Neutral Citation: [2014] IEHC 324

THE HIGH COURT

[2014 No. 4500 P]

BETWEEN

TOLA CAPITAL MANAGEMENT LLC

PLAINTIFF

AND

JOSEPH LINDERS AND PATRICK LINDERS (NO.2)

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on 26th day of June, 2014

Introduction

1. In this application the defendants are seeking an order vacating two *lites pendentes* registered against them on 19th May, 2014. The notice of motion was issued on 22nd May, 2014, and was grounded on the affidavit of Mark Heslin sworn on 21st May, 2014, and also on the affidavit of Joseph Linders sworn on 27th May, 2014. The application is resisted in full by the plaintiff.

2. I have already in these proceedings delivered a judgment on the plaintiff's application for an interlocutory injunction restraining the defendants from completing a debt purchase agreement with Ulster Bank in respect of certain properties, otherwise than in trust for the plaintiff.

3. I have set out in that judgment the factual background to that application. However, for ease of reference, I also set out herein a summary of the background facts which provide the context in which this application is brought by the defendants.

Factual Background to the Application

4. The plaintiff is a limited liability company incorporated under the laws of Delaware in the United States. It has its principal place of business at 299 Park Avenue, New York.

5. The defendants are sued in their personal capacities.

6. The defendants wished to enter into an agreement with Ulster Bank to buy back certain loans which they or their companies owed to Ulster Bank and which were secured on properties which either they, or companies controlled by them, owned. In order to buy back these loans they needed to obtain finance from alternative financiers. One possible financier was the plaintiff and, according to the defendants, the role of the plaintiff in the renegotiations of the defendants' refinancing of their loans with Ulster Bank was that the plaintiff would provide evidence of alternative funding to Ulster Bank.

7. The plaintiff alleges that the parties entered into a Binding Option Agreement on 6th February, 2014.

8. Under the terms of the option agreement, the defendants granted the plaintiff an exclusive option to acquire certain properties. The agreement also set out two possible structures to purchase the properties as follows:-

(1) Method A – Loan Structure

(2) Method B – Partnership Structure

9. Paragraph 1 of the option agreement provided that the Linders would negotiate the purchase of the loans from Ulster Bank in return for a full and final release by Ulster Bank of all claims over the companies, the individuals and the properties. Tola agreed to provide the Linders with letters demonstrating proof of funds which the Linders were authorised to present to the bank in connection with negotiating a price for the purchase of the loans.

10. Paragraph 2 of the agreement provided that for a period of thirty to forty five days after the date in which the Bank provided written notice of its acceptance of the purchase price, the parties would negotiate to reach an agreement for the purchase of the properties under the terms of Method B: Partnership Structure set out in the agreement.

11. Paragraph 3 of the option agreement provided that, in the event that the parties were unable to reach agreement on the terms of the purchase of the properties under Method B: Partnership Structure, "then Tola shall have the right, but not the obligation, to purchase the properties under the terms of Method A: Loan Structure" as set out in the agreement. It also provided that Tola could exercise its option by a notice of intent to purchase to the Linders within seven days of the expiration of the negotiation period.

12. Subsequently, the defendants entered into an agreement with Ulster Bank for the repurchase of their loans on 23rd April, 2014. The terms of this agreement were clearly confidential but were given to the plaintiff by the defendants in good faith

13. The parties then entered into negotiations to see if they could agree a partnership structure under the Binding Option Agreement.

14. However, these negotiations proved inconclusive and on 18th April, 2014, the defendants (through a Mr. Tuite), sent an email confirming that the defendants were withdrawing from the negotiations.

15. On 22nd April, 2014, the plaintiffs then, by notice, exercised its option to purchase the Tola properties in accordance with Method A: Loan Structure set forth in the option agreement.

16. On 28th April, 2014, the defendants gave notice of their intention to decline to proceed with the purchase by the plaintiff of the Tola properties in accordance with Method A; they stated that they had obtained alternative financing comprised entirely of debt

with no third party equity participation which would allow them to complete the debt purchase agreement with Ulster Bank and requested the plaintiff's bank details in order to make a payment of €500,000 pursuant to clause 4(b) of the Binding Option Agreement.

17. By letter dated 28th April, 2014, the plaintiff confirmed receipt of the defendants notice declining to proceed with method A and sought documentary confirmation that the requisite alternative financing (*i.e.* entirely debt with no equity participation) had been obtained as required by the option agreement.

18. Further correspondence took place between the parties and on 14th May, 2014, solicitors on behalf of the defendants wrote to the plaintiff stating that the defendants' sole remaining obligation under the option agreement was to make a payment of €500,000 to the plaintiffs, and asserted that the plaintiff had no entitlement to demand further information. However, the plaintiff contended that the defendants were under a contractual obligation to provide specific information to the plaintiff to confirm that the defendants had, indeed, met the precondition for declining the exercise of the plaintiff's option to purchase, (*i.e.* that they had obtained alternative debt financing from another financier without any equity participation). The plaintiff also stated in its affidavit that the defendants' failure to provide this information was unreasonable and that the only conclusion to be drawn from the refusal to supply such information was that the defendants had not complied with clause 4. More importantly, the plaintiff contends that there is a binding agreement for the purchase of the properties under Method A: Loan Structure.

19. Thus, the defendants are of the view that the Option Agreement has been terminated (and that all they need to do is pay the plaintiff the sum of €500,000); the plaintiff, on the other hand, maintains that it is still entitled to exercise its option to purchase certain properties in accordance with the terms of Method A: Loan Structure.

20. Given the impasse between the parties the plaintiff then issued a plenary summons on 16th May, 2014. (I shall refer to the pleadings and the nature of the pleadings later in this judgment.)

The Registration of the Lis Pendens
21. The plenary summons was issued on 16th May, 2014. The notice of motion seeking interlocutory injunctive relief was also issued on 16th May, 2014, and was made returnable for 19th May, 2014. The grounding affidavit for the application for an injunction did not make any reference to the fact that a *lis pendens* had been registered against the defendants. A replying affidavit of Joseph Linders was sworn on 19th May, 2014. A further affidavit on behalf of the plaintiff entitled "the second affidavit of Michael Breslin" was sworn on 20th May, 2014. In this affidavit the plaintiff stated that it had registered a *lis pendens* against the defendants in the Central Office of the High Court. Mr. Joseph Linders swore a second affidavit in the injunction proceedings in which he stated that he was surprised and disappointed to learn that the plaintiff had registered a *lis pendens* against the defendants in the Central Office of the High Court and said that no copy had been furnished to him. As he stated in para. 3 of his affidavit:-

> *"This development is extremely troubling and I say that it is yet another opportunistic attempt to apply pressure on the defendants in an attempt to frustrate the defendants in relation to completing legally binding contractual relations with third parties including in particular Ulster Bank Ireland Limited (UBIL) as well as the third party from whom alternative financing has been obtained in the manner explained in my first affidavit sworn yesterday Monday 19th May."*

22. Subsequently, the defendants exhibited the *lites pendentes* which had been registered against them.

23. There are, in fact, two *lites pendentes* which have been registered by the plaintiff in this matter. The first is against Joseph Linders and the second is against Patrick Linders.

24. It is noteworthy when reviewing the particulars of the *lis pendens* that no property is identified in the particulars of the *lis pendens*. It simply states the name, place of residence and description of the person whose estate is intended to be affected by the registration of the *lis pendens*.

