

THE HIGH COURT

[2023] IEHC 189

2019 No. 5471P

BETWEEN

DAVID LANGAN

PLAINTIFF

AND

THE PROPERTY REGISTRATION AUTHORITY OF IRELAND and THOMAS

LANGAN and KIM LANGAN

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 21 April 2023

Introduction

1. This judgment relates to two separate motions brought by the defendants.
2. The first motion is brought by the first named defendant (the “**PRA**”) in which it seeks:
 - (1) an order striking out or dismissing the plaintiff’s proceedings as disclosing no stateable cause of action as against the PRA and/or that such proceedings are bound to fail;
 - (2) an order striking out the plaintiff’s claim against the PRA pursuant to the court’s inherent jurisdiction or Order 19 of the Rules of the Superior Courts (“**RSC**”); and/or in the alternative

- (3) an order striking out or dismissing the proceedings against the PRA on the grounds that it is not a necessary defendant to the matters at issue between the plaintiff and the second and third named defendants.
3. The second motion was issued by the second and third named defendants seeking:
- (1) an order pursuant to section 123 of the Land and Conveyancing Law Reform Act 2009 (the “**2009 Act**”) vacating the *lis pendens* registered by the plaintiff on 12 July 2019 on Folio 9071 of the Register Co Dublin (the “**Property**”);
 - (2) an order pursuant to O19 rule 28 of the RSC striking out the plenary summons and dismissing the plaintiff’s claim insofar as it relates to the second and third named defendants on the grounds that it is frivolous and/or vexatious and that the pleadings disclose no reasonable cause of action against them;
 - (3) an order pursuant to the court’s inherent jurisdiction dismissing or striking out the plaintiff’s claim as against the second and third named defendants on the grounds that it is unsustainable and/or otherwise bound to fail; and
 - (4) an order restraining the plaintiff from issuing further proceedings against the defendants in respect of the Property without prior leave being granted by this court.
- In the alternative they seek an order prohibiting the plaintiff from interfering with or meddling in any future sale of the Property.
4. Both motions arise in relation to the same proceedings and the same background circumstances. I propose to set out those circumstances and will then consider each of the motions in turn.

The parties and the background to this dispute

5. The plaintiff was registered as the owner of the Property on 17 May 2006. He secured a loan to purchase the Property from ACC Bank plc who registered a first legal mortgage

and charge over the Property by way of security for the loan on 17 May 2006. This mortgage obviously predates the operative date of mortgages covered by the 2009 Act (namely 1 December 2009) and so the plaintiff's mortgage is governed by the provisions of the Conveyancing Act, 1881, as amended. The plaintiff defaulted on the loan and, following demand, ACC Bank plc appointed Mr Shane McCarthy (the "**Receiver**") as receiver over all the plaintiff's assets by deed of appointment dated 23 February 2016.

6. On 20 October 2017 the plaintiff issued proceedings (2017/8523P) against the Receiver, ACC Bank plc and the Receiver's firm KPMG. Those proceedings do not appear to have been advanced by the plaintiff, but they remain in place.
7. The Receiver made two attempts to sell the Property but, allegedly following interference by the plaintiff, these sale attempts were unsuccessful. The Receiver then issued legal proceedings against the plaintiff on 29 June 2018 seeking injunctions (which were granted on an interlocutory basis) restraining interference by the plaintiff with the sales process. Those proceedings (2018/5913P) were the subject of a judgment by Mr Justice Allen on 1 October 2019 in *McCarthy v. Langan* [2019] IEHC 651 in which, following a full oral hearing on the merits, the court confirmed the validity of the appointment of the Receiver over the Property. The plaintiff appealed that judgment to the Court of Appeal, who struck out the appeal on 18 March 2021 for no appearance.
8. The second and third named defendants (the "**Purchasers**") are a married couple. Although sharing the same surname, they are not related to the plaintiff. The evidence before this court is that they purchased the Property for value at a public auction on 24 October 2018. That sale was completed on 16 April 2019 with the mortgagee selling as mortgagee in possession.

9. It is apparent from the above timeline that the Property was sold after the Receiver had obtained interlocutory orders preventing interference by the plaintiff with the sales process but before Mr Justice Allen delivered his judgment in the substantive proceedings on 1 October 2019. Allen J held at para 90 of his judgment that “*I have come to the conclusion that the appointment of the [Receiver] was valid*”.
10. The PRA is the State organisation responsible for the registration of property transactions in Ireland.
11. On 18 April 2019, following their purchase of the Property, the Purchasers sought to register their interest with the PRA as the new owners of the Property.
12. On 10 July 2019 the plaintiff issued the within proceedings against the PRA and the Purchasers. While those proceedings were served on the PRA, the plaintiff did not serve the proceedings on the Purchasers until almost one year later, on 3 July 2020.
13. On 12 July 2019 the plaintiff registered a *lis pendens* over the Property. His stated basis for doing so was that he is “*the beneficial owner*” of the Property.
14. The PRA confirmed by letter to the Purchasers dated 30 December 2019 that it was required to register the *lis pendens* as applied for by the plaintiff and that the PRA “*does not look into the motives of the parties involved*”. The PRA refused to register the Purchasers as owners of the Property because of the *lis pendens* and this remains the position to date.
15. The plaintiff issued a statement of claim which, though undated, is said to have been delivered on 8 September 2021.
16. The PRA issued its motion on 23 June 2021.
17. The Purchasers issued their motion on 9 September 2022

