THE HIGH COURT

[2022] IEHC 140

[2020 No. 6889P.]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

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

DEFENDANTS

AND

[2020 No. 6888P.]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 15th day of March, 2022

Introduction

1. The is my judgment on two applications for orders pursuant to O. 27, r. 1 of the Rules of the Superior Courts dismissing two actions by reason of the plaintiff's failure to deliver a statement of claim.

2. Save as to the properties to which they relate, the actions are identical. They were both commenced by plenary summons issued on 8th October, 2020. Appearances were entered on 23rd November, 2020 and 22nd February, 2011. The notices of entry of appearance did not call for delivery of a statement of claim but letters of the following day, and many subsequent letters, did.

3. Order 20, r. 3 of the Rules of the Superior Courts provides that:-

> *"Where the defendant enters an appearance to a plenary summons and, at the time of entering such appearance or within eight days thereafter, gives notice in writing to the plaintiff or his solicitor, that he requires a statement of claim to be delivered, the plaintiff, if he has not already done so, shall deliver a statement of claim within twenty-one days from the receipt of such notice.*

4. The several persons on whose behalf the appearances were entered insist that they are entitled to a statement of claim.

5. Notwithstanding the plain wording of the rule, the plaintiff contends that it ought not be required to deliver a statement of claim. It is submitted that it is evident from the outcome of several interlocutory applications and appeals that the defendants' position is hopeless and that a trial of the action would amount to no more than a more costly and protracted consideration of arguments which have already been held to be devoid of merit.

6. To understand the plaintiff's argument that the actions should go no further it is necessary to look at the history of the proceedings and the history and current position of another action in relation to the same properties.

The possession proceedings

7. By special summons issued on 29th November, 2006 IIB Homeloans Limited commenced proceedings against Mr. Jerry Beades for an order for possession of the properties at 31 Richmond Avenue, Fairview, Dublin 3 and 21 Little Mary Street, Dublin 7 on the ground that Mr. Beades had defaulted on a loan which was secured by a mortgage of the properties. On 23rd June, 2008 the High Court (Dunne J.) made an order for possession. An appeal by Mr. Beades to the Supreme Court was dismissed on 12th November, 2014 and the order of the High Court was affirmed.

8. On 25th July, 2018, following a change of name and a transfer of the loan and mortgage, an order was made by the High Court (Costello J.) giving liberty to KBC Bank Ireland plc to issue execution on foot of the order for possession. Mr. Beades appealed.

9. On 14th October, 2019, following a further transfer, a order was made by the High Court (Reynolds J.) giving liberty to Beltany Property Finance DAC to issue execution. Mr. Beades appealed.

10. On 18th November, 2020, following yet another transfer, an order was made by the High Court (Twomey J.) giving liberty to Pepper Finance Corporation (Ireland) DAC to issue execution on foot of the order for possession. Mr. Beades appealed.

11. Mr. Beades' appeals against the orders of 25th July, 2018 and 14th October, 2019 were heard together by the Court of Appeal on 25th September, 2020 and, for the reasons given in written judgments delivered on 17th February, 2021 by Whelan J., [2021] IECA 40 and [2021] IECA 41, dismissed.

12. Mr. Beades' appeal against the order of 18th November, 2020 was heard by the Court of Appeal on 13th July, 2021 and, for the reasons given in a written judgment delivered on 14th October, 2021 by Binchy J., [2021] IECA 256, was dismissed.

13. In the meantime, an application for a stay on execution of the High Court order pending the hearing of the appeal had been refused by the Court of Appeal (Costello J.) on 22nd January, 2021 and, for the reasons given in a written judgment delivered on 17th February, 2021 [2021] IECA 39, Pepper had been joined as a co-respondent to both appeals.

The injunction proceedings

14. By plenary summonses issued on 8th October, 2020, Pepper claimed an order requiring all those in occupation of each of the properties to immediately surrender possession and control of the properties to Pepper and a variety of negative injunctions restraining interference with the properties, and by notices of motion issued on 14th October, 2020 applied for interlocutory relief in the same terms.

15. Pepper's motions were heard by Reynolds J. on 25th November, 2020 and, on Pepper's undertaking as to damages in the ordinary way, orders were made, pending the trial of the action, for the immediate surrender of possession and control of the property and restraining all persons with notice of the making of the order from impeding or obstructing Pepper.