The Relevant Properties the Subject Matter of the Dispute
The properties identified in the option agreement

25. The first paragraph of the "Option Agreement" provides as follows:-

> *"Subject to the terms and conditions of this agreement, in consideration of the payment by Tola to the Linders of €100.00 (one hundred euro) receipt of which is acknowledged by the Linders, the Linders hereby grant to Tola an exclusive option to acquire the "Tola properties" in accordance with the terms contained herein (the Option Agreement). The terms of the Option Agreement shall be binding upon the parties and are set forth below." (Emphasis added)*

26. Paragraph 3 of the Agreement provides:-

> *3. In the event that parties are unable to reach agreement on the terms for the purchase of the properties pursuant to Method B: Partnership Structure within the negotiation period, then Tola shall have the right but not the obligation to purchase the properties pursuant to the terms of Method A: Loan Structure set forth below. Tola may exercise its option by a notice of intent to purchase to the Linders within seven days of the expiration of the negotiation period."*

27. At page 6 of the agreement under the heading "Method A: Loan Structure"the Tola properties are therein defined and described as follows:-

> ***Tola Properties***
>
> • Metropolitan House, James Joyce Street, Dublin 1
>
> • Colville House, James Joyce Street, Dublin 1
>
> • 95 residential apartments James Joyce Street, Dublin 1"

28. On the same page, Linders Properties are also defined/described as:

> • Bloom House, James Joyce Street, Dublin 1

- Irish Distillers Properties, Smithfield, Dublin 1

- Linders Trading Company Assets

29. Most importantly, the structure is described as follows:-

> *"A newly formed Irish limited liability holding company 100% owned and controlled by Tola ("Hold Co") will purchase the loans from UB in return for a full and final release by UB of all claims over the companies and the properties.*
>
> *The Tola properties will be transferred to and retained by Hold Co." (Emphasis added)*

30. It is clear, therefore, that the option agreement defines the Tola properties as set out above. It is also clear that the major operative clause of the option agreement is to grant to Tola an exclusive option to acquire the "Tola Properties" in accordance with the terms contained therein and that these terms provide that the Tola properties will be transferred to and retained by Hold Co.

31. It is important in the light of this description and definition of the Tola properties to review the pleadings to see what the plaintiff is claiming in respect of these properties.

The Claims made by the Plaintiff in the Original Statement of Claim
32. The plaintiff delivered its statement of claim on 26th May, 2014.

33. At paras. 2 and 3 of the statement of claim it pleads as follows:-

> *"2. The defendants are businessmen and property developers and are the controlling shareholders and directors of Linders of Smithfield Ltd having its registered office at 18 Upper Mount Street, Dublin 2.*
>
> *3. Linders of Smithfield Ltd by itself or through its subsidiaries (herein after collectively referred to as the "companies" are the owners of the following properties (hereinafter collectively referred to as the properties)."*
>
> (The statement of claim then sets out six properties which correspond to the Tola properties and the Linders properties set out in the option agreement.)

34. It is noteworthy that it is specifically pleaded by the plaintiff that it is not the defendants who are the owners of the Tola properties, but rather Linders of Smithfield Ltd – as a separate company – or subsidiaries of Linders of Smithfield Ltd.

35. At para. 5 of the statement of claim the plaintiffs plead that:

> *"By an agreement made between the parties in writing on 6th February, 2014, (Binding Option Agreement) the defendants acting on their own behalf and on behalf of and with the authority of the companies granted the plaintiff an exclusive option to acquire the "Tola properties" as defined in the Binding Option Agreement and that on the exercise of the said option the defendants would be obliged to transfer the said Tola properties to the plaintiff or its nominee unless the defendants complied with the terms of clauses 4(a) and 4(b) thereof. The plaintiff shall refer to the Binding Option Agreement for its full terms, their true meaning and legal effect. The full terms of the Binding Option Agreement are contained in Schedule 1 hereto." (Emphasis added)*

36. The statement of claim is replete with references to the "Tola properties".

The Claims in the Amended Statement of Claim
37. The plaintiff has also filed an amended statement of claim. This amended statement of claim sought to add three named companies as defendants – Linders of Smithfield Ltd, Equipoint Ltd and Equiside Ltd. A separate application was made by the plaintiff for the joinder of these three defendants. This application was opposed by the defendants. The application was heard by me and is the subject of a separate judgment. In that judgment I permitted the plaintiff to join the three companies as co-defendants to the proceedings and the plaintiff agreed to serve an amended statement of claim in the terms produced to the court.

38. At para. 3 of the amended statement of claim it is pleaded as follows:-

> *"The third defendant by itself or through its subsidiaries the fourth and fifth defendants are the owners of the following properties (hereafter collectively referred to as "the properties").*
>
> *Tola Properties*
>
> *1. Metropolitan House, James Joyce Street, Dublin 1*
>
> *2. Colville House, James Joyce Street, Dublin 1*
>
> *3. 95 residential apartments, James Joyce Street, Dublin 1*
>
> *Linders Properties*
>
> *4. Bloom House, James Joyce Street, Dublin 1*
>
> *5. Irish Distillers Property, Smithfield, Dublin 1*
>
> *6. Linders Trading Company Assets."*

39. At para. 4 of the amended statement of claim it is pleaded as follows:-

> *"The Tola properties (the "Tola properties") are owned by the third, fourth and fifth defendants."*

40. At para. 10 the plaintiff specifically pleads that the defendants agreed,in the event that the plaintiff exercised its option to acquire the Tola properties under Method A: Loan Structure, that the Tola properties would be transferred by the third, fourth and

fifth defendants to, and retained by, a newly formed Irish limited liability company 100% owned and controlled by the plaintiff.

41. It is noteworthy again that the plaintiff's case as set out in the option agreement and as formally pleaded in the amended statement of claim, is that in fact the Tola properties as a matter of contract, would be transferred to, and retained by, a newly formed Irish limited liability company 100% owned and controlled by the plaintiff but not to the plaintiff itself.

42. In the prayer for relief, the plaintiff claims an order for specific performance of Method A: Loan Structure set out in the Binding Option Agreement directing the transfer of the Tola properties by the defendants to the plaintiff, a declaration that the plaintiff holds the benefit of a contract for the transfer to it of the Tola properties and a declaration that the defendants and each of them hold the properties in trust for the plaintiff.

43. Thus, the original statement of claim and amended statement of claim both plead that the Tola properties are owned by the companies, not by the first and second defendants personally. The plaintiff has not sought to resile from that plea in any respect.

44. This is accepted by the first and second defendants in their affidavits.

The Affidavit Evidence

45. In the very first affidavit grounding the plaintiff's application for injunctive relief sworn by Mr. Dodd, (the plaintiff's solicitor), on 16th May, 2014, Mr. Dodd stated at para. 8 that "*the defendants or companies controlled by them are the owners of the following properties described in the Binding Option Agreement as*" [thereafter he sets out the Tola properties and Linders properties]. Thus, it appears at the early stages that the plaintiff may have been unaware of who, in fact, owned the Tola properties.

46. In an affidavit of Michael Breslin for the plaintiff (described as his "second affidavit" but in fact his first affidavit) sworn on 20th May, 2014, Mr. Breslin states that he is the managing member of the plaintiff and states the plaintiff has registered a *lis pendens* against the defendants in the Central Office of the High Court.

