

THE HIGH COURT

[2021] IEHC 792

[Record No. 2020/6888 P]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

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

DEFENDANTS

AND

THE HIGH COURT

[Record No. 2020/6889 P]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 15th day of December, 2021.

1. On 13th August, 2021, I delivered a judgment ('the substantive judgment') in relation to applications in each of the two matters above for attachment and committal of certain individuals alleged by the plaintiff to be in occupation of one or other of the properties to which reference is made in the titles of the proceedings, *i.e.* 21 Little Mary Street, Dublin 7 and 31 Richmond Avenue, Fairview, Dublin 3 ('the properties'). The plaintiff had obtained orders ('the injunction orders') from this Court (Reynolds J) in each of the proceedings that the occupants "immediately surrender possession and control" of the properties to the plaintiff, together with the range of ancillary orders.
2. Events thereafter are set out at length in the substantive judgment, which should be read in conjunction with this ruling. Service was effected in accordance with the orders of the court; this process was complicated by the fact that most of the respondents could not be identified individually. The steps taken by the plaintiff in this regard are set out at paras. 59 and 60 of the substantive judgment. Ultimately, applications for attachment and committal of the occupants in each of the proceedings for non-compliance with the injunction orders were issued by the plaintiff on 12th February, 2021; the occupants subsequently entered appearances on 22nd February, 2021, and identified the apartments in each property occupied by them.
3. The applications came on for hearing before me on 4th/5th May 2021, and were strenuously contested by the respondents. In particular, I was urged by counsel for the respondents to hold: -
 - That the court should set aside the injunction orders as having been improperly procured by the plaintiff in a number of respects;

- that the attempts by the plaintiff to ascertain the identities of the occupants and serve documents on them were deficient;
 - that the way in which service of the injunction orders was effected caused the injunction orders to be irregular, and that they should accordingly be set aside;
 - that a criminal standard of proof should be applied by the court in determining the attachment and committal applications;
 - that the penal endorsement on the injunction orders was inaccurate and/or ineffective, and that service of those orders was thereby fatally flawed.
4. It was not disputed by the respondents that they were each in possession of an apartment in one or other of the properties from the date of the injunction orders onwards. However, various of the respondents swore affidavits in which they asserted that they were not aware of the injunction orders, as the order had not been addressed to the occupants of individual apartments rather than the properties generally, and that they only became aware of the orders in or around the end of February 2021. As such, they could not, at the date of issue and service of the motion (12th February, 2021), have been in contempt of the injunction orders as they were not aware of their existence. It was submitted on behalf of these deponents that, as they had not been cross-examined, their evidence was uncontroverted and must be accepted by the court. This issue was addressed at paragraphs 99-111 of the substantive judgment.
5. In the event, I accepted that the plaintiff had not established beyond a reasonable doubt that the respondents each knew of the making of the injunction orders, or that a conscious decision had been made by each of the respondents, as at the date of issue of the applications, to disobey those orders. However, I held that the respondents, having entered appearances and been legally represented since at least 22nd February, 2021, were at the date of the hearing beyond a reasonable doubt aware of the orders and the consequences of not complying with them, and accordingly were in deliberate breach of the orders.
6. The matter came back before me on a number of occasions. The respondents were given time to vacate the properties. It proved necessary to issue attachment orders against the respondents, who ultimately vacated the properties before the committal applications could be heard, with the result that the attachment orders were discharged. The plaintiff applied for its costs of the applications, but indicated that there was a basis upon which it would be prepared not to seek its costs against the respondents. An adjournment was granted to allow a dialogue between the parties in this regard, and the plaintiff set out its proposals in an open letter of 20th October, 2021. However, the parties were unable to conclude an agreement, and in accordance with the court's directions, have now furnished written submissions on the question of costs.
7. The respondents submit that they achieved "partial success", as the court found that it was not established beyond a reasonable doubt that they were in deliberate breach of the

injunction orders at the date of the issue of the applications for attachment and committal, and it was suggested that “significant time was spent on submissions and affidavits addressing the issue of contempt prior to the issue of the motion/orders. The Defendants have ultimately succeeded on this point, albeit losing to the ‘fallback position’ of the Plaintiff that the contempt is to be considered at the hearing date and not the issuing date”. It was submitted that certain of the points in the case were novel, and that the defendants are impecunious and, as the court recognised in the judgment [para. 119], deserved a degree of sympathy.