16. On 23rd November, 2020 two appearances were entered in each of the actions by litigants in person. By reference to the appearances later entered by F. H. O'Reilly & Co., solicitors, on behalf of those in occupation of each of the properties, it appears that Ms. Margaret Hanrahan was one of the occupants of 31 Richmond Avenue and Mr. Gabriel Petrut was one of the occupants of 21 Little Mary Street. They did not appear at the hearing of the motions but they later filed notices of appeal. It may have been that each of Ms. Hanrahan and Mr. Petrut entered an appearance in both actions.

17. The orders of Reynolds J. were subject to a stay until 14th January, 2021. On 15th January, 2021 the Court of Appeal (Noonan J.) heard and refused applications by Ms. Hanrahan and Mr. Petrut for a stay on the High Court orders pending the hearing of their appeals but continued the stay for three weeks. The costs of the stay applications were ordered to be costs in the appeal.

18. The orders of the High Court were not complied with and by notice of motion issued on 12th February, 2021, in each case, Pepper applied for orders for the attachment and committal of those persons in occupation of the premises.

19. On 22nd February, 2021 an appearance was entered by F. H. O'Reilly & Co., solicitors, on behalf of eight occupants of 31 Richmond Avenue, including Ms. Hanrahan, and on behalf of twelve occupants of 21 Little Mary Street, including Mr. Petrut. By order of Reynolds J. made on 12th March, 2021 directions were given for the management of the motions with a view to an early hearing.

20. By notice of motion issued on 18th May, 2021 the occupants of both properties (bar Ms. Hanrahan and Mr. Petrut) applied to the Court of Appeal for an extension of time within which to appeal against the judgement and order of Reynolds J., for liberty to adduce new evidence, and for a stay on what was described as the eviction order of 25th November, 2020 pending the hearing of Ms. Hanrahan's and Mr. Petrut's appeals, which had been listed for hearing on 13th July, 2021. That motion was heard by the Court of Appeal on 10th June, 2021 and, for the reasons given in an *ex tempore* judgment delivered by Donnelly J. on 24th June, 2021, [2021] IECA 277, dismissed with costs against the occupants.

21. The occupants' motions of 18th May, 2021 were finalised before the Court of Appeal on 13th July, 2021. On the same day the Court of Appeal heard the appeals which had been filed in time by Ms. Hanrahan and Mr. Petrut. For the reasons given in a written judgment delivered by Ní Raifeartaigh J. on 14th October, 2021, [2021] IECA 257, those appeals were dismissed with costs.

22. In the meantime, Pepper's motions for attachment and committal had been heard by the High Court (Sanfey J.) on 4th and 5th May, 2021 and judgment reserved. In a written judgment delivered on 13th August, 2021, [2021] IEHC 559, Sanfey J. found that the orders of 25th November, 2020 were regular, valid and remained in force and that the occupants were in breach of them but he was prepared to allow a further short time for compliance.

23. The motions for attachment were listed for mention on 30th August, 2021 and again on 1st October, 2021 when an order was made giving Pepper liberty to issue an order of attachment in respect of ten named occupants of 31 Richmond Avenue, two named occupants of 21 Little Mary Street, and any other adult found to be in occupation: they to be brought before the court on 8th October, 2021.

24. The matter was further adjourned from 8th October, 2021 to 12th October, 2021 when the court was advised that the orders of 25th November, 2020 had been complied with and the orders for attachment were discharged. For the reasons given in a further written judgment delivered on 15th December, 2021, Sanfey J. ordered that the respondents to the motion for attachment should pay the costs.

25. On 29th October, 2021 a notice of appeal was filed against the judgment and order of Sanfey J. which, at the time these motions were heard, was listed for hearing before the Court of Appeal on 17th February, 2022.

26. In the meantime, by notice of motion in each case issued on 24th May, 2021 and originally returnable for 6th September, 2021 the several occupants on whose behalf appearances had been entered applied to have the actions dismissed by reason of the plaintiff's failure to deliver a statement of claim. In circumstances which have not been explained, the motions were not served on the plaintiff's solicitors until 31st August, 2021. The motions were then adjourned to allow a replying affidavit to be filed on behalf of the plaintiff and – the plaintiff's position appearing to the court to be sufficiently unusual to warrant it – an exchange of written submissions.