47. In the second affidavit of Mr. Joseph Linders sworn in the injunction proceedings Mr. Linders stated at para. 3, as set out above, that he was surprised and disappointed that the plaintiff had registered a *lis pendens* against the defendants. He also stated at para. 3:-

> *"As explained more fully in my first affidavit the defendants are the registered owners of only one of the relevant properties the balance of which are either owned by Linders of Smithfield Ltd or its subsidiaries."*

48. Therefore, the plaintiff was on notice as and from the date of the swearing of this affidavit that the individual defendants were not the registered owners of the Tola properties and that the Tola properties were, in fact, owned by the companies, Linders of Smithfield Ltd or by its subsidiaries. The fact that the plaintiff was on notice of this fact from this time is an important factor in considering whether its subsequent actions were in fact *bona fide* in maintaining a *lis pendens* in place from this time on, and also in contesting the application to vacate the *lis pendens.*

49. The defendants brought their motion to vacate the *lis pendens* by notice of motion dated 22nd May, 2014. It was made returnable to 28th May, 2014. By this time the plaintiff would have been in a position to consider (in the light of the second affidavit of Mr. Linders in the injunction proceedings), whether the *lis pendens* had, in fact, been registered against the correct persons.

50. Moreover, Mr. Linders in his second affidavit also stated at para. 3 that the plaintiff did not have, nor could they have, any estate, right, title or interest whatsoever in any of the properties referred to in the Binding Option Agreement.

51. In the grounding affidavit of Mark Heslin, (the defendants' solicitor), Mr. Heslin stated that he believed that on any construction or interpretation of the proceedings, they did not concern an interest in property, that the registration of the *lis pendens* was an abuse of process and was "further evidence of the cynical intention of the plaintiff to disrupt the extremely important financing arrangements agreed between the defendants, their financier and third party financial institutions who have agreed to refinance the defendants indebtedness with their financier".

52. Mr. Joseph Linders, the first named defendant, swore a third affidavit dated 27th May, 2014, in respect of the application to vacate the *lis pendens*. At para. 2 of his affidavit he states as follows:-

> *"I say that the defendants learned for the first time on 20th May by virtue of para. 7 of the affidavit sworn by Michael Breslin that "the plaintiff has registered a lis pendens against the defendants in the Central Office of the High Court". I am informed and believed that searches confirm the registration of a lis pendens No. 7/214 against "Joseph Linders" and "Patrick Linders".*

At para. 3 he states:-

> *"3. I say that with a single exception (being "Bloom House" James Joyce Street, Dublin 1) [one the properties described as "the Linders properties" in the Option Agreement] none of the properties described in 21st May, 2014, letter and in 6th February, 2014, agreement between the plaintiff and the defendants are owned by myself and my brother personally. As deposed to in my earlier affidavits, while myself and my brother own "Bloom House" title to all of the other properties referred to in the lis pendens is held by various different companies. I confirm that myself and my brother are directors and shareholders in those companies but those companies have entered into no agreement whatsoever with Tola, be that 6th February, 2014, agreement (which the defendants have terminated) or otherwise. As regards "Bloom House" which is owned personally by the defendants nowhere in 6th February, 2014 agreement was Tola ever to acquire Bloom House.*
>
> *4. I am advised and believe that in the circumstances where the 6th February, 2014, agreement never contemplated the plaintiff acquiring Bloom House under any circumstances there is no bona fide basis for the plaintiff registering the lis pendens against myself and/or my brother Patrick Linders."*

53. He also states at para. 6 of his affidavit that:-

> *"The existence of the lis pendens creates a fundamental impediment to the completion of the agreement between the defendants and Ulster Bank and between the defendants and the third party provider of alternative financing, by the mid August deadline or at all. This is in circumstances where, I am advised and believe, any such security would be subject*

to the lis pendens, unless same is vacated by order of this Honourable Court or by being withdrawn voluntarily by the plaintiff on foot of an undertaking to the court. In default of the lis pendens being vacated the existing obligations to Ulster Bank cannot be satisfied and the requirements of any third party provider of finance would be entirely frustrated, the net effect being that the defendants would not in fact be able to complete on the relevant agreements within the relevant timeframe or at all. I say that these are not theoretical risks but real risks which have crystallised as a result of the registration by the plaintiff of the lis pendens against the defendants."

54. At para. 7 he says:-

> *"I say that if, not withstanding any order by this Honourable Court refusing the relief sought by the plaintiff in its notice of motion dated 16th May, the lis pendens is not vacated, it will be impossible for the due diligence process to be completed satisfactorily and it will be impossible for the defendants to complete its contract with Ulster Bank at all much less by the mid August deadline.*
>
> *8. I am advised and believe that where a plaintiff asserts a claim to an estate or interest in land the appropriate defendant is the owner of the land in question. For the reasons deposed to above, the defendants are not the owner of any land or property which, even on the interpretation of 6th February, 2014 agreement contended for by the plaintiff was ever to be acquired."*

55. This affidavit again clearly spells out as at 27th May, 2014, that the individual defendants are not the owners of the Tola properties and that the owners of the Tola properties are the companies. It also sets out that despite this the *lis pendens* is still being registered against the individual defendants personally.

56. The response of the plaintiff was to bring a motion dated 29th May, 2014, seeking to join Linders of Smithfield Ltd, Equipoint Ltd and Equiside Ltd as co-defendants to the proceedings. This application was grounded on the affidavit of Mr. Dodd, the plaintiff's solicitors, sworn on 29th May, 2014. At para. 13 Mr. Dodd avers to the following:-

> "*I believe that the proposed co-defendants are the owners of the properties the subject matter of the Binding Option Agreement*: [he then sets out paras. 1, 2 and 3 the properties known as Tola properties]

57. In a second affidavit sworn by Mr. Dodd on 29th May, 2014, which affidavit was filed in response to the application to vacate the *lis pendens*, Mr. Dodd on behalf of the plaintiff states that:-

> *"The Tola properties are owned by Linders of Smithfield Ltd, Equiside Ltd and Equipoint Ltd."*

58. A similar plea is at para. 19 of his affidavit and other similar relevant averments are also made throughout this affidavit. Thus, it is clear from the pleadings and the affidavit evidence that the plaintiff has maintained the *lites pendentes* against the defendants in the full knowledge that they are not the owners of the properties.

Applicable Legal Principles

59. The nature of a *lis pendens* is an elusive concept. At times it appears to be characterised as a mechanism to give notice to possible purchasers of land about a claim to that land. That is certainly the purpose of a system of registration of *lites pendentes*. However, the essential nature of a lis pendens appears to be that if there is a *lis* which is pending in respect of property, then the party against whom the *lis* is registered should not sell, assign, mortgage or otherwise dispose of his lands. If he does so and the purchaser is aware of the *lis*, then the purchaser takes the land subject to the rights and liabilities in respect of the land which might be subsequently declared by the court in those proceedings. In most cases that is a sufficient deterrent to ensure that a vendor will not sell and a purchaser will not purchase the land until the *lis* has been determined.

60. Therefore, the effect of a *lis pendens* and the registration of a *lis pendens* is effectively to freeze any further disposition of land until the proceedings are determined. It can, therefore, have the same effect as an interlocutory injunction restraining the disposition of land pending the hearing of the action without the necessity of the moving party having to establish that there is a serious issue to be tried, that damages are not an adequate remedy and that the balance of convenience is in favour of the application. Moreover, the moving party does not have to give an undertaking as to damages.

61. It should be noted that this concept of a *lis pendens* in respect of land is quite a different concept to the concept of, for example, a *lis pendens* under the Brussels Regulation. In that case the *lis* could be of any kind; it does not have to concern estates or interest in land. Moreover, there is no system of registration of such *lites pendentes* because it is not necessary. The issue of *lis pendens* only become relevant if there are two possible courts within the EU which might have jurisdiction over a particular claim.

