter of 16th August, 2017. The respondent's solicitors did not reply. One might have expected that if the first such request did not prompt service of the proceedings, the second letter would have done. However, quite the opposite occurred. The respondent's solicitor, Mr. Smyth, emailed Walkers on 25th August, 2017 stating that the *lis pendens* had been registered on the Folios, that the applicant was "*well aware of the nature of these proceedings*" and that Phelans had put Walkers on notice of the proceedings "*on more than one occasion*". He further stated that the Walkers' correspondence had been forwarded to counsel. The respondent's solicitors did not serve the proceedings at that point. Nor did they provide the details requested. I do not accept that the details requested in the Walkers letter of 16th August, 2017 had previously been provided in correspondence by the respondent's solicitors, Phelans. Even if they had been (and they had not been), there was no reason why they could not have been provided by letter or email to the applicant's solicitors at that stage.

98. The third request for immediate service of the proceedings, and for copies of any correspondence in which the basis for the proceedings had been set out, was made by a further letter from Walkers sent by email on 25th August, 2017. That was met by silence. The proceedings were not served. Nor were copies of any correspondence (whether open or otherwise) setting out full details in relation to the basis for the proceedings provided by the respondent's solicitors.

99. Walkers wrote again on 27th September, 2017 requesting for the fourth time that proceedings be served without any further delay and reiterating again that, despite several requests, the nature of the proceedings had not been set out in open correspondence. Nor may I add were details of or the basis for the proceedings set out in any of the "*without prejudice*" communications sent by the respondent's solicitors in the period between February 2017 and June 2017. There was again no response on behalf of the respondent to this fourth request for service of the proceedings and for details of those proceedings.

100. As of 27th September, 2017 more than four months had passed since the proceedings had been issued and yet, despite those four requests, the proceedings were not served. A further two months passed until the applicant issued its application to vacate the *lis pendens* on 20th November, 2017. By that stage six months had passed since the proceedings were commenced and yet the respondent did not serve them. The proceedings were not in fact served until 23rd November, 2017, four days before the application to vacate the *lis pendens* was first listed together with the application to admit that application to the Commercial List before

McGovern J. (on 27th November, 2017). That time line is not disputed.

101. It is necessary to consider the respondent's explanation for the failure to serve the proceedings. That explanation appears in correspondence and on affidavit. As noted earlier, Mr. Smyth informed Mr. Toner by email on 7th June, 2017 that although the proceedings had been issued by the respondent they would not be served "*in the hope that the transactions will be completed very soon"*. They were not completed either "*very soon"* or at all. In his first replying affidavit sworn on 18th December, 2017, Mr. O'Sullivan stated (at para. 31) that:

> *"the respondent delayed in serving the proceedings on the basis that it ought to have been possible to resolve the matters between the parties expeditiously, without the need for High Court litigation and its attendant costs."*

102. At para. 32 of that affidavit, he contended that the respondent did not unduly delay in serving the proceedings:

> *"in circumstances where it was considered that a solution to the issues between the parties could be agreed amicably."*

103. I do not accept that this is a good reason for the delay in serving the proceedings. Having regard to the potential consequences for an unreasonable delay in the prosecution of an action in terms of the *lis pendens* registered and having regard to the provisions of s. 123(b)(ii), there was an obligation on the respondent to serve the proceedings as soon as reasonably possible after the commencement of the proceedings notwithstanding any stated desire to resolve the dispute amicably. The failure to serve the proceedings as soon as reasonable possible after they were commenced ran the risk that the *lis pendens* registered would be vacated under s. 123(b)(ii). Moreover, the respondent has provided no explanation whatsoever, whether in correspondence or on affidavit, for the failure to serve the proceedings when requested by the applicant's solicitors on 16th August, 2017 or following the four requests for service of the proceedings made in the period between that date and 27th September, 2017. Even if the stated desire to resolve matters amicably and, therefore, not to serve proceedings while that was being attempted was justifiable (and, having regard to the particular statutory provision here, I not believe that it was), no such explanation or excuse could possibly apply (and in fairness was not advanced by counsel) to justify the failure to serve the proceedings and to prosecute the action once service of the proceedings was requested by the applicant. There is no explanation whatsoever for the failure to serve the proceedings when requested on those four occasions in August 2017 and September 2017. The explanation previously given of a desire to resolve matters amicably can not apply to the failure to serve the proceedings following those requests as it was evident that the applicant wished to be served with the proceedings in circumstances where the parties had not been able to resolve their differences amicably.