The arguments

27. Acknowledging that it is unusual for any case in which a party has obtained interlocutory injunctive relief not to be progressed to a full trial, the plaintiff submits that in this case a trial would be a complete waste of court time and would give rise to wholly avoidable legal costs.

28. It is argued that the action is effectively moot; that the occupants do not have a limitless entitlement to judicial resources and court time; and that to permit the occupants to continue ventilating arguments which have been conclusively rejected by the High Court and the Court of Appeal would be to countenance an abuse of process.

29. Reference was made to *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274*, Talbot v. Hermitage Golf Club* [2014] IESC 57, *Kavanagh v. Morrin* [2019] IECA 117*, Farley v. Ireland* (Unreported, Supreme Court, 1st May, 1997), *Fay v. Tegral Pipes Ltd*. [2005] 2

I.R. 261, *Doherty v. Minister for Justice* [2009] IEHC 246, *Sean Quinn Group Ltd. v. An Bord Pleanála* [2001] 2 I.L.R.M. 94 and *Barrett v. Beglan* [2007] IEHC 188.

30. Counsel for the plaintiff also pointed to the decision of Kelly J. (as he then was) in *Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd*. [2012] 2 I.R. 694 and the judgment of the Court of Appeal in *Shawl Property Investments Ltd. v. A. and B.* [2021] IECA 53 as to the nature and scope of the jurisdiction of the High Court to grant summary judgment in plenary proceedings. The plaintiff in this case did not counter the motion to dismiss for failure to deliver a statement of claim with a motion for summary judgment. It was submitted that to have done so would have simply added to the costs .

31. It was further submitted that in circumstances in which a litigant's position has been found at an interlocutory stage to be untenable, there is an onus on that litigant to explain how a different outcome might be achieved at trial. Reference was made to the judgment of Fullam J. in *Komady v. Ulster Bank Ireland Ltd.* [2016] IEHC 40.

32. The conclusion of the written submissions filed on behalf of the plaintiff was that the court was urged to refuse the motions and to make "*such order as the court should deem appropriate to bring the proceedings to an orderly and immediate conclusion*." In oral argument the appropriate order was said to be to simply strike out the action.

33. The occupants' case is that they are entitled, by O. 20, r. 3 of the Rules of the Superior Courts, to delivery of a statement of claim; and that they are entitled, by Article 6.1 of the European Convention on Human Rights to a determination of their civil rights and obligations and a hearing within a reasonable time.

34. It is said that there has never been any particularisation of the claims set out in the plenary summons. The order of 25th November, 2020, it is said, is on its face an interlocutory injunction that was granted "*pending the trial of the action*". The occupants, it is said, have virtually no access to documents and records. While it is acknowledged that the occupants were unsuccessful at the interlocutory stage, it is submitted that it does not necessarily follow that they will be unsuccessful at trial. "*Justice*", it is said, "*demands that the plaintiff state the case that the defendants must answer."*

35. The defendants also contend that there has been a twelve year delay on the part of the plaintiff. It is suggested that the cause of action accrued on 23rd June, 2008 – when the order for possession was made – and that Pepper was continuing the delay by refusing to deliver a statement of claim. It is said that Pepper has failed to give any meaningful reason for the delay and that it is inexcusable.

36. Reference was made *to Irish People's Assurance Society v. City of Dublin Assurance Co.* [1928] I.R. 204*, Hughes v. Hughes* [1990] N.I. 295, *O'Domhnaill v. Merric*k [1984] I.R. 151, *Gilroy v. Flynn* [2004] IESC 98, *Rogers v. Michelin Tyre plc* [2005] IEHC 294 and *Irish Family Planning Association v. Youth Defence* [2004] 1 I.R. 374.

Discussion and decision

37. It seems to me that the key to resolving this dispute is to understand why the plaintiff commenced these actions in the first place.