62. It is necessary in this case to review the historical developments in relation to the *lis pendens* because of the submissions of the parties in relation to the jurisdiction of the court to vacate a *lis pendens* under the Land and Conveyancing Law Reform Act 2009.

63. In *Giles v. Brady* [1974] I.R. 462, Kenny J. considered the nature and history of the *lis pendens* in Ireland and in England. He first considered the Judgments (Ireland) Act 1844, but noted that that Act provided a system of registration but did not alter the nature of a *lis pendens*. As he stated at p. 463:-

> *"Therefore, it is necessary to deal with the earlier authorities to discover what a lis pendens is and how it evolved.*
>
> *In the 18th and 19th centuries, Chancery suits often continued for many years and, as most of them related to land, the position of a purchaser, lessee or mortgagee of the property to which the action related presented a difficult problem. If a person acquired his interest from a defendant without notice of the proceedings, did he take it subject to the rights to which the plaintiff was subsequently declared to be entitled in the suit, which might have been started many years before? The answer given in Ireland and England was, that a person who acquired an estate or interest in relation to which a suit had been started when he got his title, took it subject to the rights and liabilities which might be declared in the suit whether he had notice of it or not. This was based originally on the remarkable view that everyone knew of all the actions which were pending in the courts, and so took his interest with notice of them…"*

64. Kenny J. also stated as follows at p. 466 of the report:-

> *"Before I deal with the Act of 1844 it is necessary to refer to Bellamy v. Sabine (1857) De G & J 566, which, though decided in 1857, related to the effect of a bill filed in 1830…Lord Cranworth in the course of his judgment said at p. 578*

of the report:-

> *'It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence . . . The language of the Court in these cases [Culpepper v. Aston; and Sorrell v. Carpenter], as well as in Worsley v. The Earl of Scarborough, certainly is to the effect that lis pendens is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is, that, pendente lite, neither party to the litigation can alienate the property in dispute so as to affect his opponent.'"*

65. Kenny J. then observed that s. 10 of the Judgments (Ireland Act) 1844, was passed to deal with this problem by providing that no *lis pendens* shall bind or affect a purchaser or mortgagee without express notice thereof unless a memorandum containing all the relevant details of the *lis* is registered.

66. A further issue which arose in the *Brady* case was that counsel for the defendants (who were seeking to vacate the *lis pendens*) argued that the *Lis Pendens* Act 1867 gave the court power to vacate a *lis pendens* before the termination of the action, even if the party who had registered it was opposed to this.

67. Kenny J. reviewed the *Lis Pendens* Act 1867, which contains only two sections. The main operative section is s. 2 which provides as follows:-

> *"Whereas a registered lis pendens cannot be vacated without the consent of the person by whom it was registered and such consent is sometimes withheld, although the suit or proceedings is at an end or is not being bona fide prosecuted: for remedy whereof be it enacted that the court before whom the property sought to be bound is in litigation may, upon the determination of the lis pendens, or during the pendency thereof, where the court shall be satisfied that the litigation is not prosecuted bona fide make an order if it shall see fit for the vacating of the registration without the consent of the party who registered it…"*

68. In that case Kenny J. was of the view that the *Lis Pendens* Act 1867, did not apply to Ireland and, therefore, in his view there was no jurisdiction to vacate a *lis pendens* against the will of the person who registered it.

69. He also considered the provisions of the Judgment Registry (Ireland) Act 1871, but concluded that s. 21 of this Act also did not give the court jurisdiction to order a vacate of a *lis pendens* during the course of the action when this was opposed by the party who registered it. Thus, he concluded that the court had no jurisdiction to order that a *lis pendens* be vacated against the will of the party who registered it until the suit had been determined.

70. This view, however, was overruled by the Supreme Court in *Flynn v. Buckley* [1980] I.R. 423. O'Higgins C.J. giving the decision of the unanimous Supreme Court stated as follows at p. 428:-

> *"As to the first matter, it seems to me to be necessary, in view of the conflict of judicial decision, for this Court to decide authoritatively whether or not the Act of 1867 did apply to Ireland."*

71. Having considered the arguments O'Higgins C.J. stated:-

> *"I have come to the conclusion that the general rule operates and that the Act of 1867 was intended to apply to Ireland and did operate satisfactorily on the provision of appropriate machinery for registering vacates under the Act of 1871. [the Judgments Registry (Ireland) Act 1871]"*

72. In the circumstances, the Supreme Court was of the view that it had jurisdiction to vacate a *lis pendens* without the consent of the party who registered it if the court was satisfied that the litigation was not being prosecuted *bona fide*. (The court also held that although it did have that jurisdiction pursuant to the statute, it would not exercise that jurisdiction on the facts of that case.)

73. In *AS v. GS & AIB* [1994] 2 ILRM 68, Geoghegan J. considered the issue of whether a claim for a property adjustment order amounted to a *lis pendens*. In the course of his judgment he set out some of the above quotations from Kenny J. in *Giles v. Brady* and, in particular, Lord Cranworth's explanation of the effect of a *lis pendens* in *Bellamy v. Sabine*. He then stated at p. 73:-

> *"It would seem that the rule was a public policy rule and had nothing to do with the ordinary rules of acquiring equitable interests linked to the doctrine of notice. Again, as Kenny J. points out, the purpose of the 1844 Act was to provide a system of registration but not to alter the nature of the lis pendens. From and after the passing of the 1844 Act, purchasers and mortgagees deriving title from a defendant did not take subject to rights declared in the litigation if they had no actual notice of the litigation and the proceeding was not registered as a lis pendens under the Act."*

74. This review of the legislative history and the judicial interpretation of it is relevant because the provisions of the Land and Conveyancing Law Reform Act 2009, appear to re-enact, albeit with amendments, some of the provisions of the previous legislation. (See sidenotes to s. 121 – 125 of the Act)

75. In the UK, the common law concept of a *lis pendens* appears to have been replaced by the statutory concept of a "pending land action" which was defined in the Land Charges Act 1972. Section 17(1) of the said Act defines a "pending land action" as any claim or proceeding pending in court relating to land or any interest in or charge on land. (See Halsbury "*Laws of England*" (5th Ed.) 2012 Vol. 87, p. 536, para. 739, footnote 2). It is also stated at footnote 1:-

> *"The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendente lite were permitted to prevail. Bellamy v. Sabine per Turner L.J."*

76. Likewise, footnote 2 of Halsbury states:-

> *"The purpose of the phrase "pending land action" is to put prospective purchasers on notice that there is a dispute which might affect the title to land; in order for an action to fall within that definition the claimant has to show a genuine interest in the outcome of the litigation. Godfrey v. Torpey [2006] EWHC 1423…A claim or proceeding may be registered as a pending land action only if some proprietary right or interest in land is claimed; it is not sufficient merely to claim that the owner should be restrained from exercising his powers of disposing of land…The purpose of registration is to prevent disposition of land so that in Taylor v. Taylor [1968] 1 All ER 843 the registration of a suit demanding that land be disposed of was ordered to be vacated." (Emphasis added)*

77. At para. 745 of Halsbury (dealing with vacation of registration) it is stated as follows:-

> *"Upon the determination of proceedings or during them if the court is satisfied they are not prosecuted in good faith, the court may if it thinks fit make an order vacating the registration of the pending action and direct the party on whose behalf it was made to pay all or any of the costs and expenses occasioned by the registration and by its vacation. The court has a general jurisdiction under the Land Charges Act 1972, to make an order pursuant to which any registration including a pending action may be vacated. In other cases vacation may be ordered under the court's inherent jurisdiction. See Haywood v. BDC Properties Ltd [1964] 2 All ER 702; Taylor v. Taylor [1968] 1 All ER 843; Calgary & Edmonton Land Co Ltd v. Dobinson [1974] CH 102 [1974] 1 All ER 484 and Norman v. Hardy [1974] 1 All ER 1170."*