104. The position from the point of view of the respondent gets even worse thereafter. There then passed a further period of almost two months between the last of the four requests for service of the proceedings made on behalf of the applicant on 27th September, 2017 and the bringing of this application to vacate the *lis pendens* on 20th November, 2017, during which the respondent failed to serve the proceedings. No explanation whatsoever was advanced for that period of delay. That further delay could not have been justified by any desire to resolve matters amicably so as to avoid troubling the court as there is no evidence in the material before the court of any further efforts being made during that period to resolve the outstanding issues in dispute during that period. The continued failure to serve the proceedings was in the teeth of the four requests made by the applicant to be served with them.

105. I am satisfied that the delay on the part of the respondent in serving the proceedings of over six months (from 18th May, 2017 to 23rd November, 2017) was an "*unreasonable delay*" on the part of the respondent in prosecuting the proceedings for the purposes of s. 123(b)(ii) of the 2009 Act. That delay would be sufficient, in my view, in itself to justify vacating the *lis pendens*. However, the delays on the part of the respondent did not end there.

106. One might reasonably have expected in light of the delay which had already occurred, and the fact that the applicant had brought an application to vacate the *lis pendens*, that the respondent would have delivered its statement of claim in a timely manner. However, that did not happen. On the contrary, despite requests for the delivery of a statement of claim in the applicant's solicitors' letters of 28th November, 2017 and 20th December, 2017, no statement of claim was delivered within the time required under O. 20, r. 2 of the Rules of Superior Courts or within the extended period to which the applicant consented in the letter of 20th December, 2017. A statement of claim was not delivered until 14th February, 2018, one week before the hearing of the application to vacate the *lis pendens*. Even then, it emerged in the course of submissions at the hearing that the statement of claim did not properly reflect the claim which the respondent wished to make against the plaintiff (in that it sought to rely (*inter alia*) on a letter from Matheson dated 4th September, 2015 to evidence an agreement allegedly made in Matheson, which agreement it was asserted at the hearing was in fact made on 10th September, 2015, although no affidavit to that effect was sworn on behalf of the respondent).

107. To my mind, this delay on the part of the respondent in delivering the statement of claim (between 23rd November, 2017 and 14th February, 2018) compounded the delay which had already occurred in the service of the proceedings (between May 2017 and November 2017). That delay in the service of the proceedings in itself amounted to an "*unreasonable delay*" in the prosecution of the action by the respondent. The further delay (between November 2017 and February 2018) in the delivery of the statement of claim compounded and reinforced that delay and rendered still more unreasonable the delay on the part of the respondent in prosecuting the case.

108. While the respondent has contended that it is necessary for a party who seeks to vacate a *lis pendens* on the basis of "*unreasonable delay*" in the prosecution of an action to establish prejudice, I do not accept that that is the case. As I have sought to explain earlier, the jurisdictional basis for vacating a *lis pendens* under this part of s. 123(b)(ii) on the grounds of "*unreasonable delay"* in the prosecution of an action is different to and distinct from the inherent jurisdiction possessed by the court to dismiss proceedings for delay or want of prosecution. The statutory basis for vacating a *lis pendens* on the grounds of "*unreasonable delay*" does not, in my view, require the party seeking such order to establish prejudice, albeit that the issue as to whether a delay is reasonable or not will depend on the context and the particular factual circumstances of the case. However, if I am wrong in that view, I am satisfied on the basis of the evidence adduced on this application (primarily in the affidavits sworn by Ms. Delahunt on behalf of the applicant which were not controverted on this issue) that the applicant has been prejudiced as a result of the respondent's "*unreasonable delay*" in the prosecution of the proceedings. Ms. Delahunt has sworn (and has not been cross-examined or otherwise challenged in relation to her averments) that the registration of the *lis pendens* will affect the applicant's ability to deal with the Centre in its entirety and that the failure to prosecute the proceedings will "*hinder the applicant's ability to complete the sale of other units in the Centre".* She has further averred (again unchallenged on affidavit) that the *lis pendens* was registered for the "*sole and exclusive purpose of affecting, hindering and/or obstructing*" the applicant's ability to sell other units in the Centre (see paras. 53 and 54 of Ms. Delahunt's affidavit of 14th November, 2017). Earlier in that affidavit (at para. 47), Ms. Delahunt stated that the applicant wished to sell certain units in the Centre which are unconnected to the Hotel and that it had recently reached a non-binding agreement for the proposed sale of 150 units, and further stated that the registration of the *lis pendens* would have an *"obvious and serious impact on the ability of the applicant to complete the sale"* the value of which is "*very significantly in excess of €1,000,000*". In my view, should it be necessary to establish prejudice (and as I have indicated, I do not believe that it is), the

applicant has established such prejudice.

