



**AN CHÚIRT UACHTARACH**  
**THE SUPREME COURT**

S: AP:IE: 2022:000126

**[2023] IESC 30**

**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**

## **RULING of the Court in respect of costs delivered the 22<sup>nd</sup> day of November 2023**

### **Introduction**

1. The Court has already delivered its principal judgment in this matter on 31<sup>st</sup> July 2023: see *Pepper Finance Finance Corporation (Ireland) DAC v. Persons Unknown* [2023] IESC. 21. The Court is now called upon to adjudicate on the issue of costs, the parties having availed themselves of the opportunity to make submissions re costs.
2. The background facts are well known to the parties and need only be recapitulated here in a more summary form than in the principal judgment. The proceedings arose out of a bank debt and an order for possession in respect of certain properties made by the High Court as far back as 2008. It appears that ownership in the loan facilities, facility letters and mortgages were transferred to Pepper on 7<sup>th</sup> August 2020. Leave had been granted in 2018 by the High Court to a previous owner of the debt to execute that judgment. In November 2022 the High Court made an order substituting Pepper Finance as the plaintiff in those proceedings.
3. The appeal to this Court arose from an endeavour from the (then) owner, 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 arose in relation to the *locus standi* of Pepper to pursue this appeal as these two properties had subsequently been sold by Pepper in February 2022 after the Court of Appeal heard an appeal in the contempt proceedings. There was also a related issue as to whether the proceedings have been thereby rendered moot. This appeal was just the latest step in litigation which has already given rise to a multiplicity of motions, hearings and judgments.

4. On 8<sup>th</sup> 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 23<sup>rd</sup> 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 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 25<sup>th</sup> November 2020, nor, as it happens, did any other occupant of these properties.
5. On 25<sup>th</sup> 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 14<sup>th</sup> 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.
6. 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 in the case of 21 Little Mary Street (which had five separate dwelling units) Reynolds J. directed those three hard copies of each of the relevant documents be delivered by hand to the property by way of service. These supplemental directions were not, however, contained in the actual orders of the High Court which were perfected on the following day, 26<sup>th</sup> November 2020.

7. Both Ms. Hanrahan and Mr. Petrut had appealed to the Court of Appeal against the making of this order by Reynolds J. On 15<sup>th</sup> January 2021 that Court, per Noonan J., refused to impose a general stay on that order but he nonetheless extended the stay. There was 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 5<sup>th</sup> February 2021. The two orders of Noonan J. (sitting alone) recorded that 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. This Court ultimately held (disagreeing with the judgment of the Court of Appeal) that this order enured for the benefit of Mr. Petrut and Ms. Hanrahan only and not the other tenants.
8. 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 14<sup>th</sup> January 2021, 8<sup>th</sup> February 2021 and 11<sup>th</sup> February 2021. Pepper then issued a motion for contempt against the occupants of the properties on 12<sup>th</sup> February 2021.
9. Following an affidavit sworn on 22<sup>nd</sup> 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 4<sup>th</sup> and 5<sup>th</sup>

May 2021 when judgment was reserved by Sanfey J. Numerous affidavits had been filed on behalf of all parties.

- 10.** 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 to obtain a further stay. In a judgment delivered on 24<sup>th</sup> 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. The appeal of Ms. Hanrahan and Mr. Petrut against the making of this order was to be the subject of a separate hearing.
- 11.** Following a two-day hearing in early May 2021, Sanfey J. delivered a reserved judgment on the contempt matter on 13<sup>th</sup> 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.
- 12.** The occupants had each averred that they were unaware of the orders and Sanfey J. concluded that he could not be satisfied for the purposes of requisite standard of proof in contempt cases that they had been so served. He held, however, that any such

deficiencies had subsequently been cured. These orders for possession were subsequently discharged with the consent of the parties on 12<sup>th</sup> October 2021 as by that stage possession had been yielded up by the occupants of the two properties.

- 13.** The Court of Appeal then delivered judgment in the case of Mr. Petrut and Ms. Hanrahan on 14<sup>th</sup> October 2021: *Pepper Finance Corporation (Ireland) DAC v. Petrut* [2021] IECA 257, Here the Court dismissed the appeals of Mr. Petrut and Ms. Hanrahan against the making of the interlocutory orders by Reynolds J.
- 14.** The judgment on the contempt matter was delivered by Whelan J on 28<sup>th</sup> July 2022.: see *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown* [2022] IECA 170 Whelan J. 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:
- 15.** In a lengthy and complex judgment Whelan J. found against Pepper, chiefly because she found that it did not fully and completely comply with requirements of Ord. 41, rr. 4 and 8 regarding penal endorsements and personal service. The Court of Appeal accordingly allowed the appeal from the decision of Sanfey J.
- 16.** In our judgment of July 2023, we firstly held that the Court should nonetheless proceed to hear and determine the appeal, even if the underlying issues was now moot. The Court then held that there was an inherent jurisdiction to make orders against persona unknown, albeit that it was a jurisdiction that should remain exceptional. While the Court held that the case was a marginal one, we nonetheless observed that we could not fault Pepper for resorting to the expedient of suing persons unknown at the time it commenced proceedings on 8<sup>th</sup> October 2020.

