AN CHÚIRT UACHTARACH

THE SUPREME COURT

` S: AP:IE: 2022:000126

[2023] IESC 21

O'Donnell C.J.
Dunne J.
Charleton J.
O'Malley J.
Hogan J.

Between/

PEPPER FINANCE CORPORATION (IRELAND) DAC

Appellants

AND

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

Respondents

-AND-

PEPPER FINANCE CORPORATION (IRELAND) DAC

Appellants

AND

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

Respondents

JUDGMENT of Mr. Justice Gerard Hogan delivered the 31st. day of July 2023

Part I - Introduction

Background

1. This appeal from a decision of Whelan J. for the Court of Appeal dated 28th July 2022 (*Pepper Finance Corporation (Ireland) DAC v. Persons Unknown* [2022] IECA 170) presents questions relating to the contempt jurisdiction of the High Court, together with its jurisdiction to grant injunctive relief against persons unknown. The appeal arises from an endeavour from the (then) owner, Pepper Finance Corporation (Ireland) DAC ("Pepper") of two properties at 21 Little Mary Street, Dublin 7 and 31 Richmond Avenue, Dublin 3 to obtain possession of those properties. A preliminary issue also arises in relation to the *locus standi* of the appellant to pursue this appeal since it has now been confirmed that these two properties have subsequently been sold by Pepper in February 2022. There is also a related issue as to whether the proceedings have been thereby rendered moot. This appeal is just the latest step in litigation which has already given rise to a multiplicity of motions, hearings and judgments, the intricacies of which do not lend themselves to any quick summary.

2. These present proceedings arise out of an original bank debt. The properties had been owned by a Mr. Jerry Beades with the benefit of a mortgage in favour of IIB Homeloans Ltd. ("IIB"). By order of the High Court on 22nd June 2008 an order for possession in respect of both properties was made in favour of IIB. An appeal against this order was dismissed by this Court on 12th November 2014.

3. It would appear that the ownership of the properties passed between various banks and finance houses in the subsequent period. Much of this is detailed in the judgment of Sanfey J. in the High Court of 13th August 2021: see *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown* [2021] IEHC 559 at paragraphs [10] to [16]. It appears that ownership in the loan facilities, facility letters and mortgages were transferred to Pepper on 7th August 2020.

4. In a judgment delivered on 29th June 2018 Costello J. made an order granting leave for execution of the possession order pursuant to Ord. 42, r. 24 RSC: see *IIB Home Loans Ltd. v. Beades* [2018] IEHC 390. (This as it happens was the second such order, as the then mortgagee had previously refrained from executing the earlier order of 18th May 2015: see paragraph [26] of the judgment of Costello J.). It seems that on 18th November 2020 the High Court (Twomey J.) made an order substituting Pepper as the plaintiff in possession proceedings and that he also made an order in its favour pursuant to Ord. 42, r. 24 granting leave for execution of that possession order in respect of these two properties.

5. On 8th October 2020 Pepper issued these plenary proceedings (bearing record number 2020 6888P) against "Persons Unknown" seeking possession of the two properties. On the same day it issued a motion seeking injunctive relief in respect of the occupation of the properties by the persons unknown. On 23rd November 2020, two of the occupants subsequently entered an appearance to these proceedings, namely, a Ms. Margaret Hanrahan, who had been in occupation of Flat 1 on 21 Little Mary Street for some ten years and a Mr. Gabriel Petrut, who was had been in occupation of Flat C, 31 Richmond Avenue for a year. Neither Ms. Hanrahan nor Mr. Petrut attended the hearing of the motion for an interlocutory injunction which came on before the High Court on 25th November 2020, nor, as it happens, did any other occupant of these properties.

6. On 25th November 2020 the High Court (Reynolds J.) made an order requiring the defendants, their servants and agents "and all other persons having notice of the said order" immediately to surrender possession and control of the properties. The orders were subject to a stay until 5pm on Thursday 14th January 2021. In her order, Reynolds J. had directed that Pepper's solicitor be at liberty to notify the making of the order to the defendants, their servants and agent and all other persons having notice of the order by both hand delivery and by ordinary pre-paid post.

7. It would also seem (see, e.g., at [89] and [90] of the judgment of Whelan J.) that Reynolds J. directed those five copies of the letter together with her order be hand delivered to the property at 31 Richmond Avenue and addressed to the occupants of the various dwelling units. A further letter was to be sent to Mr. Petrut personally. It also appears that Reynolds J. directed in the case of 21 Little Mary Street (which had five separate dwelling units) that three hard copies of each of the relevant documents be delivered by hand to the property by way of service. These supplemental directions are not contained in the actual orders of the High Court which were perfected on the following day, 26th November 2020.

8. Both Ms. Hanrahan and Mr. Petrut had appealed to the Court of Appeal against the making of this order by Reynolds J. On 15th January 2021 that Court, per Noonan J., refused to impose a general stay on that order but he nonetheless extended the stay. There is a dispute between the parties as to the extent and ambit of the stay order. In the High Court Sanfey J. ruled that based on comments made by Noonan J. in the transcript of his ruling, the stay order obtained only in favour of Mr. Petrut and Ms. Hanrahan to 5pm on 5th February 2021. The two orders of Noonan J. (sitting alone) record Ms. Hanrahan had attended the Court of Appeal hearing on that day and had appeared in person and had informed the Court that Mr. Petrut could not attend on that

date. Two separate motions seeking a stay had been issued by Ms. Hanrahan and Mr. Petrut respectively.

9. At the close of the hearing on that day following an unsuccessful application by Mr. Beades for an extension of the stay, Noonan J. said (as per the transcript of that hearing):

> "As far as I am concerned, I have made a very limited order in terms of a stay that applies only to Mr. Petrut and Ms. Hanrahan…I mean those orders say what they say and I don't think the Court has to interpret them beyond the fact that they relate to those parties and nobody else."

10. In the judgment of 28th July 2022 under appeal, however, Whelan J. took a different view, saying (at [111] and 153-156]) that "it was evident from the face of the order of Noonan J. that it was of general application" and that it applied to all the occupants. The curial parts of both orders were in the following terms:

> "**IT IS ORDERED** that the said motion as sought be refused but that the stay granted in the High Court on the said Order be extended for a period of 3 weeks from the date of this Order only."

11. It should be noted that both orders were perfected on 23rd June 2021 and were never served on any of the occupants. One of the difficulties in the present case is that both properties were divided into multiple flats, thus accentuating difficulties in respect of service. At all events, possession was not handed up until early October 2021.

12. Pepper had appointed a Mr. Gerard Hughes of Grant Thornton as the authorised person for the purposes of taking possession. Mr. Hughes swore an affidavit describing his unsuccessful efforts to take possession on 14th January 2021, 8th February 2021 and 11th

February 2021. Pepper then issued a motion for contempt against the occupants of the properties on 12th February 2021.

