THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 277

Record No.: 2021/124

Donnelly J.
Noonan J.
Ní Raifeartaigh J.

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

RESPONDENT

-AND-

PERSONS UNKNOWN IN OCCUPATION OF THE PROPERTY KNOWN AS 21 LITTLE MARY ST, DUBLIN 7

APPLICANTS

Record No.: 2021/125

PEPPER FINANCE CORPORATION (IRELAND) DAC
RESPONDENT

-AND-

PERSONS UNKNOWN IN OCCUPATION OF THE PROPERTY KNOWN AS 31 RICHMOND AVENUE, DUBLIN 3

APPLICANTS

JUDGMENT of the court (*Ex tempore*) delivered on the 24th day of June, 2021 by Ms. Justice Donnelly

1. There are two applications before this Court arising in respect of two separate proceedings. There are common aspects to the applications however. Both are applications to extend time in which to lodge an appeal, to adduce new evidence and seeking a stay pending determination of these motions and other motions which are before this Court on the 13th July next. Both concern the same plaintiff (hereafter, "Pepper") who obtained orders on the same date requiring the defendants in each case (and persons having notice of the orders) to surrender possession and control of the properties named in the title to the proceedings. The solicitor for the applicants has

sworn almost identical affidavits in each application. The applications were heard together. For those reasons it is appropriate to give a single judgment.

2. On the 25th November, 2020 Reynolds J. ordered ("the injunction orders") that the defendants and each of them their servants and/or agents and all other persons having notice of the said order

   (1) immediately surrender possession and control of the property named in the title of each set of proceedings; and

   (2) immediately deliver up to Pepper all keys alarm codes and/or security and access devices in relation to the property.

3. The injunction orders also included various injunctions restraining the defendants and each of them, their servants and/agents and all other persons having notice of the said order from impeding or obstructing the plaintiff in taking possession, securing the property, selling or renting the property or trespassing or interfering without the prior written consent of Pepper, collecting or attempting to collect any rent, holding themselves out as having any entitlement to sell, rent or otherwise grant any entitlement to possession, making contact with any current or prospective tenants or purchaser of any portion of the property without the written consent of Pepper.

4. It was further ordered that Pepper's solicitors be at liberty to notify the making of the order to the defendants their servants and/or agents and all other persons by hand delivery and ordinary pre-paid post. The order was stayed until the 14th January, 2021.

5. The original proceedings date back many years and originally arose out of a bank debt. Successive parties have acquired an interest in the properties which are owned by a Mr. Jerry Beades but mortgaged by him to the IIB Homeloans Limited (hereinafter "the bank"). By order of the High Court made on the 22nd June, 2008, an order for possession of both properties were made. The Supreme Court gave final judgment for possession of both properties on the 12th November, 2014.

6. The defendants (the applicants), save for two people, Ms. Hanrahan and Mr. Petrut (the appellants), did not enter an appearance in the High Court. Those two appellants appealed within time against the Order of Reynolds J. The Court was told that Mr. Petrut resides in 31 Richmond Avenue and Ms. Hanrahan resides in 21 Little Mary Street.

7. There are five outstanding appeals in total before the Court of Appeal on the 13th July, 2021 relating to the injunction orders. One appeal each is taken by Ms. Hanrahan and Mr. Petrut. Three are taken by Mr. Beades who is not named in either of these proceedings nor does he reside in either of these properties. Mr. Beades is appealing the injunction orders and also the substitution order of the High Court dated the 18th November, 2020 by which Pepper was substituted as sole plaintiff in related proceedings and was granted liberty to execute on foot of the 2008 possession order. Ms. Hanrahan,

Mr. Petrut and Mr. Beades were refused an application for a stay by Noonan J. pending those appeals.

8. Eoghan O'Reilly, solicitor from the firm of FH O'Reilly, has sworn two affidavits in each set of proceedings, each pair of which is virtually identical. He seeks to set out the background against which he claims the application should be viewed. He says he represents 20 adults in total. All his clients, save the two named above, claim that they did not receive notice of original proceedings or the making of the order.

9. It is apparent that Mr. O'Reilly, the solicitor for the applicants in these proceedings also seeks to represent Ms. Hanrahan and Mr. Petrut and he seems to wish to revisit the application for a stay on their behalf.

The claim that these applicants only seek to amend the appeals of Ms. Hanrahan and Mr. Petrut

10. In written and oral submissions, it was urged on the Court that this was nothing more than an application to amend the existing appeals of the above appellants and by adding grounds of appeal. The applicants claim that all is required is an amendment to the Notice of Motion already in existence for Ms. Hanrahan and Mr. Petrut to include all occupants of the properties. That approach was permitted by the Supreme Court in Balkanbank v. Taher (Unreported, Supreme Court, Hamilton C.J. and O'Flaherty J., delivered on the 19th January, 1995). It was said that the requirement of justice in the circumstances of this case is that the amended notice of appeal should be allowed.

11. No notice of motion was ever filed by those appellants seeking to extend their grounds of appeal. No notice of appeal was exhibited or produced in the many bundles of documents before this Court. This Court cannot therefore enter into any examination of the extension of grounds in those appeals.

12. In relation to the application to apparently revisit the stay in those cases, that is also not appropriate where the matter has been ruled on previously by the Court and no application in that regard is properly before this Court. Moreover, no additional evidence has been placed before us by way of affidavits from those appellants as to why such a stay should now be granted or indicating any new grounds upon which such a stay should be considered.

Adducing New Evidence

13. I should also note that it was conceded by counsel on behalf of Pepper that, as this was an appeal in relation to an interlocutory matter, no special leave to adduce new evidence was required. I also note that counsel for the applicants informed the Court that the submissions and the evidence before the Court were stated to be the extent of the material on which the applicants (and apparently the existing appellants) would seek to rely on the hearing of the appeals on the 13th July.

Legal Provisions

14. In accordance with O. 86, r. 3(2) of the Rules of the Superior Courts, 1986 (as amended) (hereinafter, "the RSC") the Court may extend time as set by the Rules of the Superior Courts. An extension of time in which to appeal is discretionary. The most well-known case is of course Eire Continental Trading Company Ltd. v. Clonmel Foods Ltd. [1955] I.R. 170 where three criteria were identified as relevant to the application. These criteria are:

(a) An intention to appeal within the permitted time;

(b) Something akin to mistake;

(c) Arguable grounds.

15. In Danske Bank A/S Danske Bank v. Kirwan [2016] IECA 99 Irvine J. in the Court of Appeal expressed the view that those criteria are not essential prerequisites and that the "judgment of Lavery J should not be read as if it were a statute". The Court ought to engage with any meritorious arguments that may be advanced by the party seeking the extension of time.

