THE COURT OF APPEAL

NO REDACTION NEEDED

[2021] IECA 257
High Court Record No. 2020/6888P
CoA Record No. 2020/271
CoA Record No:2020/268

Whelan J.
Ní Raifeartaigh J.
Binchy J.

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

Plaintiff/Respondent

AND

GABRIEL PETRUT AND MARGARET HANRAHAN

Defendants/Appellants

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 14th day of October, 2021

Nature of the case

1. This is an appeal against a decision of the High Court (Reynolds J.) on the 25 November 2020 granting orders in respect of two premises; 31 Richmond Avenue and 21 Little Mary Street, both of which are addresses in Dublin. The Court was told that Mr. Petrut resides in 31 Richmond Avenue and that Ms. Hanrahan resides in 21 Little Mary Street. They say they are tenants in these properties and that they pay rent to Mr. Jerry

Beades. The orders were for the immediate surrender of possession and control of the properties to the respondent together with certain related orders as set out in further detail below.

2. The two appellants were not present for the hearing on the 25 November 2020. Their grounds of appeal relate to the fact that Reynolds J. proceeded with the hearing of an application for an interlocutory injunction in their absence in the circumstances which will be described below.

The orders made on 25 November 2020

3. On the 25 November 2020, Reynolds J. ordered that the defendants and each of their servants and/or agents and all other persons having notice of the said order

1) immediately surrender possession and control of the property named in the title of each set of proceedings; and
2) immediately deliver up to plaintiff/respondent all keys alarm codes and/or security and access devices in relation to the property.

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

5. It was further ordered that Pepper's solicitors be at liberty to notify the making of the order to the defendants their servants or/agents and all other persons by hand delivery and ordinary pre-paid post. The order was stayed until the 14 January 2021. A further stay was refused by the Court of Appeal on the 15 January 2021.

The premises the subject of the orders made on the 25 November 2020

6. The two premises at issue in these appeals have been the subject of long-standing litigation. The original proceedings date back many years and originally arose out of a bank debt incurred by Mr. Beades; the properties were mortgaged by him to IIB Homeloans Limited (hereafter "IIB"), a predecessor in title to the plaintiff/respondent, on the 12 June 2003 and arose by reason of a loan facility letter dated 20 May 2003 whereby a sum of €1,200,000 was advanced to Mr. Beades.

7. Defaults having arisen in relation to compliance with the terms of the said mortgage, IIB instituted proceedings by way of special summons on the 29 November 2006 seeking possession of the said secured properties. The possession proceedings came on for hearing before Dunne J. in the High Court and on the 23 June 2008 an order was made requiring Mr. Beades to surrender possession of the said respective properties to IIB, the mortgagee. It will be noted that this was over 13 years ago.

8. By notice of appeal dated the 16 July 2008, Mr. Beades appealed the said order for possession to the Supreme Court. That appeal was ultimately heard on the 29 April 2014 and judgment in respect of same was delivered on the 12 November 2014, dismissing the

said appeal and affirming the order for possession previously made in the High Court on the 23 June 2008. This was almost 7 years ago.

9. In the period between the order of Dunne J. in 2008 and the 7 August 2020, there were several changes of ownership of the IIB loan facilities and related securities, which in each case were the subject of substitution orders of the High Court. There has been litigation by Mr. Beades concerning issues arising from the transfer of title in this regard, none of it successful. Ultimately the legal estate in the facilities and the mortgages over the properties became vested in the plaintiff/respondent. The latter transaction was the subject of a substitution order made by Twomey J. in the High Court on the 18 November 2020, which order was in turn appealed by Mr. Beades, and which appeal is the subject of a judgment of Binchy J. in this Court, also handed down today.

10. The deed of mortgage included a clause that the borrower will not without the previous written consent of the lender grant or agree to grant any lease or tenancy. Thus, on its face, it demonstrates a contrary intention (as *per* s.18(13) of the Conveyancing Act, 1881) in order to derogate from the provision of s.18(1) of that Act.[1] Such a clause is referred to in short-form as a 'negative pledge clause'.