18. Both motions were heard together by this court on 10 March 2023.

The Proceedings

19. The plenary summons was issued on 10 July 2019. By that time, the Purchasers had bought the Property at auction and judgment was awaited from Allen J in relation to the proceedings issued by the Receiver against the plaintiff. The plaintiff seeks various orders and declarations in the present proceedings. The primary order sought in the summons is that he is the “*beneficial owner*” of the Property, although the statement of claim seeks a declaration that he is the “*full owner*” of the Property. Many of the orders originally sought have been overtaken by events, such as, for example, an injunction restraining the Purchasers from closing any contract for sale of the Property. Furthermore, the High Court has, since the summons issued, validated the appointment of the Receiver.
20. The statement of claim challenges the validity of the sale of the Property. Complaints are levied against the auctioneer involved in the sale. Of course, the auctioneer is not a party to these proceedings. Complaint is also made that the Receiver “*did not have legal title*” to the Property (para 7). Further detail on this plea takes up most of the rest of the statement of claim. It is worth reciting this in some detail as it illustrates well the basis of the plaintiff’s claim that the sale of the Property was invalid.
21. Para 10 of the statement of claim refers to the evidence which the Receiver gave in the proceedings he issued against the plaintiff. It is alleged that the Receiver gave evidence to the High Court “*that he did not transfer my property to the alleged mortgagee by deed, therefore as the alleged mortgagee claimed to be mortgagee in possession in order to sell my property, the truth is they were not and never were a mortgagee in possession*”.

22. It is alleged at para 11 that *“this was an ad hoc process to sell my property and the mortgagee did not have possession of my property. A mortgagee must have possession in order to sell any property”*.
23. The statement of claim goes on to plead at para 12 that *“the alleged receiver Mr McCarthy admitted he had no legal interest in my property and as such he did not have legal possession of my property.”* This plea is expanded in para 13 where the plaintiff says that even if Mr McCarthy had legal possession of his property *“in order for Mr McCarthy to transfer that legal title Mr McCarthy would have had to transfer that said legal title by written and executed deed, pursuant to section 62 of the Land and Conveyancing Law Reform Act, 2009 which states “a legal estate or interest in land may only be created or conveyed by a deed”*. The plaintiff notes from the Receiver’s own evidence that the Receiver *“did not execute any deed to transfer legal title to the mortgagee to make them a mortgagee in possession”* (para 14).
24. The plaintiff claims that the Purchasers cannot show how legal title to the Property could have been validly transferred to them. He pleads at para 15 of the statement of claim that *“if the land is registered land...then the only way a mortgagee can get possession is if my property was abandoned, or I handed it up by consent or if they got an order for possession pursuant to section 62.7 of the Registration of Title Act 1964”*.
25. The plaintiff pleads that the entire sale was an *“unlawful process”* and he invites the Purchasers to *“exhibit all fully executed deeds to that complete chain of title and to show there exists no broken chain of title in the process”* (para 20).
26. Para 25 is in the following terms:

“[t]he plaintiff states that in circumstances where there is a fraudulent ad hoc process to deprive the plaintiff of his property, the process unknown to law, the law

is very clear fraud negates any contract, transfer deed and even the most solemn of judgements. Fraud unravels everything.”

27. The relief sought in the statement of claim is for damages against the defendants for defamation, slander on title, breach of the plaintiff’s constitutional rights to property, for negligence and trespass and loss caused by deception. The plaintiff also seeks a declaration that the plaintiff is entitled to be recognised as the full legal owner of the Property and a mandatory order preventing the PRA from registering a change of ownership on the grounds that no court order for possession was obtained.
28. It is clear from the statement of claim, and indeed from the written and oral submissions made by the plaintiff to this court, that the plaintiff misunderstands the manner in which receivers and mortgagees are permitted to deal with the sale of properties over which receivers have been validly appointed. I will expand further on this point under the “*Analysis*” section of this judgment.

Arguments advanced by the PRA regarding its motion

29. In broad terms, the PRA’s motion seeks to strike out these proceedings under Order 19 RSC as disclosing no reasonable cause of action against the PRA or as bound to fail. Alternatively, strike out is sought pursuant to the inherent jurisdiction of the court. An order is sought in the alternative dismissing the proceedings against the PRA on the grounds that the PRA is not a necessary party to the alleged matters at issue between the plaintiff and the Purchasers.
30. The PRA argues that the plaintiff’s claim does not disclose a stateable cause of action as against the PRA. In particular, the plaintiff has not provided any particulars as to what wrong has been committed by the PRA. It is simply asserted that the PRA should not allow fraud, but there are no particulars of any fraud set out as against the PRA. The

PRA says that the plaintiff does not state how or why the PRA is a proper party to the action. Nor does the plaintiff specify what right or entitlement of the plaintiff has been infringed by the PRA.