13. Following an affidavit sworn on 22nd February 2021 by the solicitors for the occupants of the properties, the identity of the occupants was ascertained. There were six dwelling units in Richmond Avenue occupied respectively by twelve adults and three children. Eight adults respectively occupied the five dwelling units at 21 Little Mary Street. Appearances were then entered by all the occupants to the proceedings. All the adult occupants were legally represented at the hearing of the contempt motion on 4th and 5th May 2021 when judgment was reserved by Sanfey J. Numerous affidavits had been filed on behalf of all parties.

14. In the meantime, the occupants appealed to the Court of Appeal. In that appeal the appellants sought to extend time in which to lodge an appeal against the order of Reynolds J.; to adduce new evidence and a further stay. In a judgment delivered on 24th June 2021 that Court refused the application: see *Pepper Finance Corporation v. Persons Unknown* [2021] IECA 244. In her judgment, Donnelly J. applied standard *Éire Continental* criteria (*Éire Continental Ltd. v. Clonmel Foods Ltd.* [1955] IR 170). and rejected the application. She noted that they had not formed an intention to appeal at the time; they had delayed in their application and concluded [at 114] that "as regards the central contention of the applicants which is that they have valid tenancies as against Pepper there is no arguable ground." The appeal of Ms. Hanrahan and Mr. Petrut against the making of this order was to be the subject of a separate hearing, the details of which I will presently describe.

The judgment of Sanfey J. of 13th August 2021

15. Following a two-day hearing in early May 2021, Sanfey J. delivered a reserved judgment on the contempt matter on 13th August 2021: see *Pepper Finance Corporation v. Persons Unknown* [2021] IEHC 559. In that judgment, he refused to set aside the earlier injunction of Reynolds J. He further held [at 58] that service "of the injunction application was carried out in accordance with the directions of the court." Sanfey J. arrived at a similar conclusion in respect of the service of the injunction order: see [at 91]. While Sanfey J. observed that the penal endorsement was somewhat "clumsily worded", he also concluded [at 96] that it was "perverse to suggest that the occupants could have been under any misapprehension as to the property of which they were ordered to surrender possession and control." He accordingly rejected [at 98] the argument that the injunction orders had not been properly served.

16. The occupants had each averred that they were unaware of the orders, and they were not cross-examined on their averments at the hearing in the High Court. Sanfey J. nonetheless concluded [at 111] having examined the evidence that:

> "I think, on consideration of all of the evidence, that it is probable that most, if not all, of the occupants were aware of the applications and the making of the injunction orders. However, in view of the fact that the orders, although served in accordance with the orders of 25th November, 2020, were not served on individual apartments, I do not think it is established beyond a reasonable doubt that the occupants each knew of the making of the orders, or that the circumstances of service outweigh the evidence from the eight deponents across the two properties such as would allow me to conclude beyond a reasonable doubt that a conscious decision was made to disobey the orders."

17. However, Sanfey J. then continued [at 114] that:

> "The occupants have been served with the orders in accordance with the terms of those orders. I am satisfied that the penal endorsement was sufficient and effective. If there is doubt as to whether the occupants were aware of the terms of orders prior to the end of February 2021 when they acquired legal representation, there can be no doubt in this regard after that point."

18. Sanfey J. went on to say [at 116] that the occupants were nonetheless in contempt:

> "This is not a criminal trial, in which a court must decide whether a crime occurred at a specific time and place. I am entitled and indeed obliged to take into account matters which have occurred between the issue of the present application and the hearing on 4th/5th May 2021. The occupants have had a valid order made against them. This order was served with a penal endorsement in accordance with the order of this Court. The occupants are now beyond a reasonable doubt aware of the implications of the order, and of the consequences of not complying with it. They have chosen not to comply with the orders and have advanced unmeritorious grounds as to their alleged lack of validity. "

19. Sanfey J. subsequently made orders on 1st October 2021 granting liberty to Pepper to issues of attachment directed to the Gardaí against the occupants of the properties. These orders were subsequently discharged with the consent of the parties on 12th October 2021 as by that stage possession had been yielded up by the occupants of the two properties.

20. The Court of Appeal then delivered two judgments in this matter on 14th October 2021. One judgment dealt with an (unsuccessful) attempt by Mr. Beades to participate in the hearing. In the other judgment, *Pepper Finance Corporation (Ireland) DAC v. Petrut*

[2021] IECA 257, the Court dismissed the appeals of Mr. Petrut and Ms. Hanrahan against the making of the interlocutory orders by Reynolds J There was a negative pledge clause, subject only to very limited conditions, chief of which was that any such tenancy could not be created for a period greater than one year. Drawing on established authority – such as *Farrell v. N17 Electrics Ltd.* [2012] IEHC 228 – Ní Raifeartaigh J. concluded [at 10-16] that no relationship of landlord and tenant had thereby been created between the parties.

21. The judge then went on to record that there was no suggestion that either of these appellants were unaware of the interlocutory injunction application before Reynolds J. No explanation had been tendered by Mr. Petrut for his non-attendance. Ms. Hanrahan contended that she was recovering from surgery. Ní Raifeartaigh J. noted that this had not been vouched for by appropriate medical evidence and she had not arranged for the High Court to be informed of this fact: see [48] to [50]. She concluded that in these circumstances Reynolds J. was entitled to proceed with the hearing.

The judgment of the Court of Appeal of 28th July 2022 on the contempt matter

22. . This judgment on the contempt matter was delivered by Whelan J on 28th July 2022.: see *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown* [2022] IECA 170. (This is the judgment which is under appeal.) Whelan J. first rejected the argument that the appeal was rendered moot by reason of the discharge of the committal order. She took the view that the order made by the High Court was the equivalent of a criminal conviction which the occupants were entitled to appeal: see [64] to [72].

23. Whelan J. concluded (at [112] – [113]) that the order of the Court of Appeal extending the stay "materially altered a key element of the mandatory order and interlocutory injunctions." She continued by saying:

> "Accordingly, each appellant was entitled to be appraised as to its terms and afforded an opportunity to seek advices in relation to its import. If the respondent believed that there was any error on the face of the order an application should have been brought to Noonan J. to amend same. That did not occur. No application for substituted service was made in relation to the Court of Appeal order. Purported service on Mr. Petrut via the email address of a third party was not valid service of the said order upon him…Non-compliance with the terms of order of 25th November 2020 by any of the appellants during the operative period for which the stay was extended did not give rise to rights per se in Pepper to invoke the coercive jurisdiction based on any alleged breach of the substantive orders. The benefit of the stay enured for all appellants. It follows that each appellant as a party subject to the earlier order ought to have been served with a copy of the later order extending the stay. It was particularly imperative to effect valid service of the order extending the stay since the properties in question were the dwellings of the appellants. Further, in my view, prior to invoking the coercive jurisdiction of the High Court, the 15th January order with appropriate endorsement ought to have been served on all appellants. It was served on none."