16. In Seniors Money Mortgages (Ireland) DAC v. Gately [2020] 2 ILRM 407, the Supreme Court said with respect to the judgment of Lavery J. that the Court in that case had identified the criteria as "proper matters for the consideration of the court" although it had modified them to some extent and that the essential point was the necessity to consider all of the relevant circumstances. The Supreme Court also referenced the analysis of Clarke J. in Goode Concrete v CRH [2013] IESC 39 when it was said that "the underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides"

17. In Seniors Money Mortgages (Ireland) DAC v. Gately, O'Malley J. held that longer delay meant that the party applying for an extension of time to appeal required a stronger case, a point she reiterated in Pepper Finance Corporation (Ireland) DAC v. Cannon [2020] ILRM 373. In the latter case she held that a delay of over two months was a significant delay in a context in which the appropriate time period within which to apply was 10 days of the original decision. In that case she did not think that the applicants had made a sufficiently strong case to outweigh the significant delay.

18. Even if one accepts that the applicants only knew of the original order at some time after the service of the attachment and committal papers, they have waited a period of at least 3 months (18th February to 18th May) to bring this application to extend time. That is a significant delay and that can signify that the applicants must establish more than simply arguable grounds. I will consider each of the three Eire Continental principles in turn later in the judgment. I will also consider the justice of the case.

19. The applicants say they would be severely prejudiced by not permitting the extension of time. They say that the new evidence sought to be adduced has already been considered by Pepper in the attachment and committal proceedings. And they would suffer no

prejudice were the appeal to be run in the normal way with all concerned parties represented.

20. The applicants seek to rely upon all matters that were before the High Court in the attachment and committal proceedings. In those proceedings the applicants swore affidavits confirming their tenancies and confirming they never received any documentation from the plaintiff or their predecessors in title. They submit that those affidavits were not challenged and the facts and evidence in that regard is uncontested.

21. In terms of grounds of appeal, the applicants submit that these grounds are almost identical to the grounds of appeal before Sanfey J. save for the removal of the reference to attachment and committal. Pepper have already replied and advanced significant arguments in respect of them. This is the basis upon which the applicants submit there can be no prejudice to Pepper.

No affidavits sworn by the applicants

22. None of the applicants have sworn affidavits in this appeal, instead the affidavits sworn by them in attachment and committal proceedings brought by Pepper in each of the proceedings have been placed before us. An affidavit of their solicitor addresses certain issues regarding formation of the intention, mistake and grounds of appeal. Pepper submits that as there is simply no direct evidence before the Court on any of these issues that the applications fall at the first hurdle.

23. The approach of the applicants in these proceedings is highly problematic. They have not sworn affidavits personally to show when they formed the intention to appeal and why they did not do so within time. They have not addressed their applications individually, instead there is an assumption that the correct manner in which to proceed is to deal with the applicants as a collective. That is wrong as a matter of principle as each applicant must persuade the court that his or her time should be extended but also wrong in the context of this case where different grounds of argument may be made in respect of individual tenants. It is particularly important where the balance of justice has to be considered that an applicant advances his or her own case.

24. I do accept that in certain circumstances, not necessary to discuss here, an affidavit from a solicitor may be appropriate to ground an application. Given that some issues are a matter of law and some were in the knowledge of the solicitors, it is at least appropriate to move towards a substantive examination of these applications bearing in mind the absence of personal affidavits. In those circumstances, it appears efficient for this Court to consider the application on its merits.

The evidence in these applications for leave to extend time

25. The motions to attach and commit were issued on the 12th February, 2021, Mr. O'Reilly says he was contacted on the 18th February, 2021 with a view to representing the

applicants. A point to note is that the evidence is not clear as to how each applicant became aware of the motion to attach and commit so quickly but was not aware of the initial proceedings.

26. Mr. O'Reilly details how he met the applicants in the Four Courts on the 19th February, 2021 when both motions were due to be heard. He says that the clients did not have English as their first language. His initial instructions were to resist the motion for attachment and committal. The clients described, through translators, their living situation and the fact that they had not been made aware of the proceedings until very recently.

27. The matter was adjourned for one week during which an affidavit was prepared. Pepper sought an adjournment and the matter was listed for mention on the 5th March, 2021. Pepper delivered further lengthy affidavits which the solicitor had "to instruct my clients about and seek instructions". This, he says, was a difficult task. They were facing imprisonment and this occupied their minds. He says that given the tight time line this was the only issue that they could address. He also referred to the difficulties in taking instructions with Level 5 Covid-19 restrictions in place.

28. Mr. O'Reilly also referred to the language difficulties, difficulties with obtaining interpreters, with making appointments with people due to work or childcare arrangements or self-isolation periods, a number of clients had returned to their home countries and telephone communication was extremely limiting due to language difficulties.

29. He said that the issue of an appeal was advised and although there was interest he could not get firm instructions as it was extremely difficult for his clients to understand the legal process. He arranged to meet them together, but these arrangements fell through whether in person or on Zoom.

30. He said it was clear that his clients did not understand the legal process in this jurisdiction and none of them believed the court order related to them in circumstances where they had not received any correspondence from Pepper and/or their solicitors. When he met them and asked them about correspondence from Pepper or its solicitors, a number of them showed him correspondence from himself in the belief it was from Pepper.

31. He said that on the 13th May, 2021 he attended the properties and met with the "tenants", a term which is hotly disputed by Pepper, together with interpreters and obtained instructions with a view to appealing the orders. In his earlier affidavit he said that he received instructions on the 18th February, 2021 that they wished to appeal as soon as possible.

32. The solicitor explained in his original grounding motion the background. Each person he represents had paid rent of approximately €100 to Mr. Jerry Beades who held himself out as the landlord. All the occupants have now offered to pay that rent to Pepper, but Pepper has refused to take the rent.

33. Part of the defence to the motion to attach and commit is that the orders of the 25th November, 2020 were obtained in an irregular manner, by material information not put before the High Court and that the order should be struck out as of right. The motions for attachment and committal were heard by Sanfey J. on the 4-5th May, 2021 but no decision has yet been given.

34. Mr. O'Reilly also said that Pepper's predecessors in title had a possession order (against Mr. Beades) for 13 years and had not sought to enforce it. He says that the time for these appeals will not be longer than the appeal already in being for Ms. Hanrahan and Mr. Petrut. There will be no prejudice to Pepper as they are aware of the information.

35. Pepper disputes much of what is said. In an affidavit, Mr. Gerard McHugh, senior portfolio manager with Pepper, gives a very detailed history of the legal proceedings. He says that history demonstrates numerous unsuccessful attempts by Mr. Beades to resist orders being made. Pepper's view is that the applications have been advanced as a delaying tactic for the sole aim of preventing them from securing possession.

36. He notes that since the 28th August, 2019, Pepper and its predecessor in title Beltany, began issuing correspondence to the "occupants of the properties" requesting their identities and seeking copies of all documentation relating to any purported legal entitlement upon which they were occupying the properties. No substantive response was ever received, and the occupants never identified themselves to Pepper's solicitors.