31. The PRA argues that the present case against it is an abuse of process. The plaintiff has been advised that the PRA will amend the Register, if same is directed or ordered by the court. Therefore it is argued that the PRA is not required to be a party to these proceedings. The plaintiff has sought discovery of documents but the PRA cannot provide copies of those documents to the plaintiff as pending applications are not subject to rule 159 of the Land Registry Rules 2012. The PRA says that the plaintiff has already been advised of this.
32. Counsel for the PRA confirmed that the PRA has no discretion with regard to the registration of charges and he referred in that regard to section 62 of the Registration of Title Act 1964. He says the PRA maintains the Register independently from everyone.
33. Counsel referred to paragraph 16 of the statement of claim which appears to be the only paragraph directed specifically to the PRA. It is in the following terms: –

“It is clear that the first named defendant is obliged to protect my property rights and simply cannot take part in fraudulent ad hoc processes to deprive me of my property when they too are aware of the law concerning possession of lands and the transfer of same.”
34. Counsel for the PRA referred to the decision in *Beades v Ulster Bank Ireland Limited* [2019] IEHC 389 and relies on it as authority for the well-established principle that where a party pleads fraud, that claim must be adequately particularised. In that case, O’Connor J, who struck out those proceedings against the receivers as disclosing no

stateable cause of action, stated at paragraph 12 of his judgment that “*particulars of dates, names, sums and circumstances are required at the very least*”.

35. The PRA argues that now almost four years after these proceedings were issued, the allegation of fraud as against the PRA has still not been particularised to any extent either in pleadings or affidavits filed by the plaintiff in relation to these motions. Indeed it seems that the fraud allegation is really directed at the “*process*” rather than the actions of the PRA. The PRA says in its defence dated 16 November 2021 that the proceedings do not disclose a stateable cause of action against the PRA. The PRA also argues that the Property and transactions mentioned in the proceedings have already been the subject of similar and/or overlapping matters and/or issues already determined by the courts. The PRA pleads that it is not a necessary party to the proceedings to address any issue which may arise from any alleged cause of action the plaintiff alleges against the Purchasers.

Arguments advanced by the Purchasers in relation to their motion

36. The purchasers broadly seek to (1) vacate the *lis pendens* registered by the plaintiff and (2) secure the strike out of the plaintiff’s proceedings as against them. A third aspect of their motion effectively seeks an *Isaac Wunder* order against the plaintiff, although that latter relief was not advanced with any particular emphasis at the hearing.

37. Dealing firstly with the *lis pendens*, s. 123 of the 2009 Act provides as follows:

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.

38. The Purchasers' first argument relates to the unreasonable delay on the part of the plaintiff in prosecuting this action, which delay, the Purchasers say, entitles them to have the *lis pendens* vacated. In that regard they confirm that although proceedings issued on 10 July 2019, and the *lis pendens* was registered two days later, there was a significant delay by the plaintiff in serving those proceedings on the Purchasers. The evidence is that these proceedings were not served until almost a full year later, on 3 July 2020. Thereafter an appearance was entered on behalf of the Purchasers on 15 July 2020 but a statement of claim was then not received until 8 September 2021 – over 2 years after the proceedings had issued.

39. The Purchasers rely on the decision of Barniville J (as he then was) in *Hurley Property ICAV v Charleen Ltd* [2018] IEHC 611 where, at para 82, he stated:

“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 the 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 in [Togher Management Company Ltd. v. Coolnaleen Developments Ltd. (in receivership) [2014] IHEC 596] in the prosecution of proceedings”.

40. On the facts of that case, Barniville J held that a delay of six months in issuing proceedings and serving same constituted an “*unreasonable delay*” in prosecuting the proceedings for the purposes of the statutory test in s. 123(b)(ii). The court went on to find that a further delay of three months in the delivery of the statement of claim compounded and reinforced the initial delay and rendered still more unreasonable the delay in prosecuting the case.

41. The Purchasers also rely on the comments of Butler J in *Ellis v. Boley View Owners Management clg* [2022] IEHC 103 where at para 48 of her judgment she expressed her agreement with

“the views expressed by those judges to the effect that s.123(b)(ii) of the 2009 Act imposes an obligation on a litigant who has registered a lis pendens to prosecute the proceedings with an element of expedition and vigour that goes beyond mere compliance with the time limits laid down in the rules or by statute. The person against whose property the lis pendens has been registered is prejudiced in dealing in the property by the mere fact of registration of the lis pendens. That prejudice to a person in the exercise of their constitutionally protected property rights justifies the imposition of a higher duty of expedition on the party whose lis pendens has created the prejudice”.

42. The Purchasers argue that the delay in this case to date is so unreasonable as to require the court to vacate the *lis pendens* on that ground alone.

43. Their additional challenge to the registration of the *lis pendens* is that it has not been registered nor is it being maintained for a *bona fide* purpose. The Purchasers say that the registration of the *lis pendens* is plainly an attempt to frustrate registration of the Property in the names of the Purchasers who have acquired good title and ought to be

entitled to register their ownership on the register. They argue that the substance of the plaintiff's claim is directly aimed at the conduct of the Receiver which is an issue that has already been tried and concluded by the courts.