24. Whelan J. further noted [at 116-117] that since the identity of at least some of the parties was known to Pepper, "it is not clear why no step was taken to join any of those individuals as defendants to the relevant proceedings." She also held that Pepper offered no explanation as to why "it failed or omitted to take any steps to ascertain the identity of the persons in occupation of the various dwelling units" or, if and when their identities had been ascertained, why they were not named in the proceedings.

25. She noted that the changes in the English Civil Procedure Rules had not been replicated here, so that reliance on cases such as the decision of the English Court of Appeal in *Canada Goose UK Retail Ltd. v. Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802 were not necessarily helpful. That case in any event was distinguishable on its facts, since it concerned an "ever-changing group of individuals" protesting outside a shop premises. Moreover, Ord. 4, r. 7 RSC required that in any action for the recovery of land, the summons was to be directed to a "such tenant, under-tenant, or other persons, with the addition of the words 'and all persons concerned.'"

26. Whelan J. further added [at 121] that having requirement of the administration of justice in public, "the public disclosure in pleadings of the true identities of parties to civil litigation to take reasonable steps to ascertain the names and identities if proposed defendants if justice is to be administered in public." By the time Pepper issued the attachment motion on 12th February 2021, it could [at 122] have ascertained with reasonable diligence "the names of at least some of the occupiers of the 12 dwelling units comprised within the two properties." Pepper also took no "reasonable or adequate steps to ascertain the identities of the other occupiers, such as by attending the door of each dwelling unit or writing a letter addressed to the "occupiers of each specific dwelling unit."

27. These failures were fatal to the present case, because as Whelan J. put it [at 127-128], it was imperative in attachment motions that "all relevant persons known to the moving party be named as parties to the proceedings and be named as parties to the proceedings and be named and specifically identified on the face of a penally endorsed notice or copy order." This was particularly so where the effect of the order "would result in the permanent expulsion of individuals from their family homes and dwellings."

28. Whelan J. then discussed the obligation to have strict adherence to the requirements of Ord. 41, r. 8 regarding penal endorsements. She ultimately concluded [at 146] that since the Court of Appeal order of 15th January 2021 had varied the earlier order in a material respect, the penal endorsement was invalid because it "materially misrepresent[ed] the time limited by an operative order of the court for compliance with its terms" and, further failed to serve identifiable persons and identifiable units at the property. Whelan J. reached similar conclusions (at 157-165]) regarding the service of the order of the Court of Appeal of 15th January 2021.

29. Similar views were expressed by Whelan J. (at [171-198]) regarding the necessity for strict compliance with the requirements of Ord. 41, r. 8. She further held [at 198] that "service on the solicitor after the issue of motion for attachment and committal is not valid service to invoke the coercive jurisdiction of the court against an individual." She added [at 200-201] that

> "the constitutional protection conferred on the individual's liberty necessarily predicates that compliance with Ord. 41, r. 8 must in all cases be satisfied prior to issuing a motion invoking the coercive powers of the court over the person of the alleged contemnor.
>
> [Sanfey J.] accordingly erred in finding at paragraph 114 that the occupants were validly served with the order of 25th November 2000 for the purposes of the attachment/committal motion by virtue of their solicitor having received a copy of same in late February 2021. The names of all the appellants were known to Pepper months before the hearing date and it was incumbent on them to amend the title of the proceedings in accordance with the Rules."

30. All of these failures and deficiencies in service etc. (which were summarised by Whelan J. at [213-218]) led her to conclude that [at 219]:

> "…the cumulative impact of all the above frailties and deficits is that the orders of [Sanfey J.] fall to be set aside as having been wrongly granted. It may be that any individual deficiency, if considered in isolation, would not be sufficient to justify interfering with order of the trial judge. However, the cumulative impact of the various matters identified above if such that the court has no option but to intervene in my view."

31. The Court of Appeal accordingly allowed the appeal from the decision of Sanfey J. Pepper in turn sought leave from this Court to appeal against this decision of the Court of Appeal. Noting that this appeal raised important questions concerning the manner in which the contempt of court jurisdiction is exercised along with the jurisdiction to grant relief against persons unknown, by a determination dated 17th February 2023 this Court granted Pepper leave to appeal pursuant to Article 34.5.3° of the Constitution: see *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown* [2023] IESCDET 20.

Part II – The submissions of the parties

The written submissions of the appellants

32. In their written submissions Pepper emphasise the public interest in the enforcement of court orders, including the statement of McKechnie J. to this effect in *Laois County Council v. Hanrahan* [2014] IESC 36, [2014] 3 IR 143 at 180-182. It submits that such procedural missteps as there were should not "have the effect of impeding the enforcement of uncontroverted proprietary rights." Pepper then says that the judgment of Whelan J. did not address the substance of any alleged prejudice to the respondents.

33. Nor do Pepper consider that the Court of Appeal's criticism regarding the failure to name the respondents in the proceedings was well founded. It contends that the occupants of the properties elected not to identify themselves and they therefore cannot be heard to complain if they were sued as persons unknown. Moreover, by the time the occupants had identified themselves "they had copies of the injunction orders" and they furthermore had the benefit of legal advice as to the effect of those orders. In any event, drawing on the judgment of Peart J. in *Laois County Council v. Scully* [2007] IEHC 212, [2009] 4 IR 488, it contends that there is no specific requirement as to personal service contained in Ord. 41, r. 8 and that these principles ought to have been applied by the Court of Appeal.

34. In effect, therefore, Pepper says that the occupants well knew of their obligations under the terms of the order of Reynolds J. by the date of the contempt hearing in May 2021 and that they should not be allowed to invoke purely technical arguments to order to defeat their fundamental obligation to obey that order.

The arguments of the respondents

35. The respondents first contend that the matter is now moot, and that Pepper has failed to engage on the point. It draws attention to the fact that the properties have subsequently been disposed of by Pepper and that Pepper have not engaged with this issue in their submissions.

36. Without prejudice to this, the respondents maintain that the orders themselves were never properly served. They emphasise, for example, that the orders of Noonan J. in the Court of Appeal on 15 January 2021 were never served on any of the respondents (including Ms. Hanrahan and Mr. Petrut) prior to the hearing of the contempt

application. Nor was any application made by Pepper to Noonan J. to have the perfection of the January 2021 order expedited.

37. So far as the action against persons unknown are concerned, they say that that this procedure – itself a novelty in the field of Irish civil procedure – should not be used where (as here) the defendants are identified and identifiable. They insist that personal service is a prerequisite to the invocation of the contempt jurisdiction. They further contend that they have either leasehold or some other constitutionally protected interest in the respective properties which is their "dwelling" for the purposes of Article 40.5 of the Constitution, so that the designation by Pepper of the respondents as trespassers is "disputed, unfair and inaccurate." They maintain that these are matters to be determined at a full hearing, bearing in mind that the original order of Reynolds J. was itself an interlocutory order.