17. Third, we then held that even if it could be said that the use of the exceptional persons unknown jurisdiction was not justified, contrary to that which the Court of Appeal appears to have suggested, the proceedings could not nonetheless be said on this account to be legally irregular or otherwise ineffective.
18. 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 was stressed.
19. Fifth, the failure to effect personal service of the order of Reynolds J. of 25<sup>th</sup> 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. This Court accordingly dismissed the appeal of Pepper and affirmed the decision of the Court of Appeal, albeit for different and narrower reasons.

#### **Submissions of the parties**

20. Pepper have now submitted that as the defendants (whom we shall describe as "the tenants") have only been partially successful in their appeal for the purposes of s. 169(2) of the Legal Services Regulation Act 2015 ("the 2015 Act"), they should be entitled only to 50% of their costs. It further submits that this cost order should itself be stayed pending the outcome of these proceedings. For their part the tenants maintain that they have in substance been entirely successful in their appeal within the meaning of s. 169(1) of the 2015 Act and that costs should therefore follow the event. They also point to aspects of the main judgment in which the Court effectively criticized the conduct of

the litigation on the part of Pepper and say that this should also be reflected in the court's judgment in respect of costs.

### **The Court's conclusions**

21. The Court is of the view that the tenants have been largely – but not entirely – successful within the meaning of s. 169(1) and s. 169(2) of the 2015 Act. The critical issue before the Court concerned the adequacy of the individual service of the contempt proceedings and in that they have been successful.
22. The tenants were not, however, completely successful. Pepper was substantially vindicated in respect of the persons unknown jurisdiction, albeit that the Court took the view that the title of the proceedings ought to have been amended once the names of the parties became known. It was correct to point to the irrelevancy in this context at least of the Article 40.5 issue. Its view of the effect of the stay order made by Noonan J. in the Court of Appeal in January 2021 and the fact that the proceedings were not moot was also upheld.
23. The Court also cannot ignore the fact that some of the tenants remained in occupation of these premises, so to some extent some of them may have contributed to bringing about these contempt proceedings. It is true that we have held that there was insufficient proof of service for the purposes of any contempt application, but it nevertheless cannot be said that the tenants' conduct was, in general, praiseworthy.
24. On the other hand, this Court in its principal judgment expressed its displeasure in respect of two aspects of the conduct of the litigation by Pepper, namely, first, the failure to disclose to the Court of Appeal that the properties in question were in the process of being sold and, second, the fact that an inappropriate warning was



administered to the effect that it might seek a wasted costs order against the tenant's solicitor. The Court repeats that there was simply no basis at all for this suggestion.

- 25.** While legal representatives are, of course, entitled – indeed, bound – to advance their clients' interests in a forceful fashion, they are nonetheless expected to act with reason and decorum. There may be costs consequences where the conduct of legal professionals falls below these exacting standards. These considerations are, after all, reflected in the express wording of s. 169(1)(a), (b) and (c) of the 2015 Act.
- 26.** The Court considers that, to some degree, these countervailing factors cancel each other out. We are then left in the situation where the tenants were substantially – but not entirely – successful in respect of the appeal to this Court. We propose therefore to award the tenants 80% of the costs (when adjudicated in default of agreement) before the High Court, the Court of Appeal and this Court. This figure takes account of the fact while they have been largely successful, the discounted 80% figure seeks to accommodate the fact that Pepper was successful in respect of some of its arguments.
- 27.** It remains to mention three further matters. While it is true that there was a multiplicity of tenants, it is not clear to the Court whether they required to be represented by a multiplicity of legal teams. Specifically, no less than six junior counsel were retained when it seems to the Court that these separate interests (such as they were) could more than appropriately have been addressed by two junior counsel.
- 28.** It is not entirely clear whether the tenants are seeking an order for costs on a solicitor client basis. Insofar as such was sought, the Court would reject that application. We see no basis for making for making a solicitor/client costs order.
- 29.** Pepper have also argued that this costs order should be stayed pending the continuation of the plenary possession proceedings. Without prejudging those proceedings – which

presumably involves a claim for damages for trespass – the Court is of the view that as the main event in this appeal has concluded, it would not be appropriate to stay any such order for costs.

**Disposition**

30. In the circumstances, the Court will make an order for 80% of the tenants' costs in the High Court, Court of Appeal and this Court, such costs to be adjudicated in default of agreement and limited in the case of counsel to one Senior Counsel and two Junior Counsel. No stay will be granted in respect of this costs award.