

# The Bends in Ireland: The abuse of ‘*lis pendens*’

Mark Woodcock looks at how the ‘litigation pending’ process (*‘lis pendens’*) is being used to delay the sale of assets in receiverships



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**I**t is the case in most European jurisdictions that there are various forms of protection available for parties with an interest in property which places any prospective purchaser on notice, or in some circumstances prevents a sale, where there are competing interests in relation to it.

In Ireland, as in the United Kingdom, where there is litigation in relation to property a *lis pendens* (‘litigation pending’ or a *Pending Action* in the UK) may be registered by the litigant in the Land Registry which will notify any member of the public that the property is the subject of a legal dispute.

The registration of a *lis pendens* will seriously restrict the manner in which the property in question can be dealt with and obviously have a detrimental effect on its value.

In Ireland this process is increasingly being abused in receiverships by borrowers (companies and individuals) to frustrate the sale of charged assets.

Section 121 of the Land and Conveyancing Law Reform Act 2009 (the “**2009 Act**”) provides, *inter alia*, for the registration of a *lis pendens*. Section 121 of the 2009 Act further provides that the Central Office of the High Court shall keep a register of *lis pendens* affecting land.

## Steps required to register a *lis pendens*

Order 72A of the Rules of the Superior Courts (the “RSC”) sets out the procedure for the

registration of a *lis pendens*. It also sets out the requirements to have a *lis pendens* vacated.

Section 1 of the “*High Court Information Booklet on Registering a Lis Pendens*” provides that the following documentation must be lodged in the Judgments Section of the Central Office in order to register a *lis pendens*:

- i. Form No. 31 in Appendix C of SI 149/2010 (€25 stamp duty is required on this document).
- ii. A duplicate copy of the above form (No stamp duty required).
- iii. A copy of the originating document i.e. Summons or Civil Bill.
- iv. A Form 64 of the Property Registration Authority rules is lodged if notification on the Folio in the Property Registration Authority is required (pursuant to Rule 128 of the Property Registration Authority rules).
- v. If the property is Registry of Deeds, a Form 16 must be lodged in the Property Registration Authority.

The registration of a *lis pendens* can be easily done and there is no necessity to obtain leave from the Court. An application is lodged in the High Court Central Office. There are minimal costs involved and the effect of such a registration can be far reaching for the parties involved.

There is a similarly straightforward and unilateral registration process in the United Kingdom.

## Effect of registration

A *lis pendens* puts potential purchasers and third parties on notice that there is ongoing litigation over a property which could ultimately reduce its value or affect the interests of a registered owner.

Potential purchasers will be reluctant to proceed with a sale when they discover that a *lis pendens* is registered. Certainly a prudent solicitor is unlikely to allow a client purchase property so affected.

A *lis pendens* almost always has the effect of preventing a Receiver from selling a charged asset.

## Abuse of process

The registration of a *lis pendens* is increasingly being used by lay litigants/defaulting borrowers to frustrate the sale of charged property in Ireland.

The registration of a *lis pendens* may be completed with no input from solicitors or counsel and no requirement to obtain leave of Court. Applications are increasingly lodged in the High Court Central Office relying on a Summons or Civil Bill containing a very limited and badly drafted indorsement of claim. The proceedings themselves are often not pursued at all and the Summons evidently only prepared to effect the registration of the *lis pendens*.

Indeed in the UK the process of registration of a Pending Action is even less onerous. The requirement in the UK is to provide “particulars of the title of the proceedings” only, rather than a copy of the Summons or Civil



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Bill itself (see section 5(2) of the Land Charges Act, 1972).

### Steps required to vacate a *lis pendens*

In contrast to the straight forward application to register a *lis pendens*, the procedure to vacate is relatively onerous (unless on consent). An application on notice must be brought before the High Court of Ireland. In such an application, one of the issues that the Court will consider is whether the criteria stipulated for the registration of the *lis pendens* under the 2009 Act was complied with. It must be noted that this criteria is not considered at the actual time of registration.