109. Finally, in further support of the conclusion I have already reached that the respondent has unreasonably delayed in the prosecution of the proceedings, as of the date of the hearing of this application, the respondent had not served the proceedings on the other defendants and had not sought leave to serve the proceedings outside the jurisdiction on the eighth named defendant, Davidson Kempner Capital Management LLC, a corporation which has its head or registered office in New York (according to the plenary summons and statement of claim). Ms. Delahunt's averment to that effect (at para. 48 of her affidavit sworn on 15th January, 2018) was not contradicted on behalf of the respondent. This affords further support, in my view, for the conclusion that the respondent unreasonably delayed in the prosecution of the proceedings.

110. In conclusion, therefore, I am satisfied that there has been "*unreasonable delay*" in prosecuting the action on the part of the respondent and that, in those circumstances, I should make an order pursuant to s. 123(b)(ii) of the 2009 Act vacating the *lis pendens* registered by the respondent.

111. Strictly speaking, that conclusion means that it is unnecessary for me to express a view on either of the other grounds raised by the applicant in support of its contention that the *lis pendens* should be vacated. For completeness, however, I set out relatively briefly my views and conclusions on those points.

(2) Estate or interest in land: s.121 of the 2009 Act

112. As explained earlier, under s. 121(2)(a) of the 2009 Act, it is open to a person to register as a *lis pendens* an action in the High Court in which "*a claim is made to an estate or in land (including such an estate or interest which a person receives, whether in whole or in part, by an order made in the action) whether by way of claim or counterclaim in the action*". The plenary summons issued on 18th May, 2017, and the statement of claim delivered on 14th February, 2017, seek (*inter alia*) to enforce an alleged agreement made in September, 2015 under which it is claimed that it was agreed between the respondent and the applicant and/or the Receivers of Abbiamo, Prefero and ATC Retail that a DOMEC would be executed by the parties in respect of the Town Centre and that the freehold interest in the Hotel would be transferred to the respondent and that such agreement contained certain express or implied terms. The alleged agreement is referred to in para. 17 of the statement of the claim and the express or implied terms relied upon are pleaded at para. 18. As I observed earlier, one of the documents said to evidence that alleged agreement (which is not in writing) is a letter from Matheson, who were the solicitors acting for the Receivers, to the respondents dated 4th September, 2015. It emerged at the hearing that the respondent had mistakenly relied on that letter in the statement of claim, as the respondent's position was that the agreement was reached on 10th September, 2015 (after the date of the letter). The reliefs claimed in the plenary summons and in the statement of claim seek various declarations and orders designed to enforce that alleged agreement including a declaration to the effect that the respondent is entitled to easements over the lands contained in the Folios over which the *lis pendens* were registered and a transfer of the freehold interest in the Hotel.

113. The applicant has advanced powerful submissions to the effect that no binding agreement was entered into between the applicant and the respondent for the execution of the DOMEC or for the transfer of the freehold interest in the Hotel to the respondent, although the applicant was agreeable in principle to execute a DOMEC and to transfer the freehold in the Hotel on certain terms (which it contends have not been agreed). It has pointed to the absence of any written evidence of such an agreement for the purposes of s.51 of the 2009 Act and to correspondence which undermines the existence of such a binding agreement (such as correspondence referring to the applicant's agreement "*in principle*" to execute a DOMEC and a transfer of the freehold to the respondent on certain terms, which were not agreed). In response the respondent seeks to rely on the doctrine of part performance, by its forbearance from taking proceedings against the applicant and the other defendants to the proceedings and by "*making strenuous efforts to agree the contents of the DOMEC*" (see para. 18 of the statement of claim) which it contends would get over any difficulty arising from the absence of a memorandum or note of the agreement under s. 51 of the 2009 Act (see s. 51(2)).

114. Notwithstanding the powerful arguments advanced by the applicant against the existence of an agreement such as that alleged by the respondent, it seems to me that the respondent has just about been able to establish an entitlement to register the *lis pendens* under s. 121 on the basis of the claims made in the plenary summons and in the statement of claim and, in particular, on the basis of its claimed entitlement to easements over the lands contained in the Folios (an easement, of course, being an "*interest in land*") and to a transfer of the freehold interest in the Hotel.

115. I conclude, therefore, that the respondent was entitled to register the *lis pendens* on foot of the proceedings issued by it on 18th May, 2017 for the purposes of s. 121 of the 2009 Act. However, the *lis pendens* should be vacated under s.123(b)(ii) as explained earlier.