37. Mr. McHugh details that when the application for short service was made in the High Court on the 14th October, 2020, the High Court directed that service be effected by leaving 5 copies in respect of Richmond Avenue at the property addressed to "The Occupants" and two copies addressed accordingly to "The Occupants" at 21 Little Mary Street. No Order was ever drawn up in relation to the 14th October, 2020. Pepper maintains that the Court gave its directions, which was referred to by counsel for Pepper on the 25th November, 2020 at the hearing in which the Injunctions Orders were granted.

38. Various affidavits of service (of both the documentation subsequent to the direction of the High Court regarding service and of the Orders made on the 25th November, 2020) have been produced to the Court which show, despite the ringing of buzzers in each of the properties on various occasions, there was no answer and that letters were left inside the door and/or at the foot of the post boxes. Occasionally a number of individuals were spoken to at the premises. These people indicated where post was to be left. A number of emails from which contact had been made purporting to be from tenants of the properties were also sent the correspondence and documentation. Mr. McHugh also noted that Mr. Petrut in an affidavit he swore on the 15th December, 2020 said he "only recently became aware of a Bank problem from other Romanian Tenants".

39. Mr. McHugh referred to a request made by counsel for the applicants before Reynolds J. to update the pleadings to reflect who it was Pepper sought to imprison as the 20 people were now known. This was characterised by Reynolds J as a:-

"cost generating exercise and nothing else. These people have come to light at the very last minute and the suggestion that all of the pleadings would have to be amended at this stage is simply inconceivable... There is no precedent whereby persons that are sued as persons unknown because they are unknown at the time, where it is thereafter necessary to amend the proceedings simply because certain parties come out of the woodwork as such. These parties, if they were in situ at the time of the making of the previous orders, they were well aware of the making of those orders, chose not to engage with the court process. So the suggestion now that all of these proceedings would have to be amended and further costs incurred is simply not going to fly with this court. "

Pepper did however suggest and in fact amended the Notices so that the names were listed in the schedule to the motion to attach and commit.

40. Mr. McHugh says that none of the 12 purported grounds of appeal are even remotely arguable. He avers to an interview that Ms. Hanrahan gave to The Irish Inquiry in which she effectively conceded that the appeals were ultimately a matter about staving off the inevitable. This interview was given after day one of the hearing in the High Court before Sanfey J..

Formation of Intention

41. This is the first criterion to be considered in accordance with the decision in Eire Continental. The applicants seek to rely on what they claim was lack of knowledge of the order when made and then subsequent difficulty with forming an intention for the reasons set out before. The applicants, through their solicitor, say that they formed the intention to appeal after becoming aware of the order, apparently through a former resident who is not a party to the appeal, but their immediate focus of energy was on the attachment and committal proceedings. They faced jail and risked being homeless at the height of the pandemic.

42. The first principle requires that an intention be formed in the time in which to appeal. For the purpose of this point, I will accept, without determining, that time could really only have begun to run from the 18th February (or thereabouts) when they say they became aware of the original order. The first problem is that there is no direct evidence from the applicants as to when they formed an intention to appeal. Their affidavits in the High Court did not address that issue (or certainly none have been brought to our attention as having done so). Those affidavits were addressed, in part, to the issue of service of the original proceedings. Mr. O'Reilly attempts to fill that evidential void, but there is a fundamental problem in that Mr. O'Reilly gives two different versions of when the intention was formed. He initially says the intention was formed in February, but then explains in his subsequent affidavit that he could not get instructions and it was not until the 13th May that such an intention was formed.

43. I take the view that when instructions were taken to challenge the motion to attach and commit, it must have been possible to take the instruction to challenge the original order. Indeed, a considerable amount of legal argument was addressed to Sanfey J. and was

based upon affidavits sworn in March 2021 challenging service. It is also noted that the issue of service does not appear to have been directly raised with Reynolds J. in the context of an application to set aside her own order. Instead, the applicants launched into a full defence of the application to attach and commit.

44. I am satisfied that it has not been demonstrated that an intention was formed within the time for appealing the order of Reynolds J., even if that period of time runs only from the 18th February, 2021. I am also not satisfied that there has been a satisfactory explanation as to why, despite the ability of many of these applicants to swear affidavits responding to the motion before the High Court in or about the 19th and 20th March, 2021 (and two applicants swore affidavits on the 22nd February, 2021) which would have required detailed instructions to be taken and detailed advice to be given, that it was not possible to give advice and take instructions in respect of the matter of an appeal. Indeed, it is striking that it was a week after the hearing of the motion before Sanfey J. that there was a specific attempt to meet the tenants for the purpose of an appeal. I note that Mr. O'Reilly talks of meeting all the parties together, but it is not clear why such instructions and advice had to be taken together. It is not clear such an approach had been taken to the defence of the motions to attach and commit. It is certainly unclear as to why, at least at the time each applicant was giving instructions for the purpose of his/her affidavit, that he or she could not be advised as to an appeal and/or did not give instructions as to filing one.

Mistake

45. The existence of a mistake is the second of the Eire Continental criteria. There is nothing like mistake here, but simply a claimed lack of knowledge and an inability to give advice and take instructions. For the same reasons as above, I am not satisfied that this principle can be said to be met.

Arguable Grounds

46. This is the third criterion indicated in the Eire Continental decision. In every application for a leave to extend time for appeal, a crucial consideration will be whether there are arguable grounds. That will affect, most particularly, the issue of the balance of justice but, as set out above, delay will require more significant arguable grounds. The applicants set out 12 grounds in their proposed notice of appeal. Some of these are generic grounds and some for example "the learned judge erred in law by failing to observe procedural justice in contempt proceedings" simply do not apply. The order against which appeal is sought is not a contempt order.

47. At the oral hearing counsel made two fundamental points which had sub aspects that at times applied to both points. The two points raised were:

(a) The applicants have an arguable case that they have valid tenancies;

(b) They have an arguable case that there was material non-disclosure before the trial judge.

What is an arguable ground?

48. An issue arose at the oral hearing as to what was meant by an arguable ground of appeal. This issue had been prompted by an enquiry as to how the applicants sought to distinguish the situation as to these tenancies from the Fennell and Anor. v. N17 Electrics Limited [2021] 4 I.R. 634 line of authority (to which I will return) that was raised by Pepper. Counsel conceded that there was a certain validity in what had been submitted by Pepper (without conceding the point) but said that he only had to establish an arguable ground and that the issue of whether the tenancies were valid could be dealt with at the hearing of the appeal.

49. Undoubtedly an applicant for extension of time has to do more than assert that he or she has an arguable ground. An arguable ground is not an ephemeron or a chimera or ethereal. It must have substance but does not have to be substantial. It is something more than an assertion that there is an argument, the argument itself must be laid out.