11. However, special condition/clause 34 of the facility letter giving rise to the bank debt contained a form of limited and conditional consent to the creation of a tenancy. That provision reads as follows:-

[1] The provisions of s. 8 of the Land and Conveyancing Law Reform Act, 2009 (which repealed certain provisions of the Conveyancing Act, 1881) did *not* apply to the mortgage in question.

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

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

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

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

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

12. The consent is therefore *conditional* upon a number of conditions being satisfied. Further, the tenancy could not last longer than 1 year.

13. There is a long line of authority that establishes that where consent is not provided by the lender/mortgagee, a lease created between the borrower and their tenant is not of itself sufficient to create a legal relationship between the borrower's tenant and the lender/mortgagee. A leading modern authority (which itself reviews previous authorities) is *Fennell and Anor. v. N17 Electrics Limited (in liquidation)*.[2] Delivering judgment in that case, the High Court (Dunne J.), having reviewed in detail the jurisprudence and academic commentary in this area, stated at para. 30:-

"It is also clear from the authorities... that the mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not,

[2] [2012] IEHC 228.

of itself, sufficient to create a legal relationship between the mortgagor's tenant and the mortgagee."

14. The issue of consent and the creation of a tenancy was further discussed in *Kennedy v. Kelly*[3] in the context of the Residential Tenancies Act 2004.

15. In one of many judgments concerning the properties at issue in the present case, Whelan J. pointed out in *KBC Bank Plc v. Beades*[4] at para. 59:-

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

16. The question of the consent of the mortgagee to tenancies was also considered in respect of these two particular properties in a judgment of the Court on the 24 June 2021. This arose in the context of an application by a number of persons other than the two appellants; those persons, who said they were also tenants at the two premises, were seeking an extension of time within which to appeal the decision under appeal in the present case. They had not participated in the High Court hearing of 25 November 2020

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[3] [2020] IECA 288.
[4] [2021] IECA 41.

either. The Court refused to grant such leave and in the context of doing so, considered some of the issues which have arisen in the present case. While the precise legal context is different, there is a considerable degree of overlap as between that application and the submissions made in present appeal.

17. The following is a non-exhaustive list of some of the key judgments concerning these properties:-

- *IIB Homeloans Limited (Formerly Irish Life Homeloans Limited) v Jerry Beades*[5]
- *Pepper Finance Corporation (Ireland) DAC v. Beades (Motion)* [6]
- *Pepper Finance Corporation (Ireland) DAC v. Beades*[7]
- *Pepper Finance Corporation (Ireland) DAC v. Beades*[8]
- *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown In Occupation Of The Property Known As 21 Little Mary Street, Dublin 7 AND Pepper Finance Corporation (Ireland) DAC v. Persons Unknown In Occupation Of The Property Known As 31 Richmond Avenue, Fairview, Dublin 3*[9]
- To that list may now be added this judgment and those of today's date of my colleagues, Whelan and Binchy JJ.

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[5] (Supreme Court No. 254/2008, 12 November 2014) (McKechnie J.).
[6] [2021] IECA 39 (Whelan J.).
[7] [2021] IECA 40 (Whelan J.).
[8] [2021] IECA 41 (Whelan J.).
[9] (Unreported, Court of Appeal, 24 June 2021) (Donnelly J.).

The immediate lead-up to the 25 November 2020 hearing

18. Mr. McHugh, senior portfolio manager with Pepper, described the lead-up to the hearing on the 25 November 2020. He indicated that from the 28 August 2019, Pepper and its predecessor in title Beltany, began issuing correspondence to the "occupants of the properties", requesting their identities and seeking copies of all documentation relating to any purported legal entitlement upon which they were occupying the properties. No substantive response was ever received, and the occupants never identified themselves to Pepper's solicitors.

19. Mr. McHugh details that when an application for short service was made in the High Court on the 14 October 2020, the High Court directed that service be effected by leaving five copies in respect of Richmond Avenue at the property addressed to "The Occupants" and two copies addressed accordingly to "The Occupants" at 21 Little Mary Street. These directions are referred to in the transcript of the hearing on the 25 November 2020 which was made available to the Court.