78. In *Haywood*, the Court of Appeal held that even where it had no statutory jurisdiction under the Land Charges Act 1925, to vacate the registration of a charge, it nevertheless had an inherent jurisdiction to vacate such a charge. At p. 704 of the decision Harman L.J. stated as follows:-

> *"What does arise is this: has the court any jurisdiction under the section to vacate the registration? Ploughman J. thought that he had not; and I think that he was perfectly right. The section does not provide for doing anything of the kind in circumstances of this sort. This is a lis pendens registration which ought never to have been made…nevertheless although the plaintiffs have chosen to direct themselves entirely under a statutory jurisdiction, and although as I have said that is not available, the court must not, as the judge did, let an abuse of this sort go on. I think that the court has an inherent jurisdiction to protect itself from that sort of thing and that where as here the registration on the file is wrongfully there and ought never to have been there and the defendants refuse to take it off, the plaintiffs though they do not ask for it in the proper way, should have the relief to which a consideration of the matter entitles them and should have their title cleared of a smear which ought never to have been fixed on it. I would accordingly order that the lis pendens be vacated as though that relief had been prayed on a motion invoking the general jurisdiction of the court."*

79. In *Taylor v. Taylor* [1968] 1 All ER 843, the Court of Appeal held that the registration of a *lis pendens* should be vacated because the wife had no interest in the legal estate of the property but only had an undivided share of the disputed amount of the proceeds of sale of the property which was held by her husband on a statutory trust of sale and, therefore, the proceedings were not proceeding relating to "land".

80. Russell L.J. in his judgment at p. 848 stated:-

> *"The lis, the dispute is not about any land but about what is the entitlement to the beneficial interest in the land and therefore the proceeds of such sale. The purpose of registration of a lis pendens is to prevent effective disposition of the land pendente lite. How can a suit which demands that the land be disposed of be properly registerable?...If one is going to find out what the lis is, one can look only at the formal document which contains the contention or claim of the claimant."*

81. Thus, the court held that the wife's claim was not registerable as a *lis pendens*.

82. In *Calgary & Edmonton Land Co. Ltd v. Dobinson* [1974] 1 All E.R. 484, the liquidator of the company entered into contracts for the sale of some of the company's lands and also into an agreement to sell the remainder subject to contract. The defendant who was a contributory to the company and also claimed to be a shareholder issued a summons in the Companies Court seeking an order to restrain the liquidator from disposing of any of the company's lands. Subsequently, the defendant registered a pending land action in respect of the company's lands. The company issued a motion to vacate the pending land action.

83. The court held that what was registerable as a "pending land action" within s. 17(1) of the 1972 Land Charges Act was an action or proceeding which claimed some proprietary right in the land and not an action merely claiming that the owner should be restrained from exercising his powers of disposition.

84. As McGarry J. stated at p. 486:-

> *"The main question in this motion is the meaning of the term "lis pendens" or to put it more accurately and in more modern language the term "a pending land action" which is registerable as a "pending action" under the Land Charges Act 1872."*

85. He then noted that s. 17(1) of the Land Charges Act 1972, defined a "pending land action" as "any action or proceeding pending in court relating to land or any interest in or charge on land". The question then was what was meant by the phrase "relating to land". Mc Garry J. continued at p. 487:-

> *"Plainly there are some actions which although in one sense relating to land are not within any reasonable meaning of the term "pending land action". Thus, an action to restrain a nuisance alleged to emanate from X's land is in some senses an action "relating to X's land". However, no contention that such an action would be within the statutory definition has been put before me and I do not think that I need to say any more about it. However much counsel for the defendant differed from counsel for the company in other matters, he had concurred with him in accepting that some restriction must be placed on what would otherwise be the great width of the words "relating to". The question is what the restriction should be."*

86. In that case counsel for the company submitted that in the statutory context the words "relating to" land meant cases where some proprietary claim is made against the owner of the land. Thus, if a party commenced proceedings claiming that the land is his or

that he had some interest in it, then those proceedings could be registered as pending land actions because they were asserting proprietary actions in the land, but if no proprietary interest in the land was asserted, then there would be no pending land action even though the action would or might affect the land.

87. McGarry J. stated at p. 489:-

> *"It seems to me that the soundness of counsel for the company's view not only appears from the authorities that I have mentioned but also from the earlier cases on lis pendens and also on more general considerations. Of the earlier cases I need only mention Bellamy v. Sabine, Re Barned's Banking Co and Wigram v. Buckley. In Barned Banking Co. [1967] 2 Ch. App at 171, Cairns L.J. said that "lis pendens" always implied a claim of right or a claim to charge some specific property". In Wigram v. Buckley [1894] 3 Ch. at 486 Chitty J. said "Now, the doctrine of lis pendens applies not to every suit but to a suit the object of which is to recover or to assert title to a specific property"…*
>
> *As for more general considerations, it seems to me that once it is accepted (as it has been) that some restriction must be placed on the wide statutory language, the question becomes one of what restriction is most consonant with the language and general purposes of the statute and with commonsense and practicability. The rights made registerable under the Land Charges Act 1972, as under the Land Charges Act 1975, are, in general, substantive rights in the land… What is protected is some substantive right adverse to the owner rather than a mere fetter on the owner's right of disposition. That being so, it is not surprising that an expression as wide and general in its literal meaning as "any action or proceeding pending in court relating to land or any interest in or charge on land" should be given a narrower meaning more in conformity with the generality of rights registerable under the Act. What is registerable as a pending land action is an action or proceeding which claims some proprietary right in the land and not an action merely claiming that the owner should be restrained from exercising his powers of disposition. Accordingly, on authority both ancient and modern and on principle, I hold that the defendant's proceedings in the company court do not constitute a "pending land action" within the meaning with the Land Charges Act 1872." (Emphasis added)*

88. In *Cunnane v. Shannon Foynes Port Company* (Unreported, Supreme Court, 8th July, 2002) Murphy J. (giving the decision of the unanimous court) considered an application by the defendant to vacate a *lis pendens*. Murphy J. reviewed the authorities in Ireland and in England and at p. 8 of his judgment stated as follows:-

> *"It would seem to me that what the authorities in both jurisdictions establish is that to be registerable as a lis pendens an action must claim an interest in land but that the interest claimed need not be in existence at the date in which the proceedings are instituted. If not such interest is claimed, the proceedings are not registerable."*

89. At p. 10 Murphy J. stated that the authorities also establish that if a claim is successful but would not result in an estate or interest in the land, then the *lis* could not be registerable.

90. In *Dan Morrissey (Ireland) Ltd & Ors v. Donal Morrissey & Ors* [2008] 3 I.R. 752, the High Court (Clarke J.) held that a plaintiff was entitled to register a *lis pendens* in the Central Office of the High Court provided the proceedings were being prosecuted *bona fide*. Clarke J. also held that the jurisdiction to vacate a *lis pendens* was grounded on whether the cause of action was being prosecuted *bona fide*. But the *lis* which was registered in that case was, in his view, appropriate because the plaintiff was claiming a proprietary estate or interest in the defendant's lands.