44. In relation to the relief sought striking out the proceedings, it is pleaded by the Purchasers in their defence dated 5 January 2022 that they acquired the Property for value and in good faith by way of public auction on 24 October 2018 following the Receiver advancing the Property to public auction and delivering title by the mortgagee in possession. They refer to the previous court proceedings in which “*the court found the appointment of Mr McCarthy as valid*” (para 7 of Defence). The Purchasers further argue that they are strangers to any allegations against the auctioneer and that these allegations disclose no cause of action against the Purchasers. The Purchasers say that no claim is made out against the Purchasers in the proceedings. They say that the plaintiff had an opportunity to raise these issues in the previous proceedings but he did not do so. Therefore they argue that the rule in *Henderson v Henderson* provides that the current proceedings should be viewed as an abuse of process.

Analysis

PRA Motion

45. The PRA is a creature of statute with the primary duty to ensure the maintenance of the registers established under section 8 of the Registration of Title Act 1964. A public authority should not, in general, be restrained from exercising its statutory authority. The PRA has a statutory duty to ensure that applications for registration are in accordance with the relevant legislation and Land Registry Rules. There is no discretion on compliance given to the PRA nor does the PRA look behind applications that are made to it in relation to the register. Parties are well protected by statute in the event that they

succeed in litigation challenging particular registration issues. The PRA will be bound by any court order in relation to registered land. Section 32 (1)(c) as substituted by section 55 of the Registration of Deeds and Title Act 2006 empowers the court to direct rectification of the register or a registry map if such can be affected without injustice to any party. In my view, the PRA must be allowed to carry out its statutory functions without becoming embroiled in the wide range of litigation which exists between parties regarding the registration of property interests.

46. There is nothing in this case to suggest that the PRA has failed to exercise its functions in relation to the Property. In fact, the PRA has registered the plaintiff's *lis pendens* and has not registered the Purchaser's interests – as was no doubt the very outcome intended by the plaintiff in bringing these proceedings and registering the *lis pendens*.
47. There is no plea of any wrongdoing made by the plaintiff against the PRA other than a general unparticularised claim that the PRA should not permit fraud or become involved in “*ad hoc fraudulent processes*”. There are no particulars provided and so no basis or evidence on which any claim of fraud could in my view succeed in this case against the PRA.
48. I find that the PRA is not a necessary party to these proceedings. Furthermore I find that there is no stateable cause of action advanced against the PRA by the plaintiff and in those circumstances I will strike out these proceedings against the PRA as being proceedings that are bound to fail against it.

Purchasers' motion

49. I deal firstly with the Purchasers' application to vacate the *lis pendens* on the grounds of delay. Whether there has been an unreasonable delay within the meaning of s. 123(b)(ii) of the 2009 Act must be assessed on a case by case basis, by reference to the specific

circumstances of the particular proceedings. There is no definite or certain time period which converts a delay into an “unreasonable” delay. However, it is proper for this court to have some regard to the length of delay which has resulted in *lis pendens* being vacated in other proceedings, particularly where no excuse has been proffered for the delay. I am satisfied that there has not only been a delay but also an “unreasonable” delay by the plaintiff in prosecuting these proceedings within the meaning of s. 123(b)(ii) of the 2009 Act.

50. In the present case there was, firstly, an unreasonable delay on the part of the plaintiff in advancing these proceedings. There was a considerable delay of almost one year in serving the proceedings on the Purchasers. There is evidence before the court contained in the affidavit of Thomas Langan sworn 3 August 2022 that his solicitors wrote to the plaintiff seeking service of these proceedings on 18 February 2020, almost 5 months before the proceedings were eventually served on 3 July 2020. No excuse has been advanced for this delay. The plaintiff does not appear to have had any difficulty serving the proceedings at an earlier stage on the PRA. Furthermore this initial delay was compounded by the further delay in serving a statement of claim. Again, the affidavit of Thomas Langan confirms that a statement of claim was requested in writing by his solicitors on 23 July 2020. The statement of claim was not delivered until 8 September 2021. On that basis alone I make an order vacating the *lis pendens* pursuant to s. 123(b)(ii) of the 2009 Act. I do not need to go any further and consider whether, in addition, the action is not being prosecuted *bona fide*.

51. In relation to the second relief sought by the Purchasers, namely the strike out of these proceedings against them, this is a matter which requires more detailed analysis and explanation.

52. The legal principles applicable to the court's jurisdiction to strike out proceedings have been well set out in previous cases. For present purposes, the following summary of the applicable principles as set out by McDonald J in *Moroney v Property Registration Authority* [2018] IEHC 379 at para 30 is instructive: –

“a. If on the basis of the facts pleaded, a case is bound to fail, then the proceedings should be dismissed under O. 19, r 28.

b. In contrast, the inherent jurisdiction of the court can be invoked where it is possible to establish the facts at an interlocutory stage with clarity, and where it is possible to show (again with clarity) that those facts do not support the claim made such that the court can conclude that the proceedings are bound to fail on the merits.

c. The inherent jurisdiction of the court should, however be sparingly exercised. The court should be slow to entertain an application to dismiss.