8. The respondents contend that the matter was a “complex case”, and that “there is a clear public interest in the case...”. It was submitted that an order for fifty percent of the defendant’s costs is appropriate, or that the costs should be reserved to the trial judge.
9. The plaintiff contends that, the court having found that the respondents were in contempt of court, it has been “entirely successful” within the meaning of s.169(1) of the Legal Services Regulation Act 2015 (‘the 2015 Act’), and that costs should therefore follow the event. It is submitted that the alleged impecuniosity of the respondents is not a relevant factor, and points to the fact that, even after the substantive judgment had been delivered, the respondents remained in breach of the orders, “...electing to vacate only after orders of attachment issued against each of them on 5 October, 2021”. The plaintiff does not accept that either the proceedings or the attachment and committal applications were rendered novel by virtue of the fact that orders were sought against “persons unknown”, but submits that insofar as the judgment may have brought clarity in respect of any point of law, this is not a factor which could incline the court to depart from the principle that costs follow the event. Finally, the plaintiff urged that the fact that it had made “open and entirely reasonable” proposals which would have resulted in the respondents not facing a costs liability, but which had not been accepted by the respondents, should be taken into account.

Decision

10. Some attachment and committal applications are very straightforward: a court order is made, the respondent is served with it and chooses not to comply with it, and an application is brought to attach the respondent for contempt of the order, in which the applicant seeks to show beyond a reasonable doubt that the respondent was appropriately served with the order and yet chose to ignore its strictures.
11. In the present case, the applications were undeniably more complicated. The circumstances in which the injunction orders were obtained were questioned; the plaintiff was unable to identify by name the parties against whom the orders were sought; it was alleged that service of the orders was not validly effected in a number of respects.
12. As the substantive judgment shows, the court held that it was not appropriate to set aside the injunction orders, and that service of those orders had been validly effected in accordance with the order of the court. The challenge to the penal endorsement on the order was rejected. The plaintiff therefore succeeded on these issues, which were extensively canvassed in the affidavits and written submissions, and took up most of the

time at the hearing. The respondents however were successful in persuading the court that the plaintiff had not established beyond a reasonable doubt that the individual respondents were in contempt of the injunction orders, at least until they obtained representation in respect of the attachment and committal applications in late February 2021.

13. There is no doubt that the plaintiff has been "entirely successful" in the applications, in that I indicated that I would grant the reliefs sought in the notices of motion, notwithstanding that I allowed the respondents some time to consider their position and comply with the order. As such, the plaintiff is entitled to an award of costs against the respondents unless the court orders otherwise. In this regard, s.169(1) of the 2015 Act requires that I have regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including their conduct before and during the proceedings, whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings, and the manner in which the parties conducted all or any part of their cases [s.169(1)(a) - (c) 2015 Act].
14. I considered whether, given that the respondents were found to be successful in establishing that they were not in contempt beyond a reasonable doubt at the date of issue of the attachment and committal applications, their success on this issue should result in the plaintiff obtaining an order for only part of its costs. However, it seems to me, that in establishing this point, the respondents were establishing only that, at a certain point – contrary to what the plaintiff contended – they were not in contempt of court. The court's finding was that, on being made aware of the injunction orders and receiving legal advice in late February, the respondents took a conscious decision to flout the clear orders of the court, and in doing so, managed to continue in possession of the properties in defiance of these orders for another eight months.
15. In the circumstances, it did not seem to me that I should penalise the plaintiff on costs in respect of an issue which was decided against it but did not affect the ultimate outcome of the applications, and which was only one of many issues canvassed by the parties. The respondents mounted a "root and branch" attack on the injunction orders and every procedural step in the attachment motion taken by the plaintiff; this one issue was the only one in respect of which they succeeded. In adopting a combative approach, the respondents prolonged their illegal occupation of the properties in circumstances where they were clearly in breach of the orders.
16. While there were some unusual features in the case, the matters by and large involved the application of established principles to the facts of the case. To the extent that the substantive judgment may have considered issues which may not previously have been the subject of a reported decision, this is not a reason for refusing the plaintiff its costs. The fact that the court expressed some sympathy for the respondents, or that they are impecunious, are not factors which weigh against the principle that costs should follow the event.

17. In all the circumstances, I do not consider that there is any basis for ordering otherwise than the plaintiff is entitled to the entire of its costs of the attachment and committal applications against the respondents in each of the proceedings, and there will be orders to this effect.