THE COURT OF APPEAL
Civil

Court of Appeal Record No.: 2021/270
High Court Record No.: 2020/6888P

Whelan J.
Collins J.
Pilkington J.

Neutral Citation Number [2022] IECA 240

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF/RESPONDENT

- AND –

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

DEFENDANTS/APPELLANTS

- AND –

Court of Appeal Record No.: 2021/268
High Court Record No.: 2020/6889P

BETWEEN/

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF/RESPONDENT

- AND –

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

DEFENDANTS/APPELLANTS

COSTS JUDGMENT of Ms. Justice Máire Whelan delivered on the 24th day of October 2022

Introduction

1. In the judgment delivered on the 28th July, 2022 in the above entitled appeals, a preliminary view was expressed that the appellants in their respective appeals were entitled to their costs, both in this court and in the proceedings before the High Court in relation to same. The respondent, Pepper Finance Corporation (Ireland) DAC (hereinafter "Pepper"), contend for an order that the costs of same be costs in the cause or in the alternative, that costs should be reserved. It is further submitted that should this court not accede to either approach but be minded to make any order for costs in favour of the appellants, said order should be subject to a stay on adjudication and execution pending the determination of the substantive proceedings.

2. Briefly put, the reasons advanced on behalf of Pepper are set out in written submissions dated the 18th August, 2022 and include, *inter alia*, the following:

That the orders made by Mr. Justice Sanfey in the High Court on the 1st October, 2021, the subject of the successful appeal by the appellants, were characterised as being overturned:

> "*… primarily by reference to conclusions reached by the Court of Appeal concerning the alleged lack of awareness or understanding on the part of the appellants of the terms of various orders of the High Court and the Court of Appeal made prior to the initiation of the Contempt Application."*

It is contended that several other arguments advanced on behalf of the various appellants had not found favour with either the High Court or this court. It is further submitted that the contentions concerning lack of awareness or understanding aforesaid had not been fully tested and would not be so tested pending the substantive trial. It is contended that the proposed order could give rise to an injustice were different factual conclusions reached concerning the levels of awareness and understanding on the parts of the appellants following the substantive hearing.

3. Pepper contends that as "*a matter of general principle, it is inappropriate that parties should devote time and expense in dealing with the adjudication or execution of costs orders while proceedings remain ongoing in which further costs orders may, and in all probability, will be made*." Reliance was placed on the decision in *Carey v Sweeney* [2021] IEHC 751, wherein a partial order for costs in favour of a litigant who had success on an interlocutory application was the subject of a stay.

4. The appellants oppose the application and contend that the indicative view expressed at para. 220 of the judgment delivered herein on the 28th July, 2022 represents the appropriate approach in regard to the costs of the within application.

Statutory context

5. Section 168(2)(c) of the Legal Services Regulation Act, 2015 provides:

> "*Without prejudice to subsection (1), the order may include an order that a party shall pay –*
>
> *(c) costs relating to one or more particular steps in the proceedings*."

Section 168(1)(a) provides –

> "*Subject to provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –*
>
> *(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings.*"

6. Order 99, rule 2(3) of the Rules of the Superior Courts provides:

> "*Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules: ….*
>
> (3) *The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs*

save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."

7. The approach of this court is to be informed by two key contextual factors. Firstly, at issue in this case was the invocation of the coercive jurisdiction of the High Court. Motions brought by Pepper seeking attachment and committal of the respective defendants/appellants had issued on the 12th February, 2021. The proceedings were heard before the High Court and judgment was reserved and subsequently delivered on the 13th August, 2021. Further orders were made, *inter alia*, on the 30th August, 2021. On the 1st October, 2021 the High Court granted to Pepper orders for the attachment of, *inter alia*, Margaret Hanrahan, Augustin Gabor, together with any other adult person in possession and/or occupation of the said property, with analogous orders being made in respect of the persons in occupation of 31 Richmond Avenue, Fairview, Dublin 3. The invocation of the coercive jurisdiction of the High Court was a substantial and discrete procedural step taken by Pepper in the proceedings against the persons in occupation of the respective properties.

8. As the judgment of this court makes clear, Pepper was not entitled to the relief claimed and the orders for attachment made by the High Court on the 1st October, 2021 against the respective appellants were not validly granted.

Costs follow the event

9. The motions in question issued by Pepper, the orders made by the High Court and the reversal of same in this court constitute clear "events" in the context of s. 169 of the 2015 Act and O. 99 of the Rules of the Superior Courts. Order 99, r. 3(1) of the RSC effectively re-enacts O.99, r. 1(4a), the previous relevant iteration which had been introduced by S.I. 12/2008. At para. 24-79, the authors of *Delany & McGrath on Civil Procedure*, (4th edn., Round Hall, 2018) cite Clarke J. (as he then was) in *Allied Irish Banks plc v Diamond*

(Unreported, High Court, 7th November 2011) at p. 6 of the transcript, who identified the underlying rationale for this Rule as:

> "*to discourage parties from bringing unnecessary or inappropriate interlocutory applications or indeed from defending such applications when they are brought, or perhaps even at an earlier stage, from creating the circumstances which necessitate the bringing of these applications in the first place. That is the reason why the Court should attempt, where possible, to decide if it is safe to award costs at that stage for the fact that parties may be exposed to the costs of interlocutory applications should they be unsuccessful must be a factor in concentrating in the minds of parties as to whether those applications should be brought.*"

That rationale is particularly apposite in the context of an application seeking attachment of individuals. It is difficult to think of any interlocutory application where the obligation to approach the application with a high degree of care and concentration of minds than an application for attachment and committal.