Part III - Whether the proceedings are moot

Whether this Court should hear the merits of the appeal

38. The first question which naturally arises is whether the proceedings are moot. It bears remarking that Pepper actually sold the two properties in question on 18th February 2022. The Court was informed at the hearing that this was the day after the contempt hearing in the Court of Appeal had concluded. As the various occupants of the properties had agreed to leave in October 2021, no relief is now sought by Pepper against these respondents. The only outstanding issues remain that of costs. It was also (somewhat faintly) suggested that Pepper could pursue a claim for damages in respect of the alleged acts of trespass on the part of these respondents.

39. While I agree that this case is in at least many respects moot, this is perhaps no longer a decisive consideration so far as the question of whether this Court should now proceed

to hear and determine the appeal is concerned. Much has changed since the coming into force of the 33rd Amendment of the Constitution Act 2013 in October 2014. In *E.L.G. v. Health Service Executive* [2021] IESC 82 both Baker J. and I delivered judgments in which we expressed the view that the existence of a judgment of the Court of Appeal or High Court which had been determined by this Court to contain an issue of general public importance, meant that the Court was entitled and even perhaps obliged to proceed to determine the issue, any question of mootness notwithstanding. O'Donnell J. had previously spoken to similar effect in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751 at 779.

40. Other considerations include the extent to which the decision under appeal has a precedential effect and the practical consequences of the matter for the parties and the legal system in general. If the matter under appeal has proceeded to judgment in either the High Court or the Court of Appeal before the matter is rendered moot by subsequent events, then this is a strong indication that this Court should hear an appeal, especially if leave has been granted on the basis that the matter raises an issue of general public importance. In that respect, the pre-October 2014 jurisprudence of this Court on this topic should perhaps be viewed with some reserve in the light of these subsequent constitutional changes.

41. All of this is underscored by the important decision of O'Donnell C.J. in *Odum v. Minister for Justice and Equality* [2023] IESC 3. Here the applicant had challenged the validity of a deportation order in the High Court. After Burns J. had delivered a reserved judgment in the High Court in which she had found against him, this Court granted the applicant leave to appeal directly to this Court pursuant to Article 34.5.4° of the Constitution on the ground that the case raised important questions regarding the extent

to which a non-national could rely on the fundamental rights provisions of the Constitution. Shortly afterwards the deportation order was revoked by the Minister.

42. In his judgment, O'Donnell C.J. acknowledged (at [42] - [43]) that although the revocation order had rendered the case effectively moot, this did not mean that this Court should not hear the appeal:

> "However, in this case it is an important, and indeed, decisive consideration in my view, that leave to appeal to this Court has been granted, and an appeal is ready for hearing. This has a number of consequences. First, and most importantly, it means that there has been a determination that the decision appealed against involves an issue of law of general public importance. Indeed, as discussed above, it can be said that the function of this Court since 2014 has been to hear and determine such cases. The purpose of an appeal is to clarify and settle the law for all such cases raising or having the potential to raise the same or similar points. If, however, the appeal is treated as moot, and dismissed, then these objectives will not be achieved. The law will remain unsettled, and in a state of uncertainty. That uncertainty will remain at least until a further case is brought and makes its way through the appellate process and is finally determined by this Court. In the meantime, the decision-making process in respect of applications for permissions to remain in this country which have the potential to engage with family rights will be conducted under a cloud of uncertainty. A decision in the High Court cannot resolve that uncertainty. Instead of performing its function as the court having full and original jurisdiction to administer justice, a decision in the High Court would be merely a vehicle to bring the legal issue back to the point at which it stands now, awaiting the hearing of the appeal and decision of this Court. By that point

> however, in addition to the wasted resources expended on this case, there might either be a proliferation of decisions in the High Court or cases raising the point would have to be kept in a holding pattern awaiting the final resolution of the issue. It is apparent that this is an undesirable scenario. Moreover, it is one in which the principles identified [by the Canadian Supreme Court] in *Borowski* as justifying a doctrine of mootness, point instead towards a conclusion that the case should be heard and determined. First, there is no absence of an adversarial context. The applicants wish to advance this appeal and their lawyers are willing to argue it. Second, far from court resources being saved by dismissing the case on grounds of mootness, those scarce resources will be wasted. The issue will be raised in other proceedings, and by necessity advanced to the point of decision. Finally, there is no sense in which it could be said the determination of this case would amount to or have the flavour of an advisory opinion or still less an impermissible expansion of the proper function of courts in the separation of powers. The facts in this case are not in dispute. If there was a dispute, it would have been resolved by the decision of the High Court. The issue in this case is the legal consequence of those facts and will be determined in exactly the same way as it would have been if the deportation order had not been revoked, or as it would be in any case in which a deportation order remained in existence."

43. It seems to me that much the same can be said in the present case. After the multitude of motions, court appearances and reserved judgments, it is most desirable that the important – and highly practical – issues raised on this appeal should, where possible, be finally resolved. The resolution of these issues in proceedings where – as here – the underlying facts are no longer in dispute will help to bring clarity to these questions.

The various decisions of the High Court and the Court of Appeal moreover currently enjoy precedential effect and to that extent bind other courts. While different considerations would naturally apply had these proceedings become moot at a very early stage (such as, for example, prior to the delivery of a reserved judgment addressing legal issues) for various reasons this did not occur. Given the variety of judicial pronouncements on a range of matters, it is accordingly desirable that this Court should give guidance on the question of whether these decisions are correct.

44. Before passing from this topic, however, I cannot forbear observing that Pepper's failure to disclose the fact that it had sold the two properties in question in February 2022 was unsatisfactory. There were really two such failures. First, it appears that the properties were sold the day *after* the Court of Appeal hearing on the contempt issue had concluded but *before* judgment was delivered in July 2022. Second, Pepper's application for leave to this Court made no mention of the fact that it had disposed of the properties. This matter only came to light after the *respondents* drew this to the Court's attention.

45. This information was plainly material since it bore on questions such as Pepper's standing to advance its appeal to this Court and the issue of mootness before both the Court of Appeal and this Court. It would have been desirable had this information been communicated to both the Court of Appeal and this Court.

46. This, I regret to say, was not the only unhappy aspect of this litigation. At one point an indication was given by Pepper to seek personal costs against the solicitor acting for the occupants. It bears remarking that it is a hallmark of the rule of law that every litigant is entitled to legal representation. Lawyers are duty bound to advance their client's case and interests. Save for clear cases of abuse and obviously spurious

argumentation there is simply no basis for making a personal wasted costs orders against legal professionals.

47. In the present case there is nothing at all to suggest that the solicitor for the occupants acted otherwise than in accordance with the best traditions of the profession. His task was to defend his clients against a charge of contempt. As we shall see, in this he has succeeded. A claim that a solicitor might be made liable to a wasted costs order is a serious charge which should not be lightly made, particularly during the currency of the proceedings. It is sufficient to state – if necessary, with some emphasis – that we were not pointed to anything in the conduct of the solicitor for the occupants which could properly have formed the basis for this suggestion.