Because of this imbalance between registering and vacating a *lis pendens*, it is often the case that the process is abused by an aggrieved borrower for the purpose of frustrating the sale of a property by a Receiver.

As a consequence, Receivers in Ireland are increasingly finding themselves in the invidious position of having to seek injunctive relief from the Court pursuant to section 123 of the 2009 Act.

Such a motion must be filed, a return date obtained and the various notice parties served. This of course includes the party who registered the *lis pendens* in the first place. Notice parties will immediately file replying affidavits causing the initial return date to be adjourned a number of times before a hearing date is ultimately obtained. The time and expense incurred is needlessly considerable.

Even where a Receiver successfully applies to Court to release the *lis pendens*, another *lis* is often registered immediately thereafter, without any requirement for court approval.

### Recent case law

There has been recent case law (*Kelly & O'Kelly v IBRC 2012* and *O'Connor v Cotter 2017*) where the Courts have held that where a party that registered a *lis pendens* is unable to definitively

establish a proprietary interest in the property, this amounts to an absence of *bona fides* and accordingly, the *lis pendens* should be lifted. The borrower appealed the decision.

The Supreme Court in upholding the judgment of the High Court, commented that it is important that in the interests of justice, a party is entitled to register a *lis pendens* where appropriate and justified and that it is not discreditable to do so.

The recent decision of *O'Connor v Cotter* arose on foot of various sets of proceedings involving the Plaintiff, Mr O'Connor. In 2012, Bank of Scotland (the “**Bank**”) obtained a judgment against Mr O'Connor in excess of €7.5 million relating to a property loan. Mr O'Connor at the same time instituted proceedings against the Bank and registered a *lis pendens* on the property, the subject of the Bank's proceedings. The *lis pendens* was subsequently removed by Order of the High Court.

Shortly thereafter, Mr O'Connor instituted fresh proceedings challenging the appointment of a Receiver by the Bank. He did not serve the proceedings but registered a *lis pendens* on the property in an attempt to frustrate the Receiver's ability to sell the property. As soon as the Receiver became aware of the proceedings, he immediately issued a motion in the High Court and was successful in having the proceedings dismissed as they were deemed to be an “*abuse of process*”. This decision was upheld by the Court of Appeal.

When a *lis pendens* is registered based on unsustainable grounds, the affected party has an entitlement to apply to set it aside but considerably more time, effort and cost is involved in the Court application to set a *lis pendens* aside.

In *Tola Capital Management LLC v Joseph Linders and Patrick Linders (No.2)* [2014] IEHC 324, the High Court provided that a party seeking to register a *lis pendens* must

establish the following:

“*In order to come within the statutory definition ... a party seeking to register a lis pendens has to establish*

- a) *that the plaintiff is claiming a proprietary 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; and*
- c) *that the proceedings themselves make a claim to a proprietary estate or interest in the said lands.”*

Therefore, if the proceedings pursuant to which a *lis pendens* has been registered are not being prosecuted bona fide, then in such circumstances, a Court should grant an order to have the *lis pendens* vacated.

### Conclusion

It is becoming apparent that there is a requirement for the registration process of a *lis pendens* to be reviewed in Ireland.

It is clear from the case law that the Court will not permit a *lis pendens* to be used as an attempt to frustrate a sale on unsustainable grounds. Equally, the legitimate interests of parties with an interest in land must be protected.

The problem is that a *lis pendens* can be obtained with almost no scrutiny of the application at all and the time and expense to vacate it is grossly disproportionate.

An obvious middle ground would be that any application to register a *lis pendens* should also include a motion for directions, which must be served upon the relevant notice parties before the return date. The *lis pendens* could be effective from the date of filing, protecting the genuine interests of an applicant but only confirmed by Court Order, protecting the interests of the notice parties.

All parties' interests would thus be acknowledged and protected. ■



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