20. Various affidavits of service (of both the documentation subsequent to the direction of the High Court regarding service and of the Orders made on the 25 November 2020) have been produced to the Court which show, despite the ringing of buzzers in each of the properties on various occasions, there was no answer, and that letters were left inside the door and/or at the foot of the post boxes. Occasionally a number of individuals were spoken to at the premises. These people indicated where post was to be left.

21. It is important to record that there has been no suggestion that these two appellants were not on notice of the application on the 25 November 2020 or of the existence of the

proceedings. This is manifestly clear from the fact that each of them entered an appearance two days before the hearing date. However, neither of them appeared on the hearing date itself. Ms. Hanrahan wrote a letter dated the 23 November 2020 stating that:-

> "*It is my intention to Enter an Appearance on the 23rd November 2020 followed by a substantive Affidavit outlining the facts. I am recovering from a serious operation and I need time to prepare my Affidavit.*
>
> ...
>
> *I have seen, through the Court Searches, that this is returnable before the Courts on the 25th November 2020.*
>
> *I am asking you to adjourn this case for some time until I receive the Books of Pleading and prepare my Affidavit.*"

22. The solicitors for Pepper responded by letter dated the 23 November 2020, refusing to agree to the sought-for adjournment, stating:

> "*We note from your letter that you claim to have lived in the Property for several years. Please note that our client does not accept this contention by you. Among other things, we note that you have failed and/or refused to identify yourself and respond to our correspondence for over a year. We have issued correspondence to the Property on no less than eight occasions since August 2019, all of which have been hand delivered and also sent by certified post to "The Occupants" of the Property.*
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> *In addition and prior to issuing the within proceedings, letters before action were sent to "The Occupants" of the Property on 25 February 2020, 6 July 2020 and again on 25 September 2020 confirming that our client is entitled to possession of the Property pursuant to Orders of the High Court dated 23 June 2008 and 14*

October 2019. The letters further stated that our client was prepared to engage with you in terms of providing you with a reasonable period to vacate the Property in an orderly way, if you provided a written undertaking that you would vacate the Property. No response was received to these letters nor was any undertaking forthcoming from you.

...

We sent a further letter addressed to "The Occupants" of the Property on 16 November 2020 confirming that our client would be proceeding with its application for injunctive relief on 25 November 2020.

In light of the above, there is no valid basis on which you are seeking a adjournment in this matter. You have had ample opportunity to deliver a replying affidavit and you have failed to do so. Our client's position is as set out in the affidavit sworn by Mr Gerard McHugh on 8 October 2020. In particular, our client's position remains that you are trespassing on the Property and our client requires possession of the Property so that it can be marketed and sold to pay down the indebtedness that is secured against the Property."

The hearing on the 25 November 2020

23. At approximately 10.50am on the 25 November 2020, the High Court judge (Reynolds J.) caused the case to be called. There being no response in court other than from solicitor for the plaintiff/respondent, she caused the case to be called outside the courtroom also, but no one responded. She put the case back to 12pm. Mr. Beades was present in court but neither of the appellants was there. Counsel for the plaintiff/respondent started to open his case.

24. There was then a somewhat lengthy exchange between the judge and Mr. Beades before counsel resumed his opening of the papers. Counsel emphasised the evidence before the court concerning the service that had been effected in accordance with the judge's directions. He referred to the appearances entered on behalf of both of the appellants, Mr. Petrut and Ms. Hanrahan, and directed the judge to the specific documents in this regard as well as the responses from his client's solicitors. He pointed out that both appearances had arrived from a location called Orca Print almost simultaneously. A booklet of correspondence was specifically adverted to; although the transcript does not record that he read out Ms. Hanrahan's letter seeking an adjournment in particular, it must have been included in this booklet. He notes his solicitor's correspondence raising their doubts as to whether Ms. Hanrahan actually lived at the premises. The case adjourned at 1pm and resumed again shortly after 3pm, the judge having had to deal with other matters between 2 and 3pm. Counsel continued to open passages from the affidavits of service until the following exchange took place:-

> "MS. JUSTICE REYNOLDS: Mr. Byrne, I am satisfied that not only has service been effected in accordance with my Order, but indeed service has been effected over and above the Court's Order in terms of steps that were taken by your solicitor to ensure that the parties were made aware that in spite of the fact that they had failed to furnish replying affidavits, that the matter would be proceeding before the Court today. And other than the two appearances that you have referred to, there doesn't appear to have been any other contact from any of the occupants in respect of the two properties.
>
> MR. BYRNE: That's exactly right.
>
> MS. JUSTICE REYNOLDS: There can be no doubt, Mr. Byrne, but that the parties are aware that the matters are before the Court here today."