Part IV – Is there a jurisdiction to issue proceedings against persons unknown?

The jurisdiction to issue proceedings against persons unknown

48. It is next necessary to consider whether there is a jurisdiction to issue proceedings against persons unknown. It is true that such is not provided for in the Rules of the Superior Courts. One may further observe that the entire premise of the Rules is that litigation concerns named natural or legal persons who are actually parties to the proceedings, although this Court has also accepted that, exceptionally, orders (and, in particular, cost orders) may be made against persons who are not such parties: see generally the judgment of McKechnie J. in *Moorview Developments Ltd. v. First Active plc* [2018] IESC 22.

49. Yet this cannot mean that there is no inherent jurisdiction to issue proceedings against persons unknown. If it were otherwise, it would place a premium on anonymity and deliberate evasion and place an effective remedy in respect of matters such as illegal strikes, copyright piracy, internet defamation, internet hackers, and blackmailers (and

these examples could be much extended) beyond the capacity of many litigants: see generally *Cameron v. Liverpool Victoria Insurance Co. Ltd.* [2019] UKSC 6, [2019] 1 WLR 1471 at 1478-1479, per Lord Sumption. Cases would fail not because of their intrinsic merits, but for want of an identified or identifiable defendant.

50. It is important to state that this case concerns identifiable persons, but whose names were (apparently) unknown to the plaintiff at the time of the commencement of the proceedings. As the decision in *Cameron* itself illustrates, different considerations arise in the case of entirely anonymous and unidentifiable defendants, and it is unnecessary to examine this particular category for the purposes of this appeal.

51. While the courts enjoy an inherent jurisdiction to grant relief as against persons unknown, there are several reasons why this jurisdiction is – and should remain – an exceptional one. As this Court has frequently stated, publicity is an inherent feature of the open administration of justice provided for in Article 34.1. It is sufficient here to note the comments of Ó Dálaigh C.J. in *Beamish and Crawford Ltd. v. Crowley* [1969] IR 142 at 146: "…publicity, deserved or otherwise is an inseparable from the administration of justice in public; this is a principle which, as the Constitution declares, may not be departed from except in such special and limited cases as may be prescribed by law."

52. There are, of course, cases where the non-disclosure of the identity of litigants is provided for by law (such as in the case of family law litigation) and where revealing their identity can cause injustice: see, for example, the decision of this Court in *Gilchrist v. Sunday Newspapers Ltd*. [2018] IESC 18, [2017] 2 IR 284. At the same time, as I have just stated, the administration of justice should not be placed at the mercy of those who would resort to anonymity and evasion as a ploy to hand trip the efforts of

plaintiffs. The point here is that while resorting to the expedient of suing persons unknown should very much remain the exception, it may sometimes nonetheless be necessary to do so.

53. Second, litigating against persons unknown is itself liable to cause confusion and uncertainty and it will rarely be in the interests of a plaintiff to do so. Not least where (as here) questions of enforcement subsequently arise, it is rarely satisfactory that a court can be called upon to exercise its coercive jurisdiction in circumstances where the putative contemnor is not already identified as a named defendant to the proceedings. For reasons, therefore, of both principle and pragmatism plaintiffs should only resort to this device of suing persons unknown in the exceptional cases where this step was truly warranted.

54. For my part, I am not altogether convinced that the present case quite fell into this category. As Whelan J. observed, this was not, for example, a crowd trespass case such as where an ever-changing number of protesters had gathered to protest outside a retail premises as occurred in *Canada Goose UK Retail Ltd. v. Persons Unknown* [2020] EWCA Civ. 303, [2020] 1 WLR 2802. It is clear that the occupancy of the two properties was stable and, like Whelan J., I agree that even prior to the commencement of the proceedings, it ought to have been possible for Pepper to have done more to discover the identities of most, if not all, of the occupants, along with further details regarding each dwelling unit within each property.

55. At the same time, it should be recalled that at the time of the commencement of the proceedings on 8th October 2020 Pepper was simply a mortgagee with no particular rights of access to either property. While one can – certainly with the benefit of hindsight – maintain that Pepper should have done more to identify the occupants of

the properties before issuing such proceedings, this must also be tempered by the fact that it would also seem that many of them did not wish to be identified.

56. Taking all of these considerations in the round I do not fault Pepper for resorting to the expedient of suing persons unknown at the time it commenced proceedings on 8th October 2020. At the same time, this must be regarded as at best a marginal case for the use of this mechanism and unlike the more obvious examples - such as threats of internet blackmail or copyright theft - it should not necessarily be regarded as a benchmark. Apart from anything else, a plaintiff who resorts to suing persons unknown risks the complications of enforcement at a later stage in the proceedings, so that it is in the interests of litigants themselves that defendants are named. I repeat that any departure from this rule should be exceptional.

57. I further agree with Whelan J. that the title of the proceedings should in any event have been amended as the identities of the occupants became known. After all, Ms. Hanrahan and Mr. Petrut filed appearances shortly after the proceedings commenced on 23rd November 2020 and the names of all occupants were known to Pepper by at least 22nd February 2021 when the respondents' solicitor filed an affidavit identifying the various occupants of the two properties. The title of the proceedings ought to have been amended at these points to reflect the identification of the various occupants. Contrary to the suggestion which Pepper appears to have advanced, such an amendment to the title of the proceedings could readily have been made in the existing proceedings in accordance with the provisions of Ord. 15, rr. 13 and 14 without any necessity for the proceedings to have been re-commenced *ab initio*.

58. Unsatisfactory as all of this was, and contrary to what Whelan J. appears to have decided, I do not say that either the issuing of these proceedings in this fashion or their

continuation after the names of the defendants had become known was irregular or in some way legally ineffective. But perhaps this decision will nonetheless serve to underscore how exceptional the nature of the jurisdiction against persons unknown actually is and why it must be used with such caution. Given the desirability of regularity and order in our legal system, coupled with the obligation to adhere to the general injunction of the open administration of justice in Article 34.1, courts should, in my opinion, be prepared - where necessary of their own motion as Ord. 15, r. 13 itself expressly contemplates - to amend the title of the proceedings once the identity of a hitherto unidentified party becomes known. However, and contrary in this respect to the decision in the Court of Appeal, none of these matters were grounds to set aside or otherwise impugn the proceedings for contempt if they were otherwise properly pursued.

Part V – Service of process and contempt of court

The service of the proceedings

59. It is next necessary to address the question of the service of the proceedings. I propose to address first the question of service of the proceedings and then subsequently to consider the service of the contempt motion.