d. In responding to an application to dismiss a claim, all that a plaintiff needs to do is to put forward a credible basis for suggesting that the plaintiff may, at trial, be able to establish the facts which are asserted and which are necessary for success in the proceedings. The court should bear in mind that, in a plenary action, the plaintiff has available a range of procedures provided for in the rules to assist in establishing facts and the summoning of witnesses by subpoena. Some of these steps are not available at an interlocutory stage, in the case of others, it is usually not practicable to take such steps prior to the hearing of an application to dismiss.

e. There are certain types of cases which are more amenable to an assessment of the facts at an early stage. This is especially so in cases which are wholly or significantly dependent on documents.

f. Although not specifically stated by Clarke J in Lopes v Minister for Justice [[2014] IESC 21, [2014] 2 IR 301], it is also clear from the case law that the onus lies on the defendant in an application of this kind to demonstrate that it is very clear either that the plaintiff's claim is bound to fail or that it should be struck out under O. 19. r. 28.

g. Again, although not specifically mentioned by Clarke J in Lopes v Minister for Justice, it is also clear from the judgment of McCarthy J in the Supreme Court in Sun Fat Chan v Osseous [1992] 1 IR 425 (which is cited by Clarke J in Lopes at page 428) that if a statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed.”

- 53.** In the present case, the plaintiff claims that he is the beneficial and indeed the full owner of the Property. This is the basis on which he maintains that he is entitled to register a *lis pendens*. It is also the basis on which he believes he can succeed in establishing that the documentation lodged by the Purchasers with the PRA was “*fraudulent*” and designed to “*facilitate an illegal and fraudulent transfer*” of the Property to them and the basis on which he believes he should obtain an order setting aside the transfer of the Property to the Purchasers. He relies on the fact that he is still the registered owner of the Property and the conclusiveness of the register in that regard. However this particular plea is an entirely circular one where the Purchasers are seeking to register their interest as owners of the Property.
- 54.** The plaintiff also pleads that an order for possession pursuant to s. 62(7) of the Registration of Title Act 1964 was essential before the Property could be sold, and that without such a court order, the sale was unlawful and fraudulent. The plaintiff pleads that the Purchasers should have “*withdrawn from this unlawful activity*” (para 19, statement of claim).

55. It is clear, as already set out in this judgment, that another central aspect of the belief by the plaintiff that the transfer to the Purchasers was illegal and fraudulent is because there is no deed or “*chain of title*” from him to the Receiver or from the Receiver to the mortgagee. He then argues that the mortgagee could not pass title to the Purchasers. This belief is not however well founded or correct as a matter of law.
56. A receiver does not take title to property over which he is appointed. Rather, the receiver takes possession of the property. The receiver is not the registered owner of the property and is never required to become the registered owner of the property before he sells it or hands over possession to the mortgagee who appointed him. It is well settled that, assuming he is validly appointed, a receiver is entitled to take possession of the mortgaged property over which he is appointed - either physical possession or interception of the rents and other payments to which the mortgagor is entitled. It is not essential for a receiver to obtain a court order before taking possession (although often such orders are obtained in more contentious cases), nor does a receiver need to obtain the consent of the mortgagor to take possession. There have been many cases where the courts have granted receivers interlocutory injunctions to enforce their right to possession and indeed sale. The evidence in the present case is that the Receiver obtained an interlocutory injunction restraining the plaintiff from interfering with the Receiver carrying out his functions, including in relation to the sale process for the Property.
57. Furthermore, mortgagees of land have long had statutory powers to appoint a receiver without having to resort to the court. Any receiver appointed purely on that statutory basis has a limited role. That receiver is simply a receiver of the income of the mortgaged property and has no other powers, such as a power to manage and run any business on the premises or to deal with the property, such as selling or leasing it. Such additional powers would have to be either delegated to the receiver by the mortgagee (in

which case the receiver would be exercising the mortgagee's powers as agent for the mortgagee) or conferred expressly by the mortgage deed. A primary purpose in appointing a receiver, instead of the mortgagee taking possession himself, is to avoid the liability to account strictly which applies to a mortgagee in possession. This principle is enshrined in the statutory provisions relating to the appointment of receivers. Thus, s. 24(2) of the Conveyancing Act 1881 provides that:

“The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.”

58. So far as mortgages created before 1 December 2009 are concerned (as in the present case), s. 19(1) of the Conveyancing Act 1881 conferred the power of sale under that Act on all mortgagees, provided the mortgage was made by deed after 1881. Section 19(1)(i) of the Conveyancing Act 1881 provides that the statutory power of sale does not arise until the *‘mortgage money has become due’*. Section 20 provides that the power of sale cannot be exercised by the mortgagee unless and until one of three conditions has been satisfied, namely:

“(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.”