38. The loans originally made to Mr. Beades by IIB Homeloans and the security held for them were transferred – or are said to have been transferred – to Pepper in September or October, 2020. KBC Bank Ireland plc and Beltany Property Finance DAC, to whom the loans and security had previously been transferred, had secured leave to issue execution on foot of the order of 23rd June, 2008 and, as witness the order made by Twomey J. on 18th November, 2020, Pepper plainly contemplated that it would apply for such an order. By the time of the transfer to Pepper, however, the order for possession was upwards of twelve years old. The age of the order was no impediment to an application for leave to issue execution but – as is evident from the title to the proceedings – Pepper did not know who was in occupation.

39. An order for possession of land is executed by the issue of an order of possession: by which the sheriff or county registrar, as the case may be, is directed to make delivery of the property to a named person on behalf of the plaintiff. To deliver possession of the property to the plaintiff or other person entitled to execution, the sheriff or county registrar must take possession. To take possession of the property, the sheriff or county registrar must evict all persons in possession or occupation. For that reason, the Rules of the Superior Courts require that any proceedings seeking an order for possession of land must be served on all those who are in occupation of the property or in receipt of the rents and profits.

40. As counsel for Pepper explained, since Pepper did not know who was in occupation, it could not know for how long they had been in occupation. Specifically, it was not known whether those in occupation at the time of the transfer to Pepper had been in occupation at the time the order for possession was made. Pepper, therefore, could not know whether those in occupation were bound by the order of 23rd June, 2008.

41. By these two actions commenced on 8th October, 2020 Pepper sought to establish against the occupants its right to possession of the properties.

42. By the two motions issued on 14th October, 2020 Pepper sought, and on 25th November, 2020 was granted, interlocutory mandatory as well as prohibitory orders. From this it can be confidently inferred that Pepper made out that it had a strong case which was likely to succeed that it was entitled to permanent orders but it did not seek to establish, and it did not establish, that it was entitled to permanent orders.

43. For the reasons given in a very robust as well as comprehensive judgment delivered on 24th June, 2021 by Donnelly J., the Court of Appeal refused the occupants' (other than Ms. Hanrahan and Mr. Petrut) application for an extension of time in which to appeal. The court found that the occupants had not satisfied any of the criteria laid down by *Eire Continental Trading Co., Ltd. v. Clonmel Foods, Ltd.* [1955] I.R. 70. In particular, the court found that there was no arguable ground that any of them had valid tenancies as against Pepper.

44. The judgment of Ní Raifeartaigh J. delivered on 14th October, 2021, [2021] IECA 257, dismissing Ms. Hanrahan's and Mr. Petrut's appeals was no less robust. As Ní Raifeartaigh J. explained, all of the grounds of appeal related to the fact that the hearing on 25th November, 2020 had proceeded in the absence of the defendants. The judgment rehearses very carefully the hearing before the High Court. It was noted that the appellants' submissions sought to range far beyond the grounds of appeal but the appellants were confined to the grounds on which they had appealed. The court noted that it would have been open to the appellants to apply by motion to expand their grounds of appeal but that they had not done so. Ní Raifeartaigh J. dismissed the appeals on the grounds that it had not been shown that the trial judge had erred in proceeding with the motions in the appellants' absence but went on to consider some of the other arguments made. In particular, the appellants had argued on the hearing of the two appeals (as the other occupants had on their motion to extend the time for appeal) that the attention of the High Court had not been drawn to a clause in the facility letter, clause 34, which contemplated that the lender might consent to letting subject to certain explicit conditions. Ní Raifeartaigh J. concluded that the appellants had simply failed to engage with the materiality of clause 34 to their case or to show how, even on the most minimal threshold imaginable, that it might possibly be relevant to their situation.

45. The judgment of Sanfey J. delivered on 13th August, 2021, to which I have referred, carefully considered all of the arguments advanced in opposition to the application for attachment and committal but the substance of Pepper's motion was that the occupants had failed to obey the order of Reynolds J., which had been duly served with a penal endorsement, and the *ratio* of the judgment was that a party is not entitled to ignore a regular and enforceable order of the High Court and later seek to argue that it ought not have been made in the first place.

46. On any view of the judgments of the Court of Appeal the occupants' prospects are poor – to say the least of it – but it seems to me that absent a finding that the plaintiff is entitled to permanent orders it cannot be said that the actions are moot. Pepper's submission, indeed is not that the actions are moot but that they are "*effectively"* moot.