60. In *Corrib Oil Company Ltd. v. Murray* [2017] IECA 102 I summarised the importance of service of civil proceedings by stating (at [12]:

> "As Costello P. observed in *Fox v. Taher*, High Court, 24 January 1996, the object of the service rules provided for the in the Rules of the Superior Courts is "to bring home to defendants the nature of the proceedings and the documents related to the claim being made against them." In a similar vein Dixon J. had previously stated in *Royal Bank of Ireland v. Nolan* (1958) 92 I.L.T.R. 60 that

> the fundamental objective of service "was to give the defendant notice and sufficient warning of the proceedings he might have to contest." It is precisely for this reason that "it is vital that proper service be effected, and the Rules of the Superior Courts contain detailed requirements in this regard": see Delaney and McGrath, *Civil Procedure in the Superior Courts* (Dublin, 2012) at 209.12])."

61. In possession cases of this kind, Ord. 9 RSC makes it clear that personal service is required, at least in the first instance. Ord. 9, r. 2 states the general rule by requiring that service "of any summons on the defendant shall, except in the cases of the following rules of the Order specified, be effected by personal service if it be reasonably practicable." In the case of actions for the recovery of land, Ord 9, r. 9 is even more specific by requiring that "it shall be necessary to serve every person in actual possession of the lands or any part thereof, unless the court shall otherwise direct."

62. It is thus clear that Pepper was required to effect personal service of the summons upon all of the occupants of the two premises save where the Court had otherwise ordered. For my part, I do not think that in making the orders in which she did, Reynolds J. could be said to have "otherwise direct[ed]" within the meaning of Ord. 9, r. 9 so far as service of the summons was concerned. Each of the separate orders which she made on 25th November 2020 had provided that the plaintiff's solicitor "be at liberty to notify the making of this order to the defendants, their servants and/or agents and all other persons by hand delivery and ordinary pre-paid post." This, however, was simply in ease of all parties in that the plaintiff's solicitor was permitted to *notify* the occupants of the making of the *order* be either hand delivery or by ordinary post. It did not, however, dispense with the need to effect service of the originating summons personally on each of the occupants in the manner required by Ord. 9, r. 9.

63. I am of course conscious of the supplemental directions as to service which it seems that Reynolds J. gave orally, the details of which I have already recounted. But there is nothing to this effect in the High Court orders as perfected. There is accordingly nothing to suggest that the occupants were ever validly served with the plenary summons in the manner stipulated by Ord. 9, r. 9 in respect of the occupants of lands or that they were served with the original mandatory interlocutory orders of 25th November 2020. It is, of course, true that they did at least in time each become aware of the making of these orders and each of them had ultimately entered appearances to these proceedings.

64. As I have just observed, the order of Reynolds J. required hand delivery and prepaid ordinary post. It is true that she may have given directions permitting hand delivery at the premises. These supplemental directions did not, however, form part of the perfected order of the Court. In any event, as Sanfey J. held, service in such a non-specific way was never in itself sufficient to demonstrate that the defendants were award of the making of the order and that any non-compliance with that order was deliberate or, in the hallowed language of the law, contumelious and contumacious. I am naturally mindful of the difficulties which Pepper might well have encountered in effecting personal service of either the proceedings or the subsequent orders on all of the occupants. In that event, however, the remedy was to apply to the High Court for an order for substituted service in accordance with Ord. 10, r. 1, explaining in the process that it was not certain that all the occupants had ever been validly served with the proceedings. This did not happen.

65. I am also conscious of the difficulties which Pepper might well have encountered in attempting to effect personal service in respect of multi-occupancy dwellings. But given the solemnity of the process seeking enforcement of contempt of court and, even more importantly, its significance for the alleged contemnor – as the very language of

Appendix F, Form 11 of the Rules of the Superior Court providing for an order of attachment itself emphasises – it behoves the moving party to take appropriate steps in this regard. It will not suffice to leave copies of court proceedings and orders in the common areas of such a building in the same fashion as if they were casual advertisements or a free local newspaper. If personal service cannot be effected, then any order for substituted service might usefully provide, for example, for a copy of the court order (endorsed, as appropriate with a penal endorsement) on the doorway to each individual flat.

The Article 40.5 issue

66. I now propose presently to consider the question of service of the contempt motion. Before doing so, however, there are two further points which may now conveniently be addressed. First, in her judgment Whelan J. laid much emphasis on the fact that the underlying dispute concerned the occupancy of dwellings which she held were constitutionally protected by Article 40.5. The extent to which (if at all) Article 40.5 may be invoked as a defence in proceedings of this or a similar kind has been considered in a series of recent decisions: see, e.g., *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 IR 189; *Clare County Council v. McDonagh* [2022] IESC 2, [2022] 2 IR 122 and *Shay Murtagh Ltd. v. Cooke* [2022] IEHC 436. Insofar as Article 40.5 *might* have a relevance in possession proceedings of this kind - and I express no view at all on this point - it would have a bearing only on the question of whether the substantive relief requiring the occupants to vacate the properties ought to have been granted by the High Court.

67. So far as the contempt proceedings are concerned, however, different questions arise. Here the court is concerned not with the substantive merits of the order, but rather

whether there has been contumacious disregard of its terms by the alleged contemnor. The resolution of this question turns essentially on whether the appropriate safeguards as to notice and service have been complied with so that the alleged contemnor is made aware of his or her obligations. So, the requirements as to personal service of the original order and personal service of the penal endorsement apply in all such cases, irrespective of the subject-matter of the original proceedings. To put it another way: the fact that the underlying dispute concerned a family home or dwelling did not in and of itself mean that the obligations regarding notice and service in contempt proceedings were thereby somehow elevated. These obligations apply in all contempt proceedings, irrespective of the underlying subject matter of the dispute.

The Court of Appeal order of 15th January 2021

68. The second matter concerns the status of the orders of Noonan J. of 15th January 2021. There is no question but that Noonan J. extended the stay for a further three weeks in both cases. In her judgment, however, Whelan J. held that the wording of the stay was such that it applied generally so that all the occupants of both properties could take advantage of this extended period. She further held that it was necessary, accordingly, that, the other occupants be served with this stay order as a prelude to any motion for attachment and committal.

69. With respect, I cannot agree with the construction of these orders of Noonan J. which found favour with the Court of Appeal. For my part I think it plain even from a construction of these orders – and without even looking at the accompanying transcript – that the orders apply – and apply only – to the moving party in each case. After all, both orders commence with the words "Upon motion of Gabriel Petrut" and "Upon motion of Margaret Hanrahan" respectively. The orders refer in terms to the affidavits

which they have filed and their appearances on that date. (In Mr. Petrut's case the order recites the fact that Ms. Hanrahan appeared in person and that Mr. Petrut could not attend on that date.) The orders further recite that Noonan J. ordered that the costs of the motion be costs in the appeal. In the event that the appeal was lost, these costs were indubitably the costs which were personal to both Mr. Petrut and Ms. Hanrahan and not to the other occupants.