50. Counsel turned to the written submissions to rely on the arguability especially as regards the validity of the tenancies. These are the written submissions upon which the applicants have said they will rely upon if granted leave to appeal. The arguments set out therein will be considered.

Are there valid tenancies?

51. The applicants say there was a history of almost 20 years of residential tenancies in at least some the properties. They say, contrary to what the trial judge was told, there was consent (subject to conditions) to residential tenancies by the original lender at the time of the mortgage.

52. The applicants' submission is that Pepper has incorrectly relied upon a negative pledge in the mortgage to Mr. Beades as one of the bases on which to seek an order of eviction where the real issue is the validity of the lease for every apartment. They say that the burden of proof lies with Pepper and not the applicants (as defendants) to establish that every lease with its own set of individual facts is valid or otherwise.

53. An issue here is that there was in fact a form of limited consent given in the facility letter of the 20th May, 2003 in which IIB Homeloans Ltd. agreed facilities of a loan to Mr. Beades secured on the two properties. The applicants say that Reynolds J. was not told of this but gave the orders on the basis that there could be no lawful basis for occupation of the premises, referring only to the deed of mortgage but not the clause in the facility letter.

54. The applicants submit that this was misleading (they have not pursued it as a deliberate misleading of the court) and that it was a material non-disclosure. I will deal with that aspect of the case more fully under the heading of lack of candour. I consider however that the applicants who seek to make a case that they have acquired rights under the Residential Tenancies Act, 2004 (hereinafter, "the 2004 Act"), have a duty to make that

argument to the extent sufficient to reach the threshold of an arguable ground. Moreover, where there has been significant delay, the threshold of arguability is correspondingly higher.

55. The argument arises in the context that this was a mortgage to which the provisions of s. 8 of the Land and Conveyancing Law Reform Act, 2009 (which repealed certain provisions of the Conveyancing Act, 1881) did not apply. The mortgage included a clause that the borrower will not without the previous written consent of the lender grant or agree to grant any lease or tenancy. Thus, on its face, it demonstrates a contrary intention (as per s. 18(13) of the Conveyancing Act, 1881) in order to derogate from the provision of s. 18(1) of that Act. It is the case however that special condition 34 of the facility letter giving rise to the bank debt, contained a form of limited and conditional consent to the creation of a tenancy of each of the Properties by Mr. Beades. That provision reads as follows:-

"The Lender consents to the Borrower creating a tenancy in respect of the premises on the following terms:

(i) The term of the tenancy must not under any circumstances exceed 1 year. No options to extend such a tenancy will be permitted.

(ii) The tenancy must be in writing and at an arm's length transaction between the parties.

(iii) The rent reserved must represent the open market rental of the premises.

(iv) A solicitor's certified copy of the tenancy agreement must be furnished to the Lender once executed by the tenant. Any extension of a new tenancy must comply with the above provisions."

56. There is a long line of authority that establishes that where consent is not provided by the lender that a lease created between the borrower and their tenant is not of itself sufficient to create a legal relationship between the borrower's tenant and the lender. A prime example of these authorities is Fennell and Anor. v. N17 Electrics Limited where Dunne J. in the High Court, having reviewed in detail the jurisprudence and academic commentary in this area, stated at para. 30:

"It is also clear from the authorities… that the mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not, of itself, sufficient to create a legal relationship between the mortgagor's tenant and the mortgagee."

I observe that in this case there is no evidence that the rent paid to Mr. Beades was used to discharge his obligations to the lender.

57. What the applicants say is that as there was "consent" in this case that Fennell and Anor v. N17 Electrics Limited line of authority is of little relevance. They submit that the question to be answered is not whether consent has been provided but whether the terms

of that consent have been met such that a relationship of landlord and tenant exists between Pepper and the applicants. They submit that each lease must be examined separately. They rely upon the judgment of Ní Raifeartaigh J. in Kennedy v. Kelly [2020] IECA 288 where she stressed the importance of examining each case on its own facts in order to see if the relationship of landlord and tenant has been created as between the tenant and the lender/mortgagee (as distinct from the mortgagee/landlord). I should add that the decision in Kennedy v. Kelly establishes that the Fennell and Anor v. N17 Electrics Limited principles also apply to residential tenancies.

58. The applicants' case is that special condition 34 and the consent provided means that each lease attracts the provisions of the 2004 Act giving the tenants security of tenure after 6 months. They say some leases have been registered with the Residential Tenancies Board and that there is no evidence provided by Pepper that the rent reserved did not represent the open market rental of the properties which was one of the conditions in clause 34.

59. The applicants' argument is, in many respects, deceptively simple; these are no longer simple negative pledge cases, instead the nature of their cases is more complex by reason of the consent clause i.e. clause 34 in the facility letter. Pepper's response is also simple. This was a temporary limited consent and that "any such entitlement on the part of Mr. Beades came to an end, at the latest, on the date when the possession proceedings were initiated and almost certainly long before that date". The latter point stems from the requirement that the special summons must be preceded by a demand for possession.

60. I do not understand Pepper to be making a submission that clause 34 means that consent was only granted for a period of one year from the date of the facility letter to the creation of a once off year-long tenancy. I would view any such construction of clause 34 as implausible. It seems to me that clause 34 was to apply in a more open ended or general fashion to the right to create one year tenancies but importantly consent was conditional and the tenancy could only be valid as against the Bank if made in compliance with the explicit conditions set out in clause 34.

61. On the other hand, it is a very strong argument that, at a minimum, at the time when an order for possession was made, Mr. Beades had no conceivable lawful basis on which to grant a tenancy for a premises to which he no longer had a right of possession. This is an argument that in law, as he had no right to possession, he could not create the relationship of landlord and tenant in respect of that premises. He was in effect a trespasser. As against that argument the applicants' submissions are eerily silent. Arguments about obtaining rights under the 2004 Act can only reach the launch pad where there is a valid tenancy in the first place. As Ní Raifeartaigh J. phrased it in Kennedy v. O'Kelly:-

"It seems to me that this is to put the 'cart before the horse', as it were, and that the appropriate sequence is to inquire as to whether there is a valid tenancy (whether a residential tenancy or other form of tenancy), in the first instance; and only if that question is answered in the affirmative does the Act come into play".

62. The applicants have not pointed to any legal authority that would permit a person who has no entitlement to possession to create a tenancy in respect of a property. In fact, it is perhaps coincidental that authority for the proposition that the mortgagor, Mr. Beades, was a trespasser, can be found in a recent Court of Appeal decision concerning these properties. In KBC Bank Plc v. Beades [2021] IECA 41 Whelan J. stated at para. 59:-

"If the appellant as mortgagor subject to an order for possession made in open court in the presence of his counsel in June 2008 has seen fit to subsequently place third parties in occupation and possession of the said property on any basis, such conduct on the part of the appellant was wrongful and in breach of the order. The appellant, as a mortgagor who has resisted the mortgagee's valid demand for possession in the manner in which he has done, automatically becomes a trespasser as is well established in law having regard to authorities such as Birch v. Wright (1786) 1 Term Rep. 378 at p. 383 and Jolly v. Arbuthnot (1859) 4 De G. & J. 224 at p. 236."