47. I cannot accept that it is of any significance that the orders for attachment have been discharged. The obligation of a litigant to obey an interlocutory order is quite separate to the question of whether the action should go to trial.

48. The judgment of Ní Raifeartaigh J. shows that the tenancies of Ms. Hanrahan and Mr. Petrut predated the possession proceedings by some four and thirteen years, respectively. The judgment of Donnelly J. shows that the other occupants had failed on the motion to extend time to show any arguable ground. As the appellants and the applicant occupants failed in the Court of Appeal to engage with the arguments made on behalf of Pepper that they had no defence to the claim, so, on these motions, the occupants have failed to engage with the issue as to what defence they might have to the actions. However, it seems to me that I must be mindful of the risk of allowing hard cases to make bad law.

49. The uncontested evidence of Mr. Bowen, on behalf of Pepper, is that these proceedings, the possession proceedings, and the appeals have given rise to the better part of one hundred court listings. Unquestionably, these two houses have burned up enormous judicial time at hearing and in writing. But sometimes the longest way around is the shortest way home.

50. Although Pepper has pointed to the jurisdiction of the court in clear cases to grant summary judgment, it has not invoked that jurisdiction. Rather than pressing for judgment, Pepper has sought to abandon the actions. Pepper would forego the costs of the action – for which it says it would surely obtain an order, but has no hope of recovering – but would keep the orders for costs which it obtained in the Court of Appeal. I can easily understand that a plaintiff who has – or believes that he has – achieved all that he has set out to achieve by obtaining and enforcing interlocutory orders will not want to spend any more money on the case but viscerally it strikes me as unsatisfactory that a plaintiff who has brought an action should be able to abandon it otherwise than by discontinuing it.

51. I can understand the reasons why Pepper is of the view that a trial of the action would be a waste of time and money but it seems to me that the premise of that submission is not only that the occupants have heretofore failed at every turn but that they have *no bona fide* defence to the action: which is something the court has not been asked to decide. In answer to a question by the court in argument as to whether the occupants were entitled to insist on proof of Pepper's title, counsel for Pepper fairly made the point that no such issue had been identified by counsel for the occupants – whether in his submissions on this motion or at any other time along the way. But, recognising the inherent jurisdiction of the court to summarily determine actions that in the ordinary way would go to plenary hearing, it seems to me that it would be a new departure to allow a plaintiff to insist that a defendant against whom an interlocutory order has been made should demonstrate that he has an arguable defence as a pre-condition to delivery of a statement of claim.

52. Counsel for Pepper sought to draw the analogy between these cases and the hypothetical case of a householder had obtained an interlocutory injunction against a trespasser. Surely, it was said, the trespasser could not be heard to nit-pick as to the householder's title and put the householder the expense of a full trial. Without expressing any view on the hypothesis, it seems to me that the analogy is wrong. This, it seems to me, is not a case in which someone has broken in to a long occupied property but a case in which the plaintiff claims to be entitled to possession of a property which the defendants have occupied for years. To be sure Pepper and its predecessors have established their entitlement to issue execution on foot of the order for possession but in principle the occupants were not privy or party to those applications: which, by the way, were defended by Mr. Beades as a lay litigant. Those of the occupants, including Ms. Hanrahan and Mr. Petrut, who were in occupation at the time the order for possession was made are liable to be evicted on foot of that order but the premise of these actions is that some of the occupants are not liable to be put out on foot of the order for possession.

53. As to the proposition that it would be unusual for any case in which the plaintiff has obtained interlocutory injunctive relief not to be progressed to a full trial, I am not at all sure that this is correct. The judgment of the court on an interlocutory motion will very often colour the view of one or other or both parties as to the merits of their respective positions. Moreover, the spectre of substantial future costs will often colour the parties' assessment as to what should be done for the best in relation to the costs already incurred. I think that someone may have gathered the statistics but my experience is that many, perhaps the majority of, cases in which interlocutory injunctions are granted do not go to trial. What is, perhaps, unusual about these cases is the refusal of represented defendants to recognise the apparent hopelessness of their case.