(3) Action not prosecuted *bona fide*

116. This is the second basis on which the applicant sought an order vacating the *lis pendens* under s. 123(b)(ii). In fact, it was the principal basis on which the applicant sought an order vacating the *lis pendens* in the affidavits and in the written submissions. However, when it came to the oral submissions at the hearing, counsel for the applicant commenced with and placed greater reliance on the "*unreasonable delay*" of the respondent in prosecuting the action under s. 123(b)(ii).

117. In light of my conclusions in relation to the "*unreasonable delay*" part of the section, it is not necessary for me to deal with this aspect of the application in any great detail.

118. The applicant relies on both aspects of the non *bona fide* prosecution limb of s.123(b)(ii) i.e., the abuse of process and the "bound to fail" grounds.

119. Having considered the affidavit evidence and having reviewed the correspondence in some detail, and having regard to the relatively high burden which has to be met in order to establish abuse of process (as considered by Ryan J in *Kelly* and as explained in *Sean Quinn* and *Dunnes Stores*), I would not have been persuaded that the respondent was guilty of an abuse of the process of the court in commencing the proceedings and in registering the *lis pendens*. I would not have been satisfied that the respondent did so in order to obtain an improper commercial or tactical advantage in the negotiations. There is significant dispute between the parties on affidavit as to what was or was not allegedly agreed at the meeting in September 2015 (now said to have taken place on 10th September) in the offices of Matheson. Having reviewed the affidavits and the correspondence, I would not have been persuaded that the respondent acted other than *bona fide* in the of abuse process sense of the term in commencing the proceedings in May 2017 and in registering the *lis pendens* on foot of those proceedings. I would not, therefore, have been prepared to vacate the *lis pendens* on the first of the two limbs relied on in respect of the non *bona fide* prosecution ground in s. 123(b)(ii).

120. Nor would I have been prepared to hold that the proceedings are necessarily "*doomed to failure*" (per Laffoy J. in *Gannon*). It is relevant, I believe, in considering this limb of the applicant's application that the applicant has not brought any application to dismiss

the respondent's proceedings as being bound to fail. While that is not fatal to an application to vacate a *lis pendens* on the non *bona fide* prosecution ground, it is I believe, instructive that such an application has not been made. It seems to me that the manner in which the application to vacate was argued before me properly and appropriately reflected a recognition on the part of the applicant that where the affidavits contain conflicting assertions of fact and where some difficult legal issues arise, it would be difficult for the court to be satisfied that it could confidently say that a claim is "*doomed to failure*".

121. In arguing that there was no agreement in fact between the respondent and the applicant (or by anyone its behalf) for the transfer of the freehold in the Hotel or for the execution of the DOMEC), the applicant contended that it was evident from the correspondence between the parties that essential issues remained to be agreed between the parties (such as issues in relation to insurance which were, and still are, outstanding between the parties). Therefore, the applicant contended that there could be no concluded agreement unless everything intended to be covered by that agreement had been either expressly or impliedly agreed and that at most there was an agreement to agree the terms of the documentation and, in particular, the DOMEC) (relying on *Lynch v. O'Meara* (Unreported, Supreme Court, 8th May, 1975); *Supermacs Ireland Ltd v. Katesan (Naas) Ltd* [2000] 4 I.R. 273; and *Boyle v. Lee* [1992] 1 I.R. 555). The respondent on the other hand argued that there was an agreement in relation to the transfer of the freehold and in relation to the execution of a DOMEC which was reflective of the terms of the Hotel Lease and the 2009 ATC Transfer and that the court could determine whether what was being proposed by the respondent in the correspondence after September 2015 was reflective of the terms of those pre-existing documents. The respondent placed considerable reliance on the judgment of the United Kingdom Supreme Court in *RTS Flexibile Systems Ltd v. Molkerei Alois Muller GmbH & Co KG* [2010] 1 W.L.R. 753 ("*RTS*") and, in particular, on the summary of the relevant principles provided by Lloyd LJ in *Pagnan SpA v. Feed Products Ltd* [1987] 2 Lloyd's Rep 601 which was approved by the UK Supreme Court in *RTS*.

122. The applicant maintained that while there was agreement "*in principle*" to execute the freehold transfer and to execute a DOMEC provided it reflected the earlier documents but that this did not give rise to a concluded contract.