63. At its highest what the applicants submit is that in all the applicants' cases, the burden of proof is turned around and that in relation to each and every applicant Pepper has to demonstrate that there is no consent. That is entirely at odds with the reality of the situation which is that by July 2008 when the order for possession was made, it cannot be said that there was any consent express or implied to Mr. Beades creating tenancies. He was a trespasser. Indeed in the passage quoted by the applicants from the judgment of Ní Raifeartaigh J., it is clear that there must be something more than:-

"mere awareness of the presence of a tenant on the premises or the application of rent to repay the obligations of the mortgagee (sic), which might displace the general position that a lease created without such consent would not usually be binding as against the mortgagee".

64. The first point to note is that the applicants make the argument as to the change in the burden of proof in circumstances where there is not a shred of evidence that any of their tenancies did in fact comply with the conditions of the consent set out in clause 34. They have not provided any basis for arguing that there was a consent to any specific lease. Their affidavits are conspicuously silent as to how they might contend that there was such consent. There is no evidence as to the terms of the rent meeting market conditions or that the lease was sent to the solicitor for the lender. The latter point is particularly significant. The notice to the mortgagee/lender is an essential element of the agreement between the mortgagee/lender and the mortgagor/borrower. The applicants have not even pointed to requests made to Mr. Beades to furnish any purported notices sent to the Bank or successors in title for the purpose of this application or for the purpose of defending the attachment and committal orders.

65. The argument of the applicants that the cases must be decided in a case specific way is at odds to their own approach which is not to single out individuals (subject to five who claim to have tenancies prior to the order of possession which was granted in 2008). Apart from those five applicants, all the other applicants' leases purport to have been created after the possession order. I do not consider that there is any construction of

clause 34 that would permit the borrower, by then a trespasser, to create leases after he has been ordered out of possession. No such proposition that could stand as a matter of law has been offered to the Court in written or oral submissions.

66. There is therefore no arguable case that those persons who only entered into tenancies with Mr. Beades after the order for possession was granted have a valid tenancy as against Pepper. Pepper has contended that those applicants may have a case against Mr. Beades. That is not something that this Court has to deal with. Ultimately it is a matter for those applicants to decide whether they wish to embark on such an action or not.

67. There are five applicants (although the written submissions of the applicants refer to four) who claim that they were in occupation prior to the grant of the order of possession; these are Ms. Doina Bortas and her partner Mr. Vasile Circu who claim a tenancy at Flat D 31 Richmond Avenue, Ms. Dorina Brat and her husband Ioan Brat who claim a tenancy in respect of Flat B 31 Richmond Avenue and Augustin Gabor who claims a tenancy at Flat 4, 21 Little Mary Street.

68. I will deal with Ms. Bortas and Mr. Circu first. Ms. Bortas swears she was signed a tenancy agreement in 2005 and refers to an exhibit. This exhibit refers to Flat D but only names Mr. Circu as the tenant. Ms. Bortas says she lived at Flat A and moved into Flat D in 2012. Mr. Circu swears that he and his partner entered the tenancy agreement. There is then a passage at paragraph 5 which is an exact replica of that sworn by Ms. Borta in relation to Flat A in 2005. This says that he moved to Flat D in 2012 and then says that he currently resides with his partner (Mr. Vasile Circu). It is entirely unsatisfactory that there is an apparent error in this drafting. However, from the point of view of Mr. Circu, he exhibits a number of documents which show that he lived in Flat A during the period 2008 and 2009. Other documents show he appeared to live in Flat D from 2013/2014.

69. On this basis, there is simply no evidence that at the material time, i.e. before the making of the order for possession, that either Mr. Circu or Ms. Bortas lived in flat D. There is therefore no arguable basis on which it could be argued that they have any tenancy which could conceivably impact on the right to possession of Pepper.

70. In relation to the case of Mr. and Mrs. Brat, they are in a slightly different situation. Mr. Brat says that he and his wife entered into a tenancy agreement with Mr. Beades in 2004 for Flat B 31 Richmond Avenue. He exhibits however two tenancy agreements for 2009 and 2010. In his affidavit of 20th March, 2021 he does not refer to any earlier written agreement but says that he entered into a tenancy agreement with Mr. Jerry Beades in 2004. In any event any such purported tenancy appears to have been overtaken by the subsequent one year tenancies in 2009 and 2010; that issue was not addressed in legal submissions on their behalf. I also note that Mr. Brat, swore an affidavit on the 22nd February, 2021, (like another applicant Mr. Bataraga), which was exhibited by Mr. O'Reilly in his affidavit in defence of the motion to attach and commit.

71. Furthermore, these applicants have not engaged in anything other than an assertion that the existence of a lease with Mr. Beades prior to 2008 could have given them a valid

extended tenancy which would be binding against the mortgagee. In particular, Mr. Brat was in fact served with the possession proceedings in 2008 but did not apparently take part in those proceedings. No arguable ground was engaged with/demonstrated to show that a mortgagee who acquires an order for possession, having served proceedings on a person in possession, only takes possession subject to the interest that person has by virtue of a lease entered into with the mortgagor simpliciter.

72. The position with regard to Mr. Gabor is similar in one respect to Mr. Brat. He says he resides in Flat 4 No. 21 Mary Street. It is apparent from the affidavit of service of Maria Kavanagh in the original possession proceedings that he was also served in those proceedings at that address in 2007. For the reason set out above, no arguable case has been demonstrated that the order for possession was subject to any lease he may have had simpliciter in spite of the fact that he did not participate in those proceedings.

73. Moreover, in his affidavit Mr. Gabor says he was residing at that address for approximately 15 years. He says that he currently pays "a reduced rent of €100 a week since the Covid 19 to my landlord and I am not in arrears". His affidavit is unusual as he never directly states who he claims is his landlord or how the tenancy came about. He exhibits no tenancy agreement. He says he never received any letters, post or anything from Pepper and that he never checks or knows of any general post that comes into the building.

74. He also says that he attended the Four Courts on Friday the 26th February, 2021 "as I believed that I was required to do so". He, like the other tenants, never give a precise indication as to how they came to that belief.

75. Mr. Gabor accepts he received correspondence some time ago, in 2009 or thereabouts, from the Bank in relation to a law case "in which our landlord was involved at the time". This appears to be the same service Ms. Kavanagh refers to which took place in December 2007. He does not state why he chose to ignore that.