91. In *Gannon v. Young* [2009] IEHC 511, Laffoy J. considered an application that *a lis pendens* registered by the defendant should be vacated. In the course of her judgment at p. 9 she stated:-

> *"The test on this application is whether in the changed circumstances, the defendants are now bona fide prosecuting their claim against the plaintiff in the plenary proceedings. Clearly if the claim is doomed to failure, they are not."*

(On the pleadings, however, Laffoy J. concluded that she could not make a finding that the defendants were not *bona fide* prosecuting their claim against the plaintiff and declined to vacate the *lis pendens*).

92. In *Kelly v. IBRC* [2012] IEHC 401, Ryan J. held that the proceedings insofar as they asserted an interest in land such as to justify the registration of a *lis pendens*, were an abuse of process. In this case the defendant had already issued ejectment proceedings against the plaintiffs; these were settled on consent and the plaintiffs agreed to an order for possession subject to a stay on terms. Subsequently, the terms were not honoured by the plaintiffs and the bank obtained possession of the property. (The plaintiff then issued another set of proceedings against the bank and registered a *lis pendens*).

93. The other recent authority which is of assistance in this matter is *Moorview Development Ltd & Ors v. First Active Plc & Ray Jackson & Ors* (High Court, Clarke J., 5th February, 2010). In this case Mr. Jackson was appointed as a receiver to certain companies within the Cunningham Group. Thus, he had an entitlement to cause any of the companies to sell any of the properties which it owned which were captured by any relevant mortgage debenture. Mr. Jackson was appointed as a receiver to the companies which owned the relevant properties. He argued that he did not have an interest in the relevant lands so that the proceedings, at least insofar as they related to him, did not involve a claim as against him relating to any interest in the lands concerned.

94. The plaintiffs had registered a *lis pendens* against Mr. Jackson and also First Active Plc. Mr. Jackson applied for an order vacating the *lis pendens* as far as he was concerned.

95. As Clarke J. stated at para. 3.2 of his judgment under the heading "Preliminary Points":-

> *"3.2 Second, it is true to say that part of the basis put forward on behalf of Mr. Jackson for seeking to have the lis pendens vacated was that he was, he asserted, somewhat impaired in his personal dealings by having a lis pendens registered against his name. There was a debate at the hearing before me as to whether such an assertion was factually correct. However, that consideration seems to me to be irrelevant. Either the lis pendens is properly registered, in which case it must remain in place, or it is not properly registered, in which case it should be vacated. Mr. Jackson is entitled to have the lis pendens vacated if it is not properly registered irrespective of whether its registration has any affect on him. The test is not similar to the consideration which a court may have to give in the case of an interlocutory injunction, where the court needs to balance the interests of the parties concerned. There either is or is not a sufficient piece of litigation in place as against Mr. Jackson to warrant the continuance of a lis pendens. If there is not, then Mr. Jackson is, in my view, entitled to a vacation of that lis pendens as of right.*

3.4 It follows that it seems to me that I should now decide the issue of principle which arises between the parties as to whether the connection which Mr. Jackson may have to the relevant property justifies the registration of a lis pendens against him. I now turn to that question."

4. ***Analysis***

4.1 Neither counsel was able to find any direct authority on the point. In those circumstances it seems to me that the matter must be determined from first principles. A lis pendens is designed to give notice of the fact that proceedings relating to land are pending before the court. Insofar as a lis pendens is registered against a named individual, then it seems to me that its purpose must be to bring to the attention of any interested party, the fact that there are proceedings in being against the person concerned which relate to the ownership of property or an interest in property. It may be that there is contained within the one set of proceedings a number of claims against a number of defendants in circumstances where not all of the claims are pursued against all of the defendants. It seems to me that, as a matter of first principle, it could never be the case that a defendant who happened to be properly joined in a set of proceedings in relation to some relief that did not relate directly to land in which the relevant defendant had an interest, could properly be the subject of a lis pendens. There would, in those circumstances, be no lis pending in relation to the ownership of land or an interest in land in respect of the person concerned. The underlying rationale behind the registration of a lis pendens is as was noted by Geoghegan J. in A.S. v. G.S. [1994] 1 I.R. 407. In the course of his judgment in that case Geoghegan J. noted with approval the explanation by Lord Cranworth in Bellamy v. Sabine [1957] 1 De. G. & J. 566. The relevant passage speaks of "litigation…pending between a plaintiff and a defendant as to the right to a particular estate…".

4.2 That quote seems to me to express the fundamental proposition. The issue between the parties must relate to the ownership of some interest in land. Where there is more than one defendant in the proceedings, then in order that a lis pendens be validly registered in respect of a particular defendant, then the issues which arise on the pleadings and which are being bona fide pursued by the plaintiff insofar as the relevant defendant is concerned, must relate to the ownership of some interest in land.

4.3 In those circumstances, it does not seem to me that the position of a receiver or agent is captured. A receiver does not own any interest in lands which are properly described as being owned by the company to which the receiver has been appointed. The lands remain owned by the company (in receivership). The fact that the receiver may well be entitled, provided that all necessary formalities are complied with, to execute a deed of transfer of a relevant interest in property in the name of the company does not alter that fact. It is the company which transfers the property. The receiver is simply entitled, by virtue of the debenture in favour of the relevant lender, and his appointment, to cause the company to effect the transfer. There is a real sense in which the receiver's position in this regard is no different than that of the directors of a solvent company who are, of course, entitled to act on behalf of the company, to sell its property, and, within the articles of association and the law generally, to fix the company seal to any relevant deed of assurance. The fact that, in different circumstances, it may be the receiver rather than the directors who can cause the company to execute a deed of assurance, does not make the receiver any more a person with an interest in the land owned by the company than the directors were persons with an interest in the land owned by the company.

4.4 Therefore, it seems to me that, insofar as a plaintiff may wish to contest the ownership of land held by a company in receivership, then it is that company in receivership who is the proper defendant to that aspect of any relevant proceedings rather than the receiver himself. If a party wishes to obtain injunctive or similar relief against the receiver then that is, of course, possible, but such a claim is not a claim relating to an interest in land but rather is a claim to an injunction.

4.5 In those circumstances, it does not seem to me that a receiver has a sufficient interest in any land purportedly owned by the company to which the receiver has been appointed so as to warrant the registration of a lis pendens against the receiver arising out of proceedings relating to those lands. In an appropriate case there is no reason why a lis pendens cannot be registered against a company in receivership.

5. Conclusions

5.1 In those circumstances, it seems to me that Mr. Jackson is entitled to an order vacating the lis pendens registered as against him on the 10th August, 2007."

The Provisions of the Land and Conveyancing Law Reform Act 2009

96. The relevant provisions of the Act which relate to the registration and vacation of a *lis pendens* are ss. 121 and 123.

97. Section 121 provides as follows:-

"121.— (1) A register of lis pendens affecting land shall be maintained in the prescribed manner in the Central Office of the High Court.

(2) The following may be registered as a lis pendens:

(a) any action in the Circuit Court or the High Court in which a claim is made to an estate or interest 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; and

(b) any proceedings to have a conveyance of an estate or interest in land declared void.

(3) Such particulars as may be prescribed shall be entered in the register."

98. Section 123, which has as its side note "Court order to vacate *lis pendens*" provides as follows:-

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

(a) the person on whose application it was registered, or

(b) any person affected by it, on notice to the person on whose application it was registered—

(i) where the action to which it relates has been discontinued or determined, or

(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide."

99. Section 3 is the interpretation section and sets out the legal definitions of certain terms. The term "*lis pendens*" is, however, not defined in the Act.

100. The phrase "estate or interest in land" is not specifically defined in the Act.

101. However, the phrase "legal estate" is defined in the interpretation section as having the meaning given to it by s. 11(1).

