

September 2021

Bulletin Brief

- Vacating lis pendens
- Dismissal of borrowers' proceedings

The High Court vacates lis pendens and dismisses proceedings for delay. Judgement of Justice Twomey delivered 11 August 2021 (the "Judgment") in *Declan Keogh & Una Kehoe v Promontoria (Aran) Limited & Ken Fennell*, High Court Record No 2018/2431 (the "Proceedings").

Practice Focus

- Application to vacate lis pendens.
- Application to dismiss on the grounds of inordinate and inexcusable delay.

Background

- The plenary summons was issued on 20 March 2018, with the plaintiffs seeking various reliefs including preventing the defendants from taking any steps to enforce security and to declare the appointment of the second defendant as receiver invalid.
- The lis pendens was registered on 26 March 2018.
- The plenary summons was never served on the defendants, nor were the Proceedings progressed.

Strategy and the Pre-Litigation Letter

As part of the pre-litigation letter, we (on behalf of the defendants) emphasised the following:-

- a. In dealing with the lis pendens with unserved proceedings, the industry standard is to request service of the proceedings. However, as the plenary summons had expired (12 months with no service), as a strategy, we requested the plaintiffs bring an application on notice to the defendants to renew the plenary summons, before service of the Proceedings. This created an additional application for the plaintiffs to make before they could attempt to progress the Proceedings.
- b. Pursuant to Section 121 of the Land and Conveyancing Law Reform Act 2009 (as amended) (the "2009 Act"), a receiver does not have a sufficient legal interest in property and therefore a lis pendens registered as against a

receiver is an improper use of a lis pendens.

- c. The reason(s) for the plaintiffs' delay in progressing the Proceedings since March 2018 was requested. This was so requested in the pre litigation letter and all subsequent letters.

Lis Pendens and the Law

Under section 123 (ii) of the 2009 Act, a court may make an order to vacate a lis pendens where inter alia "*the court is satisfied that there has been unreasonable delay prosecuting the action or the action is not been progressed bona fide*". Justice Twomey considered the case of *Hurley Property ICAV v Charleen Limited* [2018] IEHC 611 and the definition of '*unreasonable delay*' and '*bona fides*'.

- a. Unreasonable delay - "*a court....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*".¹

¹ [2018] IEHC 611 at para 83.

- b. Bona fides - *“where the bringing of the proceedings amounts to an abuse of the process of the court (such as where the proceedings are brought for improper purpose such as to frustrate a sale)”*.¹

Justice Twomey stated that the plaintiffs' delay ran from the date of issue of the Proceedings, namely 20 March 2018 to 17 May 2021; a total delay of 37 months.

In balancing the plaintiffs' reason for delay against the defendants' rights and property rights, Justice Twomey held that *“the defendants also have a right to a fair trial within a reasonable time and that the delay in this case has impacted upon their ability to exercise their rights in relation to the property”*.

Justice Twomey was critical of the following:-

- a. The plaintiffs' delay in bringing an application to renew the expired plenary summons.
- b. Their failure to provide an adequate reason for the delay.

- c. Interestingly, the Judge noted that engagement by the plaintiffs with the bank (that transferred its interest to the first defendant) is not an excuse to delay the progression of litigation against a separate party. *“This is particularly so where the plaintiff has registered a lis pendens over the subject land, thereby preventing the defendants from exercising their rights over the land pending determination of the litigation. It is not for a plaintiff to issue proceedings and then ‘sit on their hands’. The fact that a plaintiff might be engaging with a non-party to the proceedings does not excuse delay in litigation”*.²

Ultimately, Justice Twomey found that the delay in progressing the Proceedings was inexcusable and the Court vacated the lis pendens.

¹ [2018] IEHC 611 at para 90.

² Para 52 of the Judgment.

Strike out of the Proceedings and the Law

Justice Twomey held the Court had inherent jurisdiction to dismiss the Proceedings for want of prosecution on the grounds of delay. Relying on the three-step test set out by the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 as follows:-

- a. The Court should consider whether the delay question is inordinate;
- b. If the delay is inordinate that the court should consider whether that ordinary delay is excusable;
- c. If the delay is both ordinate and inexcusable, then the Court should consider whether the balance of justice favours the dismissal of the proceedings;

Justice Twomey found:-

- a. The delay of 37 months was inordinate;
- b. As no reason was put forward by the plaintiffs for the delay, the delay was inexcusable;
- c. As the plaintiffs failed to provide evidence to suggest any defect(s) in the deed of mortgage, deed of transfer and/or the instrument of appointment, the balance of justice lay in favour of striking out the Proceedings.

Conclusion

What is clear from the Judgment and the case law used in submissions as part of the trial, is the increased emphasis by the Court on the obligation for parties to progress their claims (particularly where such parties register *lis pendens*), the lower tolerance levels of delay by the Court, and the Court's willingness to strike out proceedings and vacate *lis pendens* in appropriate circumstances.

Key Takeaways

In a highly contested application, the High Court found:-

- a. Regarding the lis pendens, a delay of 37 months to progress the Proceedings was unreasonable and was sufficient to vacate a lis pendens.
- b. In granting the application to dismiss on the grounds of inordinate and inexcusable delay:-
 - The delay of 37 months amounted to inordinate and inexcusable delay (and unreasonable delay);
 - No sufficient reason for the delay was put forward by the plaintiffs;
 - No evidence had been adduced by the plaintiffs to suggest that there were any defect in the defendants' documents;

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