76. The implication from his affidavit is that his landlord was Mr. Beades. He exhibits no written agreement and is silent as to that fact. He is represented by solicitor and counsel and has been since February 2021. In the circumstances, I cannot draw a clear inference that he had such a written agreement. The importance of a written consent must have been uppermost in the minds of counsel and solicitor at least at that time they swore that affidavit and at a minimum at the time of the submissions to Sanfey J. on the motion to attach and commit. It was the issue of clause 34 being an apparent consent to the letting of the tenancies by Mr. Beades that featured to such a large extent in the criticisms by these applicants of the information put by counsel to Reynolds J. at the application on the 25th November, 2020. Certainly, by the time this application to extend time was issued, the approach of Pepper was known to the applicants. The submissions of counsel call, on the one hand, for a case by case analysis so it is inconceivable that the importance of a written tenancy could have been overlooked. This is particularly so as the rest of Mr. Gabor's statement is carefully drafted so as not to give any indication whatsoever that he knew of the proceedings before the Court in November 2020 i.e. it never says he did not

know but simply that he did not receive post addressed to him at his flat or addressed to the building generally.

77. Put simply, all available evidence, including the order for possession in 2008, the deed of mortgage, the facility letter, the evidence of occupation averred to by the applicants together with the Fennell and Anor v. N17 Electrics Limited line of authorities, suggest that there is no basis for saying that on the basis of a reverse burden there is an arguable case that all or any of these tenancies are binding on Pepper. In light of the complete absence of any factual or legal basis for arguing that all or any of these applicants have an arguable case based upon their tenancies, I must reject the application for an extension of time to appeal based upon any ground concerning the validity of those tenancies. The balance of justice can only enter into consideration if there is at least an arguable ground. On the contrary, as far as the validity of the tenancy is concerned the applicants have failed to show that they meet any of the Eire Continental criteria. It would not be in the interests of justice to permit an extension in those circumstances.

The Issue of Irregularly Obtained Judgment

78. The title to this objection is one which has been identified by Pepper as stemming from the applicants written submissions. In truth it probably covers the various intended grounds of appeal that have been raised in the draft notice of appeal. I will address the miscellany of points raised.

Defect in Service

79. A ground advanced at the hearing of the application was that there was a defect in service. The applicants deal with this in their written submissions under the title "problems with service of documents" and "no order for substituted service". They contend that no order for substituted service has been made and that they have been deprived of their right to defend the eviction order at first instance by Pepper failing or refusing to serve or adequately serve any pleadings or correspondence on them. The applicants claim that both the original proceedings were not validly served i.e. that the judgment was irregularly obtained and that the orders were not validly served.

80. The applicants submit that Pepper submitted to the High Court on the 25th November with respect to 31 Richmond Avenue as they say that "Mr. Beades and his representatives were routinely collecting rent from the occupants of the property and removing correspondence which had been sent by solicitors for Beltany." They rely upon this to show there was knowledge of tenants and rely also on the wording of part of the plenary summons which mentions tenants.

81. The grounding affidavit of Mr. McHugh stated that the identities of the defendants were unknown as, inter alia, they have refused to identify themselves to the plaintiff and its predecessors in title. The applicants say that the correct addresses of the tenants were always known to Pepper. The applicants say a number of the tenancies were registered in the Residential Tenancies Register pursuant to the 2004 Act. Despite this, they submit,

neither the proceedings nor correspondence was served on these tenancies and the High Court was not informed of the history of the tenancies. It appears from the affidavit of Mr. O'Reilly in the High Court that the website of the Residential Tenancies Board displays the location where tenancies are registered. This Court has been informed by Pepper that the register is not public, no counter argument was made to this by the applicants. There was therefore no means by which individual tenants could have been identified by Pepper.

82. The applicants also submit that the names of certain tenants had in fact been delivered to the mortgagee as far back as 2007 namely Doina Bortas (who has two children) and Vasile Circu (of flat D in Number 31), Dorina Brat and Augustin Gabor. I note however that of the present applicants, none of them have averred that they were known to be in situ as tenants by Pepper or its predecessors. Although Mr. Gabor says that he was served with proceedings in 2007, he does not claim to have engaged with those proceedings or in any other way made himself known to Pepper or its predecessors in the intervening years. Mr. Brat's affidavit is silent as to being served in 2007 but he does not claim to have engaged with those proceedings or to have made himself known to Pepper or its predecessors.

83. Apart from the service of the prior correspondence, there were also affidavits of service in respect of the plenary summons, the notice of motion and grounding affidavit which were served in accordance with the directions of Reynolds J.

84. I agree with the submissions of Pepper that there is a distinction between an application to set aside an "irregular" judgment or order (i.e. where the has been a significant defect in the procedure leading to the judgment or order being obtained) and an applicant to set aside a "regular" judgment or order (i.e. where there has been no significant defect in the procedure leading to the judgment or order, but the applicant nonetheless contends that the judgment or order should be set aside).

85. Clarke J. (as he then was) in Ó Tuama v. Casey [2008] IEHC 49 in the following manner:-

"[W]here judgment is obtained irregularly, the court will normally set aside the judgment without enquiring into the merits of the proposed defence. The logic of this position is that the judgment should not have been obtained in the first place and a plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion. On the other hand, where judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment so as to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward."

86. Therefore, if there was irregular service the court has to set aside the Order despite the absence of any other arguable defence. Of course, then the proceedings may recommence in another manner.

87. A major difficulty for the applicants is that they come to this Court without ever having made an application to set aside the judgment or order of the 25th November, 2020.

Indeed, they have participated in a full two-day hearing of a motion to attach and commit without, it appears, having asked for the order to be set aside. If the applicants had asked for the order to be set aside and were refused, they could appeal to this Court. It also appears that they ventilated certain issues before Reynolds J. when the motion was before her, prior to the date for hearing being set but not apparently this central contention that they now make.

88. An appeal is in the usual course based upon a decision taken by the High Court. No application to set aside has been made here. Indeed, it could be argued that having participated in the motion the applicants had waived their right to seek to set the order aside. I should also say that a court is also entitled to have regard to the entire circumstances in which a party seeks to set aside an order obtained in default of appearance. Pepper has pointed to the case of Allied Irish Banks Plc v. Darcy and Anor [2012] IEHC 305 where Ryan J. in the High Court determined that the applicant had failed to offer a sufficient explanation for his delay in bringing the application to set aside a judgment obtained in default of appearance; his depression had not offered an excuse where he was actively engaged in pursuing certain linked proceedings. Ryan J. viewed it as a question of whether, in the overall circumstances, there was a substantive defence to the claim.