70. It is accordingly clear from the terms of the perfected orders of 15th January 2021 that it was only Ms. Hanrahan and Mr. Petrut who, as moving parties, obtained the benefit of the extended stay. It was accordingly unnecessary to serve these orders upon any person other than Ms. Hanrahan and Mr. Petrut.

The service of process in the contempt motion

71. Following the entry of an appearance by the solicitors for all the occupants on or about 22nd February 2021, the solicitors for Pepper served a copy of the order of Reynolds J. of 25th November 2020 (together with a penal endorsement) and a notice of motion seeking orders of attachment and committal pursuant to Ord. 44, r. 3 on *the solicitors for the occupants*, but not upon the occupants *personally*. In the High Court, Sanfey J. took the view that even though he was not satisfied that all the occupants had been served at the time of the original motion for attachment issued in mid-February 2021, he was nonetheless also satisfied to accept Pepper's residual argument, namely, that the occupants were by May 2021 fully aware of the order of Reynolds J. of 25th November 2020 and were still refusing to yield up possession.

72. While this approach was adopted by Sanfey J., I cannot help thinking that, with respect, it would have been better if Pepper had at this stage taken the view that now that it knew the identity of all of the occupants it might have sought to adjourn the contempt

proceedings and then re-serve the occupants personally with the proceedings and a penally endorsed copy of any relevant order. If that had proved for whatever reason impossible, then application might at that point have been made for an order of substituted service.

73. At all events, the approach taken by Sanfey J. in respect of the residual argument of Pepper was not accepted as correct by Whelan J. in her judgment for the Court of Appeal. She took the view that it was necessary for the original order to have been personally served, together with a penal endorsement: see [169], [170] and [184] of the judgment. She also held that service upon the defendant's solicitors was ineffective for this purpose, distinguishing this case from the decision of Peart J. in *Laois County Council v. Scully*: see [185]. Whelan J. also relied for this purpose on Pepper's failure to serve the 15th of January 2021 Court of Appeal order extending the stay for a further three weeks on all the occupants (and not just Mr. Petrut and Ms. Hanrahan).

74. I find myself in general agreement with the conclusions of Whelan J. on this point. I consider that before any question of contempt of court could arise there would need - in general, at least - to be proper service of both the original summons in the first instance and, in the case of alleged subsequent default in respect of non-compliance with any order, the personal service of the penally endorsed *order* required by Ord. 41, r. 8. There may, of course, well be also other circumstances where the Court has made provision for substituted service under Ord. 10, r. 1 in which case service must then be effected in accordance with the terms of that particular order.

75. There is, in fact, pre-1922 authority for the proposition that an order providing for the attachment and committal will not be made unless the contempt application has been personally served on the defendant: see *Century Insurance Co. Ltd. v. Larkin* [1910] 1

IR 91. Here Meredith MR made an order requiring the defendant to deliver up possession by a named date. The defendant was physically present in court when the order was made. When the defendant refused to deliver up possession in the manner required, the plaintiff moved for attachment and committal. For some reason, however, the original order requiring the defendant to vacate the property was never served on the defendant.

76. Meredith MR nevertheless rejected the argument that even in such circumstances personal service of the penally endorsed order on the defendant was in some way supererogatory or superfluous. The Master of the Rolls then observed ([1910] 1 IR 91, at 93) that "the first duty of the solicitor obtaining an order requiring a person to do a given act within a given time is to serve the order, with a proper [penal] indorsement thereon, on the person required to do the act." The failure to serve the penally endorsed order personally on the defendant was accordingly fatal to the motion for attachment. The same may be said here. One may accept that, as Peart J. observed in *Laois County Council v. Scully* [2009] 4 IR 488 at 504-505, *Larkin* was a case where the defendant was not legally represented. Yet for the reasons I will now deal with, I do not think that this fact takes from the general authority of the case.

77. It is true, of course, that at least by late February 2021 the order (together with the penal endorsement) had been served on the occupants' solicitors who had by this stage come on record. It is also true that the decision of Peart J. in *Scully* is authority for the proposition that service of the solicitor in such circumstances is sufficient. In a very thorough and careful judgment Peart J. observed in that case that ([2009] 4 IR 488 at 504):

> "Order 41, r. 8 RSC makes no reference to personal service being required. There is simply a requirement in relation to an order requiring a person to do an act, to state the time after service by which it has to be done, and that the copy order served be endorsed with a penal endorsement. It seems to me that under the Rules of the Superior Courts an order such as the present one is not an order which the Rules require to be served personally on a defendant bound by it. It is not an order under Ord. 84, r. 1 RSC for example. It seems to me therefore that where an order of this kind is made against a defendant for whom a solicitor is on record, service on that solicitor is permitted, since the Rules themselves have not required service to be personal service. The cases to which I have referred can be distinguished on their facts. That is not to say that out of an abundance of caution a plaintiff's solicitor ought not to in fact effect personal service of such an order duly endorsed upon the defendant personally, but it does not appear to be a requirement."

78. I fear that, with respect, I cannot agree with this analysis. It seems to me that Ord. 41, r. 8 does indeed state that the service must be personal service ("…upon the copy of the judgment or order which shall be served upon the person required to obey same…"). As was observed in the course of oral argument on this appeal, one might well ask: what is to happen if the solicitor does not in fact inform his or her client of the service of these papers, whether by reason of mischance or an inability to contact the client or for some other reason? The fact that the imprisoned contemnor might have an action for damages against his solicitor in such circumstances is unlikely to assuage concerns about the fair administration of justice and the necessity for proper service upon and notice to the party said to be in default.

79. It is true that there is authority for the proposition that, for example, a notice of appeal can validly be served on the solicitor of one of the parties even where the party in question had vanished and could not now be served: see *Crowley v. McVeigh* [1989] IR 73 at 79-80, per Blayney J. In any event, this situation is different inasmuch as there was a solicitor on record and pleadings (including a notice of appeal) can be served on a solicitor. For my part, however, I would be unwilling to take the principle of *Crowley* any further as it seems to me that, generally speaking, at least, Ord. 41, r. 8 does in fact require personal service upon the person now called upon to comply with the court order and that this is not satisfied by service upon a solicitor.

80. All of this points to the vital importance of personal service upon a defendant who is said to have failed to comply with a court order. This issue of notice to a defendant arose in *DH v. Governor of Wheatfield Prison* [2011] IEHC 492, a case where I directed the release of the applicant pursuant to Article 40.4.2° of the Constitution. The unchallenged evidence was that although the applicant husband had been imprisoned by the District Court for failure to pay an instalment order in favour of his wife, he had not been served with the statutory notice (corresponding to a penal endorsement) required in such cases by s. 4(2)(b) of the Enforcement of Court Judgments Act 1940. The object of the notice was to warn the defaulting spouse that he or she might be imprisoned if they failed to comply with the District Court order.