25. Counsel then moved to the substance of his application for injunctions. He referred to the fact that the judge had previously received the papers and she said that while she had an opportunity to review them earlier in the week, she wished him to summarise them again. He referred to the affidavit of Mr. McHugh and the efforts that had been made to engage with the tenants of the properties and the judge commented that it was now a year since this had commenced. Counsel then referred to the mortgage and clause 13(iii) thereof, at which point the judge commented that it was "the equivalent of the negative pledge clause". Counsel then said:-

> "And what Mr. McHugh says in terms and what the correspondence sent by my solicitors says unequivocally is that there has never been any evidence produced by any party to the effect that there was ever consent provided to IIB or KBC or Beltany or indeed, Pepper to the creation of any tenancy in respect of these properties and that stands to reason Judge, if you think about it because, as long ago as 2006, IIB was initiating proceedings against Mr. Beades seeking an order for possession in respect of these properties. So the idea that the mortgagee would have in the intervening 14 years consented to the creation of a tenancy is, in my respectful submission, illogical."

26. Counsel said that Mr. Beades remained indebted to Pepper Finance in the amount of €2.33 million together with interest. He also referred to the fact that no document had ever been produced suggesting that the tenants' occupation was lawful. He referred to other matters such as an undertaking as to damages.

27. The judge asked about the number of tenants in the properties and about any forbearance that the plaintiff/respondent would be willing to show by means of a stay. Regarding the latter, counsel said that they appreciated the time of year and would have no difficulty with a stay being placed on any order until January.

28. The judge granted the reliefs sought with a stay until January. Reynolds J. in granting the orders stated that "*it was clear [...] from the evidence that there can be no lawful basis for the occupation of these properties. It is quite clear from the Deed of Mortgage which has been opened to the Court that the terms of the mortgage specifically preclude any occupation or lease of the premises without [...] consent and it is quite clear that there has never been any consent forthcoming.*" She also said that it was clear that there had been attempts to engage with the tenants for a year and absolutely no co-operation had been forthcoming. She said she was also satisfied that service had been effected in accordance with her directions and that the parties in occupation were aware of the proceedings but had chosen not to participate, except that after the time for delivery of affidavits, appearances had been entered (which of course was a reference to the appearances entered by Mr. Petrut and Ms. Hanrahan).

29. There was then a discussion about whether there were health and safety issues at the two premises, and again counsel discussed and referred to the evidence as to interactions with people at the premises. In the course of this discussion, the judge again indicated that she was satisfied that the persons had chosen not to engage at all, and that they were in unlawful occupation. She again referred to the absence of any documentation showing that consent to occupation by tenants had been forthcoming. She referred to the lengthy period

of time since the order for possession had been made and praised the plaintiff/respondent for its forbearance in how it had dealt with, and was dealing with, matters.

Grounds of Appeal

30. With regard to Mr. Petrut's appeal concerning 31 Richmond Avenue, Fairview, Dublin 3, the Grounds of Appeal are as follows. The grammatical/word errors are in the appeal grounds themselves:

1. The trial judge erred in fact and in law in not taking in consideration that the defendant was not properly informed that the application was a physical hearing and not a remote hearing as noted on the Courts website, no details were ever furnished by either the Court of the applicant.
2. The trial judge erred in fact and in law in failing to adjourn the case to facilitate the defendant to properly defend this action having filed his appearance on the 23rd November 2020.
3. The trial judge erred in denying the defendant his Constitution right's to defend himself.
4. The trial judge erred in fact and in law by not facilitating the defendant with an adjournment in line with the HSE guidelines as applied to other litigants.
5. The trial judge evidenced a serious degree of bias towards the defendant as the property the subject matter of the proceeding was in the ownership of a person known to court whom this judge treated as "*persona non grata*".

31. The grounds of appeal in Ms. Hanrahan's case are identical except that in No. 2 it adds in the words "and notwithstanding a request made by me of the plaintiff's solicitors for an adjournment".