"…**possible justly to adjudicate…"**

10. *Delany & McGrath* at para. 24 – 80 observe in regard to the language of the Rule:

> "*It is clear from the use of the word 'shall' … that the effect of the rule is that a court is required to adjudicate upon and make a costs order in respect of an interlocutory application rather than to reserve the costs of the application. … It is only permissible to reserve costs, thereby deferring an adjudication upon the entitlement to costs, where it is not possible, at that juncture, justly to adjudicate upon the costs of the application*."

The authors cite in particular the decision of Laffoy J. in *O'Dea v Dublin City Council* [2011] IEHC 100. The views succinctly put in the head-note convey one analysis:

"*[1] The right to costs was governed by O. 99 of the Rules of the Superior Courts, 1986. There were a number of fundamental rubrics … including that costs shall be at the discretion of the court; and unless the court otherwise ordered, costs shall follow the event. In the case of interlocutory applications, [the Rule] appeared to remove the discretion of the court in relation to the costs of interlocutory applications except in cases where it was not possible to justly adjudicate upon liability for costs, in which case the costs should be reserved to the trial judge on the basis that the determination of the substantive action would produce an 'event'.*

[2] In applying the principles as to liability for costs set out in Order 99… the first question the court has to consider was whether there had been an 'event' and, if so, what it was. In this respect, the court construed the term 'event', as envisaged in Order 99, to mean a result brought about by a determination of the court on the issues before the court, rather than by some supervening event, such as an agreement of the parties in which the court had not been involved."

11. The analysis of Laffoy J. in *O'Dea* was characterised by Murray J. in this Court in *Heffernan v Hibernia College Unlimited* [2020] IECA 121 as being a "*tentative view*" (para 42). Murray J. in his analysis of the legal principles at para. 29 of *Heffernan* considered that the provision in the RSC governing costs orders in respect of interlocutory applications "*... reflected both the preference articulated in the case law predating the introduction of O.99, r. 1(4a) RSC that those bringing and defending interlocutory applications should face a costs risk in the event that a Court determines that the stance they adopted was wrong*" and he cited *Allied Irish Banks v Diamond supra* in support of that analysis.

Other factors

12. It is noteworthy that there was some degree of uncertainty as to whether Pepper intended to proceed to a plenary hearing at all, the application for attachment and the order

was made by the High Court on the 1st October, 2021, having ostensibly achieved for Pepper its primary goals in the respective proceedings. In the instant case it is clear from the facts that the issue as to whether Pepper was entitled to the interlocutory orders sought, including attachment in the motions which issued on the 12th February, 2021, has been the subject of a determination by this court encompassed in its judgment of the 28th July, 2022.

13. In such circumstances, the "event" has been brought about by determination of the appeal. O. 99, r. 2(3) echoes the language previously to be found in O. 99, r. 1(4a). The current iteration of the Rule became operative on the 3rd December, 2019 pursuant to Schedule 1 to S.I. 584/2019.

Entirely successful

14. In circumstances where the judgment of this court has reversed the High Court decision, the application can be considered more fully in the context of s. 169(1) of the 2015 Act which provides:

> "*the party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties* …"

15. In my view, the decision of the High Court in *Carey v Sweeney* [2021] IEHC 751 is distinguishable in a number of material respects. The interlocutory application under consideration in that case concerned an application for leave to amend pleadings. By contrast, as outlined above, the application on the part of Pepper sought attachment and committal of the appellants and the potential deprivation of their liberty.

16. The characterisation by Pepper in its written submission that the determination of this court reversing the judgment and orders of the High Court dated the 1st October, 2021 as having been arrived at by reason of "*alleged lack of awareness or understanding on the part*

of the Appellants of the terms of various orders of the High Court and the Court of Appeal made prior to the initiation of the Contempt Applications" does not comprehensively characterise the legal bases for the decision and is unduly selective and ultimately erroneous. Further, a significant factor taken into account by the High Court in *Carey* was the conduct of the parties. At para. 8, the court noted that typically the costs of an application to amend pleadings will be awarded against the party seeking the amendment unless the reason for the application stems from a failing or omission by the other side. The court further noted *"[t]his is subject to an exception where a party makes unreasonable objection to an amendment which necessitates a separate, significant hearing with its own attendant additional costs*." In *Carey* reliance was placed on earlier authorities and in particular the decision in *Stafford v Rice* [2021] IEHC 344 where:

> "… *the notional costs of a short motion were netted off against the notional costs of the much longer contested motion. This resulted in a notional balance in favour of the party seeking the amendment. A similar exercise had been envisaged as part of the costs order proposed in the principal judgment, i.e. the plaintiff is entitled to recover two-thirds of his costs of the motion for leave to amend. If anything, the notional balance is generous to the second named defendant: the costs of a two day hearing would be much greater than a short motion dealt with on a Monday listing*." (para. 9)

No analogous arguments were or could reasonably been advanced by Pepper in the instant case in relation to the costs of this appeal and that reflects a further significant material distinguishing factor as between the two cases.