- 59.** These provisions continue to apply to mortgages created before 1 December 2009 but are often varied by the express terms of the mortgage.
- 60.** The extent of the receiver's powers, such as whether or not a receiver can sell a property, will depend upon the terms of the mortgage entered into between the mortgagee and the borrower as well as the deed of appointment of the receiver. Even if the receiver can sell a property under the terms of the mortgage deed and although he is appointed by the bank, he acts as agent of the borrower in selling. Therefore he does not have the same powers on sale as a mortgagee – for example a receiver cannot sell a property free from those interests in respect of which the mortgage has priority.
- 61.** On the other hand, when a mortgagee sells, this wipes out those burdens and encumbrances in respect of which the mortgage has priority. Section 21(1) of the Conveyancing Act 1881 Act provides that the statutory power can be exercised by deed
- “...to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage...”*.
- 62.** It is common for a mortgage deed to confer on any receiver appointed under the mortgage a power to sell the mortgaged property in the name of the mortgagor, usually conferring on the receiver a power of attorney. It is common for a receiver to have a power of sale conferred on him by the mortgage deed or for the mortgagee's power of sale to be delegated to a receiver appointed to take possession of the property.
- 63.** A mortgagee can give good title to a purchaser and indeed, as outlined above, in some respects a better title than the owner. Furthermore by virtue of s. 19(2) of the Conveyancing Act 1881 the statutory powers granted under it can be varied or extended

by a mortgage deed and if the mortgage deed contains such variations or extensions then they will operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were contained in the Conveyancing Act 1881.

64. Contrary to what the plaintiff argues, it was not essential that before this sale there was an order for possession made in favour of the mortgagee.

65. Section 62(7) of the Registration of Title Act 1964, (which is referred to by the plaintiff in his statement of claim), provides as follows:

“When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a summary manner for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.”

66. Section 62(7) of the Registration of Title Act, 1964 was expressly saved as regards a mortgage created prior to 1 December 2009 (as in the present case), by s. 1 of the Land and Conveyancing Law Reform Act 2013.

67. It is clear that s. 62(7) provides a mechanism for a bank/lender to secure possession of a property by way of summary proceedings and, if successful in those proceedings, the bank/lender is deemed to be a mortgagee in possession. However, this is not the only means by which a bank/lender can become a mortgagee in possession. Another method commonly used for registered property is, as outlined above, for the bank/lender to appoint a receiver who takes possession of the property and can then deliver possession

of it to the bank/lender or sell as appointed agent of the bank/lender for that purpose.

This is what the evidence confirms happened in the present case when the Property was sold to the Purchasers at a public auction.

- 68.** Contrary to what the plaintiff has argued, there is no requirement for a receiver to be registered as the owner of the property over which he/she is appointed. Similarly, there is no requirement for the receiver to “convey” the property to the mortgagee before the mortgagee can sell it. No deed or other form of transfer is required. A proper chain of title is achieved by a conveyance from the holder of the charge (mortgagee) to the purchaser under s. 21(1) of the Conveyancing Act 1881.
- 69.** The plaintiff was of course entitled to challenge the validity of the Receiver’s appointment as, if that was invalid, then this would impact the entitlement of the Receiver to sell the Property. In the present case there has in fact been a finding by the High Court (in respect of which the right of appeal has been exhausted) that the Receiver was validly appointed. This is essential context to the present application. That validly appointed Receiver gave evidence to Allen J that he agreed to give possession of the Property to the mortgagee who then conveyed the Property to the Purchasers. In that way the Purchasers acquired good title by that conveyance to the estate or interest which had originally been mortgaged by the plaintiff – namely the full legal and beneficial interest in the Property.
- 70.** The plaintiff is correct that Allen J did not expressly approve the sale to the Purchasers. At para 87 of his judgment he stated that

“while evidence was given of the sale of the first and second defendants’ loans and the security held for them; the novation of the plaintiff’s appointment by the

purchaser of the loans and security; and the sale by that purchaser of the properties, there was no issue before the court as to the validity of those transactions”.

71. However Allen J did determine, following a full oral hearing, that the appointment of the Receiver was valid. He thus determined that the formalities for the appointment of the Receiver had been complied with, that the circumstances justifying the appointment had arisen, and that the appointment was made by the correct mortgagee. Allen J would also have had to be satisfied that any conditions for the making of the appointment had been met.
72. Because there had been an interlocutory order previously granted by the High Court to the Receiver preventing interference with the sale of the Property, it is clear that the High Court was also satisfied that the Receiver could (if validly appointed), sell the Property either because there was a power of sale afforded to the Receiver under the mortgage deed, or because the Receiver could give possession of the Property to the mortgagee to sell on its own behalf (or through the Receiver as appointed agent of the mortgagee).
73. In the present case, the Purchasers did not exhibit a copy of the mortgage deed nor the documentation pursuant to which they acquired the Property. It would have been preferable for this court had they done so to demonstrate to the court the precise basis on which the sale in fact took place. Because this was not done, all this court can safely adduce on the evidence before it relating to the previous court decisions is that the High Court was satisfied that the Receiver could (if validly appointed) offer the Property for sale and should not be prevented from doing so, and that the Receiver was in fact validly appointed. I cannot say that the sale to the Purchasers was expressly validated by Allen J. However I believe that it follows from the validation of the Receiver’s appointment that the sale to the Purchasers was not unlawful. Even if there is any doubt on that matter, I am of the view that the statutory protection afforded to purchasers who buy from validly

appointed receivers or mortgagees provides an answer to these proceedings. I now proceed to consider that protection.

Legal protection for purchasers who buy from mortgagees exercising their statutory power of sale.