32. It may be noted, therefore, that, apart from the bias ground (which was not pursued at the oral hearing of this appeal), all the grounds of appeal relate to the fact that the hearing proceeded on the 25 November 2020 despite the absence of the appellants. No point of substance is pleaded, in the sense of any challenge to the reasoning actually employed by the judge in her ruling on the injunctions. All the grounds relate to the procedural issue only *i.e.* that the judge decided to proceed in the absence of the defendants. This is pleaded in various formulations across a number of the grounds, but that is the point common to them all.

Submissions of counsel for the appellants

33. Counsel submits that by way of general background, two points should be made. First, he says that it is difficult to see why the application for interlocutory injunctions had been treated as urgent in circumstances where the order for possession had originally been made in 2008 and the appeal to the Supreme Court disposed of in 2014. The notice of motion seeking the interlocutory injunctions had issued on the 14 October 2020 and the matters were disposed of on the first hearing date, which was the 25 November 2020. Counsel said that some tenants had been in occupation for many years but accepted that of his two clients, the appellants, one had been there since 2019 only. The other is said to have lived at the premises for 10 years. He says that in those circumstances, it was not necessary that the matters be disposed of urgently on the 25 November 2020.

34. Secondly, counsel complains that the respondent had failed to deliver statements of claim in the cases not only by the time of the application for the interlocutory injunction but also by the date of this appeal hearing. He submits that it is wrong for the respondent to be pressing ahead with the interlocutory injunction, on the one hand, and dragging its heels, in effect, on progressing the plenary action, on the other.

35. Counsel submits that the trial judge, Reynolds J., was not informed of the letter from Ms. Hanrahan seeking an adjournment and therefore had not even entered upon the necessary 'balancing' of interests that would normally have to be engaged in by a decision-maker faced with an application for an adjournment. He referred to *Hynes v Appeals Tribunal Of The Chartered Accountancy Regulatory Board*[10] in which the High Court granted *certiorari* of a decision refusing an adjournment of an appeal concerning a professional disciplinary case. Meenan J. said that (paras. 31-32):-

> "*In dealing with the application for an adjournment the respondent should, in my view, have balanced the rights of the parties involved. The applicant sought to be legally represented, which necessarily entails the lawyers involved having sufficient time to familiarise themselves with the documentation and issues involved. As against this, the respondent was entitled to deal with the appeal expeditiously. This right has to be in seen in the context of a duty on the part of the respondents to uphold the professional standards of, and maintain public confidence in, the profession.*
>
> *There does not appear to have been any such balancing exercise carried out. Although the respondent was aware of the possibility of an adjournment being given on a peremptory basis it is not at all clear that this was considered to any extent*".

[10] [2018] IEHC 138.

36. Counsel also sharply criticises the failure of counsel for the plaintiff/respondent to inform the trial judge about clause 34 of the Facility Letter. The trial judge was told that there was a 'negative pledge clause' in the mortgage but she was not told that there had been a consent in clause 34. Thus, he said, a material matter was not put forward the court and the judge made her decision upon the basis of incomplete information. Counsel submitted that there had a failure in terms of the duty of candour to the Court. He said that when papers are handed up to a judge in a busy list, there is an onus on counsel to draw the judge's attention to relevant documents.

37. Counsel submitted that matters required to be judged on the basis of what Reynolds J. was told at the time and that what was crucial to remember was that she had been deprived of the opportunity to give proper consideration to the matters because of the omissions in what she was told. He said it was not appropriate for this Court to engage in an *ex post facto* review of whether the omitted material would have made a difference to how she decided matters on the day. He said that the respondent was seeking to give retrospective validation to what had happened on the day but that the Court should judge things on the basis of how they stood on the 25 November 2020 itself. He also complained that the respondent was seeking to conflate the issue of the adjournment with the issue of the granting of the interlocutory injunction.

38. Counsel also submitted that it was inappropriate for the application for the interlocutory injunction to have been initiated, and for the court to have granted it, in respect of "persons unknown" in circumstances where the names of his clients were known to the respondent at the time of the application. In this regard, he relied upon *Canada*

Goose UK Retail Ltd & Anor v. Persons Unknown & Anor.[11] While he accepted that the factual context was different insofar as *Canada Goose* concerned a fluctuating body of persons, he maintained that the point of principle was nonetheless applicable to the present circumstances.