89. It is well established that a litigant will not succeed on an application to set aside an order obtained in default of appearance by merely asserting that they have not been validly served. In terms of whether there had been an irregularity in the obtaining of the judgment because of the failure to comply with the RSC, in the present case, we have a situation where directions were given as to how the occupants of the premises were to be served. This was in the context of the clear averment by Mr. McHugh that Pepper was not aware of the identities of the tenants and that previous correspondence had not produced any contact. The applicants make submissions that the identities were known because Mr. Brat and Mr. Gabor had previously been served in respect of the possession proceedings. Neither of those two make any reference to an appearance in those proceedings, nor to communications on their own behalf with IIB or its successors in title. In short there is nothing to indicate that Pepper or its predecessors in title were aware of current or ongoing occupation by particular named persons.

90. These were proceedings which had issued against Persons Unknown in current occupation. Nothing that has been submitted demonstrates that this was untrue or that Pepper's predecessors must have known who was in occupation. The issue of personal service or service by registered post must be seen in that context. In those circumstances, directions were sought from and were granted by Reynolds J. as to service. Her memory as to those directions was refreshed by counsel and she accepted that such service was good. Indeed, it had produced two persons to come forward and identify themselves as occupants. The affidavits of service were opened in detail and Reynolds J. accepted that the service was good.

91. I do not accept that there was evidence that any particular tenants remained in situ from the time of the possession order. Mr. McHugh responding to these applications by affidavit listed multiple occasions when the occupants of the two premises were sent papers but there was no engagement by any of these occupiers. In circumstances where difficulties in identifying the occupants had been brought to the attention of the Court and directions given and adhered to, I do not accept that there is a clear ground that this order can be said to have been obtained irregularly because of lack of service.

92. In the present case, there is no doubt but that the occupants of the two properties were served with the proceedings, the documents comprising the injunction applications and the injunction orders bearing a penal endorsement in compliance with the directions concerning service which were given by the High Court (Reynolds J.). Those directions involved inter alia leaving five hard copies of the relevant documents to 31, Richmond Avenue and leaving two hard copies of the relevant documents to 21 Little Mary Street. They were so delivered by the leaving of the documents at the premises.

93. There was a significant delay in the proceedings where these applicants were actively engaged in pursuing another aspect of these proceedings i.e. the contempt proceedings. While I can accept that those contempt proceedings may have been uppermost in the mind of the applicants and their legal advisers, part of those considerations had to address the overall defence of their position. For whatever reason, despite being in a position to give full instructions to lawyers on the defence of the motion, these applicants only chose to pursue that motion and it was over a week after that two-day hearing that they sought to appeal.

94. Overall therefore, I do not consider that there is any arguable ground of any great strength upon which the applicants can come to this Court seeking to set aside a judgment when no such application was made to the court below in circumstances where the meaning and application of that judgment was still a live issue in the form of the contempt proceedings.

95. The fact that the applicants claim that they were not served is an entirely different matter to the claim that the judgment was procured in an irregular matter. Their claims in respect of lack of service do not render the order and judgment irregular in the overall circumstances of this case. If their claims as to non-service (and therefore no knowledge) of the injunction orders are accepted, it might give them an answer to the present motion to attach and commit but that is before Sanfey J. and I do not believe that it is necessary for this Court to make a pronouncement on it. This is not a matter which would give rise to an arguable ground of appeal.

96. I must however consider the overall balance of justice in the situation as to the irregularity of service on the basis that the lack of service in accordance with the rules and in the absence of a formal order for substituted service may be arguable even if not of any great strength. In that situation I take into account for the balance of justice that:

(a) there has been a very significant delay in making this appeal;

(b) the service actually made was in accordance with directions of the High Court;

(c) there is no compliance with grounds one and two of the Eire Continental grounds;

(d) there has been no application before the High Court to set the judgment aside;

(e) in the interim there has been a two-day hearing on a contempt motion, that the issue of service/knowledge forms part of the defence to that motion;

(f) even if successful on the application to set aside it would not give the applicants entitlements as their leases are not valid;

(g) even if the applicants are entitled to those tenancies and to have the legislative requirements met for the purpose of terminating a tenancy they have had a very significant and lengthy period to date in which to seek to organise alternative accommodation;

(h) the applicants have not sworn personal affidavits in these proceedings,

(i) the affidavits of the applicants appear to rely upon the technical grounds of non-service and avoid engaging with whether they knew of the proceedings at the time;

(j) Pepper has an interest in reaching finality with these proceedings; and

(k) the interest of the administration of justice is at stake whereby applications ought to be made before, and not after, taking up two days of court time (with further judicial time needed for the writing of a judgment on that motion) which may not have been necessary (at least in theory) if this issue had been addressed in a timely manner.

I am satisfied that when those matters are fully considered the balance of justice clearly leans in favour of refusing this application to extend time in which to appeal.

Lack of Candour

97. I must consider whether the applicants have any arguable ground of appeal in relation to the validity of their leases arising from the fact of an apparent failure to inform the Court of the fact that the facility letter contained clause 34 which provided for consent subject to certain explicit conditions. It is surprising that, in the voluminous documentation we received, we did not receive the affidavits grounding the applications for the injunction orders. Presumably this is because it is not gainsaid that all the correct evidence i.e. the facility letter, was before the Court, the issue is what Reynolds J. was told. We have the transcript of the 25th November, 2020 proceedings.

98. The transcript demonstrates that the High Court judge had the papers and had time to consider them. The issue that arises is that counsel, when he commenced making his application, referred to the mortgage and clause 13(iii) thereof. The motion judge then responded: "the equivalent of the negative pledge clause". Counsel then referred to what Mr. McHugh said in his affidavit unequivocally "is that there has never been any evidence

produced by any party to the effect that there was ever consent provided to IIB or KBC or Beltany or indeed, Pepper to the creation of any tenancy in respect of these properties and that stands to reason Judge, if you think about it because, as long ago as 2006, IIB was initiating proceedings against Mr. Beades seeking an order for possession in respect of these properties. So the idea that the mortgagee would have in the intervening 14 years consented to the creation of a tenancy is, in my respectful submission, illogical."

99. Reynolds J. in granting the orders stated that "it was clear […] from the evidence that there can be no lawful basis for the occupation of these properties. It is quite clear from the Deed of Mortgage which has been opened to the Court that the terms of the mortgage specifically preclude any occupation or lease of the premises without […] consent and it is quite clear that there has never been any consent forthcoming."

100. It is against that backdrop that the applicants say there was material non-disclosure because there was in fact consent provided by the facility letter. The facility letter forms the background for their argument that the general consent to the creation of tenancies shifted the onus of proof regarding consent/lack of consent to Pepper. Yet as I have set out above, a shifting onus could have made no material difference as there was no possible consent to the post possession order leases and there was no evidence that residents in occupation prior to the possession order were either in occupation with a written lease for their particular flat or they were tenants who had never contested the earlier proceedings in relation to the possession order.