74. The legal protection for purchasers who buy from mortgagees exercising their statutory power of sale (or receivers to whom the mortgagees have delegated their statutory power of sale) is to be found in s. 21(2) of the Conveyancing Act 1881 which provides that:

“Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

75. To this, s 5(1) of the Conveyancing Act 1911 adds:

“Upon any sale made in professed exercise of the power conferred on mortgagees by the Act of 1881, a purchaser is not, and never has been, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised.”

76. Further protection was afforded to a purchaser by s. 22(1) of the Conveyancing Act 1881 which provides that a receipt in writing of the mortgagee is a sufficient discharge for any money arising under the statutory power of sale and *“a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due*

under the mortgage". This provision continues to apply to mortgages created before 1 December 2009.

- 77.** It is clear that there is a distinction in the Conveyancing Act 1881 between when the statutory power of sale arises (section 19) and when the power is exercisable (section 20). By virtue of s. 21(2) the purchaser obtains a good title once a power of sale has arisen and he is not obliged to enquire as to whether it is also exercisable.
- 78.** If the holder of a First Legal Mortgage is selling as mortgagee in possession pursuant to his statutory powers of sale then by virtue of s. 62(10) of the Registration of Title Act 1964 and Section 21(1) of the Conveyancing Act 1881 the purchaser takes free of all Estates, interests or rights ranking in priority after the first Legal Mortgagee and there is no need to furnish formal Discharges or Releases of any Mortgages, Judgement Mortgages or other Burdens ranking subsequent to the first Legal Mortgage.
- 79.** I was not referred by counsel to any caselaw on the title acquired by purchasers in the position of the Purchasers in the present case. A decision I have found useful on this subject however is a recent decision of the High Court of Justice of Northern Ireland in *Trimble v Cassidy* [2022] NICh 7 in which McBride J considered the nature and extent of the protection afforded by section 21(2) of the Conveyancing and Law of Property Act 1881 (identical to the same section of the Conveyancing Act 1881) to a purchaser buying from a mortgagee or a fixed charge receiver. The live issues in that case were identified at para 12 of the judgment as to "*whether the appointment of the fixed charge receiver was irregular and if so whether the plaintiffs' title in such circumstances is unimpeachable by reason of the provisions of section 21(2).*"
- 80.** The court in *Trimble* proceeded on the basis that the receiver in that case had not been validly appointed (without making a final determination on that point). This is in contrast

to the present case where there has been a finding that the Receiver was validly appointed.

81. Even in those circumstances however, the court in *Trimble* found that the purchasers title was protected as *bona fide* purchasers by virtue of s. 21(2). McBride J stated at para 27 that:

“If the plaintiffs can come within the statutory protection provided by section 21(2), then notwithstanding any invalidity in respect of the appointment of the fixed charge receiver the conveyance of the lands to them is unimpeachable and the first defendant’s only remedy is in damages against the bank”.

82. The protection for a purchaser is not absolute. McBride J in *Trimble* relied on dicta of Sterling J in *Life Interest and Reversionary Securities Corporation v Hand-in-Hand Fire and Life Insurance Society* [1898] Ch D 230 to the effect that s. 21(2) confers “*protection only on a purchaser who has obtained a conveyance without knowledge of any irregularity*”. A purchaser is not protected where he has *actual knowledge* of any impropriety or irregularity in the exercise of the power of sale or knowingly participates in such exercise. The court in *Trimble* also considered at para 41 the question as to “*what standard of inquiry is required from a purchaser who is buying from a mortgagee, in light of the provisions of section 21(2)*”. The Court referred to the decision of Linley LJ in *Bailey v Barnes* [1879] 1 Ch 25, where he held at p 8:

“The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on ownership of property, but the doctrine must not be carried to such an extent as to defeat honest purchasers...”.

McBride J held at para 43 of his judgment that

“a purchaser from a mortgagee or fixed charge receiver is under no obligation to make inquiries and will not be fixed with constructive knowledge of irregularities in circumstances where he has made no inquiries. He would only be fixed with such knowledge if there is fraud or mal fides. The purpose of section 21(2) is to simplify conveyancing by reducing the inquiries a purchaser is expected to make when buying from a mortgagee. Such a purchaser is only obliged to satisfy himself that the power of sale has arisen. He is not obliged to make inquiries which could become extremely complex into the detailed relationships between the mortgagee and the mortgagor during the currency of the mortgage. Indeed as Sterling J stated in Life Interest at p 238 “a purchaser without notice of any impropriety or irregularity would be well advised to abstain from making any such requisition due to the efficacy of the protection afforded to the purchaser by section 21(2).” This is the effect and purpose of section 21(2).”

This court’s decision on strike out sought by the second and third named defendants

83. In all the circumstances, I have come to the conclusion that the plaintiff has not made out a stateable cause of action as against the Purchasers, even if I take the plaintiff’s claim at its height, as I do. I am supported in that conclusion by the conclusive finding of the High Court that the Receiver was validly appointed. In his judgment in *McCarthy v Langan* [2019] IEHC 651, Mr Justice Allen did not explicitly validate the sale of the Property to the Purchasers, confirming, at para 40 of his judgment, that *“the court could not possibly entertain arguments as to the validity of the sales without notice to the parties to those transactions”*. He held at para 41 that *“any legitimate complaint about the sale must depend on the issue as to whether the interlocutory orders ought not to have been made”*. Having considered all the evidence in that case, Allen J determined

that the Receiver was validly appointed (and therefore the interlocutory orders had been properly made). Those orders restrained interference with the Receiver selling the Property.