39. Finally, counsel pointed out that an injunction is an equitable remedy and that the various matters raised by him were relevant to the exercise of discretion; including the fact that the need to vacate the premises could not be described as urgent, given the factual background and history of proceedings concerning the premises; and the failure of counsel for the respondent to disclose important matters to the trial judge. Counsel also criticised the fact that the respondent had taken steps by this route, that is to say by way of plenary proceedings and interlocutory injunction, instead of via the sheriff.

Submissions of counsel for the respondent

40. Counsel for the respondent submitted that the seeking of the interlocutory injunction could hardly be described as 'urgently sought' in circumstances where the proceedings for possession dated back to 2006, the order for possession had been made by the High Court in 2008, and the Supreme Court appeal in respect of the order for possession had been dismissed in 2014, from which time (at the very latest) it was entirely clear that Mr. Beades had no lawful right to enter any relationship of landlord and tenancy with the appellants. Counsel said that the failure to deliver a statement of claim to date was entirely irrelevant to the issues before the Court in this appeal. He said that the appropriate remedy for a failure to deliver a statement of claim is a motion in the High Court and that it had nothing to do with the issues on the appeal.

[11] [2020] EWCA Civ 303.

41. As to the form of procedure employed by the respondent, he said that the sheriff will not execute against people in occupation who claim to be tenants and that the use of injunction proceedings is not an unusual procedure to be used in those circumstances.

42. Counsel distinguished between (1) the "procedural question", namely whether the trial judge should have dealt with the application at all in circumstances where the appellants were not present; and (2) the legal question, namely whether she was correct in how she dealt with the application, having decided to proceed. He said, with regard to the first matter, that the criticisms of counsel were unfair. It was clear from the transcript that Reynolds J. had read the papers earlier in the week and she did not require Mr. Byrne to open them to her. He said that a margin of appreciation has to be afforded to counsel in such circumstances as it is the judge who drives the pace of the proceedings when papers have been left with her in advance of the hearing. He also points out that a booklet of correspondence was handed in to the judge, which included the letter from Ms. Hanrahan seeking an adjournment. He accepted that counsel did not open the letter itself to the judge, but again he was "taking his cue" from the judge as to what needed to be opened to her.

43. Counsel also referred to the fact that the two appellants had entered an appearance only two days before that, and there were affidavits of service before the trial judge. In all of the circumstances, she was not in any way misled, nor was she wrong to proceed with the application. He pointed out that if the appellants felt that the application should not have proceeded in their absence or that they had been taken short, they could have applied to the trial judge to set aside the order.

44. As to the appellants' arguments on the substance of the application, counsel observed that these were not within the grounds of appeal. In any event, it would have made no difference if clause 34 of the Facility Letter had been drawn to the attention of the trial judge. He pointed out that this issue was addressed at length in the judgment of Donnelly J. of the 24 June 2021. The appellants had failed to address this at all. There was simply no arguable ground upon which the two appellants could suggest they had a valid tenancy. The omission to refer explicitly to clause 34 could not be described as failure to disclose a "material" fact. The same conclusion had been reached in the judgment of Donnelly J. in relation to the other tenants who had sought to be joined to the appeal (and failed for this precise reason). One of the conditions of a valid tenancy was that, as of 25 November, there was no evidence of any tenancy agreement, let alone one which complied with clause 34. As of the date of the appeal hearing, there was still no such evidence. It was impossible to see how there could be a valid tenancy in circumstances where Mr. Petrut became a tenant some 13 years, and Ms. Hanrahan some 4 years, after the possession proceedings had been initiated in respect of the premises.

45. As to the *Canada Goose* argument, counsel submitted that was purely a matter of substance over form and that they did not know any of the names when the proceedings were brought. He submitted that this was a valid complaint only at enforcement stage, and that it had not resulted in a situation where anyone was deprived of any opportunity to be heard or to appeal in the present case.