101. The applicants accepted that this was not strictly speaking an ex parte application if one considers that there has been service of the papers, but they do contend that in the absence of the appearance of any respondent to the motion in the High Court there remained a duty of candour on counsel in seeking the order. I consider that the duty of candour would extend to the type of situation that applied here. Proceedings had been taken against Persons Unknown, by virtue of the number of copies of the documents left at the premises it was at least suspected that there were multiple occupants i.e. in excess of the two who entered appearances, and where despite those appearances no one appeared before the Court to resist the application.

102. The applicants did not refer to any case-law on the issue of the duty of candour, but I consider that it is appropriate to refer to the decision of Clarke J. in the High Court, in the case of Kanwell Developments Ltd. v. Salthill Properties Ltd. [2008] IEHC 3 where he referred to his earlier decision in Bambrick v. Cobley [2006] 1 ILRM 81.

103. In Kanwell Developments Ltd. v. Salthill Properties Ltd., Clarke J. reiterated that in considering what is material the court must consider the extent to which the party is culpable. It must also consider the level of materiality of the material. In Bambrick v. Cobley, Clarke J. stated that a duty of candour lay in respect of all ex parte applications but that one of the factors the court should take into account in deciding what to do about non-disclosure was the extent of the rights involved i.e. procedural or affecting substantive rights or obligations. In both cases he indicated that if the disclosure of something may have caused the judge to make a different order, even as to short service

or the exercise of a discretion, then it was material. In Bambrick v. Cobley the Court held that it could weigh in the balance of justice, the extent of the materiality at issue.

104. The first issue for adjudicating upon is whether there was in fact non-disclosure of the facility letter and the possibility of consent to a tenancy. The facility letter was among the papers. Leaving aside the materiality (or level of materiality) of the facility letter to the overall issue in the case, I do not consider that the mere fact of it being in the judge's papers was sufficient in and of itself. The mere fact of a letter being exhibited among hundreds of pages of documentation would not be sufficient to ensure that a judge would have been mindful of the full implications of each clause of a letter on a material issue in what is usually a busy list. Counsel has a duty to ensure that matters of materiality are specifically brought to a judge's attention when seeking ex parte orders (or orders that are in effect ex parte).

105. In this case there was a discussion with the judge about the mortgage and she referred to the mortgage containing the so-called negative pledge. It was clear that the motion judge was highly attuned to that as a live issue where an injunction against occupants in these premises was being sought. The exchange between judge and counsel was quick, this was in the context of a speedy hearing and I do not find that there was deliberate non-disclosure on the part of counsel. Nonetheless the judge was left with the impression, as conveyed by the words of her judgment, that no consent of any type had been given. To that extent if the facility letter was material, it might arguably amount to a failure, albeit inadvertent, to make full disclosure not to draw it to the judge's attention.

106. I have already indicated that the facility letter is not material to the rights or obligations of these occupiers vis-à-vis Pepper. Moreover, the position is that Pepper was claiming that the occupants of the premises were trespassers, and this was the basis upon which the proceedings were moved. The evidence demonstrated that letters had been sent to the occupants (at least in general) but no one had engaged to claim a lawful tenancy or indeed to communicate their identities. On the other hand, if disclosed, it is perhaps arguable that this may have caused the judge to make some enquiries about whether this facility had in fact been used and whether any longer term tenancies had come into existence on foot of any year-long tenancy agreement with Mr. Beades. The extent of the relevance of that should not be overstated as it could only have covered tenancies that came into being prior to the possession order in 2008. Furthermore, as it turned out, we now know that no valid tenancies have been shown to be in existence.

107. I am satisfied that the issue of material non-disclosure in an application does not, on the authority of Kanwell Developments Ltd. v. Salthill Properties Ltd., amount to an issue of irregular judgment, where the order must be set aside as of right. In that case, Clarke J. weighed the balance of justice and found that it did not lean in favour of discharging the order nisi which had been obtained notwithstanding his finding of material non-disclosure.

108. This is a matter where the Court must weigh the balance of justice. The materiality of this issue of not referring to clause 34 is very limited, it does not extend to the question that these injunctions should not have been issued on the basis that to do so would be a

breach of any right of the applicants to occupation of the premises. At most it might have caused the judge to ask further questions which may have required explanation. I have set out above in respect of the ground of appeal concerning irregular service why the balance of justice lies in favour of not granting these applicants an extension of time in which to appeal. Those grounds are also relevant and applicable to the decision I have reached that the balance of justice lies in favour of refusing the applicants an extension of time to appeal on this ground also.

Persons Unknown

109. The applicants also put forward in their submissions that this order should never have been made against persons unknown. That, it is submitted, is a concept not known to the law and furthermore that at the time of the hearing on the 25th November, 2020, two persons were in fact known as they had entered an appearance. This point was not pushed at the oral hearing as in truth our courts have granted injunctions in this way.

110. I do note that the applicants in their written submissions rely on the decision of the Court of Appeal in England and Wales in Canada Goose UK Retail Ltd. v. Persons Unknown [2020] EWCA Civ 303. I also note that that case concerned facts that were entirely different from those at issue here.

111. Even if this ground of appeal was arguable, I am satisfied that for the reasons I have set out above, that the balance of justice does not require that an extension of time to appeal be granted.

Failure to deliver a statement of claim

112. One ground of appeal states that the judge erred in granting the interlocutory injunctions where Pepper refused to deliver a statement of claim and relies solely on the interlocutory orders without any intention to seek final orders. How that might be an appeal against the interlocutory injunction where the whole point of these applicants' contentions is that they did not know of the application (and of course by implication could not have called for delivery of a statement of claim) has never been explained. That ground is hopelessly unstateable. My comments here are of course related to this as an appeal ground, it is for Sanfey J. to consider its merits in the application to attach and commit.

Conclusion

113. These applications are for an extension of time in which to appeal against the injunction orders of Reynolds J. on the 25th November, 2020 in respect of the premises named in the title to these proceedings. In the course of this judgment, I have set out that the applicants have not satisfied the first two criteria in the Eire Continental case. They did not form an intention to appeal within the prescribed time (even accepting that it only ran from the time they say they were notified of the orders). Indeed, there was a very significant delay in seeking to appeal. In the interim, the applicants were able to file full defences by way of affidavits and submissions to the High Court in defence of a motion to

attach and commit. That motion took two days at hearing and judgment was reserved. It was a week after the hearing before advices were given and instructions given to appeal. It was two weeks after the motion to attach and commit was heard before the application to this Court was made. There was nothing akin to mistake in the late filing of the appeal.

114. On the third criterion set out in Eire Continental, I am satisfied that as regards the central contention of the applicants which is that they have valid tenancies as against Pepper, there is no arguable ground. As to arguments about lack of service, lack of candour or the making of the orders against "persons unknown" I am satisfied that even if an arguable ground has been made out, the balance of justice lies in refusing the applicants an extension of time in which to appeal. No other arguable ground has been identified.

115. I would therefore refuse these applications.