54. As to the extent of court time and resources that the litigation in relation to these houses has burned up, these cases are, mercifully, unusual. However, on a broader view they are not much different to the general run of what are loosely referred to as "*receiver injunctions*" by which lenders and their assignees (generally their assignees) – and often, if less frequently, borrowers – seek interlocutory injunctions with a view to accelerating or delaying, as the case may be, the realisation of security given for loans. A good deal of the litigation in the possession proceedings can be seen to have been attributable to successive assignments of the loan and mortgage: presumably at prices that reflected the inability of the immediately preceding owner to realise the security. Very few of the *"receiver injunction"* cases in which interlocutory orders are sought, or refused, come to trial and there is frequently a reluctance on the part of the plaintiffs to deliver a statement of claim.

55. One of Pepper's arguments, as I have said, is that there is an onus on a litigant whose position has been found to be untenable at the interlocutory stage, to explain how a different outcome might be achieved at trial. Reliance is placed on *Komady v. Ulster Bank Ireland Ltd.* [2016] IEHC 40.

56. With respect, I do not understand *Komady* to be authority for the proposition advanced. *Komady* was a motion by the defendants to dismiss the plaintiffs' case as vexatious, factually unsustainable and factually bound to fail. An application by the plaintiffs for interlocutory injunctions had failed. It is of some significance for present proposes to observe that Fullam J. noted the agreement of the parties – which was quite correct – that an application to dismiss a claim on the ground that it is bound to fail involves a different test and a higher threshold than an application for interlocutory injunctive relief. The interlocutory injunction had been refused on the ground that assertions in the affidavits filed on behalf of the plaintiffs were demonstrably at variance with the correspondence. As I understand the judgment, all that Fullam J. did was to observe that the findings on the interlocutory motion remained undisputed. If anything, what this conveys to me is that in principle the parties' case on the motion to dismiss might have been different to that made on the motion for the interlocutory injunction.

57. If, in these cases, the occupants have not engaged with the issue as to what case they might make at trial – or, I should probably say, following delivery of a statement of claim

– that is different to the case they have heretofore sought to make, I am not persuaded that they are obliged to do so.

58. The argument that the insistence on a statement of claim is designed to put pressure on Pepper for a financial settlement is a delicate one. On the one hand there is no evidence of a demand for money but on the other anything that might have been said between counsel would be privileged. All of the cases relied on by *Pepper – Farley v. Ireland, Fay v. Tegral Pipes Ltd., Doherty v. Minister for Justice, Sean Quinn Group Ltd. v. An Bord Pleanála* and *Barrett v. Beglan* – were defendants' motions to dismiss plaintiffs' claims as frivolous and vexatious and the observation relied on – to the effect that process must not be abused to apply pressure for the payment of money – was made in the context that the claim had been shown to have been frivolous and vexatious. It seems to me that the antithesis of a claim that is frivolous and vexatious is a claim in respect of which the plaintiff has established that he is entitled to summary judgment: which – for the moment, at least – these are not.

59. On 23rd June, 2008 IIB Homeloans Limited established that it was entitled to possession of the two properties, not only as against Mr. Beades but as against all persons then in occupation. On 18th November, 2020 Pepper established that it was entitled to issue execution on foot of the order for possession. The order then made, it seems to me, must have been premised on a finding that the loan and security had been validly transferred from IIB Homeloans Limited to KBC Bank Ireland plc, by KBC Bank Ireland plc to Beltany Property Finance DAC, and by Beltany Property Finance DAC to Pepper. However, as I have previously observed, the premise of these actions is that those occupants who went into occupation after the order for possession was made were entitled to be heard before they were put out.

60. The occupants argue that they are entitled to know the case against them and that it has not been set out in the general indorsement of claim. I accept both propositions but it does not follow that the occupants do not know the case against them: which must have been spelled out in the affidavit grounding the motion for interlocutory relief. However, whatever that case may have been it was not before the court on the hearing of these motions.

61. Counsel for the occupants sought to make much of the fact that the various declarations sought in the general indorsement of claim have not been made and that there has been no determination of the claims endorsed for damages. If I were satisfied that the substantive issue between the parties as to Pepper's entitlement to permanent orders for possession and injunctions had been finally determined I do not think that anything would turn on the form of the orders made. In particular, I do not believe that the occupants are entitled to insist that Pepper's claim for damages must be decided if Pepper does not want to press it.