Decision

46. As noted earlier, the grounds of appeal filed by these two appellants are limited. There was an allegation of bias which was not pursued on appeal. The remaining grounds

relate to the decision of the trial judge to proceed with the hearing on the 25 November 2020 notwithstanding the absence of the two appellants in circumstances where they had entered an appearance. However, the submissions on behalf of the appellants ranged far beyond these grounds of appeal. I think it is important that appellants be confined to their grounds of appeal and not be permitted to expand upon those grounds, particularly in circumstances where they never sought any leave to expand the grounds of appeal although they could have sought to do so by issuing an appropriate motion.

47. Mr. Petrut provides no explanation whatsoever for his failure to appear at the hearing on the 25 November 2020 despite having entered an appearance to the proceedings. Nor does he claim that he was unaware of the hearing date on the 25 November 2020.

48. Ms. Hanrahan relies upon the letter she wrote to the plaintiff's solicitors before the hearing, saying that she had recent surgery. The transcript does not explicitly record counsel for the plaintiff/respondent directing the attention of Reynolds J. to this letter, although he did refer the judge to the booklet of correspondence which, as appears from the transcript exchanges, she was being brought through at the time, and this booklet contained the letter in question. He also referred in some detail to the response of the solicitors to her letter. Therefore, it is not entirely clear that the trial judge was unaware of the letter from Ms. Hanrahan, as the appellant's counsel suggests. In any event, I am not persuaded that this ultimately matters. All of the evidence before the Court suggested that there was a history on the part of the plaintiff/respondent in trying to engage with the persons in occupation of the two premises, and that there was little appetite for reciprocal engagement. The trial judge was satisfied there was service and the appellants in fact entered appearances. An adjournment of a hearing date is not a matter of right on the part

of a party to litigation; it is incumbent upon the parties themselves to find a way of informing the court that they are seeking an adjournment. Even if Ms. Hanrahan was not in sufficiently good health to attend court herself, she could have found some person to attend court on her behalf; or indeed, if she could not do that, she could have emailed the court office, as people often do, although it is not an entirely satisfactory way of proceeding. Also, when medical explanations are put forward as a reason for non-attendance in court, it is customary and necessary to provide adequate medical evidence. None has ever been forthcoming on behalf of Ms. Hanrahan. Further, as I have already noted, Mr. Petrut made no attempt whatsoever to seek an adjournment and provided no explanation at all to this Court for his failure to do so. Neither of the appellants has claimed that they were unaware of the Court hearing date. A litigant is not entitled to simply sit back, fail to attend or dispatch a letter to the other side, and then complain that the court failed to grant an adjournment. Something more is required from them before they can complain of a breach of natural justice.

49. Neither of the appellants put forward any evidence in support of their grounds of appeal that they were not properly informed that the application was a physical hearing and not a remote hearing as noted on the Courts website; and/or by not facilitating the defendants with an adjournment in line with the HSE guidelines as applied to other litigants. The court is not aware of any HSE guidelines or of any courts website information to the effect pleaded by the appellants. Nothing at all was said about these matters in either the written or oral submissions on behalf of the appellants.

50. In my view, in all of the circumstances of the case, the trial judge was not in error in proceeding to hear the case in the absence of the two appellants.

51. This in fact is dispositive of the appeal given the limited nature of the grounds of appeal, set out earlier. However, I will briefly refer to some of the remaining arguments made by counsel. In respect of the failure of counsel for the plaintiff/respondent to draw the court's attention to clause 34, I wish to quote from the judgment of Donnelly J. in *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown in Occupation of the Property known as 21 Little Mary St, Dublin 7 and Persons Unknown in Occupation of the Property known as 31 Richmond Avenue, Dublin 3*, a judgment with which I agree. On the issue of non-disclosure (on precisely the same facts in respect of the same hearing), Donnelly J. said:-