81. Addressing the issue of service, I observed [at 15-17]:

> "Compliance with these procedural requirements is accordingly of particular importance and any non-compliance with such requirements could only be excused where it was essentially *de minimis* or fell into some category of harmless error… The husband was given no notice whatever that the failure to

comply might lead to his imprisonment, yet s. 6(2)(b) of the 1940 Act particularly requires that the summons contain such a notice.

In view of the manifest non-compliance with the notice requirements of s. 6(2)(b) of the 1940 Act in the present case, an essential prerequisite to the valid exercise by the District Judge of his statutory contempt powers was thus missing. By reason of such non-compliance with this jurisdictional prerequisite, the District Judge accordingly had no jurisdiction whatever to impose a custodial sentence in the present case…

Such a conclusion also accords by analogy with the practice of this Court in contempt matters. Order 41, r. 8 RSC requires that the relevant court order must contain a penal endorsement (*i.e.*, a specific warning that the defendant is liable for potential imprisonment) where it sought to invoke the coercive contempt jurisdiction of this Court. While the court has a discretion to dispense with this requirement in cases where the defendant is required by court order to refrain from committing a specific act, in the ordinary course, compliance with Ord. 41. r. 8 is mandatory: see generally *Hampden v. Wallace* (1884) 26 Ch.D. 746 and *Ulster Bank Ltd. v. Whitaker* [2009] IEHC 16. Thus, in the latter case, Clarke J. refused to take any coercive step such as sequestration of assets in the absence of the relevant penal endorsement. *Whitaker* is a powerful reminder of the imperative necessity of adhering to all procedural pre-requisites to the exercise of the contempt jurisdiction."

82. Applying these principles, therefore, it seems to me that the application for attachment and committal in the present case should fail by reason of the fact that, in the absence of orders for substituted service under Ord. 10, r. 1, (i) the orders as penally endorsed

were not served personally on the defendants in the manner required by Ord. 41, r. 8 or, as it happens, in accordance with the terms of the order of Reynolds J. and (ii) fundamentally, the motion for committal was not served personally on the persons sought to be committed to prison for a deliberate breach of the order of Reynolds J.. Insofar as Peart J. concluded in *Scully* that service for this latter purpose of a penal endorsement could validly be effected by service upon on a solicitor on record, I think, with respect, that this is incorrect. (In addition, in the particular case of Ms. Hanrahan and Mr. Petrut, it was also necessary to serve the stay order of 15th January 2021.)

83. Counsel for Pepper, Mr. McCullough SC, emphasised the undoubted public interest in ensuring compliance with court orders. He drew attention to the comments of Lord Woolf MR for the English Court of Appeal in *Nicholls v. Nicholls* [1997] 1 WLR 314 and those of Peart J. in *Scully*. It was stressed in both cases that an ultra-technical approach to contempt should not be taken, especially where the contemnor well knew the nature of the obligations which the order court had imposed. As Peart J. put it in the environmental pollution case of *Scully* ([2009] 4 IR 488 at 524):

> "For this court to stand by idly by allowing these respondents to claim the benefit of some infelicity in the manner in which the order of the court has been prepared and perfected, even though these do not cause any prejudice to the respondents would permit a situation to exist where this State fails to honour its international obligations in this very important matter of environmental pollution, and to allow form to triumph over substance, and therefore over justice."

84. While I agree that, in general terms, the courts should not adopt an overly technical approach to the construction of court orders in the context of contempt applications, at

the same time compliance with the obligations in respect of service and notice are fundamental. As I put it in *DH*, save for cases where the errors are *de minimis* or essentially harmless, compliance with such requirements is essential and should not lightly be dispensed with. It was the failure to comply with the requirement for personal service of the penally endorsed order or orders which was, absent an order for substituted service, fatal to the contempt application in this case.

Part VI - Conclusions

85. It remains to sum up my overall conclusions.

86. First, although the properties in question have subsequently been sold by Pepper and no further relief is sought by it against the former occupants of these properties, given the multitude of judgments delivered in these proceedings, their potentially precedential effect and the practical importance of the legal issues which they raise, it was nonetheless appropriate for this Court to hear and determine this appeal, essentially for all the reasons given by O'Donnell C.J. in his judgment in *Odum*.

87. Second, while the High Court has an inherent jurisdiction to permit proceedings to be issued against persons unknown, there are principled and pragmatic reasons why the exercise of this jurisdiction should remain exceptional. This form of procedure cuts across the general principle of the public administration of justice provided for in Article 34.1 of the Constitution. Proceeding against persons unknown is also apt to cause confusion and uncertainty, not least where (as here) the coercive enforcement of court orders is considered to be necessary.

88. Third, having regard to all the relevant circumstances, I do not fault Pepper for resorting to the expedient of suing persons unknown at the time it commenced proceedings on 8th October 2020, even if it could have made done more to ascertain the

identity of some of the occupants. At the same time, this case must be regarded as at best a marginal case for the use of the mechanism and unlike the more obvious examples - such as threats of internet blackmail or copyright theft - it should not necessarily be regarded as a benchmark. Apart from anything else, a plaintiff who resorts to suing persons unknown risks the complications of enforcement at a later stage in the proceedings, so that it is in the interests of litigants themselves that defendants are named. I repeat that any departure from this rule should be exceptional.

89. Even if it be said that the use of the exceptional persons unknown jurisdiction was not justified, contrary, however, to that which the Court of Appeal appears to have suggested, the proceedings cannot nonetheless be said on this account to be legally irregular or otherwise ineffective. Further, as I have already pointed out, there is no reason why the proceedings could not have been amended in accordance with the provisions of Ord. 15, r. 13 as the identities of those in occupation of the flats in the respective premises became known. Such an amendment would not at all have necessitated the re-start of the proceedings.

90. Fourth, the importance of personal service of any order and the need for penal endorsement prior to any endeavour to enforce any subsequent court orders made in such litigation via contempt proceedings must be re-stated. Contrary to the views expressed by Peart J. in *Scully*, I consider that the service of a penally endorsed order on a solicitor is, at least in the first instance, insufficient for the purposes of Ord. 41, r. 8.

91. Fifth, the failure to effect personal service of the order of Reynolds J. of 25th November 2020 on the individual occupants, coupled with the failure to effect personal service of a penally endorsed order in the manner required by Ord. 41, r. 8 was fatal to Pepper's

motion to have the occupants attached and committed for failure to comply with that order of Reynolds J.

92. It follows that for these reasons I would dismiss the appeal of Pepper and affirm the decision of the Court of Appeal, albeit for different and narrower reasons. In essence, I consider that while Sanfey J. was entirely correct in finding that there had been insufficient service such as would permit the making of a committal order, he was, with respect, wrong to conclude that Pepper could then fall back on any residual arguments without proof of actual service (or, if appropriate an order for substituted service) of the penally endorsed order prior to the making of any committal order against any of the occupants.