102. Likewise, the phrase "legal interest" as defined in the interpretation section as having the meaning given to it by s. 11(4) of the Act.

103. Section 10(1) of the Act provides that:-

"The concept of an estate in land is retained and, subject to this Act, continues with the interests specified in this part to denote the nature and extent of land ownership."

104. Section 11(1) of the Act provides that:-

"The only legal estates in land which may be created or disposed of are the freehold and leasehold estates specified by this section."

105. Section 11(4) of the Act sets out the only legal interests in land which may be created or disposed of and this includes "an incumbrance". The term "incumbrance" is defined in s. 3 as including, *inter alia*, an annuity, charge, lien and mortgage.

Issues in this Application

106. The first issue which arose as between the parties in this application was whether the defendants could seek to rely on s. 121(2) and s. 123(b)(ii) (as the defendant maintained) or as the plaintiff maintained s. 123(b)(ii) alone.

107. Counsel for the defendants submitted that his argument was in two parts:-

1. Firstly, he claimed that the *lis pendens* which had been registered by the plaintiff was not a proper *lis pendens* within the meaning of s. 121(2)(a) and, therefore, the *lis pendens* should be vacated on the grounds that it should never have been registered in the first place.

2. Secondly, he submitted that the court could make an order to vacate a *lis pendens* under s. 123(b)(ii) where the court was satisfied that the action was not being prosecuted *bona fide*, which he submitted was the case in the present proceedings.

108. Counsel for the plaintiff, on the other hand, submitted that the *lis pendens* had been properly registered and that, therefore, the only issue which the court could consider was whether the *lis pendens* could be vacated by the court if it came within s. 123(b)(ii) *i.e*. if the court was satisfied that the action was not being prosecuted *bona fide*.

109. In my view, the answer to this question is clear. Section 121(2) of the Land and Conveyancing Law Reform Act 2009, provides that only certain matters may be registered as a *lis pendens*, i.e. those matters that fall within the precise terms of s. 121(2)(a) and (b). If a *lis* which has been registered as a *lis pendens* does not fall within the statutorily permissible type of action which can be registered as a *lis pendens*, then it follows that the *lis* should not have been registered as a *lis pendens* in the first place. Thus, the court may consider whether the *lis pendens* was properly registered at all. It is only if the court is satisfied that the *lis pendens* was properly registered that the court goes on to consider whether to vacate the *lis pendens* on the grounds set out in s. 123 of the Act.

110. As set out above the relevant part of s. 121(2)(a) provides that the following may be registered as a *lis pendens*:-

"Any action in the High Court in which a claim is made to an estate or interest 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."

111. Therefore, in order to come within the relevant statutory section, a person seeking to register a *lis pendens* must show:-

(a) That there is an action in the High Court (or Circuit Court)

(b) In which a claim is made to an estate or interest in land.

(c) By way of claim in the action.

112. However, in the light of the authorities which I have set out above, in order to come within the statutory definition set out in s. 121(2)(a) a party seeking to register a *lis pendens* has to establish:-

(a) That the plaintiff is claiming a proprietary estate or interest in land.

(b) That the defendant has an estate or interest in the land in which the plaintiff is claiming an estate or interest.

(c) That the proceedings themselves make a claim to a proprietary estate or interest in the said lands.

113. I now propose to consider each of these issues.

Is the Plaintiff Claiming an Estate or Interest in the Lands?
114. It is of some importance to understand the plaintiff's case which is set out in the Option Agreement and in the pleadings. The Option Agreement provides that the plaintiff will have an exclusive option to acquire the "Tola properties" in accordance with the terms contained in the Option Agreement.

115. The contractual provisions which Tola is seeking to enforce by way of specific performance is the loan structure set out at Method A: Loan Structure in the Option Agreement. This structure provides that:-

> *"A newly formed Irish limited liability company 100% owned and controlled by Tola (Hold Co) will purchase the loans from UB in return for a full and final release by UB of all claims over the companies and the properties.*
>
> The Tola properties will be transferred to and retained by Hold Co."

116. Paragraph 10 of the amended statement of claim provides:-

> *"The defendants and each of them agreed that in the event that the plaintiff exercised its option to acquire the Tola properties under Method A: Loan Structure that the Tola properties would be transferred by the third, fourth and fifth defendants to and retained by a newly formed Irish limited liability company 100% owned and controlled by the plaintiff."*

117. It is clear, therefore, that what was agreed between the parties was that the plaintiff company itself would never acquire the Tola properties, i.e. whoever acquired the Tola properties it was certainly not going to be the plaintiff. Indeed, what the plaintiff and the first two defendants agreed is that the Tola properties would be transferred to and retained by Hold Co.

118. However, Hold Co is a company which is not yet in existence. It has no legal personality. Therefore, as at the date of the registration of the *lis pendens* the person who was claiming a title or interest over lands was in fact a legal entity which did not exist.

119. Moreover, insofar as it is clear from the Option Agreement that the new Hold Co will come into existence, it is also clear from the agreement that this new company will be 100% owned and controlled by Tola. It will, therefore, be a wholly owned subsidiary of Tola. However, the Tola properties will be owned by its subsidiary and not by the parent company.

120. It is a clear principle of company law that a shareholder does not have any proprietary interest in the property of the company in which he has that shareholding. This principle was clearly stated in *Quinn & Ors v. IBRC Ltd (in special liquidation) & Ors*, a decision of Finlay Geoghegan J. delivered on 20th December, 2013. At para. 21 of her judgment Finlay Geoghegan J. stated as follows:-

> *"It is the most basic principle of company law that a shareholder does not by reason of his shareholding have any proprietary interest in the company's assets. In Kerry Co-operative Creamery Ltd v. An Bord Bainne Co-op Ltd [1980] ILRM, Costello J. cited with approval the following statement in Keane "Company Law in the Republic of Ireland" repeated at para. 17.01 of the 4th Ed.:-*
>
> > *'Where a company has a share capital, each of the members own at least one share of that capital and is consequently a shareholder in the company. This does not mean that he is the owner of any part of the company's assets or that he owns them jointly with his fellow shareholder.'"*

121. This point is also made in the third affidavit of Mark Heslin sworn on behalf of the defendants on 30th May, 2014, in the application to vacate *the lis pendens* when he sets out the relevant sections of the Method A: Loan Structure and the Binding Option Agreement and states at para. 7:-

> *"As is plain from the very terms of the "Method A: Loan Structure" it was never envisaged that the plaintiff in these proceedings would ever acquire any of the properties referred to in the agreement upon which the plaintiff relies. On the contrary and without prejudice to the termination of the agreement by the defendants "Method A" specifies that an entirely separate "newly formed Irish limited liability company"…will be the purchaser. Furthermore nowhere does "Method A" envisage a purchase of properties. Rather an entity described as "Hold Co" will purchase "loans". I say that several factual issues deserve to be highlighted. Firstly, far from constituting a valid basis upon which any lis pendens could be registered bona fide, the explicit terms of the agreement relied upon by the plaintiff in these proceedings evidence that it neither has any estate or interest in property nor will it ever have such an estate or interest even in the event of it being fully successful at the trial of the proceedings themselves."*

122. I would, therefore, conclude as follows:-

> 1. Even taking the plaintiff's case at its height and assuming that it is successful at the trial (in seeking an order of specific performance of the Binding Option Agreement and specific performance of Method A: Loan Structure), all this would mean is that the Tola properties would be transferred into a new, Irish limited liability company called "Hold Co" in the agreement. This company is not yet in existence.
>
> 2. Even if the company were in existence it would be a wholly owned subsidiary of the plaintiff.
>
> 3. It is clear that the Tola properties would therefore be directly owned by Hold Co and that Hold co would be a wholly owned subsidiary of the plaintiff.
>
> 4. Under the normal principles of company law, this does not give the plaintiff any estate or interest in the properties which will be held by its subsidiary Hold Co company.
>
> 5. Therefore, the plaintiff has no claim for an estate or interest in the land, the subject matter of these proceedings.