> "*The facility letter was among the papers. Leaving aside the materiality (or level of materiality) of the facility letter to the overall issue in the case, I do not consider that the mere fact of it being in the judge's papers was sufficient in and of itself. The mere fact of a letter being exhibited among hundreds of pages of documentation would not be sufficient to ensure that a judge would have been mindful of the full implications of each clause of a letter on a material issue in what is usually a busy list. Counsel has a duty to ensure that matters of materiality are specifically brought to a judge's attention when seeking ex parte orders (or orders that are in effect ex parte).*
>
> *In this case there was a discussion with the judge about the mortgage and she referred to the mortgage containing the so-called negative pledge. It was clear that the motion judge was highly attuned to that as a live issue where an injunction against occupants in these premises was being sought. The exchange between judge and counsel was quick, this was in the context of a speedy hearing and I do not find that there was deliberate non-disclosure on the part of counsel. Nonetheless the judge was left with the impression, as conveyed by the words of her judgment, that no*

consent of any type had been given. To that extent if the facility letter was material, it might arguably amount to a failure, albeit inadvertent, to make full disclosure not to draw it to the judge's attention."

52. However, while I agree with her comments above, the *materiality* of that omission is a different matter. The authorities cited by the appellants in respect of non-disclosure all emphasise that the non-disclosure must be material. In the present case, counsel for the appellants did not make any attempt to argue how clause 34 might advance the case for his two clients, and confined himself to saying that this should be the subject of full argument at hearing, and that the court should not consider the materiality of the omitted material but rather look at matters from the point of view of the trial judge at the time of the hearing. I cannot accept the argument that the materiality of the omitted information is entirely irrelevant to the issue of the alleged injustice of the adjournment not having been granted. Litigation is not a theoretical exercise in abstract rights with no regard to the practical realities of the situation. Where a litigant complains as here that it was unfair to proceed in his absence and that the court was not told about something (here clause 34), it is of course relevant to consider (if it be the case) whether clause 34 was in any way potentially relevant to his case.

53. The appellant cannot show clause 34 to be relevant to his situation, even applying the most minimal threshold legal test imaginable, because neither of his clients claims to have been in occupation of the premises before the order for possession was made. The circumstances in which a tenant in possession might have a lawful basis for occupation as against the mortgagee were discussed in *N17 Electrics,* in *Kennedy v O'Kelly,* and in *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown in Occupation of the*

Property known as 21 Little Mary St, Dublin 7 and Persons Unknown in Occupation of the Property known as 31 Richmond Avenue, Dublin 3. It not necessary to re-traverse the reasoning in those cases. The appellants have quite simply failed to engage with the arguments or to show even the possibility that the mortgagee may have consented to *their individual* occupation of the premises. I use the words 'possibility' and 'may' advisedly; even on the most minimal threshold imaginable, the appellants have failed to engage in any way with the relevance of clause 34 and instead direct all their fire towards the failure of counsel to mention it to Reynolds J. Even accepting that it should have been mentioned, the failure to establish that it might be possibly relevant to their case had it been mentioned to the trial judge is fatal to their argument in my opinion. If this Court were to remit the issue to the High Court (as the appellant would have us do) for no other reason than that it was not raised by the plaintiff/respondent at first instance, there is every likelihood that it would be engaging in an exercise in futility which would achieve nothing more than increase the costs of the parties, waste valuable court time and delay the plaintiff/respondent from obtaining the order to which it is entitled.

54. I do not consider it necessary to deal with the argument as to the title of the proceedings, based upon *Canada Goose,* in circumstances where no such argument features in the grounds of appeal. There must be a limit to which appellants can introduce entirely new grounds into their submissions without the leave of the Court. In any event, the judgment of Donnelly J. in *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown in Occupation of the Property known as 21 Little Mary St, Dublin 7 and Persons Unknown in Occupation of the Property known as 31 Richmond Avenue, Dublin 3* demonstrates that this authority would have little or no traction in the present circumstances in any event.

55. In all of the circumstances, I would dismiss the appeal.

56. The appellants having failed on all grounds and the respondent being entirely successful in opposing these appeals, the respondent is entitled to an order for costs against the appellants in respect of this appeal. If either or both appellant(s) contends for an alternative order regarding costs, written submissions no longer than 2,000 words should be filed in the Office of the Court of Appeal within 14 days following electronic delivery of this judgment with the respondent being entitled to respond by written submission no longer than 2,000 words within a further period of 14 days.

57. As this judgment is being electronically delivered I should say that Whelan and Binchy JJ. have authorised me to say that they are in agreement with it.

Úna Ní Raifeartaigh

19.12.22