- 84.** There is no basis for further challenge to the validity of the Receiver's appointment, and in circumstances where the Receiver then brought the Property to market by public auction when it was purchased by the Purchasers for value from the mortgagee, I find that the plaintiff's claim that he has a beneficial interest (and indeed an entitlement "*to be recognised as the full legal owner*" of the Property, as per para (g) of his statement of claim), cannot succeed. Even if there was an issue about the validity of the exercise of the power of sale by the Receiver, this would sound in a remedy in damages against the Receiver/mortgagee and not a remedy against the Purchasers.
- 85.** There is no stateable cause of action pleaded as against the Purchasers. Insofar as a generalised claim of fraud is made against them, this is not particularised in any way nor is any evidence or explanation provided, still almost 4 years after proceedings issued. In truth, the unparticularised claim of fraud is really directed at the "sale process" rather than any actions on the part of the Purchasers themselves. I appreciate that the plaintiff may not yet have all the evidence he might be expected to have at trial. However, where there is merely a bald allegation of fraud regarding the sale process undertaken by a validly appointed receiver, I do not believe that this gives rise to a stateable cause of action against the Purchasers. Indeed para 18 of the statement of claim makes an argument that the Purchasers may themselves have been "*the victims of an unlawful ad hoc fraudulent process to put them in possession*" arguing that in such circumstances "*then that is a matter for them where they might seek redress, but suffice to say they had the benefit of legal advice before entering into this unlawful process*".

86. The plaintiff's challenge to the "*illegality*" of the sale is based on his mistaken belief that in this case (i) the mortgagee or Receiver needed a court order for sale before the Property could be sold and/or (ii) that the Receiver's title and the mortgagee's title needed to be separately documented in each case by deed to create a chain of title for the Purchasers and (iii) that the Purchasers could not acquire valid title by the conveyance from the mortgagee. As a matter of law these assumptions are incorrect and do not ground proceedings against the Purchasers which have any prospect of success.
87. In those circumstances, I believe having regard to the decision of the Supreme Court in *Lopes* that the appropriate relief is to grant an order dismissing the plaintiff's proceedings on the basis that they are bound to fail and that they would amount to an abuse of process were they to proceed in those circumstances. It seems to me that the order sought should be made both under the inherent jurisdiction of the court and Order 19, rule 28 of the RSC.

Isaac Wunder order

88. Finally, the Purchasers seek an order in the nature of an *Isaac Wunder* order against the plaintiff. I am not satisfied that there is sufficient evidence before the court to justify granting such an order against the plaintiff in this case and I refuse that relief.

Summary and conclusion

89. In this case the Purchasers paid value for and acquired the Property at public auction through a receivership process in which the Receiver (who had obtained interlocutory orders preventing interference in the sale process) was subsequently confirmed by the court to have been validly appointed. Once appointed, the Receiver in this case had the power to take possession of the Property and to give possession of it to the mortgagee to

sell as mortgagee in possession. Contrary to the plaintiff's belief, no formal transfer documents or formal court orders were necessary to record the chain of title from the plaintiff through to the Receiver and then to the mortgagee.

90. I find that the plaintiff has delayed in the prosecution of these proceedings to such an unreasonable extent as to justify an order by this court to vacate the *lis pendens* he registered almost four years ago. Accordingly I make an order vacating the *lis pendens* pursuant to the provisions of s. 123(b)(ii) of the 2009 Act.
91. The proceedings are, for the reasons set out, in my view bound to fail both as against the PRA and the Purchasers.
92. There is no wrongdoing claimed as against the PRA who to date have registered the *lis pendens* and not registered the Purchasers' title. The general claim of unparticularised fraud pleaded against the PRA cannot, in my view, be credibly or properly maintained against the PRA and in those circumstances I strike out these proceedings as against the PRA as such a claim is bound to fail. I also find that the PRA is not a necessary party to these proceedings.
93. There is also no wrongdoing claimed as against the Purchasers save for similar unparticularised claims of fraud and illegality which appear to be directed at the sales process itself. Indeed it is pleaded that the Purchasers may themselves have been the victims of this alleged fraud (rather than the perpetrators). I do not believe that the claim advanced against the Purchasers can succeed against them. No wrongdoing is identified. In addition, the High Court has formally validated the Receiver's appointment and, thus by extension, has confirmed that his powers have arisen. Furthermore, there is considerable protection afforded to the Purchasers under s. 21(2) of the Conveyancing Act 1881 which confirms that their title *shall not be impeachable*. The evidence is that

the Purchasers acquired the Property as bona fide purchasers for value at a public auction. Accordingly, I strike out these proceedings as against the Purchasers as bound to fail. The *lis pendens* registered by the plaintiff would also, in those circumstances, fall away.

94. I am not satisfied that there is sufficient evidence before the court to grant an *Isaac Wunder* order against the plaintiff and I refuse that relief.
95. I will list this matter for mention on Friday 5 May at 10.45am to deal with the final form of order, legal costs, and any other issues which may arise from this judgment.