Do the Defendants have an Estate or Interest in the Properties?
123. It is clear from the pleadings and the affidavit evidence that the first and second defendants do not own any of the Tola properties. These are all owned by companies in which they have a shareholding. This is accepted by the plaintiff.

124. As set out above, it is a fundamental principle of company law that a director or shareholder does not have a direct interest in the assets of the company. All they have is a shareholding in the company. Thus, the first and second defendants do not have any estate or interest in the properties.

Is the Claim in Proceedings a Claim relating to Land?
125. The plaintiff's case could be regarded in a broad sense as a claim relating to land in that the plaintiff is alleging that a yet to be formed company has a legal right to have transferred into its name certain lands. However, for reasons set out above that is not sufficient on its own to make the proceedings the type of proceedings which can be registered as a *lis pendens*. .

Was the Lis Pendens which was Registered a Proper Lis within the Meaning of S. 121(2)(a)?
126. Thus, the first issue to be considered is whether the *lis pendens* which was registered was an appropriate *lis pendens* within the meaning of s. 121(2)(a).

127. Having considered the pleadings in this matter, the affidavit evidence in both the injunction application, the application to vacate the *lis pendens* and the application for the joinder of the three defendants, I am of the view that the *lis pendens* which was registered by the plaintiff against Joseph Linders and Patrick Linders personally was not an appropriate *lis* to register as a *lis pendens* against each of them.

128. The reasons for my conclusion on this point are as follows:-

> (1) The plaintiff's case when taken at its height, is that the company which was to acquire the Tola properties was Hold Co. Therefore, the plaintiff itself can assert no direct estate or interest in lands which are to be held by a wholly owned subsidiary of the plaintiff.
>
> (2) It is also clear from the plaintiff's pleaded case and the defendants evidence that the properties in dispute are not owned by Joseph or Patrick Linders personally, but are owned by three companies which have now been joined as co-defendants. In the circumstances, although Joseph and Patrick Linders are directors and shareholders of the companies, they do not have any direct interest in the assets of the companies under the normal principles of company law. Therefore, the personal defendants have no estate or interest in the land the subject matter of the proceedings.
>
> (3) In the circumstances I am of the view that the plaintiff's action does not relate to a claim to an estate or interest in land, and in the circumstances, the lis was not properly registered and should be vacated.

Is the Action being Prosecuted Bona Fide within the meaning of s. 123(b)(ii)
129. The defendants submit that, even if they are wrong in relation to the first argument, the *lis pendens* should be vacated because the action is not being prosecuted *bona fide*.

130. I turn to an assessment of the wording of s. 123(b)(ii). This section provides that a court may make an order vacating a *lis pendens* where the court is satisfied that the action is not being prosecuted *bona fide*. The subsection does not refer to a situation where a claim is not being brought *bona fide*, but rather "where the action is not being prosecuted *bona fide*".

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

> A That the action as a whole is not being prosecuted in a *bona fide* manner, or
>
> B. That specific steps in the action are not being prosecuted in a *bona fide* manner.

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

133. I am of the view that the plaintiff's action is not being prosecuted in a bona fide manner because the specific steps of registering and maintaining the *lites pendentes* are not being pursued in a *bona fide* manner. I say so for the following reasons:-

> 1. At the commencement of the proceedings the plaintiff issued a plenary summons, sought injunctive relief and also registered a *lis pendens*. This, at the time, might have seemed a reasonable course of action to take in circumstances where it was not clear whether the properties in dispute were owned by the individual defendants or by companies.
>
> 2. However, once the second affidavit of Mr. Joseph Linders was sworn where it was stated by the defendants that the relevant Tola properties were all owned by companies and were not owned by the personal defendants, it then became incumbent upon the plaintiff to consider the position anew.
>
> 3. The plaintiff had registered *lites pendentes* against two individual defendants and against their estates. However, it was now clear that the property over which the plaintiff was claiming was not owned by the defendants personally but was owned by companies of which they were directors and shareholders. It should then have been clear to the plaintiff that it was not appropriate to maintain *a lis pendens* against the two personal defendants.
>
> 4. As time went on and as the defendants brought an application to vacate the *lites pendentes* registered against the individual directors, and as further affidavits were exchanged between the parties clarifying the position, it became abundantly clear to the plaintiff that the properties over which the plaintiff was claiming an interest were owned not by the defendants personally, but by companies in which they had a shareholding and in which they were directors. Indeed, the plaintiff's statement of claim and amended statement of claim plead precisely this point.
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> 5. In circumstances where the plaintiff specifically pleaded that the properties were owned by the third, fourth and fifth named defendants being companies, and in circumstances where the defendants had given uncontroverted affidavit evidence that the properties were owned by the companies it was then incumbent upon the plaintiff to vacate the *lis pendens* which they had registered against the defendants personally.

6. However, despite the knowledge which the plaintiff gleaned from the replying affidavits of the defendants, and despite the specific pleadings in the plaintiff's statement of claim, the plaintiff persisted in maintaining the *lites pendentes* against the two individual defendants. It also insisted on contesting in full the defendants' application to vacate the *lites pendentes*. This is not explicable in the normal course of events and, therefore, gives substance to the defendants' contention that the registration and maintenance of the *lis pendens* by the plaintiff is a cynical and opportunistic attempt to destroy the defendants' refinancing agreement with Ulster Bank, to destroy the defendants' refinancing agreement with a third party financier and to extract the maximum commercial advantage using the registration of a *lis pendens* as a tactic.

7. This claim by the defendants that the plaintiff is engaged in these tactics is also given some force by the fact that the plaintiff, having been unsuccessful in their application for an interlocutory injunction, is now seeking to obtain a similar result using the registration of a *lis pendens* as a tactic. The relevance of the injunction becomes more apparent, particularly when one considers that the plaintiff accepted in the application for injunctive relief that damages were an adequate remedy for the plaintiff.

8. No explanation was put forward to the court as to why the plaintiff sought to maintain the *lites pendentes* against the defendants personally in circumstances where it was also pleaded that the defendants did not personally own the properties, but the properties were owned by the companies.

9. Moreover, the plaintiff's pleaded case is that the properties were to be transferred to Hold Co. Thus, it should also have been fully apparent to the plaintiff that it had no direct proprietary claim to an estate or interest in the Tola properties.

134. In the light of above, I am satisfied that the registration of the *lites pendentes* could not have been maintained in a *bona fide* manner once the true facts were made known to the plaintiff.

135. In the circumstances, I will make an order vacating the *lis pendens* pursuant to section 123(b)(ii).

Inherent Jurisdiction of the Court
136. In the light of the authorities set out above, it is also clear that the courts have an inherent jurisdiction to strike out a *lis pendens* either where it is of the view that the *lis pendens* was not properly registerable or that the action was not being prosecuted *bona fide*. On the facts of this case, I would also have struck out the *lites pendentes* on both of the above grounds pursuant to the inherent jurisdiction of the court.

Conclusion
137. I will, therefore, made an order vacating the *lites pendentes* which have been registered against the first and second defendants.