123. Difficult legal issues arise when it is suggested that an agreement "*in principle*" amounts to a binding agreement. Such an agreement is normally regarded as being incomplete (see, for example, *Cobbe v Yeoman's Row Management Ltd*. [2008] 1 W.L.R. 1752). However, that will not always be the case. An agreement may be found to be complete even though all its terms may not have been agreed or worked out in fine detail (see the consideration of these issues by the Court of Appeal in *Tolan v Connacht Gold Co-operative Society Ltd.* [2016] IECA 131 and *Globe Entertainment Ltd. v Pub Pool Ltd* [2016] IECA 272.) Likewise, difficulties exist in seeking to assert that an agreement to agree is enforceable as a binding contract or unenforceable as being incomplete or lacking certainty (see *Triatic Limited v Cork County Council* [2007] 3 I.R. 57).

124. The applicant further contended that even if there was a concluded agreement in relation to the transfer of the freehold and the execution of a DOMEC (which it submitted there was not), the agreement was not in writing and there was no note or memorandum signed by the applicant or its agent for the purposes of s. 51 of the 2009 Act. It argued that the respondent could point to no document containing such a memorandum or note in writing. In response, the respondent sought to rely on the correspondence between the parties' respective solicitors (but, as noted earlier, withdrew reliance on the Matheson letter of 4th September, 2015) and also argued that the respondent had partly performed the agreement by refraining from issuing proceedings to enforce an earlier agreement made in 2009 and by its attempts to agree and execute a DOMEC and to facilitate the transfer of the freehold in the Hotel to the respondent.

125. The applicant further argued that insofar as it appeared to be contended on behalf of the respondent that there was a pre-existing agreement in 2009 with Abbiamo, Prefero and ATC Retail in relation to the transfer of the freehold and the execution of a DOMEC (as appears from paras. 11 to 13 of the statement of claim), the applicant would rely on s. 21 of the 2009 Act to "*overreach*" any such alleged agreement or any equitable interests allegedly arising under it. The respondent disputes that.

126. In light of the conclusions which I have reached in relation to the unreasonable delay on the part of the respondent in prosecuting the action, it is unnecessary for me to express any concluded view on any of these arguments as I cannot say with the required degree of certainty that the respondent's proceedings, and these arguments which may be advanced in them (some of which give rise to quite difficult legal issues), are "*doomed to failure*". While they did not appear to me to be particularly strong arguments from the point of view of the respondent, it would be inappropriate for me at this stage to conclude that they have no prospect whatsoever of success at any trial which may take place. Nor would it be appropriate for me to resolve the application on this ground in light of the disputed issues of fact which exist between the parties.

Mediation

127. Finally, I should add that during the course of the hearing of the applicant's application, having regard to the repeated statements in correspondence on behalf of the applicant that it was agreeable "*in principle*" to execute a transfer of the freehold in the Hotel to the respondent and to execute a DOMEC provided it reflected the terms of the existing Hotel Lease and the 2009 ATC Transfer, and having regard to the correspondence which passed between the parties in the period between 2015 and August 2017, it was suggested by me that serious consideration should be given by the parties to engage in mediation to resolve the outstanding issues. While continuing to hear the application, I afforded the parties the opportunity of taking instructions on this suggestion over lunch time. Counsel for the respondent indicated that the respondent was agreeable to mediation. However, counsel for the applicant had no instructions to agree to mediation. His instructions were that, while the applicant would consider mediating the substantive dispute between the parties, it wished to proceed with its application to vacate the *lis pendens*. In the absence of agreement, having regard to the stage of the proceedings at which the issue of mediation arose (at my instigation), I felt I could not compel the parties to engage in mediation and I proceeded to hear the application. However, it is unfortunate that both parties were not agreeable to mediation at that stage. I would continue to urge the parties to attempt to resolve the outstanding disputes between them by mediation.

Conclusions

128. In conclusion, I am satisfied that this is an appropriate case in which I should make an order under s. 123(b)(ii) vacating the *lis pendens* registered by the respondent in the Central Office and on the Folios, on foot of the proceedings issued by the respondent in May 2017, on the grounds that there has been an "*unreasonable delay*" in the prosecution of those proceedings by the respondent. That is sufficient to dispose of the applicant's application. It is not necessary to rule on other grounds advanced by the applicant in support of the application. If I were required to do so, I would not have been satisfied that the *lis pendens* should be vacated on the grounds that the proceedings were not being prosecuted *bona fide* as being an abuse of process or as being "*doomed to failure*" under s.123(b)(ii) of the 2009 Act or that the respondent was not entitled to register the *lis pendens* under s. 121(2) of that Act.