17. It is noteworthy that Simons J. in *Carey* expressed concerns regarding delays, observing at para. 12:

"…*The making of a costs order in these circumstances serves a secondary purpose of ensuring discipline in legal proceedings. Without in any way trespassing upon the undoubted entitlement of a party to oppose a procedural application, they should do so on the certain knowledge that there may be costs consequences for them if unsuccessful*."

The delays in proceeding to a plenary hearing are not referable to any act or omission on the part of the appellants.

Countervailing arguments

18. Each application for costs in connection with an interlocutory application or the appeal in respect of same turns on its own particular facts. Each encompasses the exercise of judicial discretion and the conduct of the parties is of particular importance in the context of O. 99, r. 2 and s. 169 of the 2015 Act. In coming to a conclusion, I find the following factors to be of relevance:

(a) Pepper treated the outcome of the attachment/committal application before the High Court as outcome determinative of the substantive action. The indications before this court were that Pepper was not intending to pursue the matter to plenary hearing. Further, Pepper had failed to put before the court a perfected copy of the order made by Mr. Justice Noonan in this court on the 15th January, 2021 varying the earlier order it had secured from Ms. Justice Reynolds on the 25th November, 2020.

(b) It was clear from the face of the order of the 25th November, 2020 that the prohibitory and mandatory orders were made in a context that explicitly contemplated a plenary hearing, as the order states on its face: "*and the plaintiff by said counsel undertaking to abide by any order which this court may hereafter make as to damages in the event of this court being of opinion that*

the defendants or either of them shall have suffered any damages by reason of this order which the plaintiff ought to pay…".

(c) Further, seven additional orders were secured, prohibitory in nature and restraining specified conducts "*pending the trial of this action*."

(d) Hence the initial orders obtained appear to have been specifically procured in a context where a plenary hearing was signalled as intended to take place, notwithstanding and particularly on the basis of the extensive orders that were being granted by the court.

Conclusions

19. No cogent basis has been identified by the appellant for the proposition that the costs of the attachment and committal applications be made costs in the cause. I am satisfied that this court is best placed to address the issue of the costs of this appeal against the orders in the contempt motion including the order for attachment. The appellants have been entirely successful and have dislodged orders that invoked the coercive jurisdiction of the High Court against them and each of them and their person, which in each case this court is satisfied were not properly made by the High Court.

20. The conclusion of the appeals led to a clear event in each appeal. Reserving of the said costs is not warranted in light of the conclusions of this court that the said orders were not validly made.

21. Further, and by way of observation, this court is not satisfied that any valid basis was established by Pepper to warrant indicating, as it had done, that it intended to apply to have a personal costs order made against the appellants' solicitor, and no principled or clear basis was articulated for such a claim. It is imprudent to gratuitously assert or threaten an intention to claim to a personal costs order against an officer of the court without just and reasonable

cause. The appellants are entitled to their costs in respect of the said appeals, to be adjudicated in default of agreement between the parties, said costs to include:

(a) the costs of and incidental to this appeal;

(b) all their costs in respect of the said motions before the High Court; and

(c) the costs attendant upon the submissions and arguments in connection with this application concerning costs.

22. No basis has been identified for the granting of a stay. A stay is not appropriate in circumstances where the matter at issue in the within proceedings concerned the personal liberty of the individuals and the invocation erroneously brought on the part of Pepper of the coercive jurisdiction of the High Court as against the persons of each of the individual appellants.

23. Further, in light of Pepper's stance with regard to prosecuting the within proceedings after the orders in question were procured including clear delays in effecting service of a statement of claim, there may be some residual doubt as to whether they intend to prosecute the within proceedings expeditiously to an ultimate determination. In such circumstances, a stay would be entirely inappropriate.

24. The issues arising in this appeal are distinct and discrete from the substantive issues as may fall to be determined at any plenary hearing as may take place hereafter. It is not in the public interest that the coercive and punitive powers arising in the exercise of the jurisdiction to punish for contempt of court should be lightly invoked, nor should sight be lost of the fact that a committal for contempt is primarily coercive. Where such an application is found not to have been validly sought or inappropriately obtained, the aggrieved parties are entitled in general to the costs of and incidental to the setting aside of such orders and no fact has been identified to support the bare contention that the refusal of a stay would lead to an injustice

for the respondent. Accordingly, I would refuse the application for a stay on execution of the order for costs encompassing the three factors above mentioned.

25. Collins and Pilkington JJ. are in agreement with the above decision.