62. It will be recalled that the occupants' motions were issued on 24th May, 2021 returnable for 6th September, 2021 but were only served on 31st August, 2021. It was suggested in argument that the delay in service of the motions was attributable to inadvertence but

there was no evidence of that. It may or may not have been a coincidence that the occupants' motions were issued shortly after Pepper's motions for attachment were heard and served shortly after Sanfey J. gave his judgment but whether the delay in serving the motions was inadvertent or not, Pepper was not prejudiced by it.

63. Counsel for the occupants placed particular reliance on the decision of the Supreme Court in *Irish Family Planning Association v. Youth Defence* [2004] 1 I.R. 374, in which Denham J. (as she then was) observed that a plaintiff must not delay in delivering a statement of claim when it had obtained an interlocutory injunction in plenary proceedings. That, however, was on the facts, a different case to these. In *Irish Family Planning Association* the plaintiff obtained an interlocutory injunction in the High Court on 11th March, 1999 which was set aside by the Supreme Court on 16th October, 2020. By notice of motion issued on 19th February, 2001 the plaintiff moved for an extension of time for the delivery of a statement of claim, which was granted by the High Court on 25th June, 2001. There had been no reason given for the delay in delivering the statement of claim and when the defendants' appeal was heard by the Supreme Court on 4th February, 2004 it was acknowledged that the form of statement of claim which had been delivered – a draft of which had not been put before the High Court – disclosed no cause of action against the defendants. While the Supreme Court allowed the appeal it also upheld the findings of Smyth J. that there had been procedural shadow boxing on one side, and ducks and drakes on the other.

64. I do not believe that this is a case in which, as Denham J. put it, *"Those who make charges [have failed] to state at an early stage what they are and on what facts they are based."* I am not persuaded that the occupants do not know the case against them but I think that they are entitled to have it spelled out in a statement of claim.

65. Counsel for the occupants laid heavy emphasis on a letter written by Pepper's solicitors on 19th April, 2021 and to the averment at para. 10 of Mr. Bohan's affidavit to the effect that Pepper would deliver a statement of claim when the defendants had complied with the order. On the motions to attach, counsel for the occupants sought to make much of the fact that no statements of claim had been delivered. That, I entirely agree with counsel for Pepper, was *nihil ad rem* as far as obedience to the interlocutory orders went. By the same token, I do not believe that the occupants' disobedience to the interlocutory orders was necessarily a reason for postponing delivery of the statements of claim.

66. If Pepper does not wish to proceed with the actions it can serve notice of discontinuance. That will give rise to an entitlement on the part of the occupants for costs. Those costs may or may not be greater than the costs which the occupants have already been ordered to pay.

67. I do not accept that the order sought by the occupants can properly be characterised as punitive or that any liability on Pepper's side in respect of the cost of any battles which it may lose is punitive. The objective fact of the matter is that Pepper bought a fourth hand mortgage over two houses which were the subject of a twelve year old order for

possession which its three predecessors in title had not managed to execute. It was always going to be a struggle.

68. Counsel candidly acknowledges that Pepper, at a fairly late stage, made a decision not to deliver a statement of claim. I accept that the replying affidavit on this motion took longer to draft than a statement of claim would have and that the failure to deliver the statements of claim was not at all attributable to any lack of effort, industry or determination on Pepper's part. I have concluded, however, that the effort and industry have been misplaced.

Conclusion

69. In form these were applications to dismiss the two actions for failure to deliver a statement of claim but the motions were opened by counsel for the occupants as applications for delivery of a statement of claim. Counsel for Pepper made clear that if the court was against him, his client would deliver statements of claim.

70. These are not cases of an unexplained delay in the prosecution of an action in which interlocutory orders have been obtained but of incredulity of the defendants' insistence on delivery of a statement of claim, born of a forlorn hope on the part of the plaintiff that the defendants would recognise what the plaintiff, at least, believes to be the futility of their position.

71. I will extend the time for delivery of the statement of claim in each case for fourteen days. I can think of no reason why the moving parties should not have the costs of the motions. I can think of no reason why execution on foot of those orders should not be stayed pending the final determination of the proceedings.

72. I will list the motions for mention on 22nd March, 2022 in case anyone wishes to contend